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Wednesday
September 9, 1998

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

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 98–AGL–41]

Modification of Class E Airspace; Bowman, ND

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies Class E airspace at Bowman, ND. A Global Positioning System (GPS) Standard Instrument Approach Procedure (SIAP) to Runway (Rwy) 29 has been developed for Bowman Municipal Airport. Controlled airspace extending upward from 700 feet above ground level (AGL) is needed to contain aircraft executing the approach. This action increases the existing controlled airspace to the northeast, east, and southeast, for Bowman Municipal Airport.

EFFECTIVE DATE: 0901 UTC, December 03, 1998.

FOR FURTHER INFORMATION CONTACT: Michelle M. Behm, Air Traffic Division, Airspace Branch, AGL–520, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018, telephone (847) 294–7568.

SUPPLEMENTARY INFORMATION:

History

On Tuesday, June 23, 1998, the FAA proposed to amend 14 CFR part 71 to modify Class E airspace at Bowman, ND (63 FR 34136). The proposal was to add controlled airspace extending upward from 700 feet AGL to contain Instrument Flight Rules (IFR) operations in controlled airspace during portions of the terminal operation and while transiting between the enroute and terminal environments.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Class E airspace designations for airspace areas extending upward from 700 feet or more above the surface of the earth are published in paragraph 6005 of FAA Order 7400.9E date September 10, 1997, and effective September 16, 1997, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

The Rule

This amendment to 14 CFR part 71 modifies Class E airspace at Bowman, ND, to accommodate aircraft executing the proposed GPS Rwy 29 SIAP at Bowman Municipal Airport by increasing the existing controlled airspace to the northeast, east, and southeast, for the airport. The area will be depicted on appropriate aeronautical charts.

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E, AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9E, Airspace Designations and Reporting Points, dated September 10, 1997, and effective September 16, 1997, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

AGL ND E5 Bowman, ND [Revised]

Bowman Municipal Airport, ND
(Lat. 46° 11′ 13″ N, long. 103° 25′ 41″ W

That airspace extending upward from 700 feet above the surface within a 7.0-mile radius of Bowman Municipal Airport and that airspace extending upward from 1,200 feet above the surface bounded by a line beginning at lat. 46° 26′ 00″ N, long. 103° 38′ 00″ W, to lat. 46° 48′ 00″ N, long. 102° 53′ 00″ W, to lat. 46° 20′ 00″ N, long. 102° 53′ 00″ W, to lat. 45° 39′ 00″ N, long. 103° 00′ 00″ W, to lat. 45° 43′00″ N, long. 103° 43′ 00″ W, to lat. 45° 48′ 00″ N, long. 103° 54′ 00″ W, to lat. 46°17′ 30″ N, long. 103° 48′ 15″ W, to the point of beginning, excluding Federal Airways, the Hettinger, ND Dickinson, ND, and Baker, MT, Class E airspace areas.

* * * * *

Issued in Des Plaines, IL. on August 25, 1998.

David B. Johnson,

Acting Manager, Air Traffic Division.

[FR Doc. 98–24132 Filed 9–8–98; 8:45 am]

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DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Parts 2 and 3

[Docket No. 970428100–8199–03]

RIN 0651–AA87

iscellaneous Changes to Trademark Trial and Appeal Board Rules

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Final rule.

SUMMARY: The Patent and Trademark Office (PTO) is amending the rules governing practice before the Trademark Trial and Appeal Board (Board). The amendments provide for the opening and the length of the discovery period; specify that the automatic disclosure provisions of the Federal Rules of Civil Procedure do not apply to Board proceedings; state that the Board will not hold any person in contempt or award any expenses to any party; specify requirements for briefs on motions; enlarge the time for filing a response to a motion for summary judgment; specify the time for filing motions under Rule 56(f) of the Federal Rules of Civil Procedure (motions for discovery to enable parties to respond to motions for summary judgment); and specify the time for filing motions to compel and motions to test the sufficiency of an answer or objection to a request for admission. In addition, the amendments clarify the rules, conform the rules to current practice, simplify practice, and correct cross-references.

DATES: *Effective Date:* These rule amendments will be effective October 9, 1998.

Applicability Dates: Two of the provisions of amended § 2.120(a) (the provisions that the Board will specify the opening date for discovery and that the discovery period will be set for a period of 180 days), will not apply in cases in which a trial order has been issued by the Board prior to October 9, 1998. The provision of amended § 2.120(e)(1) that a motion to compel must be filed prior to the commencement of the first testimony period, as originally set or as reset, will apply only in those cases in which trial dates, beginning with the closing date for the discovery period, are set or reset on or after October 9, 1998. Similarly, the provision of amended § 2.120(h)(1) that a motion to determine the sufficiency of an answer or objection to a request for admission must be filed prior to the commencement of the first testimony period, as originally set or as reset, will apply only in those cases in which trial dates, beginning with the closing date for the discovery period, are set or reset on or after October 9, 1998.

FOR FURTHER INFORMATION CONTACT: Ellen J. Seeherman, Administrative Trademark Judge, Trademark Trial and Appeal Board, by telephone at (703) 308–9300, extension 206; or by mail marked to her attention and addressed to Assistant Commissioner for Trademarks, Box TTAB–No Fee, 2900 Crystal Drive, Arlington, Virginia 22202–3513; or by facsimile transmission marked to her attention and sent to (703) 308–9333.

SUPPLEMENTARY INFORMATION: A Notice of Proposed Rulemaking was published in the **Federal Register** (62 FR 30802) on June 5, 1997, and in the Official Gazette of the Patent and Trademark Office (1199 TMOG 88) on June 24, 1997. The purpose of the proposed rule amendments was to improve practice and expedite proceedings in inter partes cases before the Board, codify and clarify certain practices of the Board, and correct certain cross-references to citations of the Trademark Act of 1946 and the Code of Federal Regulations.

In response to a request for written comments, thirty-four written comments were received. Many of the comments suggested that a public hearing be scheduled. As a result, the PTO gave notice in the November 4, 1997 **Federal Register** (62 FR 59640), and in the November 25, 1997 Official Gazette (1204 TMOG 88), of a public hearing on the proposed rules, and reopened the comment period. At the same time, the PTO announced that it was withdrawing two of the rule amendments proposed in the June 5, 1997 Notice of Proposed Rulemaking. Those withdrawn amendments were to §§ 2.120(d)(2) and 2.120(h) to limit the number of requests for production of documents and requests for admission, respectively, which may be served in an inter partes proceeding before the Board.

At the public hearing, held on December 17, 1997, seven witnesses testified. The written and oral comments represent the views of 29 individuals and law firms and five trademark law associations, namely, the Intellectual Property Law Section of the American Bar Association, the American Intellectual Property Law Association, the Intellectual Property Law Section of The District of Columbia Bar, the New York Intellectual Property LawAssociation, and the International Trademark Association. A number of rule amendments suggested in the written and oral comments, though meritorious, cannot be adopted at this time because they are outside the scope of the present rulemaking. Some of these suggestions are discussed below; others, particularly suggestions not directed specifically to one of the proposed rule amendments, are not.

Background to Rule Amendments

In recent years there has been a rapid growth in the number of new proceedings filed with the Board, coupled with a marked increase in the number of motions and other papers filed in each inter partes case. As a result, the Board's workload has increased dramatically. Many of the inter partes rule amendments proposed in the Notice of Proposed Rulemaking were specifically designed to help reduce the Board's backlog of pending motions and cases ready for final decision, stem perceived abuses of the rules, and promote expeditious prosecution and defense of cases. These proposed amendments involved substantial changes in Board inter partes practice. For example, amendments were proposed to (1) lengthen the discovery and trial periods, as well as the time for responding to motions and requests for discovery; (2) concomitantly limit the situations in which extensions of these times would be granted; (3) limit the number of requests for production of documents and things and requests for admission which one party could serve upon another in a proceeding; (4) further limit the number of interrogatories which one party could serve upon another; (5) require that interrogatories, requests for production of documents and things, and requests for admission be served in sufficient time for responses to fall due prior to the close of the discovery period; and (6) specify that the filing of a summary judgment motion would not toll the time for the moving party to respond to outstanding discovery requests but would toll the time for the nonmoving party to do so.

A significant number of the individuals and organizations which offered written or oral comments on the proposed rules strongly objected to these substantial changes. Accordingly, the PTO is not going forward with them at this time. Instead, the PTO is going forward only with those proposed rule amendments which involve modest changes in Board practice, or which serve to clarify the rules, codify current practice, or correct cross-references in the rules. The Board is considering other measures to deal with its increased workload, including a pilot program to make greater use of telephone conferences in determining pending interlocutory matters and motions. However, the PTO will continue to monitor carefully the problems which gave rise to the Notice of Proposed Rulemaking, and may propose and adopt additional changes in the rules governing Board inter partes practice if necessary.

Discussion of Specific Rules and Response to Comments

The comments, if any, on a specific rule and the response to the comments are provided with the discussion of the specific rule. Comments in support of

proposed rule changes generally have not been reported.

Section 2.76(a) now provides, in relevant part, that an amendment to allege use may be filed in an application under Section 1(b) of the Act ''at any time between the filing of the application and the date the examiner approves the mark for publication or the date of expiration of the six-month response period after issuance of a final action.'' The section is amended to delete the phrase ''or the date of expiration of the six-month response period after issuance of a final action.'' Under the amended rule, an amendment to allege use may be filed more than six months after the issuance of a final action, as a result of which the amendment may be filed during the pendency of an appeal. This brings the rule into conformity with current practice, as stated in ''Waiver of Trademark Rule 2.76(a),'' 1156 TMOG 12 (November 2, 1993).

Section 2.76(g) now provides, in relevant part, that if an amendment to allege use does not meet the minimum requirements specified in (2.76(e), the deficiency may be corrected provided the mark has not been approved for publication ''or the six-month response period after issuance of a final action has not expired.'' It also provides that if an acceptable amendment to correct the deficiency is not filed prior to approval of the mark for publication ''or prior to expiration of the six-month response period after issuance of a final action,'' the amendment will not be examined. The section is amended to delete the phrases ''or the six-month response period after issuance of a final action has not expired'' and ''or prior to the expiration of the six-month response period after issuance of a final action.'' This amendment codifies current practice, which allows a deficiency in an amendment to allege use to be corrected subsequent to the six-month response period after issuance of a final action.

Section 2.76(h), which provides that an amendment to allege use may be withdrawn for any reason prior to approval of a mark for publication or expiration of the six-month response period after issuance of a final action, is amended to delete the phrase ''or expiration of the six-month response period after issuance of a final action.'' As a result of the rule amendment, an amendment to allege use may be withdrawn during the pendency of an appeal. This amendment, too, codifies current practice.

Section 2.85(e) pertains to the filing of certain specified papers, including a petition for cancellation, with a fee which is insufficient because multiple classes in an application or registration are involved. The section is amended to delete the references to a petition for cancellation, because the matter of an insufficient fee for a petition to cancel a registration having multiple classes is covered, in greater detail, in § 2.111(c)(1).

Section 2.87(c) now provides that a request to divide an application may be filed, inter alia, ''during an opposition, upon motion granted by the Trademark Trial and Appeal Board.'' The section is amended to provide also that a request to divide an application may be filed during a concurrent use or interference proceeding. The amendment codifies current practice and corrects an oversight in the rule.

Section 2.87(c) also now provides that a request to divide an application may be filed ''at any time between the filing of the application and the date the Trademark Examining Attorney approves the mark for publication or the date of expiration of the six-month response period after issuance of a final action.'' Similarly, this section now provides that a request to divide an application under section 1(b) of the Act may be filed with a statement of use or ''at any time between the filing of a statement of use and the date the Trademark Examining Attorney approves the mark for registration or the date of expiration of the six-month response period after issuance of a final action.'' The section is amended to delete the phrase ''or the date of expiration of the six-month response period after issuance of a final action'' from the two places where it occurs in this section. Under the amended rule, a request to divide may be filed more than six months after the issuance of a final action, as a result of which the request to divide may be filed during the pendency of an appeal. While this amendment was not included in the notice of proposed rulemaking, it corresponds to the amendment to §§ 2.76(a), (g) and (h), discussed above, and is advantageous to applicants. With this amendment, an applicant may divide out from its application those classes or that portion of the goods or services in a class to which no final refusal or requirement pertains. The divided out application will immediately go forward to publication or registration, as appropriate, and will avoid the delays related to briefing and deciding the issues involved in the appeal.

Section 2.101(d)(1), which includes a cross-reference to ''§ 2.6(1),'' is amended to correct the cross-reference to ''§ 2.6(a)(17).''

Section 2.102(d), which now provides that every request to extend the time for filing a notice of opposition should be submitted ''in triplicate (original plus two copies),'' is amended to delete the words ''(original plus two copies)''. While a request must be submitted in triplicate, the Board has no need for the original.

Section 2.111(b), which now includes a cross-reference to ''section 14(c) or (e)'' of the Act, is amended to correct the cross-reference to ''section 14(3) or (5)''.

Section 2.111(c)(1) now includes a cross-reference to ''§ 2.6(1) and 2.85(e)''. The section is amended to correct the cross-reference ''§ 2.6(1)'' to ''§ 2.6(a)(16)''. The section is further amended to delete the cross-reference to § 2.85(e) in view of the amendment to that section.

Section 2.117(a) now provides that whenever it shall come to the attention of the Board ''that parties to a pending case are engaged in a civil action which may be dispositive of the case, proceedings before the Board may be suspended until termination of the civil action.'' The quoted portion of the section is amended to read ''that a party or parties to a pending case are engaged in a civil action or another Board proceeding which may have a bearing on the case, proceedings before the Board may be suspended until termination of the civil action or the other Board proceeding.'' The amendment clarifies the rules and codifies the Board's current practice on suspension of proceedings, which is that a Board proceeding may be suspended if any of the parties is engaged in a civil action or another Board proceeding which may have a bearing on the proceeding.

Comment: One comment suggested that § 2.117(a) conclude with the phrase ''or the Board proceeding'' to correspond to the previous change in that section. That comment also suggested that the rule be modified to allow a third party who has a pending application, or who is a party in a proceeding which has been suspended pending the outcome of the pending case, to apprise the Board of the impact of the suspension on the third party.

Response: The first suggestion has been adopted. The suggested modification to allow third parties to advise the Board about the impact on them of a suspension order goes beyond the scope of the amendment as originally proposed. Moreover, no purpose would be served by allowing third parties to file such impact statements. The Board suspends proceedings when a decision in a civil action or another Board proceeding may

have a bearing on the issues in the pending case. That effect would not be altered by any adverse impact which suspension of the proceeding might have upon a third party.

Section 2.117(b) now provides that ''Whenever there is pending, at the time when the question of the suspension of proceedings is raised, a motion which is potentially dispositive of the case, the motion may be decided before the question of suspension is considered.'' The section is amended to clarify that, when a motion to suspend and a motion which is potentially dispositive of the case are both pending, the Board may decide the potentially dispositive motion before the question of suspension is considered, regardless of the order in which the motions were filed.

Comment: One comment suggested modifying the rule to provide that the filing of a potentially dispositive motion automatically suspends proceedings. The comment notes that the suggested modification would save the Board the paperwork involved in issuing a suspension order, and would avoid uncertainty for the parties as to what they should do until the suspension order is received.

Response: The suggested provision is not properly a part of this section, which relates to suspension in view of a civil action or another Board proceeding. Accordingly, the suggestion is discussed in connection with the amendments to § 2.127, which concerns motion practice.

Section 2.119(d) now provides, in pertinent part, that the mere designation of a domestic representative does not authorize the person designated to prosecute the proceeding unless qualified under § 10.14(a), or qualified under paragraphs (b) or (c) of § 10.14 and authorized under § 2.17(b). The section is amended to correct an inadvertent error in the rule by deleting the reference to § 10.14(c). That section refers to nonresidents, who cannot be domestic representatives.

Section 2.120(a) now provides, in pertinent part, that ''The provisions of the Federal Rules of Civil Procedure relating to discovery shall apply in opposition, cancellation, interference and concurrent use registration proceedings except as otherwise provided in this section.'' The section is amended to preface this provision with the words ''Wherever appropriate,'' and to specify that the provisions of the Federal Rules of Civil Procedure relating to automatic disclosure, scheduling conferences, conferences to discuss settlement and to develop a plan for discovery, and transmission to the court of a written report outlining the discovery plan, do not apply to Board proceedings. The amendment clarifies the rule, and codifies current Board practice, as expressed in a notice published in the Official Gazette in 1994, namely, ''Effect of December 1, 1993 Amendments to the Federal Rules of Civil Procedure on Trademark Trial and Appeal Board Inter Partes Proceedings,'' 1159 TMOG 14 (February 1, 1994).

Comments: Two comments suggested that all reliance on the Federal Rules of Civil Procedure be severed because, according to the comments, so few of the Federal Rules are still applicable to Board practice.

Response: The PTO believes that this suggestion goes beyond the scope of the proposed rulemaking. In addition, the PTO is not inclined to adopt it because the Board follows a substantial number of the Federal Rules and is guided by court decisions interpreting these rules. Examples of the Federal Rules followed by the Board include those governing pleadings, motions to dismiss, amendments of pleadings, acceptable discovery, summary judgment, and relief from judgment.

Section 2.120(a) also now provides that the Board will specify the closing date for the taking of discovery, and that the opening of discovery is governed by the Federal Rules of Civil Procedure. The section is amended to, inter alia, state that the Board will specify the opening (as well as the closing) date for the taking of discovery; and delete the provision that the opening of discovery is governed by the Federal Rules of Civil Procedure.

Under current Board practice, discovery opens at the times specified in Rules 30, 33, 34 and 36 of the Federal Rules of Civil Procedure as they read prior to the December 1, 1993 amendments to those rules. See ''Effect of December 1, 1993 Amendments to the Federal Rules of Civil Procedure on Trademark Trial and Appeal Board Inter Partes Proceedings,'' 1159 TMOG 14 (February 1, 1994). Thus, interrogatories, requests for production of documents and things, and requests for admission may be served upon the plaintiff after the proceeding commences, and upon the defendant with or after service of the complaint by the Board. Discovery depositions generally may be taken by any party after commencement of the proceeding, except that the Board's permission must be obtained first in certain specified situations. Further, the Board still follows the practice embodied in Rules 33(a), 34(b), and 36(a) of the Federal Rules of Civil Procedure, as they read prior to the December 1, 1993 amendments, that a defendant may serve responses to interrogatories, requests for production of documents and things, and requests for admission either within 30 days after service of a discovery request (35 days if service of the request for discovery is made by first-class mail, ''Express Mail,'' or overnight courier—see § 2.119(c)), or within 45 days after service of the complaint upon it by the Board, whichever is later. These practices relating to the opening of discovery and the time for the service of discovery responses by the defendant are complicated, and have been unpopular with practitioners. The specified amendments to the section will simplify the opening of discovery.

Comments: One organization suggested a provision allowing discovery requests to be served after the filing of a proceeding, with responses to be due 40 days after the mailing by the Board of the notice of institution. One attorney disagreed with the proposal that the Board set the date for the opening of discovery. This attorney asserted that discovery might be necessary to prepare an answer, and that the later opening of the discovery period would inhibit parties who wanted to be diligent in initiating discovery. Another organization agreed with the proposal that the Board set the opening date for discovery, but suggested that the trial order be issued with the notice of institution because discovery might be necessary to properly prepare an answer. One attorney suggested including a provision in the rules to make it clear, in those cases where a proceeding was initiated prior to the effective date of this final rule and was suspended, that the former rules apply unless the parties to the proceeding are expressly notified otherwise.

Response: The suggestion for a provision allowing discovery requests to be served after the filing of a proceeding, with responses to be due 40 days after the mailing of the notice of institution, has not been adopted. If the suggested provision were adopted, a defendant could be served with discovery requests before it had even been notified of the filing of the proceeding, with the result that the defendant would be surprised and confused. Further, because early served requests might not bear a proceeding number, they would create an administrative burden for the Board, which would have to respond to inquiries regarding the existence, number, and status of the proceeding.

The suggestion that the trial order, which would set the opening of

discovery, be sent with the notice of institution of the proceeding has been adopted. It is believed that a defendant will not be prejudiced if it does not have the plaintiff's discovery responses prior to the time it must file its answer, because a defendant may move to amend its answer based upon information obtained through discovery. With respect to the suggestion for including in the rules a specific provision concerning applicability of the amended rules in cases initiated prior to the final rule and then suspended, it is believed that the information concerning the effective date of the rule amendments, as set forth at the beginning of this notice, is sufficient.

Section 2.120(a) is further amended to provide that the discovery period will be set for a period of 180 days, and that the parties may stipulate to a shortening of that period.

Comments: Two comments believed that the 180-day discovery period would unduly lengthen proceedings. Another comment said that the proposal would shorten the current discovery period and suggested that the discovery period be 270 days. One comment suggested providing that the period could be shortened on a showing of good cause, for example, if the applicant had not yet used its mark, while the parties would have to justify any enlargement, even one that was stipulated, of the discovery period. That comment also suggested a provision that extensions of the discovery period would be denied if a non-party files a notice that the proceeding is delaying its application.

Response: As indicated above, the PTO has adopted a suggestion that the trial order setting the opening and closing dates for the discovery period be mailed with the notice of institution of the proceeding. With the adoption of this suggestion, the proposed 180-day discovery period will result in a discovery period that is generally the same as that under present practice. Under current practice, discovery in essence opens for the defendant upon the commencement of the proceeding and opens for the plaintiff upon the Board's service of the complaint and the notice of institution. Often, the defendant does not know that a complaint has been filed until it receives this mailing from the Board. The discovery period currently closes 90 days after the mailing of the trial order, which is not done until the defendant's answer has been filed and processed by the Board. The amount of time that currently elapses between the mailing by the Board of the notice of institution (with a copy of the complaint for the defendant) and the issuance of a trial order averages approximately 90 days, with the discovery period set to close 90 days after the issuance of the trial order. Thus, setting the discovery period for 180 days in a trial order which forms part of the institution letter will not, in general, either lengthen or shorten the current discovery period. The suggestion that the discovery period be enlarged to 270 days has not been adopted because all other comments received indicated that a 180-day discovery period was either acceptable or too long.

The suggestion that the section be amended to provide that one party may move to shorten the discovery period has not been adopted. With respect to the example given in the comment, although an opposer may not need substantial discovery from an applicant who has not yet made use of its mark, that applicant may need discovery with respect to the opposer's use. The suggestions for provisions that the parties would have to justify any extension of the discovery period, and that an extension of the discovery period would be denied if a non-party files a notice that the proceeding is delaying his application, are not adopted. The PTO received numerous comments to the effect that extensions of the discovery period were useful in facilitating settlement, and it is the Board's experience that the vast majority of proceedings are settled prior to trial. Although the Board retains its inherent right to deny motions for extensions of time, even if the parties stipulate to the extension, it is believed that it would cause an undue burden on the parties to require them to justify each consented extension of time. The suggestion that a non-party have the right to prevent an extension of the discovery period is beyond the scope of the proposed rules and cannot be considered.

Section 2.120(a) was proposed to be further amended to require that interrogatories, requests for production of documents and things, and requests for admission be served in sufficient time for responses to fall due prior to the close of the discovery period, and that discovery depositions be noticed and taken prior to the close of the discovery period.

Comments: Five comments disagreed with this proposal. There was concern that the proposed amendment would increase expenses early in the proceedings and by so doing have a negative effect on settlement. It was also suggested that discovery would become more dependent on depositions, again increasing expenses for the parties. In addition, there was concern that the proposed amendment would create difficulties with respect to follow-up discovery, particularly in connection with requests for admission, which are most useful late in the discovery process. One organization also said that the proposal might create an incentive for a mischievous party to wait until the last 30 days of the discovery period to offer up its most damaging documents so that there would be no opportunity for follow-up discovery.

One attorney suggested a modification regarding the service of discovery requests so that, when discovery requests are served by overnight courier, five additional days would not be added to the time for responding to such discovery requests, which is the case under present § 2.119(c). Another attorney suggested that § 2.120(a) be amended to specify that documents to be served by the parties may be served by fax, and that facsimile signatures are acceptable for all purposes.

Response: The proposal to require that interrogatories, requests for production of documents and things, and requests for admission be served in sufficient time that responses will fall due prior to the close of the discovery period is withdrawn. The section is instead amended to specify that ''discovery depositions must be taken, and interrogatories, requests for production of documents and things, and requests for admission must be served, on or before the closing date of the discovery period as originally set or as reset.'' The amendment codifies current practice.

The suggestion to amend § 2.119(c) to eliminate the five additional days to respond to discovery requests when service of the requests is made by overnight courier goes beyond the scope of the proposed rules, and therefore cannot be considered. But see the final rule notice entitled ''Amendment of Trademark Rules Governing Inter Partes Proceedings, and Miscellaneous Amendments of Other Trademark Rules,'' published in the **Federal Register** on August 22, 1989, at 54 FR 34886, 34891–34892, and in the Official Gazette on September 12, 1989, at 1106 TMOG 26, 31 (rejecting a suggestion to amend § 2.119(c) to provide for the addition of only one day, rather than five, to the prescribed time for taking action when service is made by ''Express Mail'' or overnight courier). The suggestion to allow service of documents by facsimile is also beyond the scope of the proposed rules.

Section 2.120(a) was proposed to be amended to specify that extensions of the discovery period will be granted

only upon stipulation of the parties approved by the Board.

Comments: Thirteen comments, including those of each of the organizations, disagreed with the proposed amendment. Some of the comments pointed out that there may be genuine business reasons, such as holidays in foreign countries, change of management, and the time required to translate materials and locate documents which may have been archived decades ago, as to why discovery cannot be completed within the time set. Several comments said the proposal would lend itself to abuse, for example, if one side can complete taking discovery in 180 days but the other cannot; it was also suggested that the proposed amendment would promote the practice of ambushing opponents through dilatory conduct and obstreperous tactics. It was also felt that the elimination of extensions of the discovery period absent consent would eliminate flexibility, which was considered a principal advantage of Board proceedings. Most of the comments suggested that the standard for granting an extension remain good cause. Some of those commenting were willing to accept a modification of the current good cause basis for an extension, as long as the basis for extensions was not limited only to stipulation. For example, two comments suggested that extensions be allowed upon a showing of extraordinary circumstances; one attorney suggested that extensions of up to two months be granted for good cause; and an organization suggested keeping the good cause standard but specifying that both parties' discovery obligations would continue while the motion is pending, and that sanctions would be levied against a party abusing the extension process.

One attorney also commented that the Board should specify in the rules, rather than merely indicating in the preamble to the notice of proposed rulemaking, that the Board may reset the discovery period if necessary. Another attorney suggested that provision be made for a party to move for sanctions without first filing a motion to compel to avoid a situation where a party is deprived of follow-up discovery because its adversary is recalcitrant. The example given involved a party which serves discovery promptly, the adversary responds on the last day permitted with evasive answers and objections, weeks of correspondence to resolve the issues ensue, followed by a motion to compel. The attorney suggested that even though the motion to compel is granted, the moving party would be deprived of an opportunity to take follow-up discovery.

Response: It is clear that most of those commenting want the standard for obtaining extensions to remain good cause and that most of those who suggested a more restricted standard than good cause did so as an alternative to limiting extensions only to situations involving consent. In view of the comments, the proposal to amend the section to provide that extensions of the discovery period will be granted only on stipulation of the parties is withdrawn. The section is instead amended to provide that the discovery period may be extended upon stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board.

The amended rule codifies the current practice of allowing extensions of the discovery period upon motion showing good cause. However, the Board is mindful of the comments that abuses of the extension process must be curbed. Therefore, the Board will scrutinize carefully any such motions and will consider, in determining whether good cause has been shown, the diligence of the moving party during the discovery period.

Moreover, the rule is amended to specifically state that, if a motion for an extension is denied, the discovery period may remain as set or reset. While the Board has always had the discretion to do this, the explicit statement of this fact in the rules will alert parties to the potential consequences if a motion to extend does not show good cause, and will put them on notice that the Board will not tolerate abuses of the rules. It is hoped that this will avoid some of the games-playing mentioned in the comments, in which a party files a motion for an extension as a strategic move to obtain a delay until the Board decides the motion, even if the requested extension is denied.

With respect to the suggestion that the rule be amended to explicitly state that the Board may reset the discovery period if necessary, it is believed that this is unnecessary, and would, because such a provision is not present in the other rules regarding the setting of time periods, lead to confusion. For example, there is no specific provision that, if a motion to dismiss is filed and the motion is subsequently denied, the Board will reset the time for the defendant to file an answer, although it is Board practice to do so.

The suggestion that a party be permitted to move for sanctions without first filing a motion to compel has not been adopted. The reason cited as the basis for the suggestion is the need to avoid a situation where a party is deprived of follow-up discovery because its adversary is recalcitrant. However, it is the practice of the Board, when granting a motion to compel in such situations, to reset the discovery period, at the request of the moving party, so as to restore (at least for that party) that amount of time which would have remained in the discovery period had the discovery responses been made in a timely and proper fashion. See Trademark Trial and Appeal Board Manual of Procedure (403.04 (''TBMP''). Thus, there is no need for the suggested amendment.

Section 2.120(a) was proposed to be amended to provide that responses to interrogatories, requests for production of documents and things, and requests for admission must be served within 40 days from the date of service of such discovery requests, and to specify that the time to respond may be extended only upon stipulation of the parties or upon motion showing extraordinary circumstances approved by the Board.

Comments: Two organizations and one attorney believed that 30 days was a sufficient time to respond to discovery requests, and both the attorney and one of the organizations thought that the Board's practice should follow the 30-day time period provided by the Federal Rules of Civil Procedure. One organization expressed the concern that this proposal, combined with the proposal to eliminate extensions of the discovery period absent stipulation of the parties, would put too much pressure on the parties to serve discovery requests early in the discovery period, which could have an adverse effect on settlement.

Nine comments disagreed with the proposal to amend the section to provide that the time to provide responses to interrogatories, requests for production of documents and things, and requests for admission may be extended only upon stipulation of the parties or upon motion showing extraordinary circumstances. Several comments expressed the view that this proposal would eliminate flexibility, which was felt to be a principal advantage of Board proceedings. There were concerns that the proposal would favor ITU applicants or those who are discovery-proof; prejudice the party relying on an old, widely used and promoted mark; and encourage harassing discovery. The comments also pointed out that there could be legitimate, but ordinary, business reasons why extensions might be necessary, such as situations where requests have to be translated for foreign entities, businesses which close for

vacation, and small businesses which do not have the resources to compile answers within 40 days. There was also concern that the proposal would result in parties giving incomplete responses to meet the deadline.

Response: The proposal to amend the section to specify that the time to respond to interrogatories, requests for production of documents and things, and requests for admission may be extended only upon stipulation of the parties or upon motion showing extraordinary circumstances is withdrawn. The section is instead amended to specify that the time to respond may be extended upon stipulation of the parties, or upon motion granted by the Board, or by order of the Board. In view thereof, there is no longer a need to enlarge the period for providing responses to these requests. Accordingly, the proposal to enlarge the time to serve responses to 40 days from the date of service of the discovery requests is also withdrawn, and the section is amended to specify that discovery responses must be served within 30 days from the date of service of the discovery requests. The period for responding will thus remain consistent with that provided under the Federal Rules of Civil Procedure.

Section 2.120(a) was proposed to be further amended to include provisions currently found in § 2.121(a)(1), in somewhat different form. Specifically, the section was proposed to be amended to provide that the resetting of a party's time to respond to an outstanding request for discovery will not result in the automatic rescheduling of the discovery and/or testimony periods; that the discovery period will be rescheduled only upon stipulation of the parties approved by the Board; and that testimony periods will be rescheduled only upon stipulation of the parties approved by the Board, or upon motion showing extraordinary circumstances granted by the Board. The latter parts of this proposed amendment are withdrawn, for the reasons discussed above in connection with the withdrawal of the proposal to allow extensions of the discovery period only upon stipulation of the parties, and below in connection with the withdrawal of the proposal to amend §§ 2.121(a)(1) and 2.121(c) to allow the rescheduling or extension of testimony periods only upon stipulation of the parties or a showing of extraordinary circumstances. Only the first portion of the proposed amendment is included in the amended section.

Thus, the section is amended to specify that the resetting of a party's time to respond to an outstanding request for discovery will not result in the automatic rescheduling of the discovery and/or testimony periods, and that such dates will be rescheduled only upon stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board. The new provisions are the same as those currently found at the end of § 2.121(a)(1). It is believed that § 2.120(a), rather than § 2.121(a)(1), which governs the scheduling and rescheduling of testimony periods, is the most logical place for these provisions.

Section 2.120(d)(1) now provides, in pertinent part, that the total number of written interrogatories which a party may serve upon another party in a proceeding shall not exceed 75, counting subparts, except that the Board, in its discretion, may allow additional interrogatories upon motion showing good cause, or upon stipulation of the parties. The section was proposed to be amended to lower the interrogatory number limit from 75, counting subparts, to 25, counting subparts, and to delete the references to a motion for leave to serve additional interrogatories.

Comments: Twenty comments asserted that limiting the number of interrogatories that could be served upon a party to 25, counting subparts, was too restrictive, while thirteen comments stated that parties should be permitted to file a motion for leave to serve additional interrogatories. Those commenting believed that 25 interrogatories was not a sufficient amount to obtain necessary discovery. As a result, it was feared that parties would serve overly broad interrogatories, which would lead to more motions to compel. The comments also asserted that the proposed limit would force parties into taking more depositions, and thus increase the cost of litigating an inter partes proceeding before the Board. Further, the comments noted that depositions are generally not a viable alternative when the adversary is a foreign entity.

Response: The proposed amendments to lower the number of interrogatories which a party may serve upon another party and to eliminate the provision for a motion for leave to serve additional interrogatories are withdrawn.

Section 2.120(d)(2), which now includes only a provision concerning the place for production of documents and things, was proposed to be amended to limit the number of requests for production of documents and things which a party may serve upon another party to 15, counting subparts, except upon stipulation of the parties.

Comments: For reasons similar to those given in connection with the objections to lowering the number of interrogatories a party could serve upon another party in a proceeding, twenty-three comments disagreed with the proposal to limit to 15 the number of document production requests that a party could serve.

Response: The proposed amendment has been withdrawn, as set forth in the notice of hearing and reopening of comment period on the proposed rules, namely, ''Miscellaneous Changes to Trademark Trial and Appeal Board Rules,'' 62 FR 59640 (Nov. 4, 1997), 1204 TMOG 88 (Nov. 25, 1997).

Section 2.120(e), which governs motions to compel discovery, was proposed to be amended to, inter alia, redesignate the present paragraph as (1), and to amend that paragraph to insert, after the first sentence, a new sentence specifying that a motion to compel must be filed within 30 days after the close of the discovery period, as originally set or as reset.

Comments: Two comments expressed the concern that under the wording of the proposed amendment, motions to compel could not be filed until after the close of the discovery period. It was suggested that instead of stating that the motion must be filed ''within'' 30 days after the close of the discovery period, the language be changed to ''no later than'' 30 days after the close of the discovery period. Another comment, while agreeing that it is appropriate to require that motions be filed within a specified time, suggested that there should be flexibility to extend this date.

Response: The PTO agrees that parties should be allowed to file motions to compel during the discovery period. However, the suggested language has not been adopted because of changes made to proposed § 2.120(a). Specifically, § 2.120(a) was proposed to be amended to require, inter alia, that interrogatories, requests for production of documents and things, and requests for admission be served in sufficient time for answers to fall due prior to the close of discovery. However, as a result of comments received on the proposed amendment, it has been withdrawn, and § 2.120(a) instead has been amended to codify the Board's current practice that discovery depositions must be taken, and interrogatories, requests for production of documents and things, and requests for admissions must be served, on or before the closing date of the discovery period. In the case of written discovery requests served on the last day of the discovery period, responses would not fall due until 30 days after the close of the discovery

period (or 35 days if service of the requests was made by mail—See § 2.119(c)). In view thereof, a requirement that motions to compel be filed no later than 30 days after the close of discovery is no longer appropriate.

Nevertheless, the PTO still believes that a motion to compel (as well as a motion to test the sufficiency of an answer or objection to a request for admission) deals with pre-trial matters and should be filed and determined prior to trial. Therefore, § 2.120(e) is amended to state, in relevant part of redesignated paragraph (e)(1), ''The motion must be filed prior to the commencement of the first testimony period as originally set or as reset.'' Under the amended rule, motions to compel can be filed at any time during the discovery period, and up to the commencement of the first testimony period, as originally set or as reset. The Board, when setting trial dates in cases arising under these rules as amended, intends to schedule an interval of 60 days between the closing date of the discovery period and the opening date of the first testimony period. Accordingly, there will be adequate time to file a motion to compel prior to the opening of the first testimony period even with respect to those discovery requests served on the last day of the discovery period.

Section 2.120(e) is also amended to add a new paragraph, designated (e)(2), specifying, inter alia, that when a party files a motion for an order to compel discovery, the case will be suspended by the Board with respect to all matters not germane to the motion, and no party should file any paper which is not germane to the motion, except as otherwise specified in the Board's suspension letter.

Comments: One organization suggested that the filing of a motion to compel (or a motion to test the sufficiency of an answer or an objection to a request for admission) should automatically suspend proceedings, so that the parties would not have to wait to receive the Board's suspension order. Two comments suggested that the rule should be more specific as to the manner of suspension, and explicitly state that, when the motion is resolved, discovery will be resumed and the moving party will be given more time for discovery if the motion is granted. A law firm commented that the proposed change ''would be unnecessary if we keep the discovery at 270 days'' and suggested that suspension should occur only if the motion is not decided within 45 days of filing the motion so that there would be pressure on the Board to decide discovery matters promptly.

Response: The suggestion that the rule should be modified to provide that the filing of a motion to compel will automatically suspend proceedings has not been adopted. The Board must review the motion to ascertain, for example, whether it is timely and meets the minimal requirements for a motion to compel. Proceedings should not be suspended when a motion to compel is not timely or does not meet the minimal requirements for such a motion. Further, if the mere filing of a motion to compel resulted in an automatic suspension of proceedings, parties might be encouraged thereby to file such a motion merely as a strategic move to gain time and/or delay proceedings. The PTO believes that the better practice is for the Board to retain control over the running of the suspension period.

As for the suggestion that the rule specify that the Board will provide additional time for discovery if a motion to compel is granted, the determination of whether discovery dates will be reset varies from situation to situation. For example, if the moving party serves its discovery requests so late in the discovery period that responses will not be due until after the close of the discovery period, that party will not be entitled to time for serving additional discovery requests even if its motion to compel is granted. On the other hand, the moving party may serve its discovery requests early enough in the discovery period that there will be time for follow-up discovery if the adverse party serves timely responses, but the adverse party may not respond, or may serve responses which are insufficient, and the propounding party may be forced to file a motion to compel. In this situation, the Board, at the request of the propounding party, will reset the discovery period to put that party back in the position it would have been in if it had received timely and proper responses. See TBMP § 403.04. Because the relief to be granted in connection with a motion to compel (or a motion to test the sufficiency of an answer or an objection to a request for admission) in any given case is highly dependent on the particular facts of that case, the Board must have discretion to determine what relief is appropriate.

The comment that the proposed change ''would be unnecessary if we keep the discovery at 270 days'' is not understood, because under present practice the discovery period, absent extensions, would rarely amount to 270 days. As for the suggestion that suspension should occur only if a motion to compel is not decided by the Board within 45 days of its filing, thus keeping pressure on the Board, this suggested modification would seem to work a hardship not on the Board, but on the parties. In view of the time allowed under the applicable rules for filing a brief in opposition to a motion, as well as the time involved in the processing of mail within the PTO, a motion to compel is not likely to be determined within 45 days of filing. If a motion to compel is filed shortly before the commencement of the plaintiff's testimony period, and the case is not suspended until 45 days or more after the filing of the motion to compel, the testimony periods would go forward, and the parties would be left in a state of uncertainty as to what action, if any, should be taken. A motion to compel (like a motion to test the sufficiency of an answer or objection to a request for admission) deals with pre-trial matters and should, therefore, be filed and determined prior to trial. The new provisions governing the time for filing a motion to compel and the Board's suspension of proceedings pending the determination of the motion, coupled with the Board's intention to schedule an interval of 60 days between the close of the discovery period and the opening of the first testimony period, will provide for a more orderly administration of the proceeding and allow parties more certainty in scheduling testimony. Accordingly, the suggested modification has not been adopted.

Section 2.120(e) is further amended to provide, in the new paragraph (e)(2), that the filing of a motion to compel shall not toll the time for a party to respond to any outstanding discovery requests or to appear for any noticed discovery deposition.

Comments: One attorney suggested that the entire proceeding (including the time for responding to outstanding discovery requests or for appearing at noticed discovery depositions) should be suspended, or it might create an unfair advantage for the non-moving party. That person was concerned that the non-moving party could serve the same discovery requests as the moving party, and that, even if the Board denied the motion to compel or placed limitations on the required responses, the moving party would have had to respond fully while the non-moving party would not. Another commented that with this amendment a prompt decision on the motion to compel is critical, and suggested telephone conferences to decide the motion.

Response: The suggested modification has not been adopted. The Board does not believe that the amended rule prejudices the party filing a motion to compel. Because the signature of a party

or its attorney to a request for discovery constitutes a certification by the party or its attorney that the request is warranted, consistent with the Federal Rules of Civil Procedure, and not unreasonable or unduly burdensome, a party ordinarily will not be heard to contend that a request for discovery is proper when propounded by the party itself but improper when propounded by its adversary. See TBMP § 402.02 and cases cited therein. Thus, if the non-moving party serves the same discovery requests as the moving party, the non-moving party will ordinarily be required to respond to the requests. Moreover, to the extent that the moving party believes that any of the discovery requests served on it are inappropriate, it may object to those requests when it serves its responses. As for the suggestion that telephone conferences be used to decide motions to compel, as indicated previously, the Board is undertaking a pilot program to make greater use of telephone conferences in determining pending interlocutory matters and motions.

Section 2.120(g)(1) now provides, in pertinent part, that ''the Board does not have authority to hold any person in contempt or to award any expenses to any party.'' The section is amended to state that ''the Board will not hold any person in contempt or award any expenses to any party.'' The Board has long taken the position that it does not have authority to award expenses or attorney fees. See *MacMillan Bloedel Ltd.* v. *Arrow-M Corp.*, 203 USPQ 952, 954 (TTAB 1979); *Fisons Ltd.* v. *Capability Brown Ltd.*, 209 USPQ 167, 171 (TTAB 1980); *Anheuser-Busch, Inc.* v. *Major Mud & Chemical Co.*, 221 USPQ 1191, 1195 n. 9 (TTAB 1984); *Luehrmann* v. *Kwik Kopy Corp.*, 2 USPQ2d 1303, 1305 n. 4 (TTAB 1987); *Fort Howard Paper Co.* v. *G.V. Gambina Inc.*, 4 USPQ2d 1552, 1554 (TTAB 1987); *Nabisco Brands Inc.* v. *Keebler Co.*, 28 USPQ2d 1237, 1238 (TTAB 1993). *Cf. Driscoll* v. *Cebalo*, 5 USPQ2d 1477, 1481 (Bd. Pat. Int. 1982), *aff'd in part, rev'd in part*, 731 F.2d 878, 221 USPQ 745 (Fed. Cir. 1984); *Clevenger* v. *Martin*, 1 USPQ2d 1793, 1797 (Bd. Pat. App. & Int. 1986). However, in 1995 the PTO, by final rule notice published in the **Federal Register** of March 17, 1995, at 60 FR 14488, and in the *Official Gazette* of April 11, 1995, at 1173 TMOG 36, amended Patent Rule 1.616, 37 CFR 1.616, which concerns the imposition of sanctions in proceedings before the Board of Patent Appeals and Interferences (Patent Board), to provide for the imposition of a sanction in the form of compensatory expenses and/or compensatory attorney fees. 37 CFR 1.616(a)(5) and 1.616(b). The final rule acknowledged the foregoing decisions but concluded, based on a detailed analysis of the Commissioner's authority to issue regulations imposing sanctions, that the Commissioner has the authority to promulgate a rule authorizing imposition of compensatory monetary sanctions.

It is believed that the adoption of a rule authorizing the Board to impose a sanction in the form of compensatory expenses and/or compensatory attorney fees would result in an increase in the number of papers and motions filed in proceedings before the Board. For this reason, and in order to harmonize § 2.120(g)(1) with § 1.616, § 2.120(g)(1) is amended to substitute a statement that the Board ''will not'' hold any person in contempt or award any expenses to any party, for the statement that the Board ''does not have authority'' to hold any person in contempt or award any expenses to any party. Section 2.127(f), which now states in pertinent part that the Board ''does not have authority to hold any persons in contempt, or to award attorneys' fees or other expenses to any party,'' is amended in the same manner.

Comments: Five comments suggested that the rule be amended not only to indicate that the Board has authority to award expenses as a sanction, but also to provide that the Board will exercise this sanctioning power. They stated that awarding expenses would be an effective tool for combating improper motions and other abuses by parties and their attorneys. One organization, while approving of the proposed amendment not to award monetary sanctions, urged the Board to make more effective use of the sanctioning powers it will exercise by using its power more often and publishing decisions in which sanctions are imposed.

Response: As indicated above, it is believed that the adoption of a rule authorizing the Board to impose a sanction in the form of compensatory expenses and/or compensatory attorney fees would result in the filing of many motions for such sanctions (as well as a large number of associated papers concerning the appropriate amount for such expenses and/or fees), thus increasing the workload of the Board. Accordingly, this suggestion has not been adopted. However, the Board plans to follow the suggestion that it use its other sanctioning powers more often, and that it publish more decisions in which it enters sanctions. It is hoped that these steps will make practitioners aware of the Board's lack of tolerance for abuses and lead to a curtailment of abuses.

Section 2.120(h), which concerns requests for admission, was proposed to be amended to redesignate the present paragraph as (h)(2); delete the first sentence, which reads ''Requests for admissions shall be governed by Rule 36 of the Federal Rules of Civil Procedure except that the Trademark Trial and Appeal Board does not have authority to award any expenses to any party.''; add to the beginning a new sentence reading ''Any motion by a party to determine the sufficiency of an answer or objection to a request made by that party for an admission must be filed within 30 days after the close of the discovery period, as originally set or as reset.''; and revise the beginning of the second sentence, which now reads, ''A motion by a party to determine the sufficiency of an answer or objection to a request made by that party for an admission shall * * * ,'' to read ''The motion shall * * * .''

The section was proposed to be further amended to add a new paragraph, designated (h)(1), limiting the number of requests for admission which a party may serve upon another party, in a proceeding, to 25, counting subparts. Specifically, the proposed new paragraph provided that the total number of requests for admission which a party may serve upon another party pursuant to Rule 36 of the Federal Rules of Civil Procedure, in a proceeding, shall not exceed 25, counting subparts, except upon stipulation of the parties; that if a party upon which requests for admission have been served believes that the number of requests served exceeds the limitation specified in the paragraph, and is not willing to waive this basis for objection, the party shall, within the time for (and instead of) serving answers and specific objections to the requests, serve a general objection on the ground of their excessive number; and that if the inquiring party, in turn, files a motion to determine the sufficiency of the objection, the motion must be accompanied by a copy of the set(s) of requests for admission which together are said to exceed the limitation, and must otherwise comply with the requirements of paragraph (h)(2) of the section. The proposed provisions paralleled the provisions of § 2.120(d)(1), which limit the number of interrogatories which a party may serve upon another party in a proceeding.

Finally, § 2.120(h) was proposed to be amended to add another new paragraph, designated (h)(3), which provided for the suspension of proceedings when a motion to determine the sufficiency of an answer or objection to a request for

admission is filed. Specifically, the proposed new paragraph provided that when a party files a motion to determine the sufficiency of an answer or objection to a request made by that party for an admission, the case will be suspended by the Board with respect to all matters not germane to the motion, and no party should file any paper which is not germane to the motion, except as otherwise specified in the Board's suspension order. The proposed new paragraph also provided that the filing of a motion to determine the sufficiency of an answer or objection to a request for admission shall not toll the time for a party to respond to any outstanding discovery requests or to appear for any noticed discovery deposition. The provisions of proposed new § 2.120(h)(3) paralleled the provisions of proposed new § 2.120(e) and § 2.127(d).

Comments: Nineteen comments were received which objected to the proposed limit on requests for admission. The comments noted that requests for admission are useful in limiting issues for trial and for streamlining the introduction of documentary evidence. In addition, the comments raised objections similar to those made in response to the proposal to amend § 2.120(d)(1) to lower the number of interrogatories which one party may serve upon another in a proceeding.

Response: As a result of the comments received, the proposed amendment to limit requests for admission has been withdrawn. See the notice of hearing and reopening of comment period on the proposed rules, namely, ''Miscellaneous Changes to Trademark Trial and Appeal Board Rules,'' 62 FR 59640 (Nov. 4, 1997), 1204 TMOG 88 (Nov. 25, 1997) (stating the PTO's intention to withdraw this proposal). Accordingly, the rule is not being amended to include the proposed new first paragraph; the present paragraph will remain but is redesignated (h)(1), and the proposed paragraph (h)(3) is added but redesignated (h)(2). These amendments are described in more detail below.

Section 2.120(h), redesignated as (h)(1), is amended to delete the first sentence, which reads ''Requests for admissions shall be governed by Rule 36 of the Federal Rules of Civil Procedure except that the Trademark Trial and Appeal Board does not have authority to award any expenses to any party.'' The sentence suggests that the only provision in Federal Rule 36 which does not apply in Board proceedings is that pertaining to the awarding of expenses. However, there are also other provisions in Rule 36 which do not apply in Board proceedings. Moreover, § 2.120(a), as amended herein, specifies that whenever appropriate, the provisions of the Federal Rules of Civil Procedure relating to discovery shall apply in opposition, cancellation, interference, and concurrent use registration proceedings, except as otherwise provided in § 2.120. Further, § § 2.120(g)(1) and 2.127(f), as amended herein, provide that the Board will not hold any person in contempt or award expenses to any party. Accordingly, the first sentence of § 2.120(h), redesignated herein as (h)(1), is being deleted because it is confusing and redundant.

It was proposed to amend the second sentence of the present paragraph (now redesignated as § 2.120(h)(1)) to add to the beginning of the paragraph a new sentence reading ''Any motion by a party to determine the sufficiency of an answer or objection to a request made by that party for an admission must be filed within 30 days after the close of the discovery period, as originally set or as reset.'' For the reasons stated above in connection with § 2.120(e)(1), governing motions to compel, the paragraph is instead amended to include a new first sentence reading, ''Any motion by a party to determine the sufficiency of an answer or objection to a request made by that party for an admission must be filed prior to the commencement of the first testimony period, as originally set or as reset.'' The amendment parallels a similar amendment to § 2.120(e).

Present § 2.120(h), redesignated as § 2.120(h)(1), is further amended to revise the beginning of the second sentence, which now reads, ''A motion by a party to determine the sufficiency of an answer or objection to a request made by that party for an admission shall * * *,'' to read ''The motion shall * * *.''

Section 2.120(h) is amended to add a new paragraph, proposed to be designated as (h)(3) but, with the withdrawal of the proposal to limit requests for admission, now designated (h)(2). This new paragraph provides for the suspension of proceedings when a motion to determine the sufficiency of an answer or objection to a request for admission is filed. Specifically, the paragraph provides that when a party files a motion to determine the sufficiency of an answer or objection to a request for an admission, the case will be suspended by the Board with respect to all matters not germane to the motion, and no party should file any paper which is not germane to the motion, except as otherwise specified in the Board's suspension order. The paragraph further provides that the filing of a motion to determine the sufficiency of an answer or objection to a request for admission shall not toll the time for a party to respond to any outstanding discovery requests or to appear for any noticed discovery deposition. The amendment parallels a similar amendment to § 2.120(e). The comments submitted (and discussed above) in connection with the amendment to § 2.120(e) were considered also in connection with this amendment, with the same outcome.

Section 2.121(a)(1) now provides, inter alia, that testimony periods may be rescheduled ''by stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board.'' The sentence was proposed to be amended to provide that testimony periods may be rescheduled ''by stipulation of the parties approved by the Board, or upon motion showing extraordinary circumstances granted by the Board.'' Similarly, § 2.121(c) now provides, inter alia, that testimony periods may be extended ''by stipulation of the parties approved by the Trademark Trial and Appeal Board, or upon motion granted by the Board, or by order of the Board.'' The sentence was proposed to be amended to provide that testimony periods may be extended ''by stipulation of the parties approved by the Trademark Trial and Appeal Board, or upon motion showing extraordinary circumstances granted by the Board.'' The proposed amendments would have eliminated extensions or rescheduling upon motion showing good cause.

Comments: Thirteen comments, including those from four organizations, disagreed with the proposal to eliminate the good cause standard for extending or rescheduling the testimony periods. The reasons given included that there could be many genuine business reasons, or unforeseen developments, why extensions would be necessary, but which would not rise to the level of extraordinary circumstances. Some of the comments suggested allowing one 30-day extension for good cause, or extensions for up to 2 months on a showing of good cause, or extensions on good cause with sanctions for abuse. Three attorneys from the same law firm suggested that the rule should provide for the grant of one extension as of right, and further extensions on a showing of good cause. One attorney suggested changing the pertinent sentence in § 2.121(a)(1) to read ''Testimony periods may be rescheduled or extended as provided for in 37 CFR 2.121(c)'' to avoid duplication. That same attorney also suggested providing for a non-party to object to a stipulated rescheduling or enlargement of testimony when the

proceeding is delaying an application by a non-party or delaying another proceeding in which the non-party has an interest.

Response: The proposal to amend §§ 2.121(a)(1) and 2.121(c) to eliminate the good cause standard for motions to reschedule or extend the testimony periods is withdrawn. As for the suggestion that one rescheduling or extension of the testimony periods be granted without any showing of cause, the Board does not believe this is warranted since the proposed amendments have been withdrawn. Moreover, once an inter partes proceeding commences, no other extensions of time are granted as of right. With respect to the suggestion to reword the pertinent sentence in § 2.121(a)(1) to refer to § 2.121(c), it is believed that the clarity offered in setting forth the bases for the rescheduling of testimony periods in § 2.121(a)(1) is helpful to the parties. The suggestion that a non-party be permitted to object to a rescheduling of the testimony periods is beyond the scope of the proposed rule amendment, and therefore cannot be considered at this time.

Section 2.121(a)(1) is amended to add a new sentence specifying that if a motion to reschedule testimony periods is denied, ''the testimony periods may remain as set.'' The Board has always had the discretion to leave the testimony periods as set when a motion to reschedule is denied. However, it is hoped that explicit statement of this fact in the rules will alert parties to the potential consequences if a motion to reschedule does not show good cause, and will put them on notice that the Board will not tolerate abuses of the rules.

Section 2.121(a)(1) now includes a last sentence reading, ''The resetting of a party's time to respond to an outstanding request for discovery will not result in the automatic rescheduling of the discovery and/or testimony periods; such dates will be rescheduled only upon stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board.'' The section is amended by deleting this sentence, which has been added to § 2.120(a). It is believed that § 2.120(a), which governs, inter alia, extensions of time to respond to discovery requests, is the most logical place for the sentence.

Comment: One attorney suggested that the rule provide that if the discovery period is rescheduled, the start of the testimony period should be automatically reset without a party having to make a request or motion.

Response: Such a provision appears as the fourth sentence of present § 2.121(a)(1), and will remain in the amended rule as the last sentence of the paragraph.

Section 2.121(c), which governs the length of the testimony periods, was proposed to be amended to enlarge the rebuttal testimony period from 15 to 30 days, and to enlarge all other testimony periods from 30 to 60 days.

Comments: Four comments disagreed with this proposal, stating that the existing trial periods are adequate, that 60 days is rarely needed to complete testimony, and that most trials in trademark litigation are conducted in one to two weeks or less. It was also felt that enlarging the testimony periods would unduly lengthen inter partes proceedings.

Response: The proposal to lengthen the testimony periods was tied to the proposal to eliminate good cause extensions of these periods. Because the proposal to eliminate good cause extensions is withdrawn, the proposal to lengthen the testimony periods is also withdrawn.

Section 2.121(c), which now provides, inter alia, that the testimony periods may be extended ''by stipulation of the parties approved by the Trademark Trial and Appeal Board, or upon motion granted by the Board, or by order of the Board,'' was also proposed to be amended to provide that the periods may be extended ''by stipulation of the parties approved by the Trademark Trial and Appeal Board, or upon motion showing extraordinary circumstances granted by the Board.'' The proposed amendment paralleled a similar proposed amendment to § 2.121(a)(1), which governs, inter alia, the rescheduling of testimony periods. For the reasons stated in connection with the proposed parallel amendment to § 2.121(a)(1), the proposal is withdrawn.

Section 2.121(c) is amended to specify that if a motion to extend the testimony period is denied, ''the testimony periods may remain as set.''

Comments: One organization suggested that if the motion were denied, the testimony period should be reset to allow the amount of time which remained when the motion to extend was filed. Three attorneys, all from the same law firm, commented that if prior deadlines are to remain in effect when a motion to extend is denied, the Board needs new procedures to expedite the delivery of motion papers to the Board, and for deciding the motion.

Response: With respect to the first comment, the PTO believes it is important for the Board to retain discretion as to the rescheduling of testimony periods. There is a concern that, if testimony periods had to be reset to provide the amount of time which was remaining at the time a motion to extend was filed, a party might file a motion for extension as a strategic measure to obtain a delay until the Board decides the motion, even if the motion is ultimately denied. The Board has always had the discretion, if it denied a motion for an extension, to leave the testimony periods as set. It is hoped that specifically stating this fact in this section, as well as in § 2.121(a)(1), will alert parties to the potential consequences if a motion to extend does not show good cause, and will put them on notice that the Board will not tolerate abuses of the rules.

As for the need for new procedures to expedite the processing and determination of motions to extend, the telephone pilot program, discussed above, should prove helpful in expediting the rendering of such decisions.

Section 2.121(d) now provides, in pertinent part, that when parties stipulate to the rescheduling of testimony periods or to the rescheduling of the closing date for discovery and the rescheduling of testimony periods, a stipulation ''submitted in one original plus as many photocopies as there are parties'' will, if approved, be so stamped, signed, and dated, and the copies will be promptly returned to the parties. The section is amended by revising the quoted section to read ''submitted in a number of copies equal to the number of parties to the proceeding plus one copy for the Board.'' The Board does not need the original copy.

Section 2.122(b)(1) now provides, in pertinent part, that each application or registration file specified in a declaration of interference forms part of the record of the proceeding without any action by the parties. The section is amended to clarify the rule by substituting the word ''notice'' for the word ''declaration.'' A declaration of an interference is issued by the Commissioner upon the granting of a petition filed pursuant to § 2.91. An interference proceeding declared by the Commissioner does not commence until the Examining Attorney has determined that all of the subject marks are registrable; all of the marks have been published in the Official Gazette for opposition; and the Board mails a ''notice of interference'' notifying the parties that the interference proceeding is thereby instituted. In the interim between the Commissioner's declaration of an interference and the institution of the proceeding by the Board, some of

the applications mentioned in the declaration of interference may become abandoned for one reason or another. When the Board institutes the proceeding, it is only the surviving applications which are specified in the notice of interference, and it is only those application files which form part of the record of the proceeding without any action by the parties.

Section 2.122(d)(1) provides that a registration of the opposer or petitioner pleaded in an opposition or petition to cancel will be made part of the record if the opposition or petition is accompanied ''by two copies of the registration prepared and issued by the Patent and Trademark Office showing both the current status of and current title to the registration.'' The section, which now includes a cross-reference to ''§ 2.6(n),'' is amended to correct the cross-reference to ''§ 2.6(b)(4).''

Comment: A suggestion was made to further amend this section to require that only one status and title copy of a registration be submitted with a notice of opposition. It was pointed out that only one copy of a registration is necessary when it is submitted with a notice of reliance, and it was believed that requiring that two be submitted with a notice of opposition was wasteful.

Response: A notice of opposition or petition to cancel, together with any exhibits thereto, must be submitted in duplicate. See §§ 2.104(a) and 2.112(a). This is because the Board places one of the copies in the Board's file of the proceeding, and the other copy is sent to the applicant or registrant with the notification of the institution of the proceeding. Thus, when a plaintiff wishes to make a pleaded registration of record by submitting a status and title copy of the registration with its complaint pursuant to § 2.122(d)(1), one copy of the registration must be submitted with each copy of the complaint. That is, both the complaint, and the status and title copy of the registration, must be submitted in duplicate. A party need only file one copy of a registration with a notice of reliance, on the other hand, because the party itself must separately serve a copy of the notice of reliance and the registration on each adverse party. It may be that the comment was occasioned by a belief that two copies of a pleaded registration must be submitted with each copy of the complaint, for a total of four copies of the registration. That is not the case. To the extent the comment is concerned about the expense of obtaining two status and title copies of a registration from the PTO, the Board does not require that two ''originals'' be submitted. The section is amended to make this clear by adding as a parenthetical the words ''originals or photocopies'' after the word ''copies'', so that the sentence will read, in pertinent part, ''* * * if the opposition or petition is accompanied by two copies (originals or photocopies) of the registration prepared and issued by the Patent and Trademark Office * * *''

Section 2.122(d)(2), provides, inter alia, that a registration owned by any party to a proceeding may be made of record by filing a notice of reliance which is accompanied by a copy of the registration prepared and issued by the Patent and Trademark Office showing the current status of and current title to the registration. This section is amended to add, as a parenthetical after the word ''copy,'' the words ''original or photocopy'', so that the sentence will read, in pertinent part, ''* * * a notice of reliance, which shall be accompanied by a copy (original or photocopy) of the registration prepared and issued by the Patent and Trademark Office * * *'' This change is consistent with the amendment to § 2.122(d)(1).

Section 2.123(b) now provides, in its second sentence, that by agreement of the parties, the testimony of any witness or witnesses of any party may be submitted in the form of an affidavit by such witness or witnesses. The sentence is amended by inserting the word ''written'' between the words ''by'' and ''agreement.'' The third sentence of the section now provides that the parties may stipulate what a particular witness would testify to if called, or the facts in the case of any party may be stipulated. The sentence is amended by inserting the words ''in writing'' after the word ''stipulate'' and after the word ''stipulated.'' The amendments clarify the rule.

Section 2.123(f) pertains to the certification and filing of a deposition by the officer before whom the deposition was taken. The section now provides, in pertinent part, that the officer certifying a testimony deposition shall, without delay, forward the evidence, notices, and paper exhibits to the Commissioner of Patents and Trademarks. The section is amended to eliminate the requirement that this material be forwarded to the Commissioner ''without delay.'' The section is also amended to state that either the officer or the party taking the testimony deposition, or its attorney or other authorized representative, should forward this material to the Commissioner. Specifically, the third sentence of the second paragraph of the section now reads, ''unless waived on the record by an agreement, he shall then, without delay, securely seal in an envelope all the evidence, notices, and paper exhibits, inscribe upon the envelope a certificate giving the number and title of the case, the name of each witness, and the date of sealing, address the package, and forward the same to the Commissioner of Patents and Trademarks.'' The sentence is amended to delete the words ''without delay,'' to put a period after the word ''sealing,'' and to convert the remainder of the present sentence into a new sentence which reads, ''The officer or the party taking the deposition, or its attorney or other authorized representative, shall then address the package and forward the same to the Commissioner of Patents and Trademarks.'' The fourth sentence of the paragraph now reads, ''If the weight or bulk of an exhibit shall exclude it from the envelope, it shall, unless waived on the record by agreement of all parties, be authenticated by the officer and transmitted in a separate package marked and addressed as provided in this section.'' The sentence is amended to insert, after the word ''transmitted,'' the phrase ''by the officer or the party taking the deposition, or its attorney or other authorized representative.'' Finally, in view of the amendments to the third and fourth sentences, the title of the section, which now reads ''Certification and filing by officer,'' is amended to read ''Certification and filing of deposition.'' To eliminate undesignated text, paragraph (f) has been redesignated.

The amendment eliminating the present requirement that the material be forwarded to the Commissioner of Patents and Trademarks ''without delay,'' conforms the section to current Board practice. While the Board prefers that testimony depositions be submitted promptly, and such depositions are normally filed with the Board at the same time that they are served on the adverse party or parties to the proceeding, it is Board practice to accept transcripts of testimony depositions at any time prior to the rendering of a final decision on the case. The amendment does not affect the requirement of § 2.125(a) that one copy of the testimony transcript, together with copies of documentary exhibits and duplicates or photographs of physical exhibits, be served on each adverse party within thirty days after completion of the taking of that testimony. The amendment concerning who is to file the material makes it clear that if the officer sends the envelope or package containing the deposition and

associated materials to the party taking the deposition, or to its attorney or other authorized representative, the party, or its attorney or other authorized representative, need not return the envelope or package to the officer for filing with the PTO, but rather may send it directly to the PTO.

Section 2.125(c), which now provides that one certified transcript (of a testimony deposition) and exhibits shall be filed ''promptly,'' with the Board, is amended to delete the word ''promptly.'' The amendment corresponds to the amendment deleting the words ''without delay'' from § 2.123(f), and conforms § 2.125(c) to current Board practice.

Section 2.127(a), which governs the filing of briefs on motions, was proposed to be amended to enlarge the time for filing a brief in response to a motion (other than a motion for summary judgment which was covered separately in proposed § 2.127(e)(1)) from 15 days to 30 days.

Comments: Two comments stated that 30 days was too long a period and suggested that 15 or 20 days would be sufficient; a third comment, while not objecting to the enlargement of time, believed that the current time period was not too short.

Response: The proposal to enlarge the time to respond to a motion which is not a motion for summary judgment was tied to a proposal to amend § 2.127(a) to eliminate good cause extensions of this time. Because the proposal to eliminate good cause extensions is withdrawn, as indicated immediately hereafter, the proposal to lengthen the time to respond is also withdrawn.

Section 2.127(a) was proposed to be amended to delete, from the second sentence, a provision for extension of the time to respond to a motion by ''order of the Board on motion for good cause'' and substitute a provision for an extension by ''stipulation of the parties approved by the Board, or upon motion showing extraordinary circumstances granted by the Board.''

Comments: Three comments suggested that the good cause standard be retained, one organization stating that sanctions should be imposed in cases involving abuse. Three attorneys from the same law firm suggested that a first extension of time be granted as of right, and that further extensions be granted upon a showing of good cause.

Response: Just as the proposals to eliminate good cause as a standard for motions to extend the discovery and discovery response periods (§ 2.120(a)), and motions to reschedule (§ 2.121(a)(1)) or extend (§ 2.121(c)) testimony periods, are withdrawn herein, so too the proposal to eliminate good cause as a standard for obtaining extensions of time to respond to a motion is withdrawn.

Section 2.127(a) is amended to provide that if a motion for an extension of time to file a brief in response to a motion is denied, the time for responding to the motion for summary judgment may remain as specified under this section.

Comment: Three attorneys from the same law firm commented that in view of this amendment, the Board will need some provision for quick processing of the motion papers and for expedited decisions.

Response: The telephone pilot program, discussed above, should prove helpful in expediting decisions on motions for extensions of time.

Section 2.127(a), which now makes no mention of reply briefs or further papers in support of or in opposition to motions, was proposed to be amended to (1) state that a reply brief, if filed, shall be filed within 15 days from the date of service of the brief in response to the motion; (2) preface this new provision with the phrase ''Except as provided in paragraph (e)(1), a'' to make clear that this provision does not apply to reply briefs in support of summary judgment motions; and (3) specify that the time for filing a reply brief will not be extended, and that no further papers in support of or in opposition to a motion will be considered by the Board.

Comments: One organization disagreed with the proposal to amend the section to specify that the time to file a reply brief will not be extended. This organization stated that there was no reason why the circumstances that necessitate an extension of time to file a brief in opposition are less likely to be present when filing a reply brief. As for the prohibition against papers beyond a reply brief, four comments expressed the concern that the moving party will save new issues for its reply, and the party opposing a motion will be at a disadvantage because it will not be able to respond. A suggestion was made to adopt the rule that the reply be limited to rebuttal of points newly raised in the answering brief, and that issues not raised in the moving brief are waived. Another comment suggested that there should either be a provision in the section that no new issues raised in a reply brief will be considered, or the Board should allow for a surreply brief limited to any new issues raised in the reply.

Response: It is believed that extensions of time to file a reply brief need not be available in the same way that extensions to file a brief in opposition are available, because the circumstances surrounding the filing of a reply brief and a brief in opposition are different. Specifically, while the service of a motion may come as a surprise to a party, the moving party labors under no such obstacle. It must also be acknowledged that reply briefs are generally found to have little persuasive value; often they are a mere reargument of the points made in the main brief. It is the practice of the Board to consider a reply brief only when, in the Board's opinion, such a brief is warranted under the circumstances of a particular case, such as when the Board finds that a reply brief is necessary to permit the moving party to respond to new issues raised in the brief in opposition to the motion, or that the issue to be determined is complex or needs to be further clarified, or that certain arguments against the motion should be answered so as to assist the Board in arriving at a just decision on the motion. See TBMP § 502.03. Accordingly, the section is amended as proposed. However, to emphasize that the Board does not intend to encourage the filing of reply briefs, the sentence, ''The Board may, in its discretion, consider a reply brief,'' has been added to the section.

With respect to the concern that the moving party may ''save'' new issues for its reply brief, the Board is able to recognize what is proper material for a reply brief. However, it is believed that it is not necessary to include a specific provision that ''no new issues raised in a reply brief will be considered''; there are no such specific provisions in § 2.121(b)(1), which involves the rebuttal testimony period, and § 2.128(a)(1), which concerns a reply brief at final hearing.

Section 2.127(a) is further amended to (1) add form requirements for briefs, *i.e.*, that they shall be submitted in typewritten or printed form, double spaced, in at least pica or eleven-point type, on letter-size paper; (2) add a page limitation for briefs, namely, 25 pages for a brief in support of or in response to a motion and 10 pages for a reply brief; and (3) specify that exhibits submitted in support of or in opposition to a motion shall not be deemed to be part of the brief for purposes of determining the length of the brief.

Comments: One organization thought the page limits were too restrictive, and suggested 35 pages for main briefs and 15 for reply briefs; three comments suggested higher page limits for potentially dispositive motions; one attorney recommended 30- and 15-page limits for summary judgment motions; and an organization suggested a 40-page

limit for dispositive motions, pointing out that other courts have 45- and 50-page limits. Two organizations agreed with the proposed page limit, as long as the Board would grant leave to file longer briefs with a good cause showing, such as if there were multiple parties, consolidated proceedings, or multiple marks.

Response: It is believed that 25 and 10 pages are sufficient for the main brief and reply brief, respectively, of any motion that arises in a Board inter partes proceeding. Because of the limited nature of Board proceedings, briefing for motions in such proceedings need not be as extensive as that in proceedings in court. Although the Board is of the firm opinion that all issues in a motion can be briefed in 25 pages for a main brief, and 10 pages for a reply brief, the rule does not specifically prohibit a motion for leave to file a longer brief upon a showing of good cause. The Board may include such a prohibition as part of a future rulemaking if it appears that parties are abusing such requests.

Section 2.127(b), which now provides, in pertinent part, that any request for reconsideration or modification of an order or decision issued on a motion must be filed within thirty days from the date of the order or decision, is amended to change the specification of the time period for requesting reconsideration or modification from ''thirty days'' to ''one month.'' The amended rule parallels § 2.129(c), which governs the time for filing a request for rehearing or reconsideration or modification of a decision issued after final hearing.

Section 2.127(d) now provides, in its first sentence, that when any party files a motion which is potentially dispositive of a proceeding, the case will be suspended by the Board with respect to all matters not germane to the motion, and no party should file any paper which is not germane to the motion. The sentence is amended to add to the end of the sentence the phrase ''except as otherwise specified in the Board's suspension order.''

Comment: One organization suggested the section should be amended to provide that the filing of a potentially dispositive motion automatically suspends proceedings, without any action by the Board.

Response: The suggested modification has not been adopted. A variety of motions are potentially dispositive, including a motion for sanctions in the form of entry of judgment. Because of the number of situations in which a party may make a potentially dispositive motion, it is believed better for the Board to determine whether proceedings should be suspended based on the situation presented by the particular case.

Section 2.127(d) was also proposed to be amended to add a new sentence providing that the filing of a summary judgment motion shall not toll the time for the moving party to respond to any outstanding discovery requests or to appear at a noticed discovery deposition, but it shall toll the time for the nonmoving party to serve such responses or to appear for such deposition.

Comments: Three comments disagreed with this proposal. They stated that the moving party should not be forced to spend unnecessary time and money to provide discovery responses when the proceeding may be decided on the basis of the pending summary judgment motion. They believed that any discovery that is essential for the non-moving party can be obtained through an FRCP 56(f) motion. Another comment suggested that the non-moving party's obligation to respond to discovery not be tolled by the filing of a summary judgment motion, in that the moving party might require discovery if it were moving for partial summary judgment.

Response: Upon consideration of the comments regarding the tolling of time for responding to discovery, the proposal to amend § 2.127(d) to add the sentence, ''The filing of a summary judgment motion shall not toll the time for the moving party to respond to any outstanding discovery requests or to appear for any noticed discovery deposition, but it shall toll the time for the nonmoving party to serve such responses or to appear for such deposition.'', is withdrawn.

Section 2.127(e)(1) presently provides that a motion for summary judgment should be filed prior to the commencement of the first testimony period, as originally set or as reset, and that the Trademark Trial and Appeal Board, in its discretion, may deny as untimely any motion filed thereafter. The section is amended to add, at the beginning of the section, a provision that a motion for summary judgment may not be filed until notification of the proceeding has been sent to the parties by the Board. The amendment codifies current Board practice, as set forth in *Nabisco Brands Inc.* v. *Keebler Co.*, 28 USPQ2d 1237 (TTAB 1993).

Comments: One comment suggested that parties should be allowed to file summary judgment motions with the pleadings. Another comment suggested that parties be permitted to file summary judgment motions up to the end of a party's testimony period.

Response: The suggestion that parties be allowed to file summary judgment motions with the pleadings has not been adopted. The Board considers a motion for summary judgment filed prior to the issuance of the notice of institution to be premature. Although the proceeding commences with the filing of the complaint, formal service of the complaint upon the defendant is made by the Board, not by the plaintiff. The Board does not serve the complaint upon the defendant until after the Board has first examined the complaint to determine whether it has been filed in proper form, with the required fee, and then, if so, has (1) obtained the application or registration file which is the subject of the proceeding, (2) set up a proceeding file with an assigned proceeding number, and (3) entered information concerning the proceeding in the electronic records of the PTO. Thus, there is a time gap between the filing of a notice of opposition or petition for cancellation and the issuance of the Board's action notifying the defendant of the filing of the proceeding, notifying both parties of the institution of the proceeding, and forwarding a copy of the complaint to the defendant. Although a plaintiff may send a courtesy copy of the complaint to the defendant, the defendant does not know that the complaint has been filed in proper form, and that the proceeding has been instituted by the Board, until it receives from the Board the notice of institution along with a copy of the complaint. Moreover, the filing of a motion for summary judgment prior to the Board's formal institution of the proceeding may cause administrative difficulties for the Board, particularly where the Board has not yet assigned a proceeding number to the case.

As for the suggestion that parties be permitted to file summary judgment motions up to the end of a party's testimony period, this is beyond the scope of the proposed amendment. Moreover, the suggested modification would defeat the concept of summary judgment, which is a procedure to dispose of a case before trial. Once a party's testimony period has opened, trial has begun. Accordingly, the suggested modification has not been adopted.

Section 2.127(e)(1) is further amended to add provisions specifying that (1) a motion under Rule 56(f) of the Federal Rules of Civil Procedure, if filed in response to a motion for summary judgment, shall be filed within 30 days from the date of service of the summary judgment motion, and (2) the time for

filing a motion under Rule 56(f) will not be extended.

Comments: Three attorneys from one law firm asserted that this amendment would put extraordinary pressure on counsel, and suggested that there be a provision for extensions given the dispositive nature of a summary judgment motion. An organization raised a concern that when a motion to dismiss which is accompanied by affidavits and exhibits is treated as a summary judgment motion it would be difficult for the plaintiff to properly frame a Rule 56(f) motion without having the defendant's answer, and suggested that in such a case the defendant should be required to file its answer before the plaintiff must file a 56(f) motion.

Response: The PTO believes that 30 days is an adequate time for a party to review a summary judgment motion, determine whether it needs particular discovery in order to respond to the motion, and prepare a motion for such discovery, supported by an affidavit attesting to the reasons for the need for the discovery. With respect to the suggestion, in the motion to dismiss turned motion for summary judgment situation, that the defendant be required to file its answer before the plaintiff must file a 56(f) motion, the Board believes that the plaintiff will be adequately informed of the factual issues regarding the defendant's position by the summary judgment motion and accompanying materials, such that the plaintiff can frame a Rule 56(f) motion.

Section 2.127(e)(1) was also proposed to be amended to provide that if no motion under Rule 56(f) is filed, a brief in response to the motion for summary judgment shall be filed within 60 days from the date of service of the motion, unless the time is extended by stipulation of the parties approved by the Board, or upon motion showing extraordinary circumstances granted by the Board.

Comments: Two comments disagreed with the proposal to enlarge the period to respond to a summary judgment motion to 60 days, stating that 30 days was adequate. Three comments disagreed with the proposal to allow extensions of the time to file a brief only on consent or a showing of extraordinary circumstances: two suggested a good cause basis, while three comments, by attorneys from the same law firm, suggested that a first extension be allowed as of right, and additional extensions upon a showing of good cause.

Response: The proposal to amend this section to allow extensions of time to file a brief opposing a motion for summary judgment only on consent or a showing of extraordinary circumstances is withdrawn. The withdrawal of this proposal is consistent with the withdrawals herein of proposals to eliminate good cause as a standard for motions to extend the discovery and discovery response periods (§ 2.120(a)), motions to reschedule (§ 2.121(a)(1)) or extend (§ 2.121(c)) testimony periods, and motions to extend the time to respond to motions other than summary judgment motions (§ 2.127(a)). The Board practice of granting extensions based on a showing of good cause will continue, and the rule has been amended to specifically state that extensions may be had on this basis. However, the suggestion that a first extension should be granted as of right is not adopted. Once a proceeding has commenced there is no other situation where an extension of time may be obtained without providing any reason whatsoever. It is believed that a good cause standard will not place an undue burden on the parties. As for the proposal to allow 60 days for the filing of a brief in response to a motion for summary judgment, § 2.127(e)(1) is amended to provide instead that a brief in response to a motion for summary judgment shall be filed within 30 days from the date of service of the motion. The modification is made because of the decision to allow extensions upon a showing of good cause, and because of the comments regarding the time to respond to a summary judgment motion.

Section 2.127(e)(1) is further amended to provide that if a motion for an extension of time to file a brief in response to a motion for summary judgment is denied, the time for responding to the motion for summary judgment may remain as specified under this section.

Comment: Three attorneys, all of whom are from the same law firm, commented that in view of this amendment, new procedures are needed to expedite the delivery of the motion papers to the Board and for deciding the motion.

Response: The telephone pilot program, discussed above, should prove helpful in expediting decisions on motions for extensions of time.

Section 2.127(e)(1) now makes no mention of reply briefs or further papers in support of or in opposition to summary judgment motions. It was proposed to amend this section to provide that a reply brief, if filed, shall be filed within 30 days from the date of service of the brief in response to the motion; that the time for filing a reply brief will not be extended; and that no further papers in support of or in opposition to a motion for summary judgment will be considered by the Board.

Comments: One comment suggested that 15 days was a sufficient time to file a reply brief. One organization disagreed with the proposed provision that the time to file a reply brief will not be extended. This organization stated that there was no reason why the circumstances that necessitate an extension of time to file a brief in opposition are less likely to be present when filing a reply brief. With regard to the prohibition against filing papers beyond a reply brief, one organization raised the concern that the party opposing a motion will be at a disadvantage if the moving party saves new issues for its reply. It suggested that either the rule be amended to provide that new issues raised in a reply brief will not be considered, or that provision be made for a surreply brief which is limited to any new issues raised in the reply.

Response: The suggestion that a reply brief, if filed, should be filed within 15 days from the date of service of the brief in response to the motion for summary judgment is adopted. The section is otherwise amended as proposed. The amended rule parallels that portion of amended § 2.127(a) which pertains to the time for filing reply briefs to other types of motions. With respect to the comment that extensions of time to file a reply brief should be available in the same way that extensions to file a brief in opposition are available, it is believed that the circumstances surrounding the filing of a reply brief and a brief in opposition to a summary judgment motion are different, such that extensions should be permitted in the latter situation and not in the former. Specifically, the service of a motion for summary judgment may come as a surprise to a party, and it may take some time to obtain documents and affidavits in order to show that genuine issues of material fact exist; on the other hand, the party who has moved for summary judgment would have gathered the necessary evidence, and have researched the law prior to filing its motion. It must also be acknowledged that reply briefs are generally found to have little persuasive value; often they are a mere reargument of the points made in the main brief, and as such serve no useful purpose. It is not the practice of the Board to consider a reply brief of that nature. Rather, the Board considers a reply brief only when, in the Board's opinion, such a brief is warranted under the circumstances of a

particular case. See, in this regard, the discussion herein of the amendment of § 2.127(a) to add matter relating to reply briefs for motions other than summary judgment motions. However, to emphasize that the Board does not intend to encourage the filing of reply briefs, the sentence, ''The Board may, in its discretion, consider a reply brief,'' has been added to the section.

With respect to the concern that the moving party may ''save'' new issues for its reply brief, the Board is able to recognize what is proper material for a reply brief. However, it is believed that it is not necessary to include a specific provision that ''no new issues raised in a reply brief will be considered''; there are no such specific provisions in § 2.121(b)(1), which involves the rebuttal testimony period, and § 2.128(a)(1), which concerns a reply brief at final hearing.

Section 2.127(f) now provides that ''the Board does not have authority to hold any person in contempt, or to award attorneys' fees or other expenses to any party.'' This section is amended, in conformity with amended § 2.120(g)(1), and for the reasons indicated in connection therewith, to state that ''the Board will not hold any person in contempt, or award attorneys' fees or other expenses to any party.''

Comments: The comments made with respect to the amendment to § 2.120(g)(1) are applicable to this amendment. Five comments concerning § 2.120(g)(1) suggested that the rule not only be amended to indicate that the Board has authority to award expenses as a sanction, but also that the rule be amended to provide that the Board will exercise this sanctioning power. They stated that awarding expenses would be an effective tool in combating improper motions and other abuses by parties and their attorneys.

Response: As indicated in the response to the comments regarding the amendment to § 2.120(g)(1), it is believed that the adoption of a rule authorizing the Board to impose a sanction in the form of compensatory expenses and/or compensatory attorney fees would result in the filing of many motions for such sanctions (as well as a large number of associated papers concerning the appropriate amount therefor), thus increasing the workload of the Board. Accordingly, this suggestion has not been adopted. However, the Board is adopting the suggestion that it use its other sanctioning powers more often, and that it publish more decisions in which it enters sanctions. It is hoped that these steps will make practitioners aware of the Board's lack of tolerance for abuses and lead to a curtailment of abuses.

Section 2.134(a), which now includes a cross-reference to ''section 7(d)'' of the Act of 1946, is amended to correct the cross-reference to ''section 7(e).''

Section 2.146(e)(1), which now provides for filing a petition to the Commissioner from the denial of a request for an extension of time to file a notice of opposition, is amended to provide also for filing a petition from the grant of such a request. Specifically, the first sentence of the section is revised to read, ''A petition from the grant or denial of a request for an extension of time to file a notice of opposition shall be filed within fifteen days from the date of mailing of the grant or denial of the request. A petition from the grant of a request shall be served on the attorney or other authorized representative of the potential opposer, if any, or on the potential opposer. A petition from the denial of a request shall be served on the attorney or other authorized representative of the applicant, if any, or on the applicant.'' In addition, the present third sentence of the section, which provides, in pertinent part, that the applicant may file a response within fifteen days from the date of service of the petition and shall serve a copy of the response on the petitioner, is amended by revising the beginning of the sentence to read, ''The potential opposer or the applicant, as the case may be, may file a response within fifteen days * * *.'' The amendments to § 2.126(e)(1) codify current practice and clarify the rule.

Section 3.41, which now includes a cross-reference to § 2.6(q),'' is amended to correct the cross-reference to ''§ 2.6(b)(6).''

Environmental, Energy, and Other Considerations

The rule changes are in conformity with the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), Executive Order 12612, and the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*). The changes have been determined to be not significant for purposes of Executive Order 12866.

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy, Small Business Administration, that the rule changes will not have a significant impact on a substantial number of small entities (Regulatory Flexibility Act, 5 U.S.C. 605(b). The principal effect of this rule change is to improve practice and expedite proceedings in inter partes cases before the Board.

The PTO has determined that the rule changes have no Federalism implications affecting the relationship between the National Government and the States as outlined in Executive Order 12612.

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

This rule involves collections of information subject to the requirements of the PRA. The rule involves the Petition to Cancel requirement. This requirement has been approved by the Office of Management and Budget (OMB) under OMB control number 0651–0040. The public reporting burden for this collection of information is estimated to be 45 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. This rule also involves information requirements associated with filing an Opposition to the Registration of a Mark, Amendment to Allege Use, and dividing an application. These requirements have been previously approved by the OMB under OMB control number 0651–0009. Send comments regarding the burden estimate or any other aspects of the information requirements, including suggestions for reducing the burden, to the Assistant Commissioner for Trademarks, Box TTAB-No Fee, 2900 Crystal Drive, Arlington, VA 22202–3513, marked to the attention of Ellen J. Seeherman, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, N.W. Washington, DC 20230 (Attention: PTO Desk Officer).

List of Subjects

37 CFR Part 2

Administrative practice and procedure, Courts, Lawyers, Trademarks.

37 CFR Part 3

Administrative practice and procedure, Patents, Trademarks.

For the reasons given in the preamble, Part 2 and Part 3 of Title 37 of the Code of Federal Regulations are amended as set forth below.

PART 2—RULES OF PRACTICE IN TRADEMARK CASES

1. The authority citation for part 2 continues to read as follows:

Authority: 15 U.S.C. 1123; 35 U.S.C. 6, unless otherwise noted.

2. Section 2.76 is amended by revising paragraphs (a), (g), and (h) to read as follows:

§ 2.76 Amendment to allege use.

(a) An application under section 1(b) of the Act may be amended to allege use of the mark in commerce under section 1(c) of the Act at any time between the filing of the application and the date the examiner approves the mark for publication. Thereafter, an allegation of use may be submitted only as a statement of use under § 2.88 after the issuance of a notice of allowance under section 13(b)(2) of the Act. If an amendment to allege use is filed outside the time period specified in this paragraph, it will be returned to the applicant.

* * * * *

(g) If the amendment to allege use is filed within the permitted time period but does not meet the minimum requirements specified in paragraph (e) of this section, applicant will be notified of the deficiency. The deficiency may be corrected provided the mark has not been approved for publication. If an acceptable amendment to correct the deficiency is not filed prior to approval of the mark for publication, the amendment will not be examined.

(h) An amendment to allege use may be withdrawn for any reason prior to approval of a mark for publication.

3. Section 2.85 is amended by revising paragraph (e) to read as follows:

§ 2.85 Classification schedules.

* * * * *

(e) Where the amount of the fee received on filing an appeal in connection with an application or on an application for renewal is sufficient for at least one class of goods or services but is less than the required amount because multiple classes in an application or registration are involved, the appeal or renewal application will not be refused on the ground that the amount of the fee was insufficient if the required additional amount of the fee is received in the Patent and Trademark Office within the time limit set forth in the notification of this defect by the Office, or if action is sought only for the number of classes equal to the number of fees submitted.

* * * * *

4. Section 2.87 is amended by revising paragraph (c) to read as follows:

§ 2.87 Dividing an application.

* * * * *

(c) A request to divide an application may be filed at any time between the filing of the application and the date the Trademark Examining Attorney approves the mark for publication; or during an opposition, concurrent use, or interference proceeding, upon motion granted by the Trademark Trial and Appeal Board. Additionally, a request to divide an application under section 1(b) of the Act may be filed with a statement of use under § 2.88 or at any time between the filing of a statement of use and the date the Trademark Examining Attorney approves the mark for registration.

* * * * *

5. Section 2.101 is amended by revising paragraph (d)(1) to read as follows:

§ 2.101 Filing an opposition.

* * * * *

(d)(1) The opposition must be accompanied by the required fee for each party joined as opposer for each class in the application for which registration is opposed (see § 2.6(a)(17). If no fee, or a fee insufficient to pay for one person to oppose the registration of a mark in at least one class, is submitted within thirty days after publication of the mark to be opposed or within an extension of time for filing an opposition, the opposition will not be refused if the required fee(s) is submitted to the Patent and Trademark Office within the time limit set in the notification of this defect by the Office.

* * * * *

6. Section 2.102 is amended by revising paragraph (d) to read as follows:

§ 2.102 Extension of time for filing an opposition.

* * * * *

(d) Every request to extend the time for filing a notice of opposition should be submitted in triplicate.

7. Section 2.111 is amended by revising paragraphs (b) and (c)(1) to read as follows:

§ 2.111 Filing petition for cancellation.

* * * * *

(b) Any entity which believes that it is or will be damaged by a registration may file a petition, which should be addressed to the Trademark Trial and Appeal Board, to cancel the registration in whole or in part. The petition need not be verified, and may be signed by the petitioner or the petitioner's attorney or other authorized representative. The petition may be filed at any time in the case of registrations on the Supplemental Register or under the Act of 1920, or registrations under the Act of 1881 or the Act of 1905 which have not been published under section 12(c) of the Act, or on any ground specified in section 14(3) or (5) of the Act. In all other cases the petition and the required fee must be filed within five years from the date of registration of the mark under the Act or from the date of publication under section 12(c) of the Act.

(c)(1) The petition must be accompanied by the required fee for each class in the registration for which cancellation is sought (see 2.6(a)(16)). If the fees submitted are insufficient for a cancellation against all of the classes in the registration, and the particular class or classes against which the cancellation is filed are not specified, the Office will issue a written notice allowing petitioner until a set time in which to submit the required fees(s) (provided that the five-year period, if applicable, has not expired) or to specify the class or classes sought to be cancelled. If the required fee(s) is not submitted, or the specification made, within the time set in the notice, the cancellation will be presumed to be against the class or classes in ascending order, beginning with the lowest numbered class, and including the number of classes in the registration for which the fees submitted are sufficient to pay the fee due for each class.

* * * * *

8. Section 2.117 is amended by revising paragraphs (a) and (b) to read as follows:

§ 2.117 Suspension of proceedings.

(a) Whenever it shall come to the attention of the Trademark Trial and Appeal Board that a party or parties to a pending case are engaged in a civil action or another Board proceeding which may have a bearing on the case, proceedings before the Board may be suspended until termination of the civil action or the other Board proceeding.

(b) Whenever there is pending before the Board both a motion to suspend and a motion which is potentially dispositive of the case, the potentially dispositive motion may be decided before the question of suspension is considered regardless of the order in which the motions were filed.

* * * * *

9. Section 2.119 is amended by revising paragraph (d) to read as follows:

§ 2.119 Service and signing of papers.

* * * * *

(d) If a party to an inter partes proceeding is not domiciled in the

United States and is not represented by an attorney or other authorized representative located in the United States, the party must designate by written document filed in the Patent and Trademark Office the name and address of a person resident in the United States on whom may be served notices or process in the proceeding. In such cases, official communications of the Patent and Trademark Office will be addressed to the domestic representative unless the proceeding is being prosecuted by an attorney at law or other qualified person duly authorized under § 10.14(c) of this subchapter. The mere designation of a domestic representative does not authorize the person designated to prosecute the proceeding unless qualified under § 10.14(a), or qualified under § 10.14(b) and authorized under § 2.17(b).

* * * * *

10. Section 2.120 is amended by redesignating current paragraphs (e) and (h) as (e)(1) and (h)(1), respectively; adding new paragraphs (e)(2) and (h)(2); and revising paragraphs (a), (g)(1) and redesignated paragraphs (e)(1) and (h)(1) to read as follows:

§ 2.120 Discovery.

(a) *In general.* Wherever appropriate, the provisions of the Federal Rules of Civil Procedure relating to discovery shall apply in opposition, cancellation, interference and concurrent use registration proceedings except as otherwise provided in this section. The provisions of the Federal Rules of Civil Procedure relating to automatic disclosure, scheduling conferences, conferences to discuss settlement and to develop a discovery plan, and transmission to the court of a written report outlining the discovery plan, are not applicable to Board proceedings.

The Trademark Trial and Appeal Board will specify the opening and closing dates for the taking of discovery. The trial order setting these dates will be mailed with the notice of institution of the proceeding. The discovery period will be set for a period of 180 days. The parties may stipulate to a shortening of the discovery period. The discovery period may be extended upon stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board. If a motion for an extension is denied, the discovery period may remain as originally set or as reset. Discovery depositions must be taken, and interrogatories, requests for production of documents and things, and requests for admission must be served, on or before the closing date of the discovery period as originally set or as reset. Responses to interrogatories, requests for production of documents and things, and requests for admission must be served within 30 days from the date of service of such discovery requests. The time to respond may be extended upon stipulation of the parties, or upon motion granted by the Board, or by order of the Board. The resetting of a party's time to respond to an outstanding request for discovery will not result in the automatic rescheduling of the discovery and/or testimony periods; such dates will be rescheduled only upon stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board.

* * * * *

(e) *Motion for an order to compel discovery.* (1) If a party fails to designate a person pursuant to Rule 30(b)(6) or Rule 31(a) of the Federal Rules of Civil Procedure, or if a party, or such designated person, or an officer, director or managing agent of a party fails to attend a deposition or fails to answer any question propounded in a discovery deposition, or any interrogatory, or fails to produce and permit the inspection and copying of any document or thing, the party seeking discovery may file a motion before the Trademark Trial and Appeal Board for an order to compel a designation, or attendance at a deposition, or an answer, or production and an opportunity to inspect and copy. The motion must be filed prior to the commencement of the first testimony period as originally set or as reset. The motion shall include a copy of the request for designation or of the relevant portion of the discovery deposition; or a copy of the interrogatory with any answer or objection that was made; or a copy of the request for production, any proffer of production or objection to production in response to the request, and a list and brief description of the documents or things that were not produced for inspection and copying. The motion must be supported by a written statement from the moving party that such party or the attorney therefor has made a good faith effort, by conference or correspondence, to resolve with the other party or the attorney therefor the issues presented in the motion and has been unable to reach agreement. If issues raised in the motion are subsequently resolved by agreement of the parties, the moving party should inform the Board in writing of the issues in the motion which no longer require adjudication.

(2) When a party files a motion for an order to compel discovery, the case will be suspended by the Trademark Trial and Appeal Board with respect to all matters not germane to the motion, and no party should file any paper which is not germane to the motion, except as otherwise specified in the Board's suspension order. The filing of a motion to compel shall not toll the time for a party to respond to any outstanding discovery requests or to appear for any noticed discovery deposition.

* * * * *

(g) *Sanctions.* (1) If a party fails to comply with an order of the Trademark Trial and Appeal Board relating to discovery, including a protective order, the Board may make any appropriate order, including any of the orders provided in Rule 37(b)(2) of the Federal Rules of Civil Procedure, except that the Board will not hold any person in contempt or award any expenses to any party. The Board may impose against a party any of the sanctions provided by this subsection in the event that said party or any attorney, agent, or designated witness of that party fails to comply with a protective order made pursuant to Rule 26(c) of the Federal Rules of Civil Procedure.

* * * * *

(h) (1) Any motion by a party to determine the sufficiency of an answer or objection to a request made by that party for an admission must be filed prior to the commencement of the first testimony period, as originally set or as reset. The motion shall include a copy of the request for admission and any exhibits thereto and of the answer or objection. The motion must be supported by a written statement from the moving party that such party or the attorney therefor has made a good faith effort, by conference or correspondence, to resolve with the other party or the attorney therefor the issues presented in the motion and has been unable to reach agreement. If issues raised in the motion are subsequently resolved by agreement of the parties, the moving party should inform the Board in writing of the issues in the motion which no longer require adjudication.

(2) When a party files a motion to determine the sufficiency of an answer or objection to a request made by that party for an admission, the case will be suspended by the Trademark Trial and Appeal Board with respect to all matters not germane to the motion, and no party should file any paper which is not germane to the motion, except as otherwise specified in the Board's suspension order. The filing of a motion to determine the sufficiency of an answer or objection to a request for admission shall not toll the time for a

party to respond to any outstanding discovery requests or to appear for any noticed discovery deposition.

* * * * *

11. Section 2.121 is amended by revising paragraphs (a)(1), (c) and (d) to read as follows:

§ 2.121 Assignment of times for taking testimony.

(a)(1) The Trademark Trial and Appeal Board will issue a trial order assigning to each party the time for taking testimony. No testimony shall be taken except during the times assigned, unless by stipulation of the parties approved by the Board, or, upon motion, by order of the Board. Testimony periods may be rescheduled by stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board. If a motion to reschedule testimony periods is denied, the testimony periods may remain as set. The resetting of the closing date for discovery will result in the rescheduling of the testimony periods without action by any party.

* * * * *

(c) A testimony period which is solely for rebuttal will be set for fifteen days. All other testimony periods will be set for thirty days. The periods may be extended by stipulation of the parties approved by the Trademark Trial and Appeal Board, or upon motion granted by the Board, or by order of the Board. If a motion for an extension is denied, the testimony periods may remain as set.

(d) When parties stipulate to the rescheduling of testimony periods or to the rescheduling of the closing date for discovery and the rescheduling of testimony periods, a stipulation presented in the form used in a trial order, signed by the parties, or a motion in said form signed by one party and including a statement that every other party has agreed thereto, and submitted in a number of copies equal to the number of parties to the proceeding plus one copy for the Board, will, if approved, be so stamped, signed, and dated, and a copy will be promptly returned to each of the parties.

12. Section 2.122 is amended by revising paragraphs (b)(1), (d)(1) and (d)(2) to read as follows:

§ 2.122 Matters in evidence.

* * * * *

(b) *Application files.* (1) The file of each application or registration specified in a notice of interference, of each application or registration specified in the notice of a concurrent use registration proceeding, of the application against which a notice of opposition is filed, or of each registration against which a petition or counterclaim for cancellation is filed forms part of the record of the proceeding without any action by the parties and reference may be made to the file for any relevant and competent purpose.

* * * * *

(d) *Registrations.* (1) A registration of the opposer or petitioner pleaded in an opposition or petition to cancel will be received in evidence and made part of the record if the opposition or petition is accompanied by two copies (originals or photocopies) of the registration prepared and issued by the Patent and Trademark Office showing both the current status of and current title to the registration. For the cost of a copy of a registration showing status and title, see § 2.6(b)(4).

(2) A registration owned by any party to a proceeding may be made of record in the proceeding by that party by appropriate identification and introduction during the taking of testimony or by filing a notice of reliance, which shall be accompanied by a copy (original or photocopy) of the registration prepared and issued by the Patent and Trademark Office showing both the current status of and current title to the registration. The notice of reliance shall be filed during the testimony period of the party that files the notice.

* * * * *

13. Section 2.123 is amended by revising paragraphs (b) and (f) as follows:

§ 2.123 Trial testimony in inter partes cases.

* * * * *

(b) *Stipulations.* If the parties so stipulate in writing, depositions may be taken before any person authorized to administer oaths, at any place, upon any notice, and in any manner, and when so taken may be used like other depositions. By written agreement of the parties, the testimony of any witness or witnesses of any party, may be submitted in the form of an affidavit by such witness or witnesses. The parties may stipulate in writing what a particular witness would testify to if called, or the facts in the case of any party may be stipulated in writing.

* * * * *

(f) *Certification and filing of deposition.* (1) The officer shall annex to the deposition his certificate showing:

(i) Due administration of the oath by the officer to the witness before the commencement of his deposition;

(ii) The name of the person by whom the deposition was taken down, and whether, if not taken down by the officer, it was taken down in his presence;

(iii) The presence or absence of the adverse party;

(iv) The place, day, and hour of commencing and taking the deposition;

(v) The fact that the officer was not disqualified as specified in Rule 28 of the Federal Rules of Civil Procedure.

(2) If any of the foregoing requirements in paragraph (f)(1) of this section are waived, the certificate shall so state. The officer shall sign the certificate and affix thereto his seal of office, if he has such a seal. Unless waived on the record by an agreement, he shall then securely seal in an envelope all the evidence, notices, and paper exhibits, inscribe upon the envelope a certificate giving the number and title of the case, the name of each witness, and the date of sealing. The officer or the party taking the deposition, or its attorney or other authorized representative, shall then address the package, and forward the same to the Commissioner of Patents and Trademarks. If the weight or bulk of an exhibit shall exclude it from the envelope, it shall, unless waived on the record by agreement of all parties, be authenticated by the officer and transmitted by the officer or the party taking the deposition, or its attorney or other authorized representative, in a separate package marked and addressed as provided in this section.

* * * * *

14. Section 2.125 is amended by revising paragraph (C) to read as follows:

§ 2.125 Filing and service of testimony.

* * * * *

(c) One certified transcript and exhibits shall be filed with the Trademark Trial and Appeal Board. Notice of such filing shall be served on each adverse party and a copy of each notice shall be filed with the Board.

* * * * *

15. Section 2.127 is amended by revising paragraphs (a), (b), (d), (e)(1) and (f) to read as follows:

§ 2.127 Motions.

(a) Every motion shall be made in writing, shall contain a full statement of the grounds, and shall embody or be accompanied by a brief. Except as provided in paragraph (e)(1) of this section, a brief in response to a motion shall be filed within fifteen days from the date of service of the motion unless another time is specified by the Trademark Trial and Appeal Board or the time is extended by stipulation of the parties approved by the Board, or

upon motion granted by the Board, or upon order of the Board. If a motion for an extension is denied, the time for responding to the motion may remain as specified under this section. The Board, may in its discretion, consider a reply brief. Except as provided in paragraph (e)(1) of this section, a reply brief, if filed, shall be filed within 15 days from the date of service of the brief in response to the motion. The time for filing a reply brief will not be extended. No further papers in support of or in opposition to a motion will be considered by the Board. Briefs shall be submitted in typewritten or printed form, double spaced, in at least pica or eleven-point type, on letter-size paper. The brief in support of the motion and the brief in response to the motion shall not exceed 25 pages in length; and a reply brief shall not exceed 10 pages in length. Exhibits submitted in support of or in opposition to the motion shall not be deemed to be part of the brief for purposes of determining the length of the brief. When a party fails to file a brief in response to a motion, the Board may treat the motion as conceded. An oral hearing will not be held on a motion except on order by the Board.

(b) Any request for reconsideration or modification of an order or decision issued on a motion must be filed within one month from the date thereof. A brief in response must be filed within 15 days from the date of service of the request.

* * * * *

(d) When any party files a motion to dismiss, or a motion for judgment on the pleadings, or a motion for summary judgment, or any other motion which is potentially dispositive of a proceeding, the case will be suspended by the Trademark Trial and Appeal Board with respect to all matters not germane to the motion and no party should file any paper which is not germane to the motion except as otherwise specified in the Board's suspension order. If the case is not disposed of as a result of the motion, proceedings will be resumed pursuant to an order of the Board when the motion is decided.

(e)(1) A motion for summary judgment may not be filed until notification of the proceeding has been sent to the parties by the Trademark Trial and Appeal Board. A motion for summary judgment, if filed, should be filed prior to the commencement of the first testimony period, as originally set or as reset, and the Board, in its discretion, may deny as untimely any motion for summary judgment filed thereafter. A motion under Rule 56(f) of the Federal Rules of Civil Procedure, if filed in response to a motion for summary judgment, shall be filed within 30 days from the date of service of the summary judgment motion. The time for filing a motion under Rule 56(f) will not be extended. If no motion under Rule 56(f) is filed, a brief in response to the motion for summary judgment shall be filed within 30 days from the date of service of the motion unless the time is extended by stipulation of the parties approved by the Board, or upon motion granted by the Board, or upon order of the Board. If a motion for an extension is denied, the time for responding to the motion for summary judgment may remain as specified under this section. The Board may, in its discretion, consider a reply brief. A reply brief, if filed, shall be filed within 15 days from the date of service of the brief in response to the motion. The time for filing a reply brief will not be extended. No further papers in support of or in opposition to a motion for summary judgment will be considered by the Board.

* * * * *

(f) The Board will not hold any person in contempt, or award attorneys' fees or other expenses to any party.

16. Section 2.134 is amended by revising paragraph (a) to read as follows:

§ 2.134 Surrender or voluntary cancellation of registration.

(a) After the commencement of a cancellation proceeding, if the respondent applies for cancellation of the involved registration under section 7(e) of the Act of 1946 without the written consent of every adverse party to the proceeding, judgment shall be entered against the respondent. The written consent of an adverse party may be signed by the adverse party or by the adverse party's attorney or other authorized representative.

* * * * *

17. Section 2.146 is amended by revising paragraph (e)(1) to read as follows:

§ 2.146 Petitions to the Commissioner.

* * * * *

(e)(1) A petition from the grant or denial of a request for an extension of time to file a notice of opposition shall be filed within fifteen days from the date of mailing of the grant or denial of the request. A petition from the grant of a request shall be served on the attorney or other authorized representative of the potential opposer, if any, or on the potential opposer. A petition from the denial of a request shall be served on the attorney or other authorized representative of the applicant, if any, or on the applicant. Proof of service of the petition shall be made as provided by § 2.119(a). The potential opposer or the applicant, as the case may be, may file a response within fifteen days from the date of service of the petition and shall serve a copy of the response on the petitioner, with proof of service as provided by § 2.119(a). No further paper relating to the petition shall be filed.

* * * * *

PART 3—RULES OF PRACTICE IN TRADEMARK CASES

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

Authority: 15 U.S.C. 1123; 35 U.S.C. 6.

19. Section 3.41 is revised to read as follows:

§ 3.41 Recording fees.

All requests to record documents must be accompanied by the appropriate fee. A fee is required for each application, patent and registration against which the document is recorded as identified in the cover sheet. The recording fee is set in § 1.21(h) of this chapter for patents and in § 2.6(b)(6) of this chapter for trademarks.

Dated: August 27, 1998.

Bruce A. Lehman,

Assistant Secretary of Commerce and Commissioner of Patents and Trademarks.

[FR Doc. 98–23680 Filed 9–8–98; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AE64

Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA)

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the medical regulations concerning medical care for survivors and dependents of certain veterans. These regulations establish basic policies and procedures governing the administration of the Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA), including CHAMPVA claims processing procedures, benefits and services.

DATES: *Effective Date:* October 9, 1998.

FOR FURTHER INFORMATION CONTACT: Susan Schmetzer, Health Administration Center (formerly CHAMPVA Center), P.O. Box 65023, Denver, CO 80206–9023, telephone (303) 331–7552.

SUPPLEMENTARY INFORMATION: In a document published in the **Federal Register** (61 FR 56486) on November 1, 1996, we proposed to amend the medical regulations (38 CFR part 17) by including CHAMPVA claims processing procedures and a description of benefits and services.

The provisions of 38 U.S.C. 1713 authorize VA to provide medical care to the dependents and survivors of certain veterans ''in the same or similar manner and subject to the same or similar limitations'' as medical care is furnished by the Department of Defense (DoD) to certain dependents and survivors of active duty and retired members of the Armed Forces under 10 United States Code, Chapter 55, Civilian Health and Medical Program of the Uniformed Services (CHAMPUS/TRICARE). Previously, VA had an agreement with DoD to contract with commercial claims processors (fiscal intermediaries) for the processing of VA claims. However, in an effort to both contain costs and to improve services to the beneficiaries, VA now conducts its own claims processing services and has consolidated the operations in Denver, Colorado.

Interested parties were invited to submit written comments on or before December 31, 1996. We received comments from two organizations, the American Academy of Dermatology and the American Podiatric Medical Association, Inc. All comments submitted by these two organizations were in reference to excluded benefits under § 17.272.

It was recommended that we clarify the exclusion for cosmetic surgery found at § 17.272(19) to distinguish it from reconstructive surgery. We agree and have added clarifying language to assist in distinguishing between covered and noncovered benefits.

A recommendation was made to change the term ''podiatry services'' in § 17.272(25) to ''foot care services.'' We concur with this recommendation as it clarifies that the exclusion is applicable to all medical providers who may treat certain foot conditions, not just podiatrists.

A commenter recommended that § 17.272(35) be modified to allow for wigs and hairpieces for conditions other than alopecia. No changes were made based on this comment. 38 U.S.C. 1713 requires that CHAMPVA benefits be subject to the same or similar limitations as medical care furnished to Department of Defense dependents through the CHAMPUS/TRICARE program. In accordance with section 744 of Public Law 96–527, CHAMPUS/TRICARE wig and hairpiece benefits are specifically limited to alopecia resulting from treatment of malignant disease.

The exclusion at § 17.272(46) of service or advice rendered by telephone or telephonic device with the exception of cardiac pacemaker monitoring was suggested as presenting a roadblock to cost-saving technology. For the same reason, the commenter also objected to the exclusion at § 17.272(75) of services performed when a patient is not physically present. These exclusions promote a quality of care standard that is established for diagnosis and treatment through face-to-face contact between a provider and patient. For this reason, no changes are made to § 17.272(75). However, we do recognize that remote monitoring can be an efficient alternative to certain outpatient hospital or physician office visits. Additionally, CHAMPUS/TRICARE has recently revised their regulations on this issue to allow for remote monitoring under specific circumstances. As CHAMPVA is to be administered in a similar manner, the final rule was modified to include the applicable criteria to consider an exception to the exclusion cited under § 17.272(46) for services rendered by telephone.

It was recommended that the exclusion of benefits for autopsy and post-mortem examinations found at § 17.272(53) be eliminated. The commenter stated that accrediting bodies look at autopsy rates as a quality assurance measure. Although quality assurance is important, the CHAMPVA program was established to provide healthcare benefits. Autopsies and post-mortem examinations do not come within the scope of a healthcare benefit. For this reason, no change was made to the regulation.

One comment asserted that limiting immunotherapy for malignant diseases to Stage A and Stage O of the bladder under § 17.272(73) was too restrictive as there are some promising treatments being researched. No change was made based on this comment. CHAMPVA benefits do not include coverage for treatments that are experimental or investigational and the stated exclusion is consistent with CHAMPUS/TRICARE policy.

A commenter suggested that the exclusion of medical photography at § 17.272(76) is inappropriate as it is a procedure utilized by dermatologists to document skin disease progression. Medical photography, however, is not considered medically essential for the treatment of skin diseases and, therefore, no change was made based on this comment.

A recommendation was made to modify the exclusion of dermabrasion at § 17.272(84) to allow for treatment related to premalignant changes or for patients who are allergic to 5-fluorouracil. Although dermabrasion is not a covered benefit in the cases cited by the commenter, it is a benefit under limited circumstances. Coverage may be extended following authorized reconstructive or plastic surgery if it is required to restore body form or revise disfiguring and extensive scars resulting from neoplastic surgery. As a result, the language relating to this exclusion has been modified.

Subsequent to the publication of the proposed regulations for the Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA), the name of the administrating organization for the Program was changed from CHAMPVA Center to the Health Administration Center. As a result, a modification to 38 CFR 17.270, General Provisions, has been made to reflect this change.

Additional changes were made to the final rule for purposes of clarification as well as standardization with other VA programs for dependents. These changes, which expand benefits available under CHAMPVA, are described below.

A note was added to 38 CFR 17.271 clarifying that eligibility criteria specific to dependency and indemnity are not applicable to CHAMPVA eligibility determinations.

Consistent with CHAMPUS/TRICARE policy, wheelchair lifts were removed as an excluded benefit from § 17.272(a).

Consistent with CHAMPUS/TRICARE policy, the exception to excluded coverage of shoes and inserts in § 17.272(a)(45) was modified to include medically necessary therapeutic shoes and inserts for diabetics as a covered benefit.

Preauthorization for durable medical equipment detailed in § 17.273(a)(5) was clarified to note that the requirement is applicable to rentals and purchases.

For clarification, § 17.274, Cost Sharing, was modified from ''With the exception of services obtained directly from VA medical facilities * * *'' to ''With the exception of services obtained directly through VA medical facilities* * *'' This modification was made to clarify that cost-sharing is not required for services that are provided by VA, whether directly, through sharing agreements or through services provided by the VA's Consolidated Mail Outpatient Pharmacy. In these cases the services are an extension of VA services although a physical examination within the VA may not occur.

The proposed regulations provided that if there were disagreement with a

determination concerning covered services or calculation of benefits, a request for reconsideration may be submitted within one year of the initial determination. If there continues to be disagreement with the reconsideration decision, a request for written review may be made to the Center Director within 30 days. The final rule has been changed from allowing 30 days to submit the request for review to the Center Director to 90 days. This action provides consistency in the reconsideration procedures between CHAMPVA and other VA health benefit programs for dependents.

In addition to the above modifications, three Public Laws were enacted which impact the proposed regulations. As noted earlier, under the provisions of 38 U.S.C. 1713, the CHAMPVA program is to provide the same/similar benefits as those provided under CHAMPUS. The Public Laws expand available benefits under CHAMPUS/TRICARE. Accordingly, we are making these same changes to the CHAMPVA regulations.

Public Law 103–322, section 230202, effective September 13, 1994, states that, notwithstanding any other law, if a Federal program or Federally financed State or local program would otherwise pay benefits which are also available under an eligible crime victim compensation plan, (1) such crime compensation program must not pay that compensation; and (2) the other program must make its payments without regard to the existence of the crime victim compensation program. This provision, therefore, mandates that CHAMPVA assume primary payer status to State Victims of Crime Compensation Programs. As a result, the final rule at § 17.272(a)(3) has been modified to indicate that CHAMPVA is the primary payer when benefits are also available through the State Victims of Crime Compensation Program.

Public Law 103–337, section 705, enacted October 5, 1994, added voice prostheses to the benefits available under CHAMPUS/TRICARE. 38 U.S.C. 1713 requires that CHAMPVA benefits be subject to the same or similar limitations as medical care furnished to Department of Defense dependents through the CHAMPUS/TRICARE program. As a result, the regulations at § 17.272(a)(44) were modified to include voice prostheses as a covered benefit.

Public Law 104–106, section 701, enacted February 10, 1996, expands pediatric coverage under the CHAMPUS/TRICARE program. Previously, coverage for well-baby visits and immunizations was provided to children up to age two. With the enactment of the Public Law, this coverage was extended for children up to age six. As 38 U.S.C. 1713 requires that CHAMPVA benefits be subject to the same or similar limitations as medical benefits furnished to Department of Defense dependents through the CHAMPUS/TRICARE program, the regulations at § 17.272(a)(31)(i) were modified to provide for well child care up to age six.

This final rule has been reviewed by OMB under Executive Order 12866.

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. These amendments would not cause significant economic impact on healthcare providers, suppliers, or entities since only a small portion of their business concerns CHAMPVA beneficiaries. The final rule would mostly impact individuals who are VA beneficiaries. Pursuant to 5 U.S.C. 605(b), these amendments are exempt from the initial and final regulatory flexibility analyses requirements of §§ 603 and 604.

The Catalog of Federal Domestic Assistance Program numbers are 64.009, 64.010, 64.011.

List of Subjects in 38 CFR Part 17

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

Approved: May 8, 1998.

Togo D. West, Jr.,

Secretary.

For the reasons set out in the preamble, 38 CFR part 17 is amended as follows:

PART 17—MEDICAL

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

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

§ 17.84 [Removed]

2. Section 17.84 is removed.

3. A new center heading and §§ 17.270 through 17.278 are added to read as follows:

Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA)—Medical Care for Survivors and Dependents of Certain Veterans

Sec.
17.270 General provisions.
17.271 Eligibility.
17.272 Benefit limitations/exclusions.
17.273 Preauthorization.
17.274 Cost sharing.
17.275 Claim filing deadline.
17.276 Appeal/review process.
17.277 Third party liability/medical care cost recovery.
17.278 Confidentiality of records.

§ 17.270 General provisions.

(a) CHAMPVA is the Civilian Health and Medical Program of the Department of Veterans Affairs and is administered by the Health Administration Center, Denver, Colorado. Pursuant to 38 U.S.C. 1713, VA is authorized to provide medical care in the same or similar manner and subject to the same or similar limitations as medical care furnished to certain dependents and survivors of active duty and retired members of the Armed Forces. The CHAMPVA program is designed to accomplish this purpose. Under CHAMPVA, VA shares the cost of medically necessary services and supplies for eligible beneficiaries as set forth in §§ 17.271 through 17.278.

(b) For purposes of this section, the definitions of ''child,'' ''service-connected condition/disability,'' ''spouse,'' and ''surviving spouse'' must be those set forth further in 38 U.S.C. 101. The term ''fiscal'' year refers to October 1, through September 30.

(Authority: 38 U.S.C. 1713)

§ 17.271 Eligibility.

(a) The following persons are eligible for CHAMPVA benefits provided that they are not eligible for CHAMPUS/TRICARE or Medicare Part A (except as noted in § 17.271).

(1) The spouse or child of a veteran who has been adjudicated by VA as having a permanent and total service-connected disability;

(2) The surviving spouse or child of a veteran who died as a result of an adjudicated service-connected condition(s); or who at the time of death was adjudicated permanently and totally disabled from a service-connected condition(s);

(3) The surviving spouse or child of a person who died on active military service and in the line of duty and not

due to such person's own misconduct; and

(4) An eligible child who is pursuing a full-time course of instruction approved under 38 U.S.C. Chapter 36, and who incurs a disabling illness or injury while pursuing such course (between terms, semesters or quarters; or during a vacation or holiday period) that is not the result of his or her own willful misconduct and that results in the inability to continue or resume the chosen program of education must remain eligible for medical care until:

(i) The end of the six-month period beginning on the date the disability is removed; or

(ii) The end of the two-year period beginning on the date of the onset of the disability; or

(iii) The twenty-third birthday of the child, whichever occurs first.

(Authority: 38 U.S.C. 1713)

(b) Persons who lose eligibility for CHAMPVA by becoming potentially eligible for Medicare Part A as a result of reaching age 65 or who qualify for Medicare Part A benefits on the basis of a disability, including end stage renal disease, may re-establish CHAMPVA eligibility by submitting documentation from the Social Security Administration (SSA) certifying their non-entitlement to or exhaustion of Medicare Part A benefits. Persons under age 65 who are enrolled in both Medicare Part A and B may become potentially eligible for CHAMPVA as a secondary payer to Medicare. In cases where CHAMPVA eligibility is restored upon exhaustion of Medicare benefits, CHAMPVA coverage will extend even during subsequent periods of Medicare eligibility. When both CHAMPVA and Medicare eligibility exist, CHAMPVA must be the secondary payer.

(Authority: 38 U.S.C. 1713(d))

Note to § 17.271: Eligibility criteria specific to Dependency and Indemnity Compensation (DIC) benefits are not applicable to CHAMPVA eligibility determinations.

§ 17.272 Benefits limitations/exclusions.

(a) Benefits cover allowable expenses for medical services and supplies that are medically necessary and appropriate for the treatment of a condition and that are not specifically excluded from program coverage. Covered benefits may have limitations. The fact that a physician may prescribe, order, recommend, or approve a service or supply does not, of itself, make it medically necessary or make the charge an allowable expense, even though it is not listed specifically as an exclusion. The following are specifically excluded from program coverage:

(1) Services, procedures or supplies for which the beneficiary has no legal obligation to pay, or for which no charge would be made in the absence of coverage under a health benefits plan.

(2) Services and supplies required as a result of an occupational disease or injury for which benefits are payable under workers' compensation or similar protection plan (whether or not such benefits have been applied for or paid) except when such benefits are exhausted and are otherwise not excluded from CHAMPVA coverage.

(3) Services and supplies that are paid directly or indirectly by a local, State or Federal government agency (Medicaid excluded), including court-ordered treatment. In the case of the following exceptions, CHAMPVA assumes primary payer status:

(i) Medicaid.

(ii) State Victims of Crime Compensation Programs.

(4) Services and supplies that are not medically or psychologically necessary for the diagnosis or treatment of a covered condition (including mental disorder) or injury.

(5) Radiology, laboratory, and pathological services and machine diagnostic testing not related to a specific illness or injury or a definitive set of symptoms.

(6) Services and supplies above the appropriate level required to provide necessary medical care.

(7) Services and supplies related to an inpatient admission primarily to perform diagnostic tests, examinations, and procedures that could have been and are performed routinely on an outpatient basis.

(8) Postpartum inpatient stay of a mother for purposes of staying with the newborn infant (primarily for the purpose of breast feeding the infant) when the infant (but not the mother) requires the extended stay; or continued inpatient stay of a newborn infant primarily for purposes of remaining with the mother when the mother (but not the newborn infant) requires extended postpartum inpatient stay.

(9) Therapeutic absences from an inpatient facility or residential treatment center (RTC).

(10) Custodial care.

(11) Inpatient stays primarily for domiciliary care purposes.

(12) Inpatient stays primarily for rest or rest cures.

(13) Services and supplies provided as a part of, or under, a scientific or medical study, grant, or research program.

(14) Services and supplies not provided in accordance with accepted professional medical standards or related to experimental or investigational procedures or treatment regimens.

(15) Services or supplies prescribed or provided by a member of the beneficiary's immediate family, or a person living in the beneficiary's or sponsor's household.

(16) Services and supplies that are (or are eligible to be) payable under another medical insurance or program, either private or governmental, such as coverage through employment or Medicare.

(17) Services or supplies subject to preauthorization (see § 17.273) that were obtained without the required preauthorization; and services and supplies that were not provided according to the terms of the preauthorization.

(18) Inpatient stays primarily to control or detain a runaway child, whether or not admission is to an authorized institution.

(19) Services and supplies (to include prescription medications) in connection with cosmetic surgery which is performed to primarily improve physical appearance or for psychological purposes or to restore form without correcting or materially improving a bodily function.

(20) Electrolysis.

(21) Dental care with the following exceptions:

(i) Dental care that is medically necessary in the treatment of an otherwise covered medical condition, is an integral part of the treatment of such medical condition, and is essential to the control of the primary medical condition.

(ii) Dental care required in preparation for, or as a result of, radiation therapy for oral or facial cancer.

(iii) Gingival Hyperplasia.

(iv) Loss of jaw substance due to direct trauma to the jaw or due to treatment of neoplasm.

(v) Intraoral abscess when it extends beyond the dental alveolus.

(vi) Extraoral abscess.

(vii) Cellulitis and osteitis which is clearly exacerbating and directly affecting a medical condition currently under treatment.

(viii) Repair of fracture, dislocation, and other injuries of the jaw, to include removal of teeth and tooth fragments only when such removal is incidental to the repair of the jaw.

(ix) Treatment for stabilization of myofascial pain dysfunction syndrome, also referred to as temporomandibular joint (TMJ) syndrome. Authorization is limited to initial radiographs, up to four office visits, and the construction of an occlusal splint.

(x) Total or complete ankyloglossia.

(xi) Adjunctive dental and orthodontic support for cleft palate.

(xii) Prosthetic replacement of jaw due to trauma or cancer.

(22) Nonsurgical treatment of obesity or morbid obesity for dietary control or weight reduction (with the exception of gastric bypass, gastric stapling, or gastroplasty procedures in connection with morbid obesity when determined to be medically necessary) including prescription medications.

(23) Services and supplies related to transsexualism or other similar conditions such as gender dysphoria (including, but not limited to, intersex surgery and psychotherapy, except for ambiguous genitalia which was documented to be present at birth).

(24) Sex therapy, sexual advice, sexual counseling, sex behavior modification, psychotherapy for mental disorders involving sexual deviations (e.g., transvestic fetish), or other similar services, and any supplies provided in connection with therapy for sexual dysfunctions or inadequacies.

(25) Removal of corns or calluses or trimming of toenails and other routine foot care services, except those required as a result of a diagnosed systemic medical disease affecting the lower limbs, such as severe diabetes.

(26) Services and supplies, to include psychological testing, provided in connection with a specific developmental disorder. The following exception applies: Diagnostic and evaluative services required to arrive at a differential diagnosis for an otherwise eligible child unless the state is required to provide those services under Public Law 94–142, *Education for All Handicapped Children Act of 1975 as amended, see 20 U.S.C. chapter 33.*

(27) Surgery to reverse voluntary surgical sterilization procedures.

(28) Services and supplies related to artificial insemination (including semen donors and semen banks), in vitro fertilization, gamete intrafallopian transfer and all other noncoital reproductive technologies.

(29) Nonprescription contraceptives.

(30) Diagnostic tests to establish paternity of a child; or tests to determine sex of an unborn child.

(31) Preventive care (such as routine, annual, or employment-requested physical examinations; routine screening procedures; and immunizations). The following exceptions apply:

(i) Well-child care from birth to age six. Periodic health examinations designed for prevention, early detection, and treatment of disease are covered to include screening procedures, immunizations, and risk counseling. The following services are payable when required as part of a well-child care program and when rendered by the attending pediatrician, family physician, or a pediatric nurse practitioner.

(A) Newborn examination, heredity and metabolic screening, and newborn circumcision.

(B) Periodic health supervision visits intended to promote optimal health for infants and children to include the following services:

(*1*) History and physical examination.

(*2*) Vision, hearing, and dental screening.

(*3*) Developmental appraisal to include body measurement.

(*4*) Immunizations as recommended by the Centers for Disease Control (CDC) and Prevention Advisory Committee on Immunization Practices.

(*5*) Pediatric blood lead level test.

(*6*) Tuberculosis screening.

(*7*) Blood pressure screening.

(*8*) Measurement of hemoglobin and hematocrit for anemia.

(*9*) Urinalysis.

(C) Additional services or visits required because of specific findings or because the particular circumstances of the individual case are covered if medically necessary and otherwise authorized for benefits under CHAMPVA.

(ii) Rabies vaccine following an animal bite.

(iii) Tetanus vaccine following an accidental injury.

(iv) Rh immune globulin.

(v) Pap smears.

(vi) Mammography tests.

(vii) Genetic testing and counseling determined to be medically necessary.

(viii) Chromosome analysis in cases of habitual abortion or infertility.

(ix) Gamma globulin.

(32) Chiropractic and naturopathic services.

(33) Counseling services that are not medically necessary in the treatment of a diagnosed medical condition (such as educational counseling; vocational counseling; and counseling for socioeconomic purposes, stress management, life style modification, etc.).

(34) Acupuncture, whether used as a therapeutic agent or as an anesthetic.

(35) Hair transplants, wigs, or hairpieces, except that benefits may be extended for one wig or hairpiece per beneficiary (lifetime maximum) when the attending physician certifies that alopecia has resulted from treatment of malignant disease and the beneficiary certifies that a wig or hairpiece has not been obtained previously through the U.S. Government (including the Department of Veterans Affairs). The wig or hairpiece benefit does not include coverage for the following:

(i) Maintenance, wig or hairpiece supplies, or replacement of the wig or hairpiece.

(ii) Hair transplant or any other surgical procedure involving the attachment of hair or a wig or hairpiece to the scalp.

(iii) Any diagnostic or therapeutic method or supply intended to encourage hair growth.

(36) Self-help, academic education or vocational training services and supplies.

(37) Exercise equipment, spas, whirlpools, hot tubs, swimming pools, health club membership or other such charges or items.

(38) General exercise programs, even if recommended by a physician.

(39) Services of an audiologist or speech therapist, except when prescribed by a physician and rendered as a part of treatment addressed to the physical defect itself and not to any educational or occupational deficit.

(40) Eye exercises or visual training (orthoptics).

(41) Eye and hearing examinations except when rendered in connection with medical or surgical treatment of a covered illness or injury or in connection with well-child care.

(42) Eyeglasses, spectacles, contact lenses, or other optical devices with the following exceptions:

(i) When necessary to perform the function of the human lens, lost as a result of intraocular surgery, ocular injury or congenital absence.

(ii) Pinhole glasses prescribed for use after surgery for detached retina.

(iii) Lenses prescribed as ''treatment'' instead of surgery for the following conditions:

(A) Contact lenses used for treatment of infantile glaucoma.

(B) Corneal or scleral lenses prescribed in connection with treatment of keratoconus.

(C) Scleral lenses prescribed to retain moisture when normal tearing is not present or is inadequate.

(D) Corneal or scleral lenses prescribed to reduce a corneal irregularity other than astigmatism.

(iv) The specified benefits are limited to one set of lenses related to one qualifying eye condition as set forth in paragraphs (a)(42)(iii)(A) through (D) of this section. If there is a prescription change requiring a new set of lenses, but still related to the qualifying eye condition, benefits may be extended for a second set of lenses, subject to medical review.

(43) Hearing aids or other auditory sensory enhancing devices.

(44) Prostheses with the following exceptions:

(i) Artificial limbs.

(ii) Voice prostheses.

(iii) Eyes.

(iv) Items surgically inserted in the body as an integral part of a surgical procedure.

(v) Dental prostheses specifically required in connection with otherwise covered orthodontia directly related to the surgical correction of a cleft palate anomaly.

(45) Orthopedic shoes, arch supports, shoe inserts, and other supportive devices for the feet, including special ordered, custom-made built-up shoes, or regular shoes later built up with the following exceptions:

(i) Shoes that are an integral part of an orthopedic brace, and which cannot be used separately from the brace.

(ii) Extra-depth shoes with inserts or custom molded shoes with inserts for individuals with diabetes.

(46) Services or advice rendered by telephone are excluded except that a diagnostic or monitoring procedure which incorporates electronic transmission of data or remote detection and measurement of a condition, activity, or function (biotelemetry) is covered when:

(i) The procedure, without electronic data transmission, is a covered benefit; and

(ii) The addition of electronic data transmission or biotelemetry improves the management of a clinical condition in defined circumstances; and

(iii) The electronic data or biotelemetry device has been classified by the U.S. Food and Drug Administration, either separately or as part of a system, for use consistent with the medical condition and clinical management of such condition.

(47) Air conditioners, humidifiers, dehumidifiers, and purifiers.

(48) Elevators.

(49) Alterations to living spaces or permanent features attached thereto, even when necessary to accommodate installation of covered durable medical equipment or to facilitate entrance or exit.

(50) Items of clothing, even if required by virtue of an allergy (such as cotton fabric versus synthetic fabric and vegetable-dyed shoes).

(51) Food, food substitutes, vitamins or other nutritional supplements, including those related to prenatal care for a home patient whose condition permits oral feeding.

(52) Enuretic (bed-wetting) devices; enuretic conditioning programs.

(53) Autopsy and post-mortem examinations.

(54) All camping, even when organized for a specific therapeutic purpose (such as diabetic camp or a camp for emotionally disturbed children), or when offered as a part of an otherwise covered treatment plan.

(55) Housekeeping, homemaker, or attendant services, including a sitter or companion.

(56) Personal comfort or convenience items, such as beauty and barber services, radio, television, and telephone.

(57) Smoking cessation services and supplies.

(58) Megavitamin psychiatric therapy; orthomolecular psychiatric therapy.

(59) All transportation except for specialized transportation with life sustaining equipment, when medically required for the treatment of a covered condition.

(60) Inpatient mental health services in excess of 30 days in any fiscal year (or in an admission), in the case of a patient nineteen years of age or older; 45 days in any fiscal year (or in an admission), in the case of a patient under 19 years of age; or 150 days of residential treatment care in any fiscal year (or in an admission) unless a waiver for extended coverage is granted in advance.

(61) Outpatient mental health services in excess of 23 visits in a fiscal year unless a waiver for extended coverage is granted in advance.

(62) Institutional services for partial hospitalization in excess of 60 treatment days in any fiscal year (or in an admission) unless a waiver for extended coverage is granted in advance.

(63) Detoxification in a hospital setting or rehabilitation facility in excess of seven days.

(64) Outpatient substance abuse services in excess of 60 visits during a benefit period. A benefit period begins with the first date of covered service and ends 365 days later.

(65) Family therapy for substance abuse in excess of 15 visits during a benefit period. A benefit period begins with the first date of covered service and ends 365 days later.

(66) Services that are provided to a beneficiary who is referred to a provider of such services by a provider who has an economic interest in the facility to which the patient is referred, unless a waiver is granted.

(67) Abortion except when a physician certifies that the life of the mother would be endangered if the fetus were carried to term.

(68) Abortion counseling.

(69) Aversion therapy.

(70) Rental or purchase of biofeedback equipment.

(71) Biofeedback therapy for treatment of ordinary muscle tension states (including tension headaches) or for psychosomatic conditions.

(72) Drug maintenance programs where one addictive drug is substituted for another, such as methadone substituted for heroin.

(73) Immunotherapy for malignant diseases except for treatment of Stage O and Stage A carcinoma of the bladder.

(74) Services and supplies provided by other than a hospital, such as nonskilled nursing homes, intermediate care facilities, halfway houses, homes for the aged, or other institutions of similar purpose.

(75) Services performed when the patient is not physically present.

(76) Medical photography.

(77) Special tutoring.

(78) Surgery for psychological reasons.

(79) Treatment of premenstrual syndrome (PMS).

(80) Medications not requiring a prescription, except for insulin and related diabetic testing supplies and syringes.

(81) Thermography.

(82) Removal of tattoos.

(83) Penile implant/testicular prosthesis procedures and related supplies for psychological impotence.

(84) Dermabrasion of the face except in those cases where coverage has been authorized for reconstructive or plastic surgery required to restore body form following an accidental injury or to revise disfiguring and extensive scars resulting from neoplastic surgery.

(85) Chemical peeling for facial wrinkles.

(86) Panniculectomy, body sculpting procedures.

(b) CHAMPVA-determined allowable amount.

(1) The term allowable amount is the maximum CHAMPVA-determined level of payment to a hospital or other authorized institutional provider, a physician or other authorized individual professional provider, or other authorized provider for covered services. The CHAMPVA-allowable amount is determined prior to cost sharing and the application of deductibles and/or other health insurance.

(2) A Medicare-participating hospital must accept the CHAMPVA-determined allowable amount for inpatient services as payment-in-full. (Reference 42 CFR parts 489 and 1003).

(3) An authorized provider of covered medical services or supplies must accept the CHAMPVA-determined allowable amount as payment-in-full.

(4) A provider who has collected and not made appropriate refund, or attempts to collect from the beneficiary, any amount in excess of the CHAMPVA-determined allowable amount may be subject to exclusion from Federal benefit programs.

(Authority: 38 U.S.C. 1713)

§ 17.273 Preauthorization.

Preauthorization or advance approval is required for any of the following:

(a) Non-emergent inpatient mental health and substance abuse care including admission of emotionally disturbed children and adolescents to residential treatment centers.

(b) All admissions to a partial hospitalization program (including alcohol rehabilitation).

(c) Outpatient mental health visits in excess of 23 per calendar year and/or more than two (2) sessions per week.

(d) Dental care.

(e) Durable medical equipment with a purchase or total rental price in excess of $300.00.

(f) Organ transplants.

(Authority: 38 U.S.C. 1713)

§ 17.274 Cost sharing.

(a) With the exception of services obtained through VA medical facilities, CHAMPVA is a cost-sharing program in which the cost of covered services is shared with the beneficiary. In addition to the beneficiary cost share, an annual (calendar year) outpatient deductible requirement ($50 per beneficiary or $100 per family) must be satisfied prior to the payment of outpatient benefits. There is no deductible for inpatient services. CHAMPVA pays the CHAMPVA-determined allowable amount less the deductible, if applicable, and less the beneficiary cost share. To provide financial protection against the impact of a long-term illness or injury, an annual cost limit or ''catastrophic cap'' has been placed on the beneficiary cost-share amount for covered services and supplies. This annual cap on cost sharing is $7,500 per CHAMPVA-eligible family. Credits to the annual catastrophic cap are limited to the applied annual deductible(s) and the beneficiary cost-share amount. Costs above the CHAMPVA-allowable amount, as well as costs associated with noncovered services are not credited to the catastrophic cap computation.

(b) If the CHAMPVA benefit payment is under $1.00, payment will not be issued. Catastrophic cap and deductible will, however, be credited.

(Authority: 38 U.S.C. 1713)

§ 17.275 Claim filing deadline.

(a) Unless an exception is granted under paragraph (b) of this section, claims for medical services and supplies must be filed with the Center no later than:

(1) One year after the date of service; or

(2) In the case of inpatient care, one year after the date of discharge; or

(3) In the case of retroactive approval for medical services/supplies, 180 days following beneficiary notification of authorization; or

(4) In the case of retroactive approval of CHAMPVA eligibility, 180 days following notification to the beneficiary of authorization for services occurring on or after the date of first eligibility.

(b) Requests for an exception to the claim filing deadline must be submitted, in writing, to the Center and include a complete explanation of the circumstances resulting in late filing along with all available supporting documentation. Each request for an exception to the claim filing deadline will be reviewed individually and considered on its own merit. The Center Director may grant exceptions to the requirements in paragraph (a) if he or she determines that there was good cause for missing the filing deadline. For example, when dual coverage exists CHAMPVA payment, if any, cannot be determined until after the primary insurance carrier has adjudicated the claim. In such circumstances an exception may be granted provided that the delay on the part of the primary insurance carrier is not attributable to the beneficiary. Delays due to provider billing procedures do not constitute a valid basis for an exception.

§ 17.276 Appeal/review process.

Notice of the initial determination regarding payment of CHAMPVA benefits will be provided to the beneficiary on a CHAMPVA Explanation of Benefits (EOB) form. The EOB form is generated by the CHAMPVA automated payment processing system. If a beneficiary disagrees with the determination concerning covered services or calculation of benefits, he or she may request reconsideration. Such requests must be submitted to the Center in writing within one year of the date of the initial determination. The request must state why the beneficiary believes the decision is in error and must include any new and relevant information not previously considered. Any request for reconsideration that does not identify the reason for dispute will be returned to the claimant without further consideration. After reviewing the claim and any relevant supporting documentation, a CHAMPVA benefits advisor will issue a written determination to the beneficiary that affirms, reverses or modifies the previous decision. If the beneficiary is still dissatisfied, within 90 days of the date of the decision he or she may make a written request for review by the Center Director. The Director will review the claim, and any relevant supporting documentation, and issue a decision in writing that affirms, reverses or modifies the previous decision. The decision of the Director with respect to benefit coverage and computation of benefits is final.

(Authority: 38 U.S.C. 1713)

Note to § 17.276: Denial of CHAMPVA benefits based on legal eligibility requirements may be appealed to the Board of Veterans' Appeals in accordance with 38 CFR part 20. Medical determinations are not appealable to the Board. 20 CFR 20.101.

§ 17.277 Third-party liability/Medicare cost recovery.

The Center will actively pursue third-party liability/medical care cost recovery in accordance with applicable law.

§ 17.278 Confidentiality of records.

Confidentiality of records will be maintained in accordance with 38 CFR 1.460 through 1.582.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[NM 22–1–7103a; FRL–6152–4]

Approval and Promulgation of Implementation Plan for New Mexico: General Conformity Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action conditionally approves a revision to the New Mexico State Implementation Plan (SIP) that contains regulations for implementing and enforcing the general conformity rules which the EPA promulgated on November 30, 1993 (58 FR 63214). Specifically, the general conformity rules enable the New Mexico Environment Department to review conformity of all Federal actions (*See* 40 CFR part 51, subpart W—Determining Conformity of General Federal Actions to State or Federal Implementation Plans) with the control strategy SIPs

submitted for the nonattainment and maintenance areas within the State except for actions within the boundaries of Bernalillo County. This approval action is intended to streamline the conformity process and allow direct consultation among agencies at the local levels. The Federal actions by the Federal Highway Administration and Federal Transit Administration (under Title 23 U.S.C. or the Federal Transit Act) are covered by the transportation conformity rules under 40 CFR part 51, subpart T—Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Act. The EPA will act on the New Mexico transportation conformity SIP under a separate action.

The EPA is approving this SIP revision under sections 110(k) and 176 of the Clean Air Act (the Act) on the condition that the agreed-to revision is made. The rationale for the approval and other information are provided in this document.

DATES: This action is effective on October 9, 1998.

ADDRESSES: Copies of the State general conformity SIP and other relevant information are available for inspection during normal business hours at the following locations. Interested persons wanting to examine these documents should make an appointment with the appropriate office at least 24 hours before the visiting day.

Air Planning Section (6PDL), Multimedia Planning and Permitting Division, Environmental Protection Agency, Region 6, 1445 Ross Avenue, Dallas, Texas 75202, Telephone: (214) 665–7214.

Air and Radiation Docket and Information Center, Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460.

Air Quality Bureau, New Mexico Environment Department, 1190 St. Francis Drive, Santa Fe, New Mexico 87502, Telephone: (505) 827–0042.

FOR FURTHER INFORMATION CONTACT: Mr. J. Behnam, P.E., Air Planning Section (6PDL), Multimedia Planning and Permitting Division, Environmental Protection Agency, Region 6, 1445 Ross Avenue, Dallas, Texas 75202, Telephone: (214) 665–7247.

SUPPLEMENTARY INFORMATION:

I. Background

Section 176(c) of the Act requires that all Federal actions conform to an applicable implementation plan. Conformity is defined in section 176(c) of the Act as conformity to the SIP's purpose of eliminating or reducing the severity and number of violations of the National Ambient Air Quality Standards and achieving expeditious attainment of such standards, and that such activities will not: (1) Cause or contribute to any new violation of any standard in any area, (2) increase the frequency or severity of any existing violation of any standard in any area, or (3) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

As required by section 176(c) of the Act, EPA published the final general conformity rules on November 30, 1993 (58 FR 63214), which are codified under 40 CFR part 51 subpart W—Determining Conformity of General Federal Actions to State or Federal Implementation Plans. The general conformity rules require the States and local air quality agencies (where applicable) to adopt and submit a general conformity SIP revision to EPA no later than November 30, 1994.

On November 17, 1994, the Governor of New Mexico submitted a SIP revision in accordance with 40 CFR part 51, subpart W that contained the general conformity rule. The SIP revision was adopted by the New Mexico Environmental Improvement Board on November 10, 1994, after appropriate public participation and interagency consultation. The EPA could not approve this submittal because it was not consistent with the requirements of 40 CFR part 51. Subsequently, the Governor of New Mexico submitted a completely revised SIP on July 18, 1996, which revised the rule and included a completely recodified set of general conformity regulations. The revised and recodified SIP revision was adopted by the New Mexico Environmental Board on June 14, 1996.

The EPA published a direct final approval action on March 26, 1997 (62 FR 14332) for approval of the New Mexico general conformity SIP, and EPA concurrently published a proposed action on March 26, 1997 (62 FR 14382), to allow interested parties to submit comments, if any. During the public comment period, EPA received one adverse comment from FAA. Subsequently, EPA withdrew the direct final approval action on May 28, 1997 (62 FR 28806).

II. Response to Public Comments

During the public comment period, EPA received an adverse comment from FAA opposing approval of the New Mexico general conformity SIP without certain revisions to the reporting requirements of the State rule. The following paragraphs present the commenter's remarks and EPA's response.

Comment—The commenter noted that 40 CFR 51.851 allows the State to establish more stringent criteria and procedures only if they apply equally to non-Federal as well as Federal entities. The commenter contended that Section 20 NMAC 2.98.110.C of the State regulation would make the State general conformity rule more stringent than the Federal rule and, as there are not similar reporting requirements or subsequent penalties for non-Federal entities, the section should be removed.

The commenter also noted that the possible reduction of the FAA's emission budget by 50 percent may indirectly impact interstate air carrier services. Therefore, according to the commenter, Section 110.C of the proposed rules is Federally preempted by Section 41713 of Title 49 of the United States Code. Further, the commenter argued, the police powers of the State with respect to aircraft operations are also subject to Federal preemption. The commenter also argued that by its potential to reduce flights into and out of the State of New Mexico, Section 110.C of the proposed rules violates the Commerce Clause of the United States Constitution.

Response: The EPA has reviewed the FAA comments and examined provisions of the Act and general conformity rule pertaining to Section 110.C of the State rule. The EPA did not find any statutory or regulatory provisions similar to Section 110.C. In addition, a review by the State of New Mexico Environment Department indicated that the provisions of Section 110.C would not be appropriate since the State never intended their requirements to be more stringent than the Federal requirements. Subsequently, the State agreed to remove Section 110.C from its general conformity rule, making the State rule consistent with the Federal rule. This action by the State satisfactorily addresses the FAA concerns.

III. Conditions and Commitments

Review of the State rule, the public comment, and the State's evaluation of its rule indicated that Section 110.C of the State rule makes the New Mexico general conformity rule more stringent than the Federal rule. Since the State's original intention was to make the general conformity rule requirements, including the provisions of Section 110.C, applicable to the Federal actions only, EPA has determined that Section 110.C is not consistent with the Federal rule 40 CFR 51.851 that specifies more stringent criteria and procedures must

apply equally to non-Federal as well as Federal entities.

After EPA's consultation with the State, the State has agreed to correct this inconsistency by removing Section 110.C from its general conformity rule. In a letter dated April 22, 1998, from the Chief of the Air Quality Bureau, New Mexico Environment Department, to the EPA Region 6 Office, the State commits to remove Section 110.C from its general conformity rule and submit a SIP revision to EPA within twelve (12) months from the date of this notice, September 9, 1999. The EPA accepted this commitment from the State because EPA believes that the State has shown a good faith effort in complying with the SIP requirements, and this minor inconsistency was not intentionally added to the regulations. The State's commitment letter will allow EPA to proceed with a conditional approval while the State is preparing the appropriate corrections for submission of a SIP revision.

The EPA has determined that New Mexico's general conformity rule meets the Federal requirements except the provisions of Section 110.C as cited above. Therefore, EPA is conditionally approving this SIP revision until the State makes the appropriate corrections and submits a SIP revision before the date specified above. If the State does not submit a SIP revision for removal of Section 110.C by the date specified in this Section of this action, this conditional approval will automatically be converted to a disapproval on the date specified above and as further discussed in Section IV of this action.

IV. Final Action

The EPA is conditionally approving a revision to the New Mexico general conformity SIP revision based on the rationale elaborated in this action. The general conformity rule is applicable to all nonattainment and maintenance areas within the State, outside the boundaries of Bernalillo County. The EPA has evaluated this SIP revision and has determined that the State has fully adopted the provisions of the Federal general conformity rule in accordance with 40 CFR part 51, subpart W, with one exception as noted in Sections II and III of this action. The State has undertaken appropriate public participation and interagency consultations during development and adoption of the rules at the local level.

The EPA is approving this SIP revision, based on the State's April 22, 1998, commitment letter and on the condition that the State will adopt and submit a revised general conformity rule which will contain the corrections detailed in this action (see Sections II and III) within 12 months of this final approval action, but not later than September 9, 1999. If the State fails to submit a SIP revision, as committed in the letter of April 22, 1998, for removal of Section 110.C by September 9, 1999, this conditional approval under section 110(k) of the Act will automatically be converted to a disapproval on that date, and the sanctions clock will begin. If the State does not submit a SIP, and EPA does not approve the SIP on which the disapproval was based within 18 months of the disapproval, EPA must impose the sanctions under section 179 of the Act.

V. Administrative Requirements

A. Executive Orders (E.O.) 12866 and 13045

The Office of Management and Budget has exempted this regulatory action from E.O. 12866, entitled ''Regulatory Planning Review.'' This rule is not subject to E.O. 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks,'' because it is not an ''economically significant'' action under E.O. 12866.

B. Regulatory Flexibility

The Regulatory Flexibility Act (RFA), 5 U.S.C. 600 *et seq.*, generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. This rule will not have a significant impact on a substantial number of small entities because conditional approvals of SIP submittals under section 110 and subchapter I, part D of the Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not impose any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The Act forbids EPA to base its actions concerning SIPs on such grounds. *See Union Electric Co.,* v. *U.S. EPA,* 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

If the conditional approval is converted to a disapproval under section 110(k) of the Act, based on the State's failure to meet the commitment, it will not affect any existing State requirements applicable to small entities. Federal disapproval of the State submittal does not affect its state-enforceability. Moreover, EPA's disapproval of the submittal does not impose a new Federal requirement. Therefore, I certify that this disapproval action will not have a significant economic impact on a substantial number of small entities because it does not remove existing requirements nor does it substitute a new Federal requirement.

C. Unfunded Mandates

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

The EPA has determined that this approval action does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves preexisting requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

D. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller

General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

E. Petitions for Judicial Review

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 9, 1999. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review, nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. See section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, General conformity, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Volatile organic compounds.

Dated: August 14, 1998.

Jerry Clifford,

Acting Regional Administrator, Region 6.

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

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7401 *et seq.*

Subpart GG—New Mexico

2. In § 52.1620(c) the first table is amended by adding a new entry in numerical order to read as follows:

§ 52.1620 Identification of plan.

* * * * *

(c) * * *

EPA APPROVED NEW MEXICO REGULATIONS

State citation	Title/subject	State approval/effective date	EPA approval date	Comments
New Mexico Administrative Code (NMAC) Title 20—Environment Protection Chapter 2—Air Quality				
*	*	*	*	*
Part 98	General Conformity	08/02/96	September 9, 1998	Conditional approval expires on September 9, 1999.

* * * * *

3. Section 52.1623 is added to read as follows:

§ 52.1623 Conditional approval.

(a) *General Conformity.* (1) A letter, dated April 22, 1998, from the Chief of Air Quality Bureau New Mexico Environment Department to the EPA Regional Office, commits the State to remove Section 110.C from its rule for making the State's rule consistent with Federal rule. Specifically, the letter states that:

This letter is regarding our general conformity rule, 20 NMAC 2.98—Conformity of General Federal Actions to the State Implementation Plan. We have been reviewing paragraph 110.C under Section 110—Reporting Requirements. This is the paragraph in which the Federal Aviation Administration (FAA) had submitted a comment of concern to EPA, during EPA's proposed/final approval period for our rule. This comment caused EPA to withdraw its approval. The FAA had commented that New Mexico was more stringent than EPA, since our rule does not apply to non-Federal agencies. Our analysis has determined that our inclusion of this paragraph may make our rule more stringent than EPA, and should not have been included. The paragraph had originally come from a STAPPA/ALAPCO model rule. New Mexico had never intended to be more stringent than EPA with regards to general conformity. Hence, the State commits to putting 20 NMAC 2.98 on our regulatory agenda and plan to delete this paragraph within one year from the **Federal Register** publication of final notice of conditional approval to New Mexico's general conformity SIP.

(2) If the State ultimately fails to meet its commitment to remove this section from its rule within one year of publication of this conditional approval, then EPA's conditional action will automatically convert to a final disapproval.

(b) [Reserved]

[FR Doc. 98–23330 Filed 9–8–98; 8:45 am]

BILLING CODE 6560–50–U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–300704; FRL–6024–1]

RIN 2070–AB78

Acrylic Acid Terpolymer, Partial Sodium Salts; Tolerance Exemption

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of acrylic acid terpolymer, partial sodium salts when used as inert ingredients (dispersant) in pesticide formulations applied to growing crops, raw agricultural commodities after harvest, and animals. BF Goodrich Specialty Chemicals requested this exemption from the requirement of a tolerance under the Federal Food, Drug and Cosmetic Act, as amended by the Food Quality Protection Act of 1996.

DATES: This regulation is effective September 9, 1998. Objections and requests for hearings must be received by EPA on or before November 9, 1998.

ADDRESSES: Written objections and hearing requests, identified by the docket control number, [OPP–300704], must be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. Fees accompanying objections and hearing requests shall be labeled ''Tolerance Petition Fees'' and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251. A copy of any objections and hearing requests filed with the Hearing Clerk identified by the docket control number, [OPP–300704], must also be submitted to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW.,

Washington, DC 20460. In person, bring a copy of objections and hearing requests to Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA.

A copy of objections and hearing requests filed with the Hearing Clerk may also be submitted electronically by sending electronic mail (e-mail) to: opp-docket@epamail.epa.gov. Copies of objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Copies of objections and hearing requests will also be accepted on disks in WordPerfect 5.1/6.1 file format or ASCII file format. All copies of objections and hearing requests in electronic form must be identified by the docket control number [OPP–300704]. No Confidential Business Information (CBI) should be submitted through e-mail. Electronic copies of objections and hearing requests on this rule may be filed online at many Federal Depository Libraries.

FOR FURTHER INFORMATION CONTACT: By mail: Bipin Gandhi, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: Rm. 707A, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA, (703) 308–8380, e-mail: gandhi.bipin@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of April 29, 1998 (63 FR 23438)(FRL–5783–4), EPA issued a notice pursuant to section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(e), announcing the filing of pesticide petitions (PP 8E4958, 8E4961, and 8E4962) for tolerance exemptions by BF Goodrich Specialty Chemicals, 9911 Brecksville Road, Cleveland, OH 44141. This notice included a summary of the petitions prepared by BF Goodrich Specialty Chemicals, the petitioner. There were no comments received in response to the notice of filing.

The petitions requested that 40 CFR 180.1001(c) and (e) be amended by establishing an exemption from the requirement of a tolerance for residues of acrylic acid terpolymer, partial sodium salts when used as inert ingredients (dispersants) in pesticide formulations applied to growing crops, raw agricultural commodities after harvest, and animals.

I. Background and Statutory Authority

The Food Quality Protection Act of 1996 (FQPA) (Pub. L. 104-170) was signed into law August 3, 1996. FQPA amends both the FFDCA, 21 U.S.C. 301 *et seq.*, and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.* The FQPA amendments went into effect immediately. Among other things, FQPA amends FFDCA to bring all EPA pesticide tolerance-setting activities under a new section 408 with a new safety standard and new procedures.

New section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement of a tolerance for a pesticide chemical residue on food only if EPA determines that the exemption is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water, but does not include occupationalc exposure. Section 408(c)(2)(B) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing an exemptionfrom the requirement of tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue'' and specifies factors EPA is to consider in establishing an exemption.

II. Inert Ingredient Definition

Inert ingredients are all ingredients that are not active ingredients as defined in 40 CFR 153.125 and include, but are not limited to, the following types of ingredients (except when they have a pesticidal efficacy of their own): solvents such as alcohols and hydrocarbons; surfactants such as polyoxyethylene polymers and fatty acids; carriers such as clay and diatomaceous earth; thickeners such as carrageenan and modified cellulose; wetting, spreading, and dispersing agents; propellants in aerosol dispensers; microencapsulating agents; and emulsifiers. The term ''inert'' is not intended to imply nontoxicity; the ingredient may or may not be chemically active. Generally, EPA has exempted inert ingredients from the requirement of a tolerance based on the low toxicity of the individual inert ingredients.

III. Risk Assessment and Statutory Findings

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be clearly demonstrated that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no appreciable risks to human health. In order to determine the risks from aggregate exposure to pesticide-inert ingredients, the Agency considers the toxicity of the inert ingredient in conjunction with possible exposure to residues of the inert ingredient in food, drinking water, and other nonoccupational exposures. If EPA is able to determine that a finite tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the inert ingredient, an exemption from the requirement of a tolerance may be established.

IV. Aggregate Risk Assessment and Determination of Safety

Consistent with section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of acrylic acid terpolymer, partial sodium salts and to make a determination on aggregate exposure, consistent with section 408(b)(2) of FFDCA, for a tolerance exemption for residues of acrylic acid terpolymer, partial sodium salts on growing crops, raw agricultural commodities after harvest and animals. EPA's assessment of the dietary exposures and risks associated with establishing these tolerances follows.

The data submitted in the petitions and other relevant material have been evaluated. As part of the EPA policy statement on inert ingredients published in the **Federal Register** of April 22, 1987 (52 FR 13305), the Agency set forth a list of studies which would generally be used to evaluate the risks posed by the presence of an inert ingredient in a pesticide formulation. However, where it can be determined without that data that the inert ingredient will present minimal or no risk,the Agency generally does not require some or all of the listed studies to rule on the proposed tolerance or exemption from the requirement of a tolerance for an inert ingredient.

A. Toxicological Profile

In the case of certain chemical substances that are defined as ''polymers,'' the Agency has established a set of criteria which identify categories of polymers that present low risk. These criteria (described in 40 CFR 723.250) identify polymers that are relatively unreactive and stable compared to other chemical substances as well as polymers

that typically are not readily absorbed. These properties generally limit a polymer's ability to cause adverse effects. In addition, these criteria exclude polymers about which little is known. The Agency believes that polymers meeting these criteria will present minimal or no risk. Acrylic acid terpolymer, partial sodium salts conform to the definition of polymer given in 40 CFR 723.250(b) and meets the following criteria that are used to identify low risk polymers:

1. Acrylic acid terpolymer, partial sodium salts are not cationic polymers, nor are they reasonably anticipated to become cationic polymers in a natural aquatic environment.

2. Acrylic acid terpolymer, partial sodium salts contain as an integral part of their composition the atomic elements carbon, hydrogen, oxygen, sulfur, and nitrogen. They also contain the monatomic-counterion Na+.

3. Acrylic acid terpolymer, partial sodium salts do not contain as an integral part of their composition, except as impurities, any elements other than those listed in 40 CFR 723.250(d)(2)(ii).

4. Acrylic acid terpolymer, partial sodium salts are not designed, nor are they reasonably anticipated to substantially degrade, decompose, or depolymerize.

5. Acrylic acid terpolymer, partial sodium salts are not manufactured or imported from monomers and/or other reactants that are not already included on the Toxic Substances Control Act (TSCA) Chemical Substance Inventory or manufactured under an applicable TSCA section 5 exemption.

6. Acrylic acid terpolymer, partial sodium salts are not water-absorbing polymers.

7. The only reactive-functional group the acrylic acid terpolymer, partial sodium salts contain is a carboxylic acid.

8. Acrylic acid terpolymer, partial sodium salts have a number average molecular weight (MW) of 2,440 daltons (and an oligomer content less than 10% below MW 500 and less than 25% below MW 1,000).

9. Acrylic acid terpolymer, partial sodium salts have a number average MW of 2,440 daltons. Substances with MW greater than 400 generally are not absorbed through the intact skin, and substances with MW greater than 1,000 generally are not absorbed through the intact gastrointestinal (GI) tract. Chemicals not absorbed through the skin or GI tract generally are incapable of eliciting a toxic response.

Based on the conformance of acrylic acid terpolymer, partial sodium salts to the criteria in Unit IV. A. 1-9 of the preamble, no mammalian toxicity is anticipated from dietary, inhalation or dermal exposure to acrylic acid terpolymer, partial sodium salts.

B. Exposures and Risks

1. *From food and feed uses, drinking water, and non-dietary exposures.* For the purposes of assessing the potential dietary exposure, EPA considered that under these tolerance exemptions acrylic acid terpolymer, partial sodium salts could be present in all raw and processed agricultural commodities and drinking water and that non-occupational, non-dietary exposure was possible. EPA concluded that, based on these chemicals' categorization as polymers conforming to the definition of a polymer under 40 CFR 723.250(b) that also meet the criteria used to identify low-risk polymers, there are no concerns for risks associated with any potential-exposure scenarios that are reasonably foreseeable.

2. *Cumulative exposure to substances with common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

In the case of acrylic acid terpolymer, partial sodium salts, the lack of expected toxicity of these substances based on their conformance to the definition of polymers as given in 40 CFR 723.250(b) as well as the criteria that identify low-risk polymers results in no expected cumulative effects; a cumulative risk assessment is therefore not necessary.

C. Aggregate Risks and Determination of Safety for U.S. Population

Based on these chemicals' conformance to the definition of a polymer given in 40 CFR 723.250(b) as well as the criteria that are used to identify low-risk polymers, EPA concludes that there is a reasonable certainty that no harm to the U.S. population will result from aggregate exposure to acrylic acid terpolymer, partial sodium salts. EPA believes these compounds present no dietary risk under reasonably foreseeable circumstances.

D. Aggregate Risks and Determination of Safety for Infants and Children

FFDCA section 408 provides that EPA shall apply an additional ten-fold margin of safety for infants and children in the case of threshold effects to account for pre-and post-natal toxicity and the completeness of the database unless EPA determines that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments either directly through use of a MOE analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans. Because EPA has concluded that these substances pose minimal or no risk it did not use a margin of safety analysis for assessing risk to the general population. For the same reason, application of an additional margin of safety is unnecessary to protect the safety of infants and children. Based on the conclusions in Unit IV. of this preamble, EPA concludes that there is a reasonable certainty that no harm to the infants and children will result from aggregate exposure to acrylic acid terpolymer, partial sodium salts.

V. Other Considerations

The Agency establishes an exemption from the requirement of a tolerance without any numerical limitation; therefore, the Agency has concluded that analytical methods are not required for enforcement purposes for acrylic acid terpolymer, partial sodium salts.

There are no Codex Alimentarius Commission (Codex), Canadian or Mexican residue limits for acrylic acid terpolymer, partial sodium salts.

VI. Conclusion

Therefore, an exemption from the requirement of a tolerance is established for residues of acrylic acid terpolymer, partial sodium salts.

VII. Objections and Hearing Requests

The new FFDCA section 408(g) provides essentially the same process for persons to ''object'' to a tolerance regulation issued by EPA under new section 408(e) and (l)(6) as was provided in the old section 408 and in section 409. However, the period for filing objections is 60 days, rather than 30 days. EPA currently has procedural regulations which govern the submission of objections and hearing requests. These regulations will require some modification to reflect the new law. However, until those modifications can be made, EPA will continue to use those procedural regulations with appropriate adjustments to reflect the new law.

Any person may, by November 9, 1998, file written objections to any aspect of this regulation and may also request a hearing on those objections. Objections and hearing requests must be

filed with the Hearing Clerk, at the address given above (40 CFR 178.20). A copy of the objections and/or hearing requests filed with the Hearing Clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issues on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the requestor (40 CFR 178.27). A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as Confidential Business Information (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

VIII. Public Record and Electronic Submissions

EPA has established a record for this rulemaking under docket control number [OPP–300704] (including any comments and data submitted electronically). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The public record is located in Room 119 of the Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA.

Electronic comments may be sent directly to EPA at:

opp-docket@epamail.epa.gov.

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption.

The official record for this rulemaking, as well as the public version, as described above will be kept in paper form. Accordingly, EPA will transfer any copies of objections and hearing requests received electronically into printed, paper form as they are received and will place the paper copies in the official rulemaking record which will also include all comments submitted directly in writing. The official rulemaking record is the paper record maintained at the Virginia address in ''ADDRESSES'' at the beginning of this document.

IX. Regulatory Assessment Requirements

This final rule establishes an exemption from the tolerance requirement under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled Regulatory Planning and Review (58 FR 51735, October 4, 1993). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4). Nor does it require any prior consultation as specified by Executive Order 12875, entitled Enhancing the Intergovernmental Partnership (58 FR 58093, October 28, 1993), or special considerations as required by Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994), or require OMB review in accordance with Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997).

Executive Order 12875. Under Executive Order 12875, entitled Enhancing Intergovernmental Partnerships (58 FR 58093, October 28, 1993), EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments. If the mandate is unfunded, EPA must provide to the Office of Management and Budget (OMB) a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments ''to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.''

Today's rule does not create an unfunded federal mandate on State, local or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of Executive Order 12875 do not apply to this rule.

Executive Order 13084. Under Executive Order 13084, entitled Consultation and Coordination with Indian Tribal Governments (63 FR 27655, May 19,1998), EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide OMB, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.''

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

In addition, since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerances in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA)(5 U.S.C. 601 *et seq.*) do not apply. Nevertheless, the Agency has previously assessed whether establishing tolerances, exemptions from tolerances, raising tolerance levels or expanding exemptions might adversely impact small entities and concluded, as a generic matter, that there is no adverse economic impact. The factual basis for the Agency's generic certification for tolerance actions published on May 4, 1981 (46 FR 24950) and was provided to the Chief Counsel for Advocacy of the Small Business Administration.

XI. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: August 17, 1998.

James Jones,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180–[AMENDED]

1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 346a and 371.

2. In § 180.1001, the table in paragraph (c) and (e) is amended by adding alphabetically the following inert ingredient to read as follows:

§ 180.1001 Exemptions from the requirement of a tolerance.

* * * * *

(c) * * *

Inert ingredients	Limits	Uses
* *	* * *	* *
Acrylic acid terpolymer, partial sodium salt (CAS Reg. No. 151006–66–5), minimum number average molecular weight (in amu) 2,400.	.....	Dispersant
* *	* * *	* *

* * * * *

(e) * * *

Inert ingredients	Limits	Uses
* *	* * *	* *
Acrylic acid terpolymer, partial sodium salt (CAS Reg. No.151006–66–5), minimum number average molecular weight (in amu) 2,400.	.....	Dispersant
* *	* * *	* *

[FR Doc. 98–24151 Filed 9–8–98; 8:45 am]
BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–300692; FRL 6020–2]
RIN 2070–AB78

Fenpropathrin; Extension of Tolerance for Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule extends a time-limited tolerance for residues of the insecticide fenpropathrin and its metabolites in or on currants at 15 parts per million (ppm) for an additional 18 months, to June 30, 2000. This action is in response to EPA's granting of an emergency exemption under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act authorizing use of the pesticide on currants. Section 408(l)(6) of the Federal Food, Drug, and Cosmetic Act (FFDCA) requires EPA to establish a time-limited tolerance or exemption from the requirement of a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under section 18 of FIFRA.

DATES: This regulation becomes effective September 9, 1998. Objections and requests for hearings must be received by EPA, on or before November 9, 1998.

ADDRESSES: Written objections and hearing requests, identified by the docket control number, OPP–300692, must be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. Fees accompanying objections and hearing requests shall be labeled ''Tolerance Petition Fees'' and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251. A copy of any objections and hearing requests

filed with the Hearing Clerk identified by the docket control number, [OPP–300692], must also be submitted to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring a copy of objections and hearing requests to Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA.

A copy of objections and hearing requests filed with the Hearing Clerk may also be submitted electronically by sending electronic mail (e-mail) to: opp-docket@epamail.epa.gov. Follow the instructions in Unit II. of this preamble. No Confidential Business Information (CBI) should be submitted through e-mail.

FOR FURTHER INFORMATION CONTACT: By mail: Jacqueline Mosby-Gwaltney, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: Rm. 274, CM#2, 1921 Jefferson Davis Hwy., Arlington, VA, (703) 305–6792; e-mail: gwaltney.jackie@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: EPA issued a final rule (40 CFR 180.466), published in the **Federal Register** of July 14, 1997 (62 FR 37516) (FRL 5731–3), which announced that on its own initiative and under section 408(e) of the FFDCA, 21 U.S.C. 346a(e) and (l)(6), it established a time-limited tolerance for the residues of fenpropathrin and its metabolites in or on currants at 15 ppm, with an expiration date of December 31, 1998. EPA established the tolerance because section 408(l)(6) of the FFDCA requires EPA to establish a time-limited tolerance or exemption from the requirement of a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under section 18 of FIFRA. Such tolerances can be established without providing notice or period for public comment.

Subsequently, EPA issued a revision to 40 CFR 180.466 in the **Federal Register** November 26, 1997 (62 FR 63027)(FRL–5755–1). In this revision, the time-limited tolerance for currants which had been established in the July 14, 1997 final rule was inadvertently left out. The July 14, 1997 tolerance for currants has an expiration date of December 31, 1998, such that the tolerance has not expired. Therefore, with this final rule, EPA is adding currants back into 40 CFR 180.466(b) and extending the expiration date for the tolerance.

EPA received a request to extend the use of fenpropathrin on currants for this year's growing season due to currant borer being a serious pest in Washington. The Washington Department of Agriculture stated that the currant borer adults emerge during mid May in central Washington and lay their eggs on the currant canes over a period of 4 to 5 weeks. Newly hatched larvae bore into the center of the cane and feed in the pith creating a tunnel. Borer damage increases each year when no control measures are taken. With the cancellation of parathion there are no registered pesticides that will provide adequate control. The applicant state that presently, cane stands have dead canes ranging from 10 to 30% and if left uncontrolled, the perennial plantings will be lost. EPA has authorized under FIFRA section 18 the use of fenpropathrin on currants for control of the currant borer in Washington. After having reviewed the submission, EPA concurs that emergency conditions exist for this state. EPA has authorized under FIFRA section 18 the use of fenpropathrin on currants for control of currant borer in currants.

EPA assessed the potential risks presented by residues of fenpropathrin in or on currants. In doing so, EPA considered the new safety standard in FFDCA section 408(b)(2), and decided that the necessary tolerance under FFDCA section 408(l)(6) would be consistent with the new safety standard and with FIFRA section 18. The data and other relevant material have been evaluated and discussed in the final rule of July 14, 1997 (62 FR 37516). Based on that data and information considered, the Agency reaffirms that extension of the time-limited tolerance will continue to meet the requirements of section 408(l)(6). Therefore, the time-limited tolerance is extended for an additional 18 months. Although this tolerance will expire and is revoked on June 30, 2000, under FFDCA section 408(l)(5), residues of the pesticide not in excess of the amounts specified in the tolerance remaining in or on currants after that date will not be unlawful, provided the pesticide is applied in a manner that was lawful under FIFRA and the application occurred prior to the revocation of the tolerance. EPA will take action to revoke this tolerance earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

I. Objections and Hearing Requests

The new FFDCA section 408(g) provides essentially the same process for persons to ''object'' to a tolerance regulation issued by EPA under new section 408(e) and (l)(6) as was provided in the old section 408 and in section 409. However, the period for filing objections is 60 days, rather than 30 days. EPA currently has procedural regulations which govern the submission of objections and hearing requests. These regulations will require some modification to reflect the new law. However, until those modifications can be made, EPA will continue to use those procedural regulations with appropriate adjustments to reflect the new law.

Any person may, by November 9, 1998, file written objections to any aspect of this regulation and may also request a hearing on those objections. Objections and hearing requests must be filed with the Hearing Clerk, at the address given above (40 CFR 178.20). A copy of the objections and/or hearing requests filed with the Hearing Clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issues on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the requestor (40 CFR 178.27). A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential

may be disclosed publicly by EPA without prior notice.

II. Public Record and Electronic Submissions

The official record for this rulemaking, as well as the public version, as described above will be kept in paper form. Accordingly, EPA will transfer any copies of objections and hearing requests received electronically into printed, paper form as they are received and will place the paper copies in the official rulemaking record which will also include all comments submitted directly in writing. The official rulemaking record is the paper record maintained at the Virginia address in ''ADDRESSES''at the beginning of this document.

Electronic comments may be sent directly to EPA at: opp-docket@epamail.epa.gov.

Electronic objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Objections and hearing requests will also be accepted on disks in WordPerfect 5.1/6.1 or ASCII file format. All copies of objections and hearing requests in electronic form must be identified by the docket control number [OPP–300692]. No CBI should be submitted through e-mail. Electronic copies of objections and hearing requests on this rule may be filed online at many Federal Depository Libraries.

III. Regulatory Assessment Requirements

A.Certain Acts and Executive Orders

This final rule extends a time-limited tolerance that was previously extended by EPA under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled Regulatory Planning and Review (58 FR 51735, October 4, 1993). In addition, this final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4). Nor does it require any prior consultation as specified by Executive Order 12875, entitled Enhancing the Intergovernmental Partnership (58 FR 58093, October 28, 1993), or special considerations as required by Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994), or require OMB review in accordance with Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997).

Under Executive Order 12875, entitled Enhancing Intergovernmental Partnerships (58 FR 58093, October 28, 1993), EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments. If the mandate is unfunded, EPA must provide to the Office of Management and Budget (OMB) a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments ''to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.''

Today's rule does not create an unfunded Federal mandate on State, local or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of Executive Order 12875 do not apply to this rule.

C. Executive Order 13084

Under Executive Order 13084, entitled Consultation and Coordination with Indian Tribal Governments (63 FR 27655, May 19,1998), EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide OMB, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.''

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

Since this extension of an existing time-limited tolerance does not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. Nevertheless, the Agency has previously assessed whether establishing tolerances, exemptions from tolerances, raising tolerance levels or expanding exemptions might adversely impact small entities and concluded, as a generic matter, that there is no adverse economic impact. The factual basis for the Agency's generic certification for tolerance actions published on May 4, 1981 (46 FR 24950), and was provided to the Chief Counsel for Advocacy of the Small Business Administration.

IV. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the Agency promulgating the rule must submit a rule report, which includes a copy the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this rule in the **Federal Register**. This is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: August 6, 1998.

Arnold E. Layne,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180 — [AMENDED]

1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 346a and 371.

2. In § 180.466, by revising paragraph (b) to read as follows:

§ 180.466 Fenpropathrin; tolerances for residues.

* * * * *

(b) *Section 18 emergency exemptions.* Time-limited tolerances are established for residues of the herbicide fenpropathrin in connection with use of the pesticide under section 18 emergency exemptions granted by EPA. The tolerance will expire and is revoked on the date specified in the following table.

Commodity	Parts per million	Expiration/Revocation Date
Currants	15	6/30/00

* * * * *

[FR Doc. 98–24148 Filed 9–8–98; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–300703; FRL–6024–7]

RIN 2070–AB78

Herbicide Safener HOE-107892; Pesticide Tolerances for Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes time-limited tolerances for residues of the inert ingredient, herbicide safener HOE-107892 and its metabolites HOE-113225, HOE-109453, and HOE-094270 in or on barley grain, barley hay, barley straw, and the processed by-products of barley grain: pearled barley, bran, and flour. This action is in response to EPA's granting of an emergency exemption under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act authorizing use of the pesticide fenoxaprop formulated with HOE-107892 on barley. This regulation establishes maximum permissible levels for residues of HOE-107892 and its metabolites HOE 113225, HOE-109453, and HOE-094270 in these food commodities pursuant to section 408(l)(6) of the Federal Food, Drug, and Cosmetic Act, as amended by the Food Quality Protection Act of 1996. These tolerances will expire and be revoked on February 1, 2000.

DATES: This regulation is effective September 9, 1998. Objections and requests for hearings must be received by EPA on or before November 9, 1998.

ADDRESSES: Written objections and hearing requests, identified by the docket control number, [OPP–300703], must be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. Fees accompanying objections and hearing requests shall be labeled ''Tolerance Petition Fees'' and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251. A copy of any objections and hearing requests filed with the Hearing Clerk identified by the docket control number, [OPP–300703], must also be submitted to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring a copy of objections and hearing requeststo Rm. 119, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA.

A copy of objections and hearing requests filed with the Hearing Clerk may also be submitted electronically by sending electronic mail (e-mail) to: opp-docket@epamail.epa.gov. Copies of objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Copies of objections and hearing requests will also be accepted on disks in WordPerfect 5.1 file format or ASCII file format. All copies of objections and hearing requests in electronic form must be identified by the docket control number [OPP–300703]. No Confidential Business Information (CBI) should be submitted through e-mail. Electronic copies of objections and hearing requests on this rule may be filed online at many Federal Depository Libraries.

FOR FURTHER INFORMATION CONTACT: By mail: Andrew Ertman, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, (703) 308–9367, e-mail: ertman.andrew@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: EPA, on its own initiative, pursuant to section 408(e) and (l)(6) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(e) and (l)(6), is establishing tolerances for residues of the herbicide safener HOE-107892 and its metabolites HOE 113225, HOE-109453, and HOE-094270, in or on barley grain at 0.05 part per million (ppm), barley hay at 0.5 ppm, barley straw at 1.0 ppm, and the processed by-products of barley grain: pearled barley at 0.1 ppm, bran at 0.4 ppm, and flour at 0.1 ppm. These tolerances will expire and be revoked on February 1, 2000. EPA will publish a document in the **Federal Register** to remove the revoked tolerance from the Code of Federal Regulations.

I. Background and Statutory Authority

The Food Quality Protection Act of 1996 (FQPA) (Pub. L. 104–170) was signed into law August 3, 1996. FQPA amends both the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 301 *et seq.*, and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.* The FQPA amendments went into effect immediately. Among other things, FQPA amends FFDCA to bring all EPA pesticide tolerance-setting activities under a new section 408 with a new safety standard and new procedures. These activities are described below and discussed in greater detail in the final rule establishing the time-limited tolerance associated with the emergency exemption for use of propiconazole on sorghum (61 FR 58135, November 13, 1996)(FRL–5572–9).

New section 408(b)(2)(A)(i) of the FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is

''safe.'' Section 408(b)(2)(A)(ii) defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

Section 18 of FIFRA authorizes EPA to exempt any Federal or State agency from any provision of FIFRA, if EPA determines that ''emergency conditions exist which require such exemption.'' This provision was not amended by FQPA. EPA has established regulations governing such emergency exemptions in 40 CFR part 166.

Section 408(l)(6) of the FFDCA requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under section 18 of FIFRA. Such tolerances can be established without providing notice or period for public comment.

Because decisions on section 18-related tolerances must proceed before EPA reaches closure on several policy issues relating to interpretation and implementation of the FQPA, EPA does not intend for its actions on such tolerance to set binding precedents for the application of section 408 and the new safety standard to other tolerances and exemptions.

II. Emergency Exemption for the Herbicide Safener HOE-107892 on Barley and FFDCA Tolerances

The applicant requested the use of fenoxaprop formulated with the herbicide safener HOE-107892 (trade name Puma) to control trifluralin-resistant foxtail in barley fields. The applicant stated that resistant foxtail has gradually become a problem over the years with the end result being a significant drop in barley yields. The registered alternatives currently available are not adequate to control the problem and growers could be expected to experience significant economic losses without the authorized use of this formulation of fenoxaprop. EPA has authorized under FIFRA section 18 the use of fenoxaprop formulated with the herbicide safener HOE-107892 on barley for control of foxtail in North Dakota. After having reviewed the submission, EPA concurs that emergency conditions exist for this state.

As part of its assessment of this emergency exemption, EPA assessed the potential risks presented by residues of HOE-107892 in or on barley grain, barley hay, barley straw, and the processed by-products of barley grain: pearled barley, bran, and flour. In doing so, EPA considered the new safety standard in FFDCA section 408(b)(2), and EPA decided that the necessary tolerances under FFDCA section 408(l)(6) would be consistent with the new safety standard and with FIFRA section 18. Consistent with the need to move quickly on the emergency exemption in order to address an urgent non-routine situation and to ensure that the resulting food is safe and lawful, EPA is issuing these tolerances without notice and opportunity for public comment under section 408(e), as provided in section 408(l)(6). Although these tolerances will expire and be revoked on February 1, 2000, under FFDCA section 408(l)(5), residues of the pesticide not in excess of the amounts specified in the tolerances remaining in or on barley grain, barley hay, barley straw, and the processed by-products of barley grain: pearled barley, bran, and flour after that date will not be unlawful, provided the pesticide is applied in a manner that was lawful under FIFRA, and the residues do not exceed levels that were authorized by these tolerances at the time of that application. EPA will take action to revoke these tolerances earlier if any experience with, scientific data on, or other relevant information on this herbicide safener indicate that the residues are not safe.

Because these tolerances are being approved under emergency conditions, EPA has not made any decisions about whether HOE-107892 meets EPA's registration requirements for use on barley or whether a permanent tolerance for this use would be appropriate. Under these circumstances, EPA does not believe that this tolerance serves as a basis for registration of HOE-107892 by a State for special local needs under FIFRA section 24(c). Nor does this tolerance serve as the basis for any State other than North Dakota to use this pesticide on this crop under section 18 of FIFRA without following all provisions of section 18 as identified in 40 CFR part 166. For additional information regarding the emergency exemption for HOE-107892, contact the Agency's Registration Division at the address provided above.

III. Risk Assessment and Statutory Findings

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides based primarily on toxicological studies using laboratory animals. These studies address many adverse health effects, including (but not limited to) reproductive effects, developmental toxicity, toxicity to the nervous system, and carcinogenicity. Second, EPA examines exposure to the pesticide through the diet (e.g., food and drinking water) and through exposures that occur as a result of pesticide use in residential settings.

A. Toxicity

1. *Threshold and non-threshold effects.* For many animal studies, a dose response relationship can be determined, which provides a dose that causes adverse effects (threshold effects) and doses causing no observed effects (the ''no-observed effect level'' or ''NOEL'').

Once a study has been evaluated and the observed effects have been determined to be threshold effects, EPA generally divides the NOEL from the study with the lowest NOEL by an uncertainty factor (usually 100 or more) to determine the Reference Dose (RfD). The RfD is a level at or below which daily aggregate exposure over a lifetime will not pose appreciable risks to human health. An uncertainty factor (sometimes called a ''safety factor'') of 100 is commonly used since it is assumed that people may be up to 10 times more sensitive to pesticides than the test animals, and that one person or subgroup of the population (such as infants and children) could be up to 10 times more sensitive to a pesticide than another. In addition, EPA assesses the potential risks to infants and children based on the weight of the evidence of the toxicology studies and determines whether an additional uncertainty factor is warranted. Thus, an aggregate daily exposure to a pesticide residue at or below the RfD (expressed as 100% or less of the RfD) is generally considered acceptable by EPA. EPA generally uses the RfD to evaluate the chronic risks posed by pesticide exposure. For shorter term risks, EPA calculates a margin of exposure (MOE) by dividing the estimated human exposure into the NOEL from the appropriate animal study. Commonly, EPA finds MOEs lower than 100 to be unacceptable. This 100-fold MOE is based on the same

rationale as the 100-fold uncertainty factor.

Lifetime feeding studies in two species of laboratory animals are conducted to screen pesticides for cancer effects. When evidence of increased cancer is noted in these studies, the Agency conducts a weight of the evidence review of all relevant toxicological data including short-term and mutagenicity studies and structure activity relationship. Once a pesticide has been classified as a potential human carcinogen, different types of risk assessments (e.g., linear low dose extrapolations or MOE calculation based on the appropriate NOEL) will be carried out based on the nature of the carcinogenic response and the Agency's knowledge of its mode of action.

2. *Differences in toxic effect due to exposure duration.* The toxicological effects of a pesticide can vary with different exposure durations. EPA considers the entire toxicity data base, and based on the effects seen for different durations and routes of exposure, determines which risk assessments should be done to assure that the public is adequately protected from any pesticide exposure scenario. Both short and long durations of exposure are always considered. Typically, risk assessments include ''acute,'' ''short-term,'' ''intermediate term,'' and ''chronic'' risks. These assessments are defined by the Agency as follows.

Acute risk, by the Agency's definition, results from 1-day consumption of food and water, and reflects toxicity which could be expressed following a single oral exposure to the pesticide residues. High end exposure to food and water residues are typically assumed.

Short-term risk results from exposure to the pesticide for a period of 1-7 days, and therefore overlaps with the acute risk assessment. Historically, this risk assessment was intended to address primarily dermal and inhalation exposure which could result, for example, from residential pesticide applications. However, since enaction of FQPA, this assessment has been expanded to include both dietary and non-dietary sources of exposure, and will typically consider exposure from food, water, and residential uses when reliable data are available. In this assessment, risks from average food and water exposure, and high-end residential exposure, are aggregated. High-end exposures from all three sources are not typically added because of the very low probability of this occurring in most cases, and because the other conservative assumptions built into the assessment assure adequate protection of public health. However, for cases in which high-end exposure can reasonably be expected from multiple sources (e.g. frequent and widespread homeowner use in a specific geographical area), multiple high-end risks will be aggregated and presented as part of the comprehensive risk assessment/characterization. Since the toxicological endpoint considered in this assessment reflects exposure over a period of at least 7 days, an additional degree of conservatism is built into the assessment; i.e., the risk assessment nominally covers 1-7 days exposure, and the toxicological endpoint/NOEL is selected to be adequate for at least 7 days of exposure. (Toxicity results at lower levels when the dosing duration is increased.)

Intermediate-term risk results from exposure for 7 days to several months. This assessment is handled in a manner similar to the short-term risk assessment.

Chronic risk assessment describes risk which could result from several months to a lifetime of exposure. For this assessment, risks are aggregated considering average exposure from all sources for representative population subgroups including infants and children.

B. Aggregate Exposure

In examining aggregate exposure, FFDCA section 408 requires that EPA take into account available and reliable information concerning exposure from the pesticide residue in the food in question, residues in other foods for which there are tolerances, residues in groundwater or surface water that is consumed as drinking water, and other non-occupational exposures through pesticide use in gardens, lawns, or buildings (residential and other indoor uses). Dietary exposure to residues of a pesticide in a food commodity are estimated by multiplying the average daily consumption of the food forms of that commodity by the tolerance level or the anticipated pesticide residue level. The Theoretical Maximum Residue Contribution (TMRC) is an estimate of the level of residues consumed daily if each food item contained pesticide residues equal to the tolerance. In evaluating food exposures, EPA takes into account varying consumption patterns of major identifiable subgroups of consumers, including infants and children. The TMRC is a ''worst case'' estimate since it is based on the assumptions that food contains pesticide residues at the tolerance level and that 100% of the crop is treated by pesticides that have established tolerances. If the TMRC exceeds the RfD or poses a lifetime cancer risk that is greater than approximately one in a million, EPA attempts to derive a more accurate exposure estimate for the pesticide by evaluating additional types of information (anticipated residue data and/or percent of crop treated data) which show, generally, that pesticide residues in most foods when they are eaten are well below established tolerances.

Percent of crop treated estimates are derived from federal and private market survey data. Typically, a range of estimates are supplied and the upper end of this range is assumed for the exposure assessment. By using this upper end estimate of percent of crop treated, the Agency is reasonably certain that exposure is not understated for any significant subpopulation group. Further, regional consumption information is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups, to pesticide residues. For this pesticide, the most highly exposed population subgroup (children 1-6 years old) was not regionally based.

IV. Aggregate Risk Assessment and Determination of Safety

Consistent with section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of HOE-107892 and to make a determination on aggregate exposure, consistent with section 408(b)(2), for time-limited tolerances for residues of HOE-107892 and its metabolites HOE 113225, HOE-109453, and HOE-094270 on barley grain at 0.05 ppm, barley hay at 0.5 ppm, barley straw at 1.0 ppm, and the processed by-products of barley grain: pearled barley at 0.1 ppm, bran at 0.4 ppm, and flour at 0.1 ppm. EPA's assessment of the dietary exposures and risks associated with establishing the tolerance follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. The nature of the toxic effects caused by HOE-107892 are discussed below.

1. *Acute toxicity.* For acute dietary risk assessment, a reference dose (RfD)

was established for females, ages 13+, the population subgroup of concern. The Agency used a No Observable Effect Level (NOEL) of 100 mg/kg/day, based on increased preimplantation loss (indicative of initiation of dosing too early, which appeared after a single dose) at the Lowest Observable Effect Level (LOEL) of 250 mg/kg/day, from a developmental toxicity study in rabbits. Using an uncertainty factor of 100 for intra- and inter-species differences, the Acute RfD for oral exposure was calculated to be 1 mg/kg/day (100 mg/kg/day ÷ 100). The Agency determined that the 10X factor required by FQPA for protection of infants and children from exposure to HOE-107892 should be reduced to 3X for the purposes of this section 18 only. Application of the additional 3X safety factor for enhanced susceptibility of infants and children to the acute RfD results in an acceptable acute dietary exposure (food plus water) of 33.3% or less of the acute RfD for the population subgroup, females, 13+ years.

2. *Short - and intermediate - term toxicity.* For short-term dermal Margin of Exposure (MOE) calculations, the Agency used the maternal/developmental NOEL of 100 mg/kg/day from a developmental study in the rabbit. At the LOEL of 250 mg/kg/day, there were decreases in body-weight gain during days 6 to 13 accompanied by reduced food efficiency index and food consumption and a higher rate of abortions starting on gestation day 16. An acceptable MOE is ≧ 100.

An endpoint for inhalation exposure was not found. The acute LC_{50} is > 1.32 mg/L for the technical material and the acute LC_{50} for an end-use formulation of which HOE-107892 is 2.6% by weight is > 5.14 mg/L (LC_{50} = concentration lethal to 50% of animals after a 4-hour exposure). It appears unlikely that there will be a significant risk from inhalation.

For intermediate-term dermal MOE calculations, the Agency used a NOEL of 80.5 mg/kg/day from a subchronic feeding study in the dog. At the LOEL of 341.0 mg/kg/day, there were increases in alkaline phosphatase (ALP) activities and absolute/relative liver weights; a focal liver lesion characterized by hemorrhage, necrosis, and inflammation; slight anemia and decreases in food consumption and body weight gains. An acceptable MOE is ≧ 100.

An endpoint for inhalation exposure was not found. The acute LC_{50} is > 1.32 mg/L for the technical material and the acute LC_{50} for an end-use formulation of which HOE-107892 is 2.6% by weight is > 5.14 mg/L. It appears unlikely that there will be a significant risk from inhalation.

3. *Chronic toxicity.* EPA has established the RfD for HOE-107892 at 0.51 milligrams/kilogram/day (mg/kg/day). This RfD is based on a chronic feeding study in dogs with a NOEL of 51.4 mg/kg/day and an uncertainty factor of 100. An LOEL of 260 mg/kg/day is based on increased alkaline phosphatase and absolute/relative liver weights and grade 1 (minimal) intrahepatic cholestasis in the liver.

The results from a 2-generation reproduction study in the rat support the NOEL from the chronic feeding study in the dog with a NOEL of 57.3 mg/kg/day and an LOEL of 305.9 mg/kg/day based on decreased mean body weight and mean body weight gain in the parents and offspring.

4. *Carcinogenicity.* In a rat study, there were no treatment related effects, including tumors. The NOEL is >5,000 ppm (highest dose tested: HDT). The doses employed in this study were not sufficient to produce any systemic effects and appeared to be inadequate to test the carcinogenic potential of the test material. This study is classified as unacceptable because it appears that the animals could have tolerated a higher dose level.

In the mouse study, there were no treatment related effects in mortality, clinical signs, feed consumption, and gross necropsy findings. Increases in liver weights and hepatocellular hypertrophy were detected at several dose levels. At the terminal sacrifice, Harderian gland adenocarcinoma showed a positive trend in both sexes with the incidences exceeding the maximum percentages for historical controls (2%) at some dose levels. However, although there was a positive trend, the incidences were not dose-related (0/50, 0/50, 2/50, 1/50 and 2/50 in males and 0/50, 1/50, 0/50, 0/50 and 2/50 in females). A complete assessment of the toxicological significance of these tumors will be conducted when this chemical is considered for full registration. The dose levels employed in this study were adequate to characterize the carcinogenic potential of HOE-107892 in NMRI mice.

The mouse and rat cancer studies with the safener have not been reviewed and classified by either the Cancer Peer Review Committee or the HIARC. It is not known at this time whether or not the Harderian gland adenocarcinomas mentioned in the mouse study are toxicologically significant and whether or not a cancer risk assessment is appropriate for this chemical. Therefore, for the purposes of this section 18, a cancer risk assessment was not conducted.

B. Exposures and Risks

1. *From food and feed uses.* No permanent tolerances have been established for the residues of HOE-107892. A section 18 for HOE-107892 on durum wheat in North Dakota, South Dakota, and Montana was granted in 1996 and the appropriate time-limited tolerances were established. For the purposes of that section 18 only, it was assumed that there would be no quantifiable residues of HOE-107892 in wheat grain or straw. It was further assumed that there would be no quantifiable residues in meat, milk, poultry, or eggs resulting from the use. Risk assessments were conducted by EPA to assess dietary exposures and risks from HOE-107892 as follows:

i. *Acute exposure and risk.* Acute dietary risk assessments are performed for a food-use pesticide if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a one day or single exposure. The acute RfD is 1 mg/kg bw/day. Application of the 3X safety factor for enhanced susceptibility of infants and children to the Acute RfD results in an acceptable acute dietary exposure (food plus water) of 33.3% or less of the acute RfD for the population subgroup of concern, females, age 13+ years. For this population subgroup, there is an acceptable acute dietary exposure (food only) of <1% of the acute RfD.

This acute dietary (food) risk assessment used the TMRC which assumes tolerance level residues and 100% crop-treated. The Dietary Exposure Evaluation Model (DEEM) software was used for this acute dietary exposure analysis. For females (13-50 yrs), the exposure values of 0.00028 was determined to utilize <1 percent of the acute RfD.

These results should be viewed as a very conservative risk estimate; refinement using anticipated residue values and percent crop-treated information in conjunction with Monte Carlo analysis would result in a lower estimate of acute dietary exposure.

ii. *Chronic exposure and risk.* In conducting this chronic dietary risk assessment, EPA has made very conservative assumptions: 100% of all commodities (including barley) which have HOE-107892 tolerances (at the present time, time-limited tolerances) contain mefenpyr-diethyl residues, and these residues are present at the level of the tolerance. By making these assumptions, an overestimation of human dietary exposure results. Thus, in making a safety determination for this

tolerance, EPA is taking into account this conservative exposure assessment.

The time-limited HOE-107892 tolerances, including the necessary section 18 tolerance(s), result in a Theoretical Maximum Residue Contribution (TMRC) that is equivalent to the following percentages of the Chronic RfD:

Population Subgroup	TMRC(mg/kg/day)	% Chronic RFD
U.S. Population (48 States)	0.000023	<1%
Nursing Infants (<1 year old)	0.000004	<1%
Non-Nursing Infants (<1 year old)	0.000008	<1%
Children (1-6 years old)	0.000038	<1%
Children (7-12 years old)	0.000027	<1%
Females (13-50 years old)	0.000016	<1%

The subgroups listed above are: (1) U.S. population (48 states); (2) Infants and children (4 subgroups) and (3) Females (13-50 years). There are no other subgroups for which the percentage of the RfD occupied is greater than that occupied by the subgroup U.S. population (48 states).

2. *From drinking water.* HOE-107892 is not persistent and not mobile. Even though sorption to soil is relatively low (median Koc of approximately 600), its short half-life of about one week or less and low use rate imply that it has little potential to leach to ground water or runoff to surface water. Under favorable conditions, there could be runoff into surface water, primarily via dissolution in runoff water, for several days post-application. There are no established Maximum Contaminant Levels for residues of HOE-107892 in drinking water. No health advisory levels for HOE-107892 in drinking water have been established.

i. *Ground water.* The Agency used its SCI-GROW (Screening Concentration in Ground Water) screening model and environmental fate data to determine the EECs of HOE-107892 in ground water. SCI-GROW is an empirical model based upon actual ground water monitoring data collected for the registration of a number of pesticides that serve as benchmarks for the model. The current version of SCI-GROW appears to provide realistic estimates of pesticide concentrations in shallow, highly vulnerable ground water sites (i.e., sites with sandy soils and depth to ground water of 10 to 20 feet). The SCI-GROW ground water screening concentration is 0.00006 ppb.

ii. *Surface water.* The Agency used its GENEEC (Generic Estimated Environmental Concentration) screening model and environmental fate data to determine the EECs of HOE-107892 in surface water. GENEEC simulates a 1 hectare by 2 meter deep edge-of-the-field farm pond which receives pesticide runoff from a treated 10 hectare field. GENEEC can substantially overestimate (by a ≧ 3 fold factor) true pesticide concentrations in drinking water. It has certain limitations and is not the ideal tool for use in drinking water risk assessments. However, it can be used in screening calculations and does provide an upper bound on the concentration of pesticide that can be found in drinking water. Since GENEEC can substantially overestimate true drinking water concentrations, it will be necessary to refine the GENEEC estimate when the level of concern is exceeded. In those situations where the level of concern is exceeded and the GENEEC value is a substantial part of the total exposure, the Agency can use a variety of methods to refine the exposure estimates.

Using the GENEEC model and available environmental fate data, EPA calculated the following Tier 1 Estimated EECs for HOE-107892:

- GENEEC Peak EEC(ppb): 0.29 ppb
- Average 4 day EEC (ppb): 0.28 ppb
- Average 21 day EEC(ppb): 0.23 ppb
- Average 56 day EEC (ppb): 0.15 ppb.

iii. *Acute exposure and risk.* Based on the acute dietary (food) exposure estimates, acute drinking water level of concern (DWLOC) for HOE-107892 was calculated to be 9,900 (µg/L) for the subpopulation group of concern (females 13 years and older).

iv. *Chronic risk.* Based on the chronic dietary (food) exposure estimates, chronic drinking water levels of concern (DWLOC) for HOE-107892 were calculated and are summarized below:

- U.S. Population (48 States): 18,000
- Females 13 + years, nursing: 15,000
- Children (1-6 years old): 5,100

It is current Agency policy that the following subpopulations be addressed when calculating drinking water levels of concern: U.S. population (48 States), any other adult populations whose %RfD is greater than that of the U.S. population, and the Female and Infant/Children subgroups (1 each) with the highest food exposure. The subgroups which are listed above are those which fall into these categories.

3. *From non-dietary exposure.* HOE-107892 currently has no registered residential uses.

4. *Cumulative exposure to substances with common mechanism of toxicity.* Section 408(b)(2)(D)(v) requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.'' The Agency believes that ''available information'' in this context might include not only toxicity, chemistry, and exposure data, but also scientific policies and methodologies for understanding common mechanisms of toxicity and conducting cumulative risk assessments. For most pesticides, although the Agency has some information in its files that may turn out to be helpful in eventually determining whether a pesticide shares a common mechanism of toxicity with any other substances, EPA does not at this time have the methodologies to resolve the complex scientific issues concerning common mechanism of toxicity in a meaningful way. EPA has begun a pilot process to study this issue further through the examination of particular classes of pesticides. The Agency hopes that the results of this pilot process will increase the Agency's scientific understanding of this question such that EPA will be able to develop and apply scientific principles for better determining which chemicals have a common mechanism of toxicity and evaluating the cumulative effects of such chemicals. The Agency anticipates, however, that even as its understanding of the science of common mechanisms increases, decisions on specific classes of chemicals will be heavily dependent on chemical specific data, much of which may not be presently available.

Although at present the Agency does not know how to apply the information in its files concerning common mechanism issues to most risk assessments, there are pesticides as to which the common mechanism issues can be resolved. These pesticides include pesticides that are

toxicologically dissimilar to existing chemical substances (in which case the Agency can conclude that it is unlikely that a pesticide shares a common mechanism of activity with other substances) and pesticides that produce a common toxic metabolite (in which case common mechanism of activity will be assumed).

EPA does not have, at this time, available data to determine whether HOE-107892 has a common mechanism of toxicity with other substances or how to include this pesticide in a cumulative risk assessment. Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, HOE-107892 does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that HOE-107892 has a common mechanism of toxicity with other substances.

C. Aggregate Risks and Determination of Safety for U.S. Population

1. *Acute risk— U.S. adult population.* Toxicological effects applicable to the general U.S. adult population that could be attributed to a single exposure (dose) were not observed in oral toxicity studies in animal species. Therefore, a dose and endpoint were not identified for acute dietary risk assessment for this population.

Females 13 years and older: The population subgroup of concern is females 13+ years. Using TMRC, EPA concluded that the high-end exposure estimate of 0.00028 mg/kg/day, results in an acceptable acute dietary risk estimate (food only) of <1% of the acute RfD for the population of concern: Females, 13+ years.

For acute exposure, based on an adult female body weight of 60 kg and 2L consumption of water per day, EPA's DWLOC for acute exposure to HOE-107892 for Females, 13 years and older, is 9,900 ppb. The peak EEC (acute) value of 0.29 ppb is lower than the acute DWLOCs for females, 13 years and older (9900 ppb). Therefore, EPA concludes with reasonable certainty that the acute exposure to mefenpyr-diethyl (HOE-107892) in drinking water is less than our level of concern and that the acute aggregate risk estimate (food and water) is less than our level of concern.

2. *Chronic risk.* Using the conservative TMRC exposure assumptions described above, and taking into account the completeness and reliability of the toxicity data, the Agency has calculated that chronic dietary exposure to HOE-107892 from food will utilize <1% of the RfD for the U.S. population. EPA's DWLOC for chronic exposure to HOE-107892 is 18,000 ppb for the US population and 15,000 for nursing females 13 years and older. The chronic EEC, GENEEC 56-day, value of 0.15 ppb is lower than these chronic DWLOCs. Therefore, EPA concludes with reasonable certainty that exposure to HOE-107892 in drinking water is less than the level of concern and that the chronic aggregate risk (food and water) is less than the level of concern.

There are no residential exposures. Under current Agency guidelines, the proposed and current uses of HOE-107892 under the existing temporary tolerances do not constitute a chronic dermal or inhalation exposure scenario. EPA concludes that there is a reasonable certainty that no harm will result from chronic aggregate exposure to HOE-107892 residues.

3. *Short- and intermediate-term risk.* Short- and intermediate-term aggregate exposure takes into account chronic dietary food and water (considered to be a background exposure level) plus indoor and outdoor residential uses. There are no residential uses. Therefore, short- and intermediate-term aggregate risk assessments are not required.

D. Aggregate Cancer Risk for U.S. Population

Although there is a question concerning a positive statistical trend in Harderian gland tumors in mice exposed to HOE-107892 in the diet over a lifetime and the incidences exceed historical control incidences, these tumors were not dose-related and there is no statistically significant increase using a pairwise comparison at any dose level. It is unlikely that they will be toxicologically significant when officially reviewed by either the HIARC or the CPRC. Therefore, for the purposes of this section 18, which allows for a limited use over a limited period of time, a cancer risk assessment will not be conducted.

E. Aggregate Risks and Determination of Safety for Infants and Children

1. *Safety factor for infants and children*— i. *In general.* In assessing the potential for additional sensitivity of infants and children to residues of HOE-107892, EPA considered data from developmental toxicity studies in the rat and rabbit and a two-generation reproduction study in the rat. The developmental toxicity studies are designed to evaluate adverse effects on the developing organism resulting from maternal pesticide exposure during gestation. Reproduction studies provide information relating to effects from exposure to the pesticide on the reproductive capability of mating animals and data on systemic toxicity.

FFDCA section 408 provides that EPA shall apply a 10-fold margin of safety for infants and children in the case of threshold effects to account for pre-and post-natal toxicity and the completeness of the data base unless EPA determines that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments either directly through use of a margin of exposure analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans. In either case, EPA generally defines the level of appreciable risk as exposure that is greater than 1/100 of the no observed effect level in the animal study appropriate to the particular risk assessment. This 100-fold uncertainty (safety) factor/margin of exposure (safety) is designed to account for inter-species extrapolation and intra-species variability. The Agency believes that reliable data support using the 100-fold margin/factor, rather than the 1,000-fold margin/factor, when EPA has a complete data base under existing guidelines, and when the severity of the effect in infants or children, the potency or unusual toxic properties of a compound, or the quality of the exposure data do not raise concerns regarding the adequacy of the standard margin/factor.

ii. *Developmental toxicity studies.* In a developmental toxicity study in rats, the maternal NOEL is the limit dose, 1,000 mg/kg/day. There were no treatment-related effects in developmental parameters. The developmental NOEL is also the limit dose, 1,000 mg/kg/day.

In an embryotoxicity and post-natal development study HOE-107892 was tested at the limit dose of 1,000 mg/kg/day. Mean maternal body-weight gain was significantly lower during treatment and was accompanied by a significant reduction in food efficiency and food consumption. There was also a treatment-related impairment in fetal body weight and body-weight gain. Based on the results of the study, the NOEL for maternal, fetal and neonatal toxicity is < 1,000 mg/kg/day.

In a developmental toxicity study in rabbits there was a significant decrease in body-weight gain observed at 250 mg/kg/day during the first week of treatment which was accompanied by significantly reduced food efficiency index and food consumption. There was also a higher rate of abortions and an increased preimplantation loss. The NOEL for teratogenicity was 250 mg/kg/

day, the highest dose tested. The NOEL for maternal toxicity is 100 mg/kg/day. Based on the higher rate of abortions observed in the dams at 250 mg/kg/day, the NOEL for fetotoxicity is also 100 mg/kg/day.

iii. *Reproductive toxicity study.* In a 2-generation reproduction study in rats, the NOEL for general toxicity (i.e., for parents and offspring) was determined to be 57.3 mg/kg bw/day based on decreased mean body weight and mean body weight gain and an increase in the severity (but not in the incidence) of splenic extramedullary hematopoiesis. The reproductive NOEL was set at 305.9 mg/kg/day (HDT), since there were no adverse treatment-related effects on reproductive parameters evident at any dose level tested.

iv. *Pre- and post-natal sensitivity.* The toxicological data base for evaluating pre- and post-natal toxicity for HOE-107892 is complete with respect to current data requirements. Based on the developmental study data discussed above, HOE-107892 does not appear to have an extra sensitivity for pre-natal effects. The FQPA safety factor of 10X was reduced to 3X for the purposes of this section 18 only until the entire database is completely reviewed. The factor of 3X is only to be applied to the acute dietary endpoint for the females 13+ years population subgroup; the factor of 10X is to be removed for the chronic dietary endpoint for all population subgroups. The rationale was as follows: ''There is no increased sensitivity in rats and rabbits in developmental and reproduction studies in rats and rabbits, however, in the absence of an OPP toxicologist's review of the rabbit developmental study, the summary description of the rabbit developmental study indicates that there may an increased severity of effect in the offspring (increased preimplantation loss and abortions) relative to effects in the dams at the same dose (decreases in food consumption, food efficiency and weight gain).''

2. *Acute risk.* Toxicological effects applicable to children and/or infants that could be attributed to a single exposure (dose) were not observed in oral toxicity studies in several animal species. Therefore, a dose and endpoint were not identified for acute dietary risk assessment for this population subgroup.

3. *Chronic risk.* Using the conservative exposure assumptions described above, EPA has concluded that aggregate exposure to HOE-107892 from food will utilize <1% of the RfD for infants and children. EPA generally has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. EPA's DWLOC for chronic exposure to HOE-107892 is 5,100 ppb for children, ages 1-6, the subgroup with the highest food exposure of all the infant and children subgroups. The chronic EEC, GENEEC 56-day, value of 0.15 ppb is lower than this chronic DWLOC. Therefore, the Agency concludes with reasonablecertainty that exposure to HOE-107892 in drinking water is less than our level of concern for infants and children and that the chronic aggregate risk (food and water) is less than the level of concern.

4. *Short- or intermediate-term risk.* Short- and intermediate-term aggregate exposure takes into account chronic dietary food and water (considered to be a background exposure level) plus indoor and outdoor residential uses. There are no residential uses. Short- and intermediate-term endpoints were not identified for infants and children. Therefore, short- and intermediate-term aggregate risk assessments are not required.

V. Other Considerations

A. Metabolism In Plants and Animals

The nature of the residue in plants is adequately understood. The residue of concern is parent HOE-107892 and metabolites HOE-113225, HOE-109453, and HOE-094270.

For the purposes of this section 18 only, the residues of concern in poultry and ruminants are HOE-107892 and metabolites HOE-113225, HOE-109453, and HOE-094270.

B. Analytical Enforcement Methodology

Adequate enforcement methodology is available to enforce the tolerance expression. The method involves extraction, methylation, separation by gas chromoatography (GC), and detection by Mass Spectroscopy (MS).

C. Magnitude of Residues

As a result of this section 18 use, residues of mefenpyr-diethyl (HOE-107892) and its regulated metabolites (HOE-113225, 109453, and 094270) are not expected to exceed the following levels: 0.05 ppm in grain, 0.5 ppm in hay, and 1.0 ppm in straw. In addition, residues of HOE-107892 and its regulated metabolites are not expected to exceed the following levels in processed by-products of barley grain: 0.1 ppm in pearled barley, 0.4 ppm in bran, and 0.1 ppm in flour. The tolerance levels on processed barley by-products are based on the tolerance level for barley grain and theoretical concentration factors.

EPA does not expect detectable residues in livestock commodities as a result of this section 18 use.

D. International Residue Limits

There are no CODEX, Canadian, or Mexican Maximum Residue Limits (MRLs) for HOE-107892 on barley. Thus, harmonization is not an issue for this section 18 request.

E. Rotational Crop Restrictions

For this section 18 only, a 60 day plant back interval will be required for all crops other than wheat and barley. This decision is based on results of laboratory environmental fate studies and the long PHI which is stipulated. Within 1-month of application of HOE-107892, 14C activity from both mefenpyr diethyl and a major metabolite, HOE-113225, decreased to less than 6% of the original activity. A second major metabolite, HOE-094270, had a longer residence time in soil. It reached maximum activity of about 72% after 30-60 days of incubation, and has a much longer estimated DT50 (time required for compound to decay to 50% of the initial quantity) of 100-200 days. In this section 18 a 60 day PHI is stipulated. In effect, HOE-107892 automatically has 60 days to decay before re-planting can be done. For the purposes of this section 18 only, EPA is willing to allow rotation to any crops 60 days after application. For section 3 registration, actual rotational crop data will need to be reviewed to determine an appropriate plant back interval for crops other than wheat and barley.

VI. Conclusion

Therefore, the tolerance is established for residues of HOE-107892 and its metabolites HOE 113225, HOE-109453, and HOE-094270 in barley grain at 0.05 ppm, barley hay at 0.5 ppm, barley straw at 1.0 ppm, and the processed by-products of barley grain: pearled barley at 0.1 ppm, bran at 0.4 ppm, and flour at 0.1 ppm.

VII. Objections and Hearing Requests

The new FFDCA section 408(g) provides essentially the same process for persons to ''object'' to a tolerance regulation issued by EPA under new section 408(e) and (l)(6) as was provided in the old section 408 and in section 409. However, the period for filing objections is 60 days, rather than 30 days. EPA currently has procedural regulations which govern the submission of objections and hearing requests. These regulations will require

some modification to reflect the new law. However, until those modifications can be made, EPA will continue to use those procedural regulations with appropriate adjustments to reflect the new law.

Any person may, by November 9, 1998, file written objections to any aspect of this regulation and may also request a hearing on those objections. Objections and hearing requests must be filed with the Hearing Clerk, at the address given above (40 CFR 178.20). A copy of the objections and/or hearing requests filed with the Hearing Clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issues on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the requestor (40 CFR 178.27). A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

VIII. Public Record and Electronic Submissions

EPA has established a record for this rulemaking under docket control number [OPP–300703] (including any comments and data submitted electronically). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The public record is located in Room 1132 of the Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA.

Electronic comments may be sent directly to EPA at:

opp-docket@epamail.epa.gov.

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption.

The official record for this rulemaking, as well as the public version, as described above will be kept in paper form. Accordingly, EPA will transfer any copies of objections and hearing requests received electronically into printed, paper form as they are received and will place the paper copies in the official rulemaking record which will also include all comments submitted directly in writing. The official rulemaking record is the paper record maintained at the Virginia address in ''ADDRESSES'' at the beginning of this document.

IX. Regulatory Assessment Requirements

This final rule establishes tolerances under FFDCA section 408(l)(6). The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled Regulatory Planning and Review (58 FR 51735, October 4, 1993). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4). Nor does it require any prior consultation as specified by Executive Order 12875, entitled Enhancing the Intergovernmental Partnership (58 FR 58093, October 28, 1993), or special considerations as required by Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994), or require OMB review in accordance with Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997).

Executive Order 12875. Under Executive Order 12875, entitled Enhancing Intergovernmental Partnerships (58 FR 58093, October 28, 1993), EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments. If the mandate is unfunded, EPA must provide to the Office of Management and Budget (OMB) a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments ''to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.''

Today's rule does not create an unfunded federal mandate on State, local or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of Executive Order 12875 do not apply to this rule.

Executive Order 13084. Under Executive Order 13084, entitled Consultation and Coordination with Indian Tribal Governments (63 FR 27655, May 19,1998), EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide OMB, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.''

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. This action

does not involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

In addition, since these tolerances and exemptions that are established under FFDCA section 408 (l)(6), such as the tolerances in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. Nevertheless, the Agency has previously assessed whether establishing tolerances, exemptions from tolerances, raising tolerance levels or expanding exemptions might adversely impact small entities and concluded, as a generic matter, that there is no adverse economic impact. The factual basis for the Agency's generic certification for tolerance actions published on May 4, 1981 (46 FR 24950), and was provided to the Chief Counsel for Advocacy of the Small Business Administration.

X. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: August 19, 1998.

James Jones,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180–[AMENDED]

1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 346a and 371.

2. Section 180.509 is amending paragraph (b) by alphabetically adding the following entries to the table to read as follows:

§ 180.509 HOE-107892 (mefenpyrdiethyl; tolerances for residues.

* * * * *

(b) * * *

Commodity	Parts per million	Expiration/Revocation Date
Barley, bran	0.4	2/1/00
Barley, flour	0.1	2/1/00
Barley, grain	0.05	2/1/00
Barley, hay	0.5	2/1/00
Barley, pearled	1.0	2/1/00
Barley, straw	0.1	2/1/00
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[FR Doc. 98–24150 Filed 9–8–98; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 268

[FRL–6155–7]

Characteristic Slags Generated From Thermal Recovery of Lead by Secondary Lead Smelters; Land Disposal Restrictions; Final Rule; Extension of Compliance Date

AGENCY: Environmental Protection Agency (EPA).

ACTION: Extension of compliance date of final rule.

SUMMARY: The Environmental Protection Agency (EPA) is issuing an extension of the compliance date until November 26, 1998 for a limited portion of the Phase IV Final Rule, published on May 26, 1998 (63 FR 28556), which, in part, amended the Land Disposal Restriction (LDR) treatment standards for metal-bearing hazardous wastes exhibiting the toxicity characteristic. EPA is extending the date for treatment standards only for secondary lead slags exhibiting the toxicity characteristic for one or more metals that are generated from thermal recovery of lead-bearing wastes (principally batteries). The Agency is taking this action because there appear to be short-term logistical difficulties resulting in a temporary shortage of available treatment capacity for these particular wastes. In the interim, the slags affected by this extension remain subject to the treatment standards for toxicity characteristic metals promulgated in the Third Third Final Rule (55 FR 22520; June 1, 1990) and codified at 40 CFR 268.40.

EFFECTIVE DATE: August 28, 1998.

ADDRESSES: The public docket for this document extending the effective date is available for public inspection at EPA's RCRA Information Center, located at Crystal Gateway, First Floor, 1235 Jefferson Davis Highway, Arlington, Virginia. The regulatory docket contains a number of background materials pertinent to this action. To obtain a list of these items, contact the RCRA Docket at (703) 603–9230 and request the list of references in EPA Docket #F–98-LABS-FFFFF.

FOR FURTHER INFORMATION CONTACT: For general information contact the RCRA Hotline at (800) 424–9346 (toll free) or (703) 920–9810 in the Washington, DC metropolitan area. For information on this notice contact Elaine Eby, Anita Cummings or Katrin Kral (5302W), Office of Solid Waste, 401 M Street, SW, Washington DC 20460. Elaine Eby may be reached at (703) 308–8449; Anita Cummings may be reached at (703) 308–8303; and Katrin Kral may be reached at (703) 308–6120.

SUPPLEMENTARY INFORMATION:

Availability of Rule on Internet

This notice is available on the internet, at:

www: http://www.epa.gov/oswer/hazwaste/ldrmetal/facts.htm

FTP: ftp.epa/gov

Login: anonymous
Password: your Internet address

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IV. Analyses under Executive Order 12866, Executive Order 12875, the Paperwork Reduction Act of 1995, National Technology Transfer and Advancement Act of 1995, Executive Order 13045, and Executive Order 13084: Consultation and Coordination with Indian Tribal Governments; Congressional Review Directory Act

I. Background

On May 26, 1998, the Agency promulgated the Land Disposal Restrictions (''LDR'') Phase IV Final Rule. This rule revises universal treatment standards (''UTS'') for 12 metal hazardous constituents. The Phase IV Final Rule also requires toxicity characteristic (''TC'') metal wastes—those wastes exhibiting the characteristic levels set out in 261.24, as measured using the Toxicity Characteristic Leaching Procedure (''TCLP'')—to meet the UTS levels for those metal constituents prior to land disposal. In addition, the LDR rules require that underlying hazardous constituents (''UHCs'')—hazardous constituents that are present below characteristic levels but still present at levels higher than those necessary to minimize threats posed by land disposal (see 40 CFR 268.2 (i) (defining ''underlying hazardous constituent'')—present in TC metal wastes must also meet UTS levels before land disposal. Because the Agency found that there was ample stabilization capacity available to treat these metal-bearing wastes, this rule took effect 90 days from the date of promulgation, i.e., August 24, 1998, which date corresponded generally to the time needed to make logistical arrangements for treatment of wastes that were affected by Phase IV (see 63 FR at 285624–25, May 26,1998).

Prior to Phase IV, TC metal wastes were only subject to treatment standards if the wastes exceeded the characteristic level for the various hazardous metals, as established in the Third Third Final Rule (55 FR 22520, June 1, 1990). There was also no requirement to treat these wastes for underlying hazardous constituents. The Phase IV rule amends most of the standards for metals to make them more stringent, and also requires treatment of UHCs in all TC metal wastes. For example, of most relevance here, the treatment standard for lead nonwastewaters exhibiting the Toxicity Characteristic is now 0.75 mg/L (measured by the TCLP), rather than 5.0 mg/L (measured by either the TCLP or the predecessor Extraction Procedure). Further, all UHCs in characteristic lead wastes have to be treated to meet the standards for hazardous constituents set out in Section 268.48. The rule thus assures that threats posed by land disposal of these wastes will be minimized as required by RCRA section 3004 (m). See *Chemical Waste Management* v. *EPA*, 976 F. 2d 2, 16, 27, 32 (D.C. Cir. 1992) (holding first that treatment to characteristic levels was insufficient to minimize threats within the meaning of RCRA section 3004 (m), particularly when further increments of treatment are demonstrated and available, and second that treatment of underlying hazardous constituents was required (*id.* at 16–18)).

The secondary lead industry consists of lead smelters that recover lead metal from secondary materials, primarily spent lead acid batteries. Secondary lead smelters generate slag as a by-product of this process. Secondary lead slags sometime exhibit the toxicity characteristic for lead, and occasionally for other metals as well. These slags, however, may also be nonhazardous. Today's action applies only to secondary lead slags that exhibit the toxicity characteristic for one or more RCRA metals and are therefore characteristically hazardous. See 63 FR at 28566 (May 26, 1998) (secondary lead slags which do not exhibit a characteristic are not subject to further LDR treatment requirements).

II. Today's Action

EPA is today amending the compliance date of the prohibition and treatment standards for slags from secondary lead smelting until November 26, 1998 (i.e., three months from the original effective date). Although EPA believes that the treatment standards for these slags are achievable through stabilization or other means and that there is an ample amount of treatment capacity for these slags, there are certain short-term logistical difficulties in utilizing this capacity resulting in a short-term unavailability of treatment capacity.

Secondary lead slag is generated in the form of large solid blocks of material. Before the slag can be successfully stabilized to meet the amended treatment standards, it must be crushed, a process necessitating use of specialized equipment. One commercial treater presently has such equipment on-site, but most commercial stabilization facilities do not. However, a number of secondary lead plants operate their own on-site crushing equipment. Overall there is enough available crushing equipment to provide sufficient pretreatment capacity for the secondary lead slag. Once the slags are crushed, there should be ample capacity to stabilize the crushed material, either at off-site commercial treatment facilities or on-site.

Based on these facts, EPA reiterates its finding that there is an adequate amount of treatment capacity available to treat secondary lead slag, within the meaning of RCRA section 3004(h)(2). Notwithstanding the fact that this capacity is divided between different entities (i.e. crushing equipment at one locale, stabilization capacity at another), capacity still exists and must be utilized. The whole premise of the Land Disposal Restrictions program is that existing treatment capacity is to be used in lieu of land disposal of untreated hazardous wastes. See 130 Cong. Rec. S9178 (daily ed. July 25, 1984) (statement of Sen. Chafee); see also S. Rep. No. 198, 98th Cong. 1st Sess. 18 (1984). Thus, EPA emphasizes that it does not (and will not) accept any argument that treatment is unavailable because generators refuse to perform pretreatment necessary to facilitate treatment to meet LDR levels.

However, EPA recognizes in this particular case that the physically separate pretreatment and treatment operations result in a situation where additional time is needed to arrange for logistical coordination and shipping. Prospective customers typically send waste samples to commercial treaters, who then develop a stabilization recipe for the waste, a process normally taking several weeks. This process has not yet begun for several reasons. There apparently was some confusion regarding the physical form of the waste to be treated, the result being that at least some treatment facilities believed they would need to treat uncrushed material, resulting in not-fully-informed refusals to accept the waste for treatment. As a result, some limited additional time is needed for commercial treaters to receive crushed samples, develop treatment recipes for that sample, enter into necessary contractual relationships with the generators of secondary lead slag, and finalize other logistical coordination necessities, such as shipping.

In addition, the secondary lead industry is not currently prepared to ship pulverized slag to commercial treaters. Although the crushed slag can readily be shipped by rail car (among other means), it will still take the industry some time to make alternative transport arrangements (contracting to

use a different type of rolling stock, etc.). The Agency estimates that an additional 90 days is needed to resolve these logistical obstacles. Accordingly, the Agency is extending the compliance date of the prohibition and treatment standards for secondary lead slags exhibiting the toxicity characteristic for one or more metals until November 26, 1998. During this time, the slags will remain subject to the existing LDR treatment standards promulgated in the Third Third Final Rule (55 FR at 22690, June 1, 1990), which standards are codified in the present section 268.40, and will also be subject to any other applicable, ancillary LDR requirements (e.g. tracking and recordkeeping requirements in § 268.7).

Two other points regarding this extension should be noted. First, today's limited extension of the compliance date of the land disposal prohibition and treatment standards affects only the date of compliance. It does not mandate a particular means of compliance. Thus, secondary lead smelters are not obligated to have their characteristic slags treated commercially if there is another means of compliance available. Many secondary lead plants operate their own stabilization equipment, and these on-site stabilization processes may be optimized to achieve the amended treatment standards adopted in the Phase IV final rule (63 FR at 28565). Secondary lead plants remain free to treat their own slags (or to adopt some other means of compliance not requiring shipment of pulverized slag to commercial treatment facilities), provided of course that the waste complies with LDR treatment standards before it is land disposed.

Second, the secondary lead industry has questioned whether the amended UTS for lead nonwastewaters (.75 mg/l in a TCLP extract) is achievable for secondary lead blast furnace slags and has raised this as an issue in a petition for judicial review of the Phase IV Final Rule. EPA believes the standard is achievable, based on the information in the administrative record for the rule. However, today's action briefly delaying the Phase IV compliance date also provides an opportunity to develop further treatment data on this particular waste. Based on reasonable assurances from industry representatives, the Agency expects secondary lead facilities to be forthcoming in providing proper samples (i..e., of the crushed slag) to treaters for the verification testing described earlier, and to allow this information to be utilized (with suitable safeguards for business confidentiality) in confirming (or calling into question) the achievability of the Phase IV metal treatment standards with respect to secondary lead slags. If certain slags cannot be treated to meet the UTS lead nonwastewater of 0.75 mg/L, a treatment variance may be sought under the criteria of § 268.44(h) (i.e., physical or chemical properties of the waste differ significantly from wastes analyzed in developing treatment standard).

III. Legal Authority and Rationale for Immediate Effective Date

This document extending the LDR prohibition date for secondary lead smelting slags is being issued without notice and opportunity for general public comment. Under the Administrative Procedure Act (APA), 5 U.S.C. 553 (b) (B), an agency may forego notice and comment in promulgating a rule when the agency for good cause finds (and incorporates the finding and a brief statement of the reasons for that finding into the rule) that notice and public comment procedures are impracticable, unnecessary, or contrary to the public interest. For the reasons set forth below, EPA finds good cause to conclude that notice and comment would be unnecessary and contrary to the public interest, and therefore is not required.

First, many secondary lead plants are currently in a position of being unable to comply with the existing rule because they are not meeting the treatment standards with their own stabilization processes and have not been able to finalize arrangements with commercial treaters (as explained earlier). An immediate delay of the rule's compliance date for this particular waste is needed to provide further time to make the administrative arrangements necessary for the treatment capacity to become available (again as explained earlier).

EPA believes that this short-term emergency arose even though both the generating and commercial treatment industries acted in good faith in preparing to comply with the standards, so that this is not an artificially manipulated situation created in the hope of delaying the rule's compliance date. (Now that the necessary pretreatment steps are identified and understood, however, EPA will not consider a further extension based on generators' need for more time in making arrangements with commercial treatment facilities.)

Second, EPA has been involved in detailed discussions with both the generating and commercial treatment industries, so that there has been direct notice about the possibility of today's extension to the entities most directly affected by today's action.

EPA therefore concludes that notice and comment would be unnecessary and contrary to the public interest in these special circumstances. For these reasons, EPA believes that there is good cause to issue this extension of the compliance date immediately and without prior notice and comment.

IV. Analysis Under Executive Order 12866, Executive Order 12875, the Paperwork Reduction Act, National Technology Transfer and Advancement Act of 1995, Executive Order 13045, and Executive Order 13084: Consultation and Coordination With Indian Tribal Governments; Congressional Review Directory Act

This action extends the compliance date for treatment standards established in the recently promulgated LDR Phase IV Rule for secondary lead slags that exhibit the toxicity characteristic for metals. Since the rule simply extends the rule's compliance date it imposes no new costs and does not raise novel policy issues. EPA therefore does not consider it to be a ''significant regulatory action'' for the purposes of Executive Order 12866, and it therefore is not subject to executive review under that Order. For the same reason, today's rule also does not impose obligations on State, local or tribal governments for the purposes of Executive Order 12875.

Furthermore, this action is not subject to the Regulatory Flexibility Act (RFA) since this rule is exempt from notice and comment rulemaking requirements for good cause, as explained in Section III. The Administrator is, therefore, not required to certify under the RFA regarding the significance of any economic impact on small entities. However, because today's action simply extends the rule's compliance date for 90 days for one type of waste and does not impose any new costs, the Agency believes that the rule will not have a significant economic impact on a substantial number of small entities.

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Pub L. No. 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable

voluntary consensus standards. There are no voluntary consensus technical standards directly applicable to treatment of secondary lead slags that exhibit the toxicity characteristic for metals. Therefore, EPA did not consider the use of any voluntary standards in today's action.

Today's action is not subject to E.O. 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because this limited extension of the Phase IV compliance date for one waste is not an economically significant rule, and it is not expected to create any environmental health risks or safety risks that may disproportionately affect children. In that regard, the Agency notes that secondary lead slags will continue to be subject to the currently-existing LDR treatment standards during this ninety day period.

Under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, EPA must consider the paperwork burden imposed by any information collection request in a proposed or final rule. Today's extension of the Phase IV compliance date for one waste will not impose any new information collection requirements and therefore EPA has met all Paperwork Reduction Act obligations.

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation.

In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities. Today's action simply delays the compliance date of Phase IV for one waste for ninety days, and does not significantly or uniquely affect the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated previously, EPA has made such a good cause finding, including the reasons therefore, and thus is promulgating this document as a final rule. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 268

Environmental protection, Hazardous waste, Land disposal restrictions.

Dated: August 28, 1998.

Carol M. Browner,

Administrator.

For the reasons set forth in the preamble, title 40 chapter I of the Code of Federal Regulations is amended as follows:

PART 268—LAND DISPOSAL RESTRICTIONS

1. The authority citation for part 268 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, and 6924.

Subpart D—Treatment Standards

2. Section 268.34 is amended by redesignating paragraphs (b) through (e) as paragraphs (c) through (f) and by adding a new paragraph (b) to read as follows:

§ 268.34 Waste specific prohibitions—toxicity characteristic metal wastes.

* * * * *

(b) Effective November 26, 1998, the following waste is prohibited from land disposal: Slag from secondary lead smelting which exhibits the Toxicity Characteristic due to the presence of one or more metals.

* * * * *

[FR Doc. 98–24045 Filed 9–8–98; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 721

[OPPTS–50628B; FRL–6020–7]

RIN 2070–AB27

Certain Chemical Substances; Removal of Significant New Use Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is removing significant new use rules (SNUR) promulgated under section 5(a)(2) of the Toxic Substances Control Act (TSCA) for twelve chemical substances which were the subject of premanufacture notice (PMNs). EPA initially published the SNURs using direct final rulemaking procedures. EPA received a notice of intent to submit adverse comments on this rule. Therefore, the Agency is removing these rules, as required under the expedited SNUR rulemaking process (40 CFR part 721, subpart D). In a separate notice of proposed rulemaking in today's **Federal Register**, EPA is proposing a SNUR for these substances with a 30-day comment period.

EFFECTIVE DATE: This action is effective on September 9, 1998.

FOR FURTHER INFORMATION CONTACT: Susan B. Hazen, Director, Environmental Assistance Division (7408), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E–531, 401 M St., SW., Washington, DC 20460, telephone: (202) 554–1404, TDD: (202) 554–0551; e-mail: TSCA-Hotline@epa.gov.

SUPPLEMENTARY INFORMATION:

Electronic Availability: Electronic copies of this document are available from the EPA Home Page at the **Federal Register**-Environmental Documents entry for this document under ''Laws and Regulations'' (http://www.epa.gov/fedrgstr/).

I. Background

In the **Federal Register** of January 22, 1998 (63 FR 3393) (FRL–5720–3), EPA issued several direct final SNURs, including SNURs for the twelve chemical substances which are the subject of this document. As described in § 721.160, EPA is removing the

sections issued for these substances under direct final rulemaking procedures because the Agency received a notice to submit adverse comments. Pursuant to § 721.160(a)(3)(ii), EPA is proposing a SNUR for these chemical substances elsewhere in today's **Federal Register**. For further information regarding EPA's expedited process for issuing SNURs, interested parties are directed to 40 CFR part 721, subpart D and the **Federal Register** of July 27, 1989 (54 FR 31314). The record for the direct final SNUR for these substances was established as docket control number OPPTS–50628. That record includes information considered by the Agency in developing this rule and the notice to submit adverse comments to which the Agency is responding with this notice of removing the twelve chemical substances. The docket control number for the removal is OPPTS–50628B. For more information refer to the proposal published elsewhere in today's **Federal Register**. The relevent portions of the original docket for the direct final SNUR are being incorporated under OPPTS–50628C, which is established for the proposed rule.

II. Public Record

The official record for this rulemaking, as well as the public version, has been established for this rulemaking under docket control number OPPTS–50628B (including comments and data submitted electronically). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 12 noon to 4 p.m., Monday through Friday, excluding legal holidays. The official rulemaking record is located in the TSCA Nonconfidential Information Center, Rm. NE–B607, 401 M St., SW., Washington, DC.

III. Regulatory Assessment Requirements

A. Certain Acts and Executive Orders

This final rule revokes or eliminates an existing regulatory requirement and does not contain any new or amended requirements. As such, the Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Since this final rule does not impose any requirements, it does not contain any information collections subject to approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or require any other action under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4). Nor does it require special considerations as required by Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994) or require OMB review in accordance with Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997).

In addition, pursuant to section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.), the Agency has determined that SNUR revocations, which eliminate requirements without imposing any new ones, have no adverse economic impacts. The Agency's generic certification for SNUR revocations appears on June 2, 1997 (62 FR 29684) (FRL–5597–1) and was provided to the Chief Counsel for Advocacy of the Small Business Administration.

B. Executive Order 12875

Under Executive Order 12875, entitled *Enhancing Intergovernmental Partnerships* (58 FR 58093, October 28, 1993), EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments. If the mandate is unfunded, EPA must provide to OMB a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments ''to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.''

Today's rule does not create an unfunded federal mandate on State, local or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of Executive Order 12875 do not apply to this rule.

C. Executive Order 13084

Under Executive Order 13084, entitled *Consultation and Coordination with Indian Tribal Governments* (63 FR 27655, May 19,1998), EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide OMB, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.''

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

IV. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 721

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: August 31, 1998.

Charles M. Auer,

Director, Chemical Control Division, Office of Pollution Prevention and Toxics.

Therefore, 40 CFR part 721 is amended as follows:

PART 721—[AMENDED]

1. The authority citation for part 721 continues to read as follows:

Authority: 15 U.S.C. 2604, 2607, and 2625(c).

§§ 721.526, 721.528, 721.567, 721.637, 721.658, 721.2082, 721.5725, 721.6197 [Removed]

2. By removing §§ 721.526, 721.528, 721.567, 721.637, 721.658, 721.2082, 721.5725, and 721.6197.

[FR Doc. 98–24142 Filed 9–8–98; 8:45 am]

BILLING CODE 6560–50–F

Proposed Rules

Federal Register
Vol. 63, No. 174
Wednesday, September 9, 1998

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.

FEDERAL LABOR RELATIONS AUTHORITY

5 CFR Part 2424

Negotiability Proceedings

AGENCY: Federal Labor Relations Authority.

ACTION: Notice of proposed rulemaking; notice of meetings.

SUMMARY: The Chair and Members of the Authority component (the Authority) of the Federal Labor Relations Authority (the FLRA) propose to revise the regulations concerning negotiability proceedings. The purpose of the proposed revisions is to expedite these proceedings and facilitate dispute resolution.

DATES: Comments must be received on or before October 23, 1998. Meetings will be held on October 6, 1998, in Chicago, Illinois; October 8, 1998, in Oakland, California; and October 14, 1998, in Washington, D.C.

ADDRESSES: Mail or deliver written comments to the Office of Case Control, Federal Labor Relations Authority, 607 14th Street, NW., Washington, D.C. 20424–0001. The October 6, 1998 meeting will be held at the Ralph H. Metcalfe Federal Building, 77 West Jackson Boulevard, Room 328, Chicago, Illinois. The October 8, 1998 meeting will be held at the Oakland Federal Building, 1301 Clay Street, North Tower, Second Floor, Conference Rooms A and B, Oakland, California. The October 14, 1998 meeting will be held at the Federal Labor Relations Authority's Headquarters, 607 14th St. NW., Washington, D.C. 20424, 2nd Floor Agenda Room.

FOR FURTHER INFORMATION CONTACT: *Regulatory information or registration for the Washington meeting:* Peter Constantine, Office of Case Control, at the address listed above or by telephone # (202) 482–6540. *Registration for the Chicago meeting:* Philip T. Roberts, Chicago Regional Office, Federal Labor Relations Authority, 55 West Monroe Street, Suite 1150, Chicago, Illinois 60603–9727, telephone # (312) 886–3465 ext. 20. *Registration for the Oakland meeting:* Lisa C. Vandenberg, San Francisco Regional Office, Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, CA 94103–1791, telephone # (415) 356–5002 ext. 18.

SUPPLEMENTARY INFORMATION: The Chair and Members of the Authority established an internal Task Force to study and evaluate the policies and procedures in effect concerning negotiability proceedings. To this end, the Task Force published a **Federal Register** notice (63 FR 19413) (April 20, 1998) inviting parties to submit written comments on several subjects relevant to negotiability proceedings. In addition, the Task Force convened focus groups in order to solicit and consider customers' views prior to proposing these revisions.

The proposed revisions represent the Authority's intent to improve and expedite negotiability proceedings. Major aspects of the proposed regulations include pre- and postfiling procedures and conferences designed to narrow and clarify issues to be resolved; revised processing procedures that will enable the Authority, where appropriate, to resolve all aspects of a dispute; and clarification of the responsibilities of each party. The proposed revisions also divide Part 2424 into six subparts: Subpart A—Applicability and definitions; Subpart B—Prefiling procedures; Subpart C—Filing a petition; Subpart D—Processing a petition; Subpart E—Decisions and orders; and Subpart F—Compelling need determinations.

In connection with the proposed revisions to Part 2424, three meetings will be conducted. The first meeting will be held on October 6, 1998, at the Ralph H. Metcalfe Federal Building, 77 West Jackson Boulevard, Chicago, Illinois, at 1:00 p.m. Persons interested in attending this first meeting should write or call Philip T. Roberts, at the address and phone number listed in the preceding section, to confirm attendance. The second meeting will be held on October 8, 1998, at the Oakland Federal Building, 1301 Clay Street, North Tower, Second Floor, Conference Rooms A and B, Oakland, CA, at 1:00 p.m. Persons interested in attending this second meeting should call Lisa C. Vandenberg, at the address and phone number listed in the preceding section, to confirm attendance. The third meeting will be held on October 14, 1998, at the Federal Labor Relations Authority's Headquarters, 607 14th St. NW, Washington, D.C. 20424, 2nd Floor Agenda Room, at 10:00 a.m. Persons interested in attending this third meeting should write or call Peter Constantine, Office of Case Control, at the address and phone number listed in the preceding section, to confirm attendance.

Copies of all written comments will be available for inspection and photocopying between 8 a.m. and 5 p.m., Monday through Friday, in Suite 415 at the Office of Case Control.

Sectional analyses of the proposed amendments and revisions to Part 2424, Negotiability Proceedings, are as follows.

Part 2424—Negotiability Proceedings

Subpart A—Applicability of This Part

Section 2424.1. This section establishes the January 1, 1999 effective date of the regulations. The section clarifies that the revised regulations will be applied to all written allegations of nonnegotiability that are requested by exclusive representatives after January 1, 1999; all petitions for review filed after January 1, 1999 by exclusive representatives in response to agency head disapprovals of contract provisions; and all petitions for review filed after January 1, 1999 in response to written allegations of nonnegotiability that were requested prior to that date (whether or not the written allegation is actually provided to the exclusive representative prior to that date).

Section 2424.2. The listed terms are used throughout the part and are defined to both explain their meaning and to avoid repetition in individual sections in the part. Two new terms—''negotiability dispute'' and ''bargaining dispute''—distinguish different types of disagreements over the duty to bargain. Two other new terms—''prefiling conference'' and ''postfiling conference''—encompass requirements applicable to requests for allegations of nonnegotiability regarding proposals for bargaining and petitions for review of agency-head disapprovals of provisions.

The term ''negotiability dispute'' refers to a disagreement concerning the legality of a proposal or provision.

Specifically, a negotiability dispute is raised by an agency contention that: (1) A proposal is outside the agency's duty to bargain under section 7117 of the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7117; or (2) a provision was properly disapproved by the agency head under section 7114(c) of the Statute, 5 U.S.C. 7114(c). A ''negotiability dispute'' exists when an agency contends that a proposal or provision is not a proper subject of bargaining *under any circumstances,* or when an agency contends that a proposal is bargainable only at its election. As an example, a dispute over whether a proposal constitutes an appropriate arrangement for employees adversely affected by the exercise of a management right under section 7106 of the Statute raises a ''negotiability dispute.''

The term ''bargaining dispute'' refers to disagreements over whether, in the *specific circumstances* involved in a particular case, an agency is obligated to bargain over a proposal without regard to whether the proposal is otherwise consistent with law and regulation. As an example, an agency contention that it is not required to bargain mid-term over a proposal because it concerns a matter that is ''covered by'' an existing collective bargaining agreement raises a ''bargaining dispute.'' As another example, an agency contention that it need not bargain over a proposal offered in response to a management-initiated change in conditions of employment because the effect of the change on unit employees' conditions of employment is *de minimis* raises a ''bargaining dispute.''

It is the Authority's experience that a single petition for review filed under this part sometimes raises both a ''negotiability dispute'' and a ''bargaining dispute.'' That is, an agency might assert both that a particular proposal is outside the duty to bargain under any circumstance because it is inconsistent with law and that it is not required to bargain over the proposal in the specific circumstances of the case because it concerns a matter that is covered by the parties' agreement.

The terms ''prefiling conference'' and ''postfiling conference'' refer to discussions among representatives of the parties and a representative of the FLRA. A ''prefiling conference'' occurs before an exclusive representative requests a written allegation of nonnegotiability concerning a proposal for bargaining and encompasses discussion regarding, among other things, the meaning of a proposal and the ground(s) on which the agency claims that the proposal is outside the duty to bargain. A ''postfiling conference'' encompasses the same discussion but involves a provision and occurs after the filing of a petition for review by an exclusive representative but before the filing of the agency's statement of position.

Sections 2424.3–2424.9. These sections are reserved.

Subpart B—Prefiling Procedures in Cases Involving Proposals

Subpart B proposes significant changes to the current procedures for processing a negotiability appeal involving a proposal. As prompted by suggestions from the Task Force and numerous commenters, the proposed procedures facilitate early involvement by the Authority with the intention to assist resolution of disputes without the necessity for filing a petition for review. In cases where petitions for review are subsequently filed, these procedures facilitate clarification and narrowing of the issues in dispute with the intention to expedite the Authority's decision-making process.

The procedures in this subpart would establish one of several options considered by the Authority for implementing these goals. This option requires a prefiling conference among the parties and a representative of the FLRA before an exclusive representative would be permitted to request a written allegation of nonnegotiability from an agency. The prefiling conference would only be conducted if the exclusive representative had attempted to bargain on a specific proposal and the agency had declined to do so on the basis that the proposal was not a proper subject of bargaining under any circumstances or was bargainable only at its election. This requirement offers the potential for substantial benefits to exclusive representatives, agencies, and the Authority by resolving disputes without commencing a formal adjudicatory proceeding. However, the Authority also recognizes that such requirement could generate unnecessary, or premature, requests for Authority assistance. Such requirement also could be viewed as creating an additional, unnecessary forum for resolution of disputes.

Comments are also requested on two alternatives to requiring a prefiling conference. First, the prefiling conference could be made optional, to be conducted only with the agreement of both parties. Second, a postfiling conference could be required (after the filing of a petition for review but before the filing of an agency statement of position); this procedure would be the same one now proposed in § 2424.30 for petitions involving provisions that have been disapproved by an agency head.

There may be other alternatives as well. Accordingly, the Authority seeks comment on whether an optional or required conference among the parties and a representative designated by the Authority should take place: (1) Prior to a request for a written allegation of nonnegotiability, as proposed in this subpart; (2) immediately after the filing of a petition for review, as proposed in subpart D in connection with provisions that have been disapproved by an agency head; or (3) at another point in the negotiability process. Following receipt of comments, the Authority will determine and promulgate a final regulation setting out the most appropriate conference procedure.

Section 2424.10. This section advises the parties of the availability of the Federal Labor Relations Authority's Collaboration and Alternative Dispute Resolution Program to assist them in resolving disputes that arise under this part.

Section 2424.11. This section and section 2424.12 introduce a new dispute resolution process that is designed to address negotiability and bargaining disputes between the parties prior to an exclusive representative requesting, and the agency providing, a written allegation that the duty to bargain in good faith does not extend to a particular proposal. The first step, set forth in subsection (a), requires the filing of a notice of intent to appeal before invoking the statutory process set out in 5 U.S.C. 7117(c). Subsection (b) outlines the requirements, and subsection (c) sets forth the service requirements, of such notice.

Section 2424.12. As noted above, this new section provides for discussions between the parties and a designated representative of the FLRA prior to a request for a written allegation of nonnegotiability. Subsection (a) explains that the representative of the FLRA will conduct a prefiling conference with the parties where such a conference is appropriate. A prefiling conference is appropriate and will be conducted unless, for example, the dispute in not ripe for intervention (for example when the bargaining proposal has not been discussed by the parties). At the prefiling conference, which may occur by telephone or in person, the parties must be prepared to discuss and clarify the issues involved the dispute. The matters to be discussed at the prefiling conference are specifically set forth in the regulation. A record of the prefiling conference, to which the parties may timely object, will be prepared in accordance with subsection

(b). It is the Authority's intent that, whenever possible, the record of the prefiling conference will be developed and agreed upon prior to concluding the conference.

Section 2424.13. This section incorporates and amends the current procedure for requesting and giving allegations of nonnegotiability set out in § 2424.3 of the current regulations. As amended, the regulation provides that an exclusive representative may not seek a written allegation concerning the duty to bargain over a particular proposal until the Authority has completed the prefiling conference, declined to hold a prefiling conference, or 30 days have elapsed since the filing of the notice of intent to appeal—whichever occurs first. The latter alternative permits, but does not require, the exclusive representative to request a written allegation concerning the duty to bargain after the passage of 30 days.

Sections 2424.14–2424.19. These sections are reserved.

Subpart C—Filing a Petition

Section 2424.20. This is a new section that supersedes § 2424.2 of the current regulations. The revised regulation provides that an exclusive representative must comply with the prefiling requirements set forth in Subpart B prior to filing a petition for review. The revised regulation explains that Subpart B does not apply in cases involving an agency head's disapproval of a provision pursuant to 5 U.S.C. 7114.

Section 2424.21. This section, which addresses the time limits for filing a petition for review, incorporates the time limits set out in the current § 2424.3. A new provision specifies that an allegation of nonnegotiability provided in a response to a request that does not comply with Subpart B will not prompt the running of the 15-day period in which to file a petition for review.

Section 2424.22. This section incorporates and expands the content requirements for a petition for review contained in current § 2424.4. A form will be developed for use in filing a petition for review, but its use will not be required provided that the petition for review includes all of the information set forth in the regulation. In addition to the requirements in the current regulation, this section requires the exclusive representative to provide additional information in the petition, including any modifications to the proposal or provision resulting from the prefiling conference, a statement as to whether severance is requested and support for such a request, notification of whether the negotiability dispute is involved in an impasse procedure under part 2470 of this subchapter or a grievance pursuant to 5 U.S.C. 7121, any request for a hearing before the Authority, and, where available, a copy of the record of the prefiling conference. The section also requires that any petition for review exceeding 25 double-spaced pages in length include a table of contents and a table of legal authorities cited. This requirement, which also applies to agency statements of position under section 2424.32 and responses of exclusive representatives under section 2424.33, mirrors the requirement established in section 2423.40(a)(3), which applies to exceptions to administrative law judge decisions in unfair labor practice cases.

Comment is specifically requested on whether the proposed requirements are burdensome. If the requirements are viewed as burdensome, then commenters are requested to suggest alternatives to create a record sufficient for an agency to file a complete statement of position and for the Authority to resolve the negotiability and/or bargaining dispute.

Section 2424.23. This section parallels the current § 2424.4(b) concerning service of the petition for review.

Sections 2424.24–2424.29. These sections are reserved.

Subpart D—Processing a Petition for Review

Subpart D establishes procedures for processing petitions for review involving proposals and provisions. Section 2424.30, discussed below, requires a postfiling conference in cases involving provisions, i.e. matters that have been agreed to by the parties and disapproved on agency head review pursuant to 5 U.S.C. 7114(c).

Section 2424.30. This section addresses the processing of petitions for review involving provisions in a collective bargaining agreement. Subsection (a) sets out the purposes of the conference, which would take place after a petition for review has been filed. The purposes of the conference would be the same as those established in section 2424.12(a) for prefiling conferences.

Subsection (b) specifies that the representative of the FLRA may, on finding good cause (such cause to include, but not be limited to, cases where the parties agree), extend the time limits for filing the agency's statement of position and the exclusive representative's response thereto. Subsection (c) provides for the preparation of, service of, and objection to, the record of the postfiling conference. Subsection (c) is comparable to section 2424.12(b), which sets out identical procedures for the records of prefiling conferences.

Section 2424.31. This section replaces and significantly changes the current § 2424.5. Subsection (a) specifies how the Authority will act on petitions raising negotiability disputes where the exclusive representative has pursued a related bargaining dispute in unfair labor practice or grievance proceedings. In particular, if an exclusive representative has pursued a related bargaining dispute in such proceedings, the Authority will dismiss the petition for review without prejudice to the right of the exclusive representative to refile the petition, after the other proceeding is completed, if necessary to resolve remaining issues. After such refiling, the Authority will determine whether resolution of the petition for review is still required. Under the proposed section, an exclusive representative would, if it filed both an unfair labor practice charge and a petition for review, no longer have the ability to select which should be processed first.

Subsection (b) of the revised regulation distinguishes between two categories of cases: (1) Cases raising a negotiability dispute only; and (2) cases raising both a negotiability dispute and a bargaining dispute.

With respect to the first category, the Authority will resolve the petition under the procedures set out in subsection (b)(1). With respect to the second category, the regulation identifies three approaches in section (b)(2) under which the Authority may proceed, the last of which proposes a significant change to the current practice. Under (b)(2)(i), the Authority will inform the exclusive representative of other proceedings in which it may raise the bargaining dispute; if the exclusive representative proceeds to raise the bargaining dispute in another proceeding, the petition will be processed in accord with subsection (a) of this section. Section (b)(2)(ii), which is the current practice, allows the Authority to address and resolve only the negotiability—but not the bargaining—dispute. Under the final option, section (b)(2)(iii), the Authority would address and resolve both the negotiability dispute and the bargaining dispute aspects of a case. This option departs from current practice, in which the Authority does not resolve bargaining dispute issues in the negotiability process; where such disputes exist, the parties are obliged to pursue them in other proceedings. This change would, in appropriate cases,

relieve the parties of the burden of litigating the same dispute in two, consecutive proceedings.

Section 2424.32. This section sets out the time limits for filing, contents, and service of the agency's statement of position. These requirements make several changes to the requirements that now appear in the current § 2424.6. As with the petition for review, a form will be developed for use in filing, but its use will not be required provided that the statement of position includes all of the information set forth in the regulation. Consistent with section 7117(c)(3) of the Statute, a statement of position must be filed and, as set forth in sections 2424.35 and 2424.37 of the regulations, failure to do so may result in the Authority's refusal to consider an argument or may be considered a withdrawal of previous allegations of nonnegotiability and/or a concession. As an example, an assertion made in an allegation of nonnegotiability but not repeated in a statement of position will, in appropriate circumstances, be deemed withdrawn. As another example, an agency's failure to respond to an exclusive representative's assertion that a proposal constitutes an appropriate arrangement within the meaning of section 7106(b)(3) of the Statute, whether or not the agency repeats an argument that the proposal is inconsistent with section 7106(a), will, in appropriate circumstances, be deemed a concession that the proposal is within the duty to bargain under section 7106(b)(3).

In addition to setting out the time limits for filing, subsection (a) provides that the time limits may be extended. Subsection (b), concerning the content of the statement of position, retains and broadens the requirements in the current regulation by, for example, requiring that the agency provide a copy of the particular section of any law, rule, regulation, collective bargaining agreement, or other authority relied on as a basis for an objection or assertion that the matter is outside the duty to bargain, and describe with particularity any opposition to the exclusive representative's request for severance. Service of the statement of position is addressed in subsection (c).

Comment is specifically requested on whether the proposed requirements are burdensome. If the requirements are viewed as burdensome, then commenters are requested to suggest alternatives to create a record sufficient for an exclusive representative to file a complete response and for the Authority to resolve the negotiability and/or bargaining dispute.

Section 2424.33. All matters related to the exclusive representative's response to the agency's statement of position that currently appear in § 2424.7 are incorporated here. The section mirrors the format of the preceding section, setting out time limits, contents, and service requirements in subsections (a), (b), and (c) respectively. Subsection (a) provides that time limits may be extended. As with other sections of the proposed rules, subsection (b) indicates that a form will be developed for use in filing, but its use will not be required provided that the response includes all of the information set forth in the regulation. The section requires that the exclusive representative specifically support any allegations and citations offered in response to the agency's statement of position. Service of the statement of position is addressed in subsection (c).

This section is not intended to require an exclusive representative to restate arguments and information that were included in its petition for review. However, consistent with section 7117(c)(4) of the Statute, a response must be filed and, as set forth in sections 2424.35 and 2424.37 of the regulations, failure to address an assertion or argument made in an agency's statement of position may result in the Authority's refusal to consider an argument or may be deemed a concession. As an example, an exclusive representative's failure to respond to an agency's assertion that a proposal would directly determine the conditions of employment of employees outside the bargaining unit will, in appropriate circumstances, be deemed a concession that it would have that effect.

Section 2424.34. This new section explains procedures through which the Authority, or a representative of the FLRA, may resolve factual disputes arising in connection with a negotiability and/or bargaining dispute.

Section 2424.35. This section, which incorporates certain provisions in the current § 2424.4, outlines the options available to the Authority in the event that a party fails to participate in a conference or provide timely, complete, and responsive information. Subsections (a)–(e) define the actions the Authority may, in its discretion, take to address a party's failures in these respects.

Section 2424.36. This section, which addresses additional submissions to the Authority, incorporates the requirements set out in the current § 2424.8.

Section 2424.37. This new section defines both the exclusive representative's and the agency's responsibilities to make, respond to, and support arguments. Subsection (a) specifies the exclusive representative's responsibilities. Absent good cause, the regulations limit the exclusive representative's arguments to those raised in its petition for review and those made in response to the agency's statement of position. Similarly, subsection (b) specifies the agency's responsibilities and, absent good cause, prohibits an agency from subsequently raising arguments in its statement of position or any other proceeding that it did not raise in the prefiling or postfiling conference. Failure by either party to raise, support, or respond to a particular objection or assertion will be deemed, as appropriate, a concession to, or withdrawal of, the objection or assertion.

Section 2424.38. This section regarding the holding of a hearing pursuant to 5 U.S.C. 7117(c)(5) contains no changes from the current § 2424.9.

Section 2424.39. This section is reserved.

Subpart E—Decision and Order

Section 2424.40. Matters related to decisions and orders of the Authority, which currently appear in § 2424.10, are moved to this section and appear in subsections (a) , (b), and (c). Subsection (a) states that the Authority will expedite proceedings to the extent practicable. Subsection (b) explains the actions the Authority will take with respect to proposals and subsection (c) explains the actions the Authority will take with respect to provisions disapproved on agency head review. This section is intended to clarify the actions that the Authority will take in its decisions and orders, depending on the determinations reached in individual cases. For example, the Authority order will note when bargaining dispute defenses have been raised but not resolved and the Authority's order will recognize the severance of provisions or proposals.

Section 2424.41. The current § 2424.10(c) is moved to this section. No changes are made.

Sections 2424.42—2424.49. These sections are reserved.

Subpart F—Criteria for Determining Compelling Need for Agency Rules and Regulations

Section 2424.50. The current § 2424.11 is moved to this section. No changes are made.

Sections 2424.51—2424.59. These sections are reserved.

Regulatory Flexibility Act Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Authority has determined that these regulations, as amended, will not have a significant impact on a substantial number of small entities, because this rule applies to federal employees, federal agencies, and labor organizations representing federal employees.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This action is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction Act of 1995

The amended regulations contain no additional information collection or record keeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*

List of Subjects in 5 CFR Part 2424

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

For the reasons discussed in the preamble, the Federal Labor Relations Authority proposes to revise 5 CFR Part 2424 as follows:

PART 2424—NEGOTIABILITY PROCEEDINGS

Subpart A—Applicability of This Part and Definitions

Sec.
2424.1 Applicability of this part.
2424.2 Definitions.
2424.3–2424.9 [Reserved]

Subpart B—Prefiling Procedures in Cases Involving Proposals

2424.10 Collaboration and Alternative Dispute Resolution Program.
2424.11 Notice of intent to appeal.
2424.12 Prefiling conference.
2424.13 Requesting and giving allegations concerning the duty to bargain.
2424.14–2424.19 [Reserved]

Subpart C—Filing a Petition

2424.20 Who may file a petition.
2424.21 Time limits for filing a petition.
2424.22 Content of petition.
2424.23 Service of petition.
2424.24–2424.29 [Reserved]

Subpart D—Processing of a Petition for Review

2424.30 Postfiling conference in cases involving provisions.
2424.31 Procedure through which the petition for review will be resolved.
2424.32 Agency statement of position; time limits; content; service.
2424.33 Response of the exclusive representative; time limits; content; service.
2424.34 Resolution of disputed factual matters.
2424.35 Participation in conferences; incomplete or untimely submissions; Authority requests for supplemental information.
2424.36 Additional submissions to the Authority.
2424.37 Responsibilities to make, respond to, and support arguments.
2424.38 Hearing.
2424.39 [Reserved]

Subpart E—Decision and order.

2424.40 Authority decision and order.
2424.41 Compliance.
2424.42–2424.49 [Reserved]

Subpart F—Criteria for Determining Compelling Need for Agency Rules and Regulations

2424.50 Illustrative criteria.
2424.51–2424.59 [Reserved]

Authority: 5 U.S.C. 7134.

Subpart A—Applicability of This Part and Definitions

§ 2424.1 Applicability of this part.

This part is applicable to all written allegations of nonnegotiability that are requested by exclusive representatives after January 1, 1999; all petitions for review filed after January 1, 1999 by exclusive representatives in response to agency head disapprovals of contract provisions; and all petitions for review filed after January 1, 1999 in response to written allegations of nonnegotiability that were requested prior to that date.

§ 2424.2 Definitions.

In this part, the following definitions shall apply:

(a) *Bargaining dispute* means a disagreement between an exclusive representative and an agency concerning whether, in the specific circumstances involved in a particular case, the parties are obligated to bargain over a proposal. A bargaining dispute may exist where there is no dispute about the legality of a proposal.

(b) *Collaboration and Alternative Dispute Resolution Program* refers to an agency-wide program in the Federal Labor Relations Authority that assists the parties in resolving disputes.

(c) *Negotiability dispute* means a disagreement between an exclusive representative and an agency concerning the legality of a proposal or provision. A negotiability dispute exists when an agency contends that a proposal or provision is not a proper subject of bargaining under any circumstances, and when an agency contends that a proposal is bargainable only at its election.

(d) *Notice of intent to appeal* means a written notice that an exclusive representative must file with the Authority prior to requesting a written allegation from an agency that the duty to bargain in good faith does not extend to a matter proposed to be bargained.

(e) *Petition for review* means an appeal filed with the Authority after:

(1) An exclusive representative has requested a written allegation from an agency that the duty to bargain in good faith does not extend to a matter proposed to be bargained; or

(2) An agency head has disapproved a provision.

(f) *Proposal* means any matter offered for bargaining that has not been agreed to by the parties.

(g) *Provision* means any matter that has been offered for bargaining and agreed to by the parties, including matters disapproved by the agency head on review pursuant to 5 U.S.C. 7114(c).

(h) *Service* requires compliance with part 2429 of this subchapter and also requires the parties to serve copies of any filing on the other's principal bargaining representative and, in the case of an exclusive representative, on the head of the agency.

(i) *Severance* refers to the division of a proposal or provision into separate parts having independent meaning in the event that certain parts of a proposal are determined to be outside the duty to bargain or certain parts of a provision are determined to be contrary to law.

(j) *Written allegation concerning the duty to bargain* means an agency allegation, provided in response to a written request from an exclusive representative, that the duty to bargain in good faith does not extend to a matter.

§ 2424.3–2424.9 [Reserved]

Subpart B—Prefiling Procedures in Cases Involving Proposals

§ 2424.10 Collaboration and Alternative Dispute Resolution Program.

Where the parties experience difficulties in resolving disputes that arise under this part, they may voluntarily request the assistance of the Collaboration and Alternative Dispute Resolution Program. This program will endeavor to assist the parties to resolve these disputes before they become cases, utilize alternative dispute resolution techniques, and develop collaborative and constructive relationships.

§ 2424.11 Notice of intent to appeal.

(a) *Precondition.* After the parties have attempted, but failed to reach agreement over a proposal and the agency has indicated that the duty to bargain does not extend to the proposal under consideration, prior to requesting a written allegation concerning the duty to bargain, the exclusive representative must file a notice of intent to appeal with the Authority. The filing of a notice of intent to appeal does not relieve the parties of any obligation to continue negotiations in an effort to resolve the dispute.

(b) *Form and content.* The notice of intent to appeal must be in writing on a form provided by the Authority for that purpose, or in a substantially similar format, and must briefly describe any proposal that the agency has claimed to be the subject of a negotiability dispute and any attempts to reach agreement over the proposal. It must contain the names, addresses, telephone, and facsimile numbers of the parties to the negotiations.

(c) *Service.* The notice of intent to appeal must be served in accord with § 2424.2(h).

§ 2424.12 Prefiling conference.

(a) *Conduct of conference.* On receipt of the notice of intent to appeal, a representative of the FLRA will determine whether to conduct and, where appropriate, will conduct, one or more prefiling conferences either by telephone or in person. If it is determined not to conduct a conference, the parties will be provided the reasons for such determination. All parties to the dispute must participate in any prefiling conference and be prepared to discuss and clarify:

(1) The meaning of the proposal(s) in dispute;

(2) Any disputed factual issue(s);

(3) Any agency negotiability dispute objections to the proposal(s);

(4) Any agency bargaining dispute defenses to the proposal(s);

(5) Whether the dispute is also involved in an unfair labor practice charge under part 2423 of this subchapter, in a grievance pursuant to 5 U.S.C. 7121, or an impasse procedure under part 2470 of this subchapter;

(6) Whether the dispute can be resolved through the Collaboration and Alternative Dispute Resolution program.

(b) *Record of the prefiling conference.* After the prefiling conference has been completed, the representative of the FLRA will prepare and serve a report of what transpired during the conference. The parties have 10 days to file written objection to the report of the prefiling conference, which will be made part of the record of the conference.

§ 2424.13 Requesting and giving written allegations concerning the duty to bargain.

(a) *Relationship between prefiling conference and requests for written allegations concerning the duty to bargain.* The exclusive representative may not request a written allegation concerning the duty to bargain until the prefiling conference has been completed. *Provided however,* if the Authority declines to hold a prefiling conference or if a prefiling conference has not been completed within 30 days of the filing of a notice of intent to appeal, the exclusive representative may request a written allegation concerning the duty to bargain.

(b) *Agency response.* The agency must respond to the exclusive representative's request and effect service in accord with § 2424.2(h).

§§ 2424.14—2424.19 [Reserved]

Subpart C—Filing a Petition

§ 2424.20 Who may file a petition.

A petition for review of a negotiability issue may be filed by an exclusive representative that is a party to the negotiations, and has complied with subpart B. *Provided however,* that where, pursuant to 5 U.S.C. 7114(c), an agency head has disapproved a provision, an exclusive representative may file a petition without having complied with subpart B.

§ 2424.21 Time limits for filing a petition.

The time limit for filing a petition for review is fifteen (15) days after the date of service of the agency's written allegation, requested and provided in accord with §§ 2424.12 and 2424.13, that the duty to bargain in good faith does not extend to the matter proposed to be bargained. *Provided however,* that review of a negotiability issue may be requested by an exclusive representative under this subpart without a prior written allegation concerning the duty to bargain if the agency has not served such written allegation upon the exclusive representative within ten (10) days after the agency bargaining representative at the negotiations has received a written request for such allegation. A written allegation concerning the duty to bargain that is provided prior to the notice of intent to appeal and prefiling conference described in subpart B will not begin the 15-day filing period for the petition for review.

§ 2424.22 Content of petition.

A petition for review must be filed on a form provided by the Authority for that purpose, or in a substantially similar format. It must be dated and contain the following:

(a) A statement setting forth the language of any proposal or provision, including any modifications resulting from the prefiling conference.

(b) An explicit statement of the meaning of the proposal or provision as a result of the prefiling conference, including:

(1) Explanation of special terms or phrases, technical language, or any other aspect of the language of the proposal or provision that is not in common usage or has a different meaning in the particular work situation; and

(2) Where the proposal or provision is concerned with a particular work situation, or other particular circumstances, a description of the situation or circumstances that will enable the Authority to understand the context in which the proposal is intended to apply; and

(3) Explanation of how the proposal or provision is intended to work and a description of the impact that it will have.

(c) A statement whether severance is requested, and if so, as to which particular portions of the proposal or provision. The exclusive representative must support its request for severance with an explanation of how the severed portions of the proposal or provision may stand alone, and how such severed portions would operate.

(d) Where available, a copy of the record of the prefiling conference.

(e) A copy of all pertinent material, including the agency's written allegation concerning the duty to bargain, any matter referred to in the proposal or provision, and any other relevant documentary material.

(f) Notification by the petitioning exclusive representative as to whether the dispute is also involved in an unfair

labor practice charge under part 2423 of this subchapter, in a grievance pursuant to 5 U.S.C. 7121, or an impasse procedure under part 2470 of this subchapter.

(g) Any request for a hearing before the Authority and the reasons supporting such suggestion.

(h) A table of contents and a table of legal authorities cited if the petition for review exceeds 25 double-spaced pages in length.

§ 2424.23 Service of petition.

The petition for review must be served in accord with § 2424.2(h).

§ 2424.24—2424.29 [Reserved]

Subpart D—Processing of a Petition for Review

§ 2424.30 Postfiling conference in cases involving provisions.

(a) *Conduct of conference.* On receipt of the petition for review involving a provision, a representative of the FLRA will, where appropriate, conduct one or more postfiling conferences either by telephone or in person. All parties to the dispute must participate in any postfiling conference and be prepared to discuss and clarify:

(1) The meaning of the provision(s) in dispute;

(2) Any disputed factual issue(s);

(3) Any agency negotiability dispute objections to the provision(s);

(4) Any agency bargaining dispute defenses to the provision(s);

(5) Whether the dispute is also involved in an unfair labor practice charge under part 2423 of this subchapter, in a grievance pursuant to 5 U.S.C. 7121, or an impasse procedure under part 2470 of this subchapter;

(6) Whether the dispute can be resolved through the Collaboration and Alternative Dispute Resolution program.

(b) Extension of time limits. The representative of the FLRA may, on determining that it will effectuate the purposes of the Federal Service Labor Management Relations Statute and this part, extend the time limits for filing set out in §§ 2424.32 and 2424.33.

(c) *Record of the postfiling conference.* After the postfiling conference has been completed, the representative of the FLRA will prepare and serve a report of what transpired during the conference. The parties have 10 days to file written objection to the report of the postfiling conference, which will be made part of the record of the conference.

§ 2424.31 Procedure through which the petition for review dispute will be resolved.

(a) *Exclusive representative has pursued bargaining dispute in other proceedings.* Where an exclusive representative files an unfair labor practice charge pursuant to part 2423 of this subchapter or grievance under 5 U.S.C. 7121, and also files a petition for review pursuant to this part concerning the same dispute, the Authority will dismiss the petition for review without prejudice to the right of the exclusive representative to refile the petition for review after the unfair labor practice or the grievance has been resolved. After the unfair labor practice charge or grievance is resolved, the exclusive representative may refile the petition within 30 days of resolution of the unfair labor practice charge or grievance, and the Authority will determine whether the resolution of the petition is still required.

(b) *Exclusive representative has not pursued bargaining dispute in other proceedings.* Where an exclusive representative files only a petition for review under this part, the petition will be processed as follows:

(1) *Agency does not assert bargaining dispute defenses.* Where the agency has not asserted any bargaining dispute defenses, the Authority will resolve the petition by addressing the negotiability dispute objections under the procedures of this part.

(2) *Agency does assert bargaining dispute defenses.* Where the agency has asserted bargaining dispute defenses, the Authority will either:

(i) Inform the exclusive representative of any opportunity to file an unfair labor practice charge pursuant to part 2423 or a grievance under 5 U.S.C. 7121 and, where the exclusive representative pursues either of these courses, proceed in accord with paragraph (a) of this section;

(ii) Proceed to resolve only the negotiability dispute aspects of the petition, but not the bargaining dispute defenses raised by the agency; or,

(iii) Proceed to resolve the petition in its entirety, including any negotiability dispute objections and bargaining dispute defenses raised by the agency, under the procedures of this part.

§ 2424.32 Agency statement of position; time limits; content; service.

(a) *Time limit for filing.* Unless the time limit for filing has been extended pursuant to § 2424.30(b) or § 2429.23, the agency must file a statement of position within thirty (30) days after the date the head of the agency receives a copy of a petition for review of a negotiability issue.

(b) *Contents.* The agency's statement of position must be on a form provided by the Authority for that purpose, or in a substantially similar format. It must be dated and must:

(1) Withdraw the allegation that the duty to bargain in good faith does not extend to the matter proposed to be negotiated; or

(2) Set forth in full the agency's position on any matters relevant to the petition that it wishes the Authority to consider in reaching its decision, including a full and detailed statement of the reasons supporting any objections or assertions made concerning any proposal during the prefiling conference or provision during the postfiling conference. The statement must cite and contain a copy of the particular section of any law, rule, regulation, or provision of a collective bargaining agreement relied on. The statement also must cite and contain a copy of other authority relied on as a basis for the objection or assertion, except that copies of published judicial decisions and decisions of the Authority are not required. The agency must submit legal arguments and explanation in support of its contentions that the duty to bargain does not extend to a particular matter. The statement of position must also include:

(i) If different from the exclusive representative's position, an explanation of the meaning the agency attributes to the proposal or provision, including any special terms or phrases, technical language, or any other aspect of the language of the proposal or provision that is not in common usage or has a different meaning in the particular work situation, and the reasons for disagreeing with the exclusive representative's explanation of meaning;

(ii) A description of the particular work situation, or other particular circumstances the agency views the proposal or provision to concern, which will enable the Authority to understand the context in which the proposal is considered to apply to the agency; and

(iii) If different from the exclusive representative's position, an explanation of how the agency asserts the proposal or provision is intended to work and a description of the impact that it will have, and the reasons for disagreeing with the exclusive representative's explanation of meaning;.

(3) If the agency opposes the exclusive representative's request for severance in any respect, the agency must explain with particularity why severance is not appropriate.

(4) A table of contents and a table of legal authorities cited if the statement of position exceeds 25 double-spaced pages in length.

(c) *Service.* A copy of the agency's statement of position, including all

attachments thereto, must be served in accord with § 2424.2(h).

§ 2424.33 Response of the exclusive representative; time limits; content; service.

(a) *Time limit for filing.* Unless the time limit for filing has been extended pursuant to § 2424.30(b) or § 2429.23, within fifteen (15) days after the date the exclusive representative receives a copy of an agency's statement of position, the exclusive representative must file a full and detailed response.

(b) *Contents.* The response must be on a form provided by the Authority for that purpose, or in a substantially similar format. The exclusive representative's response is specifically limited to the matters raised in the agency's statement of position. The response must state the exclusive representative's position including:

(1) Any disagreement with the agency's allegation that a proposal is not within the duty to bargain or that a provision is contrary to law. The exclusive representative must offer specific arguments and explanations in opposition to any agency argument, including the identification and explanation of exceptions to management rights, such as negotiable procedures and appropriate arrangements. The response must cite and contain a copy of the particular section of any law, rule, regulation, or provision of a collective bargaining agreement relied on. The response also must cite and contain a copy of other authority relied on as a basis for the objection or assertion, except that copies of published judicial decisions and decisions of the Authority are not required;

(2) Any arguments and explanations, in response to an agency's allegations, that a proposal or provision is severable; and

(3) Any allegation that the agency's rules or regulations violate applicable law, rule, regulation or appropriate authority outside the agency; that the rules or regulations were not issued by the agency or by any primary national subdivision of the agency, or otherwise are not applicable to bar negotiations under 5 U.S.C. 7117(a)(3); or that no compelling need exists for the rules or regulations to bar negotiations. All such allegations must be supported by argument, explanation, and citation to any applicable law, rule, or regulation.

(4) A table of contents and a table of legal authorities cited if the response to an agency statement of position exceeds 25 double-spaced pages in length.

(c) *Service.* A copy of the response of the exclusive representative including all attachments thereto must be served in accord with § 2424.2(h).

§ 2424.34 Resolution of disputed factual matters.

In resolving necessary factual matters in a negotiability or bargaining dispute, the Authority, or its designated agent, may, as appropriate:

(a) Request specific documentary evidence;

(b) Request that the parties provide answers to specific factual questions in the form of interrogatories;

(c) Refer the matter for fact finding and a recommended decision before a hearing officer designated by the Authority; or

(d) Take any other action that will aid in the resolution of the disputed factual issue, including the holding of a hearing in accord with § 2424.38.

§ 2424.35 Participation in conferences; incomplete or untimely submissions; Authority requests for supplemental information.

Where a party fails to participate in a prefiling conference, pursuant to § 2424.12, or a postfiling conference as described in § 2424.30, or where a party provides an untimely or incomplete petition for review as described in § 2424.22, an untimely or incomplete statement of position as described in § 2424.32, an untimely or incomplete response to an agency's statement of position as described in § 2424.33, or otherwise fails to provide timely or responsive information under this part, the Authority may as appropriate and in its discretion:

(a) Refuse to consider certain exclusive representative arguments and, where appropriate, dismiss the petition for review, with or without prejudice to refile;

(b) Refuse to consider certain agency arguments and, where appropriate, grant the petition for review and order the agency to bargain, with or without conditions;

(c) Direct a party to provide the necessary or requested information, or direct the holding of a fact finding conference or hearing for the purpose of obtaining the necessary or requested information;

(d) Disregard and/or strike from the record portions of a party's claims and arguments that rely on information not provided;

(e) Take any other action which in the Authority's discretion is deemed appropriate.

§ 2424.36 Additional submissions to the Authority.

The Authority will not consider any submission filed by any party, whether supplemental or responsive in nature, other than those authorized or requested under this part, except that the Authority may, in its discretion, grant permission to file such a submission based on a written request by any party, a copy of which is served in accord with this part.

§ 2424.37 Responsibilities to make, respond to, and support arguments.

(a) *Responsibilities of the exclusive representative.* In the petition for and response to the agency's statement of position filed pursuant to this part, the exclusive representative has the burden of explaining fully why the proposals or provisions under consideration are within the duty to bargain and, where applicable, why severance is appropriate. Failure to address an assertion or objection raised by the agency, will, where appropriate, be deemed a concession to such objection or assertion. Absent good cause, arguments not presented in the petition for review or made in response to the agency's statement of position may not be raised in the response.

(b) *Responsibilities of the agency.* In the statement of position, filed pursuant to § 2424.32, the agency has the burden of explaining fully why the proposals or provisions under consideration are outside the duty to bargain or contrary to law, respectively, and where applicable, its position on severance. Failure to raise and support an objection or defense, will, where appropriate, be deemed a withdrawal of such objection or assertion, and failure to address an assertion raised by the exclusive representative will, where appropriate, be deemed a concession to such assertion. Absent good cause, arguments not raised in the prefiling conference, pursuant to § 2424.12, or postfiling conference, pursuant to § 2424.30, may not be raised in the agency's statement of position or in any other proceeding.

§ 2424.38 Hearing.

A hearing may be held, in the discretion of the Authority, before a determination is made under 5 U.S.C. 7117(b) or (c). If a hearing is held, it will be expedited to the extent practicable and will not include the General Counsel as a party.

§ 2424.39 [Reserved]

Subpart E—Decision and Order

§ 2424.40 Authority decision and order.

(a) *Issuance.* Subject to the requirements of this part, the Authority shall expedite proceedings under this part to the extent practicable and shall issue to the exclusive representative and

to the agency a written decision on the allegation and the specific reasons therefor at the earliest practicable date.

(b) *Cases involving proposals.* If the Authority finds that the duty to bargain extends to the matter proposed to be bargained or any severable part of a matter proposed to be bargained, the decision of the Authority will include an order that the agency must on request (or as otherwise agreed to by the parties) bargain concerning such matter. If the Authority finds that the duty to bargain does not extend to the matter proposed to be bargained, the Authority will so state and issue an order dismissing the petition for review of the negotiability issue. If the Authority finds that the matter is bargainable only at the election of the agency, the Authority will so state. If the Authority finds that the duty to bargain extends to the negotiability dispute aspects of the proposal, but there are unresolved bargaining dispute defenses, the decision of the Authority will include an order that the agency must on request (or as otherwise agreed to by the parties) bargain on this negotiability dispute in the event its bargaining dispute defenses are rejected.

(c) *Cases involving provisions.* If the Authority finds that a provision, or any severable part thereof, disapproved by an agency head pursuant to 5 U.S.C. 7114(c) is not contrary to law, rule or regulation, the decision of the Authority will include an order that the agency must rescind its disapproval of such provision in whole or in part as appropriate. If the Authority finds that a provision disapproved by an agency head pursuant to 5 U.S.C. 7114(c) is contrary to law, rule, or regulation, the Authority will so state and issue an order dismissing the petition for review as to that provision. If the Authority finds that an agreement provision, or any severable part thereof, disapproved by the agency head pursuant to 5 U.S.C. 7114(c), is bargainable only at the election of the agency, the Authority will so state and issue an order that the agency must rescind its disapproval of such provision in whole or in part as appropriate.

§ 2424.41 Compliance.

The agency or exclusive representative may report to the appropriate Regional Director within a specified period the failure to comply with an order, issued as provided in § 2424.40, that the agency must upon request (or as otherwise agreed to by the parties) bargain concerning the disputed matter or that the agency must rescind its disapproval of a provision. If the Authority finds such a failure to comply with its order, the Authority shall take whatever action it deems necessary, including enforcement under 5 U.S.C. 7123(b).

§§ 2424.42–2424.49 [Reserved]

Subpart F—Criteria for Determining Compelling Need for Agency Rules and Regulations

§ 2424.50 Illustrative criteria.

A compelling need exists for an agency rule or regulation concerning any condition of employment when the agency demonstrates that the rule or regulation meets one or more of the following illustrative criteria:

(a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency or primary national subdivision in a manner which is consistent with the requirements of an effective and efficient government.

(b) The rule or regulation is necessary to ensure the maintenance of basic merit principles.

(c) The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature.

§§ 2424.51—2424.59 [Reserved]

Dated: September 3, 1998.

Solly Thomas,

Executive Director, Federal Labor Relations Authority.

[FR Doc. 98–24164 Filed 9–8–98; 8:45 am]

BILLING CODE 6727–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 92–ANE–23]

RIN 2120–AA64

Airworthiness Directives; Pratt & Whitney JT9D Series Turbofan Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the supersedure of an existing airworthiness directive (AD), applicable to Pratt & Whitney (PW) JT9D series turbofan engines, that currently requires initial and repetitive inspections of the sixth stage low pressure turbine (LPT) inner airseal, and modification of the sixth stage LPT inner airseal to reduce the potential for two failure modes. This action would require additional repetitive borescope inspections for sixth stage LPT inner airseals found with cracks less than one inch in length. This proposal is prompted by the publication of a revision to a PW service bulletin that introduces the new borescope inspections. The actions specified by the proposed AD are intended to prevent an uncontained failure of the sixth stage LPT inner airseal, which can result in damage to the aircraft.

DATES: Comments must be received by November 9, 1998.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 92–ANE–23, 12 New England Executive Park, Burlington, MA 01803–5299. Comments may also be sent via the Internet using the following address: ''9-ad-engineprop@faa.dot.gov''. Comments sent via the Internet must contain the docket number in the subject line. Comments may be inspected at this location between 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Pratt & Whitney, 400 Main St., East Hartford, CT 06108; telephone (860) 565–6600, fax (860) 565–4503. This information may be examined at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA.

FOR FURTHER INFORMATION CONTACT: Tara Goodman, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (781) 238–7130, fax (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Comments are specifically invited on the overall regulatory, economic,

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 92–ANE–23.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 92–ANE–23, 12 New England Executive Park, Burlington, MA 01803–5299.

Discussion

On July 7, 1994, the Federal Aviation Administration (FAA) issued airworthiness directive (AD) 94–10–09, Amendment 39–8916 (59 FR 36047, July 15, 1994), applicable to Pratt & Whitney (PW) JT9D series turbofan engines, to require initial and repetitive on-wing borescope or eddy current inspections (ECI) of the sixth stage low pressure turbine (LPT) inner airseal rear retaining wing, initial and repetitive on-wing ECI of the sixth stage LPT inner airseal knife edges, rework of the sixth stage inner airseal knife edges, which is a terminating action to the repetitive knife edge inspections, and rework of the sixth stage LPT inner airseal rear retaining wing. That action was prompted by reports of thermal mechanical interference inducing low cycle fatigue (LCF) cracks at two locations on the sixth stage LPT inner airseal, resulting in five uncontained failures. That condition, if not corrected, could result in an uncontained failure of the sixth stage LPT inner airseal, which can result in damage to the aircraft.

Since the issuance of that AD, PW has issued Service Bulletin (SB) No. 5978, Revision 4, dated May 6, 1998, which introduces additional repetitive borescope inspections for sixth stage LPT inner airseals found with cracks less than one inch in length.

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would supersede AD 94–10–09 to add, at intervals not to exceed 50 cycles in service (CIS) since last inspection, additional repetitive borescope inspections for sixth stage LPT inner airseals found with cracks less than one inch in length. Consistent with the timetable of the existing AD, this proposal would require rework of the sixth stage LPT inner airseal knife edge diameters and rear retaining wings prior to further flight.

There are approximately 566 engines of the affected design in the worldwide fleet. The FAA estimates that 157 engines installed on aircraft of U.S. registry would be affected by this proposed AD, that it would take approximately 2.1 work hours per engine to accomplish the proposed additional inspection, and that the average labor rate is $60 per work hour. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $19,782.

The regulations proposed 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 proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing amendment 39–8916 (59 FR 36047, July 15, 1994) and by adding a new airworthiness directive to read as follows:

Pratt & Whitney: Docket No. 92–ANE–23. Supersedes AD 94–10–09, Amendment 39–8916.

Applicability: Pratt & Whitney (PW) Model JT9D–59A, –70A, –7Q, and –7Q3 turbofan engines, installed on but not limited to Boeing 747 series, McDonnell Douglas DC–10 series, and Airbus A300 series aircraft.

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

Compliance: Required as indicated, unless accomplished previously.

To prevent an uncontained failure of the sixth stage low pressure turbine (LPT) inner airseal, which can result in damage to the aircraft, accomplish the following:

(a) Prior to further flight, rework the sixth stage LPT inner airseal knife edge diameters in accordance with the Accomplishment Instructions of PW Service Bulletin (SB) 5847, Revision 2, dated October 31, 1990.

(b) Eddy current inspect (ECI) or borescope inspect sixth stage LPT inner airseal rear retaining wings for cracks, as follows:

(1) For sixth stage LPT inner airseals identified by part number (P/N) in PW SB No. 5978, Revision 4, dated May 6, 1998, or Revision 3, dated May 20, 1992, with greater than 500 cycles since new (CSN) on the effective date of this AD, accomplish an initial ECI or borescope inspection prior to accumulating more than 250 cycles in service (CIS) after the effective date of this AD, or 500 CIS since the last in-shop fluorescent penetrant inspection (FPI), whichever occurs later, in accordance with the Accomplishment Instructions of PW SB No. 5978, Revision 4, dated May 6, 1998, or Revision 3, dated May 20, 1992.

(2) For sixth stage LPT inner airseals identified by P/N in PW SB No. 5978, Revision 4, dated May 6, 1998, or Revision 3, dated May 20, 1992, with less than or equal to 500 CSN on the effective date of this AD, accomplish an initial ECI or borescope

inspection prior to accumulating 750 CSN, or 500 CIS since the last in-shop FPI, whichever occurs later, in accordance with the Accomplishment Instructions of PW SB No. 5978, Revision 4, dated May 6, 1998, or Revision 3, dated May 20, 1992.

(3) For sixth stage LPT inner airseals that meet the continue in service criteria described in PW SB No. 5978, Revision 4, dated May 6, 1998, thereafter, ECI or borescope inspect the sixth stage LPT inner airseal retaining wing for cracks at intervals specified in accordance with the Accomplishment Instructions of PW SB No. 5978, Revision 4, dated May 6, 1998.

(4) Remove cracked sixth stage LPT inner airseals that do not meet the continue in service criteria described in PW SB No. 5978, Revision 4, dated May 6, 1998, and replace with a new, or serviceable sixth stage LPT inner airseal that has been reworked in accordance with paragraph (c) of this AD.

(5) Thereafter, inspect initially, reinspect, and remove from service, if necessary, the replacement sixth stage LPT inner airseals in accordance with paragraphs (b)(1), (b)(2), (b)(3), and (b)(4) of this AD.

(c) Prior to further flight, rework the sixth stage LPT inner airseal rear retaining wing in accordance with the Accomplishment Instructions of PW SB 5745, Revision 2, dated October 24, 1990.

Note 2: Rework of the sixth stage LPT inner airseal rear retaining wing in accordance with paragraph (c) of this AD does not exempt sixth stage LPT inner airseals from initial and repetitive inspections in accordance with paragraphs (b)(1), (b)(2), (b)(3), and (b)(4) of this AD.

(d) Installation of a new, improved 6th stage LPT inner airseal, in accordance with PW SB No. 6054, Revision 1, dated April 24, 1992, constitutes terminating action to the inspections and rework required by this AD.

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

Note 3: Information concerning the existence of approved alternative methods of compliance with this airworthiness directive, if any, may be obtained from the Engine Certification Office.

(f) 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 aircraft to a location where the requirements of this AD can be accomplished.

Issued in Burlington, Massachusetts, on September 1, 1998.

David A. Downey,

Assistant Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 98–24186 Filed 9–8–98; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–ANE–36–AD]

RIN 2120–AA64

Airworthiness Directives; Williams International FJ44–1A Turbofan Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to Williams International FJ44–1A turbofan engines. This proposal would require removing the high pressure turbine (HPT) disk from service prior to accumulating a reduced cyclic life limit of 1,900 cycles since new (CSN) and replacing with a serviceable disk. As an option, the HPT nozzle can be modified thereby increasing the HPT disk cyclic life limit from the new reduced cyclic life limit. This proposal is prompted by a revised life analysis conducted by the manufacturer after the failure of a similarly designed HPT disk. The actions specified by the proposed AD are intended to prevent HPT disk rim failure, which could result in an uncontained engine failure and damage to the aircraft.

DATES: Comments must be received by November 9, 1998.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 98–ANE–36–AD, 12 New England Executive Park, Burlington, MA 01803–5299. Comments may also be sent via the Internet using the following address: ''9-ad-engineprop@faa.dot.gov''. Comments sent via the Internet must contain the docket number in the subject line. Comments may be inspected at this location between 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Patricia Bonnen, Aerospace Engineer, Chicago Aircraft Certification Office, FAA, Small Airplane Directorate, 2300 East Devon Avenue, Des Plaines, IL 60018; telephone (847) 294–7134, fax (847) 294–7834.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 98–ANE–36–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 98–ANE–36–AD, 12 New England Executive Park, Burlington, MA 01803–5299.

Discussion

Williams International, manufacturer of FJ44–1A turbofan engines, recently conducted a revised life limit analysis of high pressure turbine (HPT) disks, part number (P/N) 55291. This revised analysis was prompted by the failure of a similarly designed HPT disk. The revised analysis revealed that the calculated low cycle fatigue lives are significantly lower than the current published maximum approved service lives. To this date no failures of HPT disk, P/N 55291, have been reported. This condition, if not corrected, could result in HPT disk rim failure, which could result in an uncontained engine failure and damage to the aircraft.

Williams International has also published service information which authorizes certain modifications to the

HPT nozzle assembly and subsequent reidentification of the HPT disk and assembly. Incorporation of these modifications increases the approved service life limit from the new reduced service life.

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would require removing the HPT disk from service prior to accumulating a reduced cyclic life limit of 1,900 cycles since new (CSN) and replacing with a serviceable disk.

There are approximately 223 engines of the affected design in the worldwide fleet. The FAA estimates that 165 engines installed on aircraft of U.S. registry would be affected by this proposed AD. The cost of removing a disk earlier than the original life-limit rather than reworking the disk is $12,546 per engine. The costs of reworking the HPT nozzle assembly to obtain increased HPT life are substantially less than the costs of replacement of the HPT disk. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $2,070,090 assuming all disks are replaced. The actual total cost to U.S. operators, however, will be less depending on how many operators exercise the rework option. In addition, the manufacturer may reimburse operators for the costs of removing disks earlier than the original life limit reducing even further the total cost impact for U.S. operators.

The regulations proposed 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 proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Williams International: Docket No. 98–ANE–36–AD.

Applicability: Williams International FJ44–1A turbofan engines, installed on but not limited to Cessna 525 series aircraft.

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

Compliance: Required as indicated, unless accomplished previously.

To prevent high pressure turbine (HPT) disk rim failure, which could result in an uncontained engine failure and damage to the aircraft, accomplish the following:

(a) Prior to accumulating 1,900 cycles since new (CSN), remove from service HPT disk, part number (P/N) 55291, and replace with a serviceable part.

(b) As an option to paragraph (a), modify the HPT nozzle assembly and remark the HPT disk and assembly with new part numbers in accordance with Williams International Service Bulletin FJ44–72–36, dated October 21, 1997.

Note 2: The low cycle fatigue retirement lives for the HPT disks remarked with new part numbers in accordance with paragraph (b) of this AD may be found in Williams SB FJ44–A–72–38, dated October 21, 1997.

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

Note 3: Information concerning the existence of approved alternative methods of compliance with this airworthiness directive, if any, may be obtained from the Chicago Aircraft Certification Office.

(d) Thereafter, except as provided in paragraph (c) of this AD, no alternative replacement times or life limits may be approved for HPT disk, P/N 55291.

(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 aircraft to a location where the requirements of this AD can be accomplished.

Issued in Burlington, Massachusetts, on September 2, 1998.

Donald E. Plouffe,

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

[FR Doc. 98–24185 Filed 9–8–98; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–CE–45–AD]

RIN 2120–AA64

Airworthiness Directives; Industrie Aeronautiche e Meccaniche Model Piaggio P–180 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes to adopt a new airworthiness directive (AD) that would apply to certain Industrie Aeronautiche e Meccaniche (I.A.M.) Model Piaggio P–180 airplanes. The proposed AD would require inspecting the elevator and aileron control retaining pins for proper installation and damage, and replacing any improperly installed or damaged pins. The proposed AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for Italy. The actions specified by the proposed AD are intended to prevent the retaining pins from interfering with the flight control elements, which could result in loss of the cable retaining function with consequent loss of control of the airplane.

DATES: Comments must be received on or before October 13, 1998.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 98–CE–45–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106. Comments may be inspected at this location between 8 a.m. and 4 p.m., Monday through Friday, holidays excepted.

Service information that applies to the proposed AD may be obtained from I.A.M. Ronald Piaggio S.p.A., Via Cibrario, 4 16154 Genoa, Italy. This information also may be examined at the Rules Docket at the address above.

FOR FURTHER INFORMATION CONTACT: Mr. David O. Keenan, Aerospace Engineer, FAA, Small Airplane Directorate, 1201 Walnut, suite 900, Kansas City, Missouri 64106; telephone: (816) 426–6934; facsimile: (816) 426–2169.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 98–CE–45–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 98–CE–45–AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Discussion

The Registro Aeronautico Italiano (R.A.I.), which is the airworthiness authority for Italy, recently notified the FAA that an unsafe condition may exist on certain I.A.M. Model Piaggio P–180 airplanes. The R.A.I. reports that the retaining pins located in the aileron and elevator control systems were improperly installed on one of the affected airplanes. The manufacturer believes that the retaining pin may have been improperly installed at the factory.

This condition, if not corrected, could result in loss of the cable retaining function with consequent loss of control of the airplane.

Relevant Service Information

I.A.M. has issued Piaggio Service Bulletin (Mandatory) No. SB–80–0089, dated May 22, 1996, which specifies procedures for removing the vertical stabilizer rear fairing and inspecting the elevator and aileron control retaining pins for proper installation and damage, and replacing any improperly installed or damaged pins.

The R.A.I. classified this service bulletin as mandatory and issued Italian AD No. 96–158, dated July 1, 1996, in order to assure the continued airworthiness of these airplanes in Italy.

The FAA's Determination

This airplane model is manufactured in Italy and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the R.A.I. has kept the FAA informed of the situation described above.

The FAA has examined the findings of the R.A.I.; reviewed all available information, including the service information referenced above; and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of the Provisions of the Proposed AD

Since an unsafe condition has been identified that is likely to exist or develop in other I.A.M. Model Piaggio P–180 airplanes of the same type design registered in the United States, the FAA is proposing AD action. The proposed AD would require inspecting the elevator and aileron control retaining pins for proper installation and damage, and replacing any improperly installed or damaged pins. Accomplishment of the proposed installation would be required in accordance with I.A.M. Piaggio Service Bulletin (Mandatory) No. SB–80–0089, dated May 22, 1996.

Cost Impact

The FAA estimates that 5 airplanes in the U.S. registry would be affected by the proposed inspection, that it would take approximately 3 workhours per airplane to accomplish the proposed inspection, and that the average labor rate is approximately $60 an hour. Based on these figures, the total cost impact of the proposed inspection on U.S. operators is estimated to be $900, or $180 per airplane. These figures do not account for any damaged or improperly installed retaining pins found during the proposed inspection that would need to be replaced.

Regulatory Impact

The regulations proposed 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 proposal would 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) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action has been placed in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Industrie Aeronautiche E Meccaniche: Docket No. 98–CE–45–AD. Applicability: Model Piaggio P–180 airplanes, serial numbers 1001, 1002, 1004, and 1006 through 1033, certificated in any category.

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

Compliance: Required as indicated in the body of this AD, unless already accomplished.

To prevent the retaining pins from interfering with the flight control elements, which could result in loss of the cable retaining function with consequent loss of control of the airplane, accomplish the following:

(a) Within the next 100 hours time-in-service after the effective date of this AD, inspect the elevator and aileron control retaining pins for proper installation and damage in accordance with the Accomplishment Instructions section in I.A.M. Piaggio Service Bulletin (Mandatory) No. SB–80–0089, dated May 22, 1996. Prior to further flight, replace any improperly installed or damaged pins in accordance with the service bulletin.

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

(c) An alternative method of compliance or adjustment of the compliance time that provides an equivalent level of safety may be approved by the Manager, Small Airplane Directorate, 1201 Walnut, suite 900, Kansas City, Missouri 64106. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Small Airplane Directorate.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from Small Airplane Directorate.

(d) Questions or technical information related to Piaggio Service Bulletin (Mandatory) No. SB–80–0089, dated May 22, 1996, should be directed to I.A.M. Rinaldo Piaggio S.p.A., Via Cibrario, 4 16154 Genoa, Italy. This service information may be examined at the FAA, Central Region, Office of the Regional Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Note 3: The subject of this AD is addressed in Italian AD No. 96–158, dated July 1, 1996.

Issued in Kansas City, Missouri, on September 1, 1998.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 98–24182 Filed 9–8–98; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 98–AGL–54]

Proposed Modification of Class E Airspace; Owatonna, MN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to modify Class E airspace at Owatonna, MN. A VHF Omnidirectional Range/Distance Measuring Equipment (VOR/DME) Standard Instrument Approach Procedure (SIAP) to Runway (Rwy) 30, Amendment 4, has been developed for Owatonna Municipal Airport. Controlled Airspace extending upward from 700 to 1200 feet above ground level (AGL) is needed to contain aircraft executing the approach. This action proposes to increase the radius of, and add a southeast extension to, the existing controlled airspace for this airport.

DATES: Comments must be received on or before October 26, 1998.

ADDRESSES: Send comments on the proposal in triplicate to: Federal Aviation Administration, Office of the Assistant Chief Counsel, AGL–7, Rules Docket No. 98–AGL–54, 2300 East Devon Avenue, Des Plaines, Illinois 60018.

The official docket may be examined in the Office of the Assistant Chief Counsel, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois. An informal docket may also be examined during normal business hours at the Air Traffic Division, Airspace Branch, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois.

FOR FURTHER INFORMATION CONTACT: Michelle M. Behm, Air Traffic Division, Airspace Branch, AGL–520, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018, telephone (847) 294–7568.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify the airspace docket number and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Airspace Docket No. 98–AGL–54.'' The postcard will be date/time stamped and returned to the commenter. All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available for examination in the Rules Docket, FAA, Great Lakes Region, Office of the Assistant Chief Counsel, 2300 East Devon Avenue, Des Plaines, Illinois, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA–230, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–3484. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11–2A, which describes the application procedure.

The Proposal

The FAA is considering an amendment to 14 CFR part 71 to modify Class E airspace at Owatonna, MN, to accommodate aircraft executing the proposed VOR/DME Rwy 30 SIAP, Amendment 4, at Owatonna Municipal Airport by increasing the radius of, and adding a southeast extension to, the existing controlled airspace for the airport. Controlled airspace extending upward from 700 to 1200 feet AGL is needed to contain aircraft executing the approach. The area would be depicted on appropriate aeronautical charts. Class E airspace designations for airspace areas extending upward from 700 feet or more above the surface of the earth are published in paragraph 6005 of FAA Order 7400.9E dated September 10, 1997, and effective September 16, 1997, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

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

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120,; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 3789.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9E, Airspace Designations and Reporting Points, dated September 10, 1997, and effective September 16, 1997, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

AGL MN E5 Owatonna, MN [Revised]

Owatonna Municipal Airport, MN
(Lat. 44° 07′ 18″ N., long. 93° 15′ 27″ W.)
Halfway VOR/DME
(Lat. 44° 12′ 16″ N., long. 93° 22′ 14″ W.)

That airspace extending upward from 700 feet above the surface within an 6.7-mile radius of the Owatonna Municipal Airport, and within 1.7 miles each side of the Halfway VOR/DME 135° radial extending from the 6.7-mile radius of the airport to 14.0 miles southeast of the Halfway VOR/DME, excluding that airspace within the Waseca, MN, Class E airspace area.

* * * * *

Issued in Des Plaines, IL on August 25, 1998.

David B. Johnson,

Acting Manager, Air Traffic Division.

[FR Doc. 98–24131 Filed 9–8–98; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–118966–97]

RIN 1545–AV69

Information Reporting With Respect to Certain Foreign Partnerships

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations under section 6038 of the Internal Revenue Code providing information reporting requirements for certain United States persons holding interests in controlled foreign partnerships. The proposed regulations reflect changes to the law made by the Taxpayer Relief Act of 1997. These proposed regulations would provide guidance to United States persons who must file such a return. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written comments must be received by November 9, 1998. Outlines of topics to be discussed at the public hearing scheduled for November 10, 1998, at 10 a.m., must be received by October 20, 1998.

ADDRESSES: Send submissions to: CC:DOM:CORP:R (REG–118966–97), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. In the alternative, submissions may be hand delivered between the hours of 8 a.m. and 5 p.m. to: CC:DOM:CORP:R (REG–118966–97), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the ''Tax Regs'' option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at http://www.irs.ustreas.gov/prod/tax__regs/comments.html.

A public hearing has been scheduled to be held in room 2615, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Victoria Scotto Balacek, 202–622–3860; concerning submissions and requests for a hearing, Michael Slaughter, 202–622–7190 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has 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, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attention: IRS Reports Clearance Officer OP:FS:FP, Washington, DC 20224. Comments on the collection of information must be received by November 9, 1998. Comments are specifically requested on:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of the capital or start-up costs of operation, maintenance, and purchase of services to provide information.

The collection of information in these regulations is in § 1.6038–3. This information is required by the IRS to identify foreign partnerships which are controlled by United States persons and verify amounts reported by the partners. The collection of information is mandatory. The likely respondents will be individuals and businesses or other for-profit organizations.

The burden of complying with the proposed collection of information required to be reported on Form 8865 is reflected in the burden for Form 8865.

The burden of complying with the proposed collection of information in § 1.6038–3(c)(3) is as follows:

Estimated total annual reporting burden: 250 hours.

Estimated annual burden per respondent: .25 hours to 1 hour, with an average of .5 hours.

Estimated number of respondents: 500.

Estimated frequency of responses: Annually.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

Taxpayer Relief Act of 1997

In the Taxpayer Relief Act of 1997 (TRA 1997), Public Law 105–34 (111 Stat. 983 (1997)), Congress significantly modified the information reporting requirements with respect to foreign partnerships under sections 6038, 6038B and 6046A (and also amended section 6501(c)(8) to provide that the statute of limitations on the assessment of tax under sections 6038, 6038B and 6046A does not expire until three years after the information required under those sections is reported). These regulations under section 6038 are being proposed along with regulations under sections 6038B (reporting of certain transfers to foreign partnerships) and 6046A (reporting of certain ownership interests in foreign partnerships). The IRS is also developing a comprehensive form (Form 8865) for reporting under all of these provisions. A draft version of the form will be issued for public comment while the proposed regulations are outstanding.

Section 6038

Prior to TRA 1997, reporting in respect of foreign partnerships was governed by section 6031 of the Internal Revenue Code (Code). Regulations had been proposed, but never finalized, that would have required reporting by foreign partnerships where United States persons were allocated 25 percent or more of certain items. Section 1141 of TRA 1997, amended section 6031 to provide that a foreign partnership is required to file an annual return of partnership income (Form 1065) only if the partnership has gross income from sources within the United States, or gross income that is effectively connected with the conduct of a U.S. trade or business. Section 1142 of TRA 1997, amended section 6038 to require information reporting by certain United States persons with direct or indirect interests in controlled foreign partnerships. Thus, these changes moved the statutory authority to require annual reporting on a foreign partnership because of the ownership interests of United States persons from section 6031 to section 6038, and moved the reporting obligation in respect of foreign partnerships from the partnership to the partner level.

Explanation of Provisions

Section 6038 requires certain United States persons that own interests in controlled foreign partnerships to provide information with respect to the interests as prescribed by the Secretary. The proposed regulations implement the statute by requiring taxpayers to furnish the IRS with annual information.

Reporting Requirements

The proposed regulations implement the rules of section 6038 by requiring a United States person that controls a foreign partnership to file an annual information return with respect to the foreign partnership (Form 8865). Pursuant to section 6038(e)(3), the proposed regulations define control as direct or indirect ownership of more than a 50-percent interest in the partnership. The constructive ownership rules of section 267(c) (other than paragraph (3)) are applied to determine ownership interests (taking into account that such rules refer to corporations and not to partnerships).

A 50-percent interest in a partnership is defined as an interest equal to 50 percent of the capital interest, 50 percent of the profits interest, or, exercising the regulatory authority under section 6038(e)(3)(A)(ii), an interest to which 50 percent of the deductions or losses are allocated. Defining control by reference to losses or deductions, as well as capital and profits, is appropriate, because a partner with a greater than 50-percent allocation of these items has a level of control sufficient to provide a significant amount of information about the partnership. Furthermore, in the case of such allocations, certain information is required to ensure that the rules of Code provisions such as section 704(b) (determination of distributive share) are being followed.

To relieve taxpayers of unnecessary filing burdens, the regulations provide exceptions from the general rule that a controlling partner must provide information to the IRS on Form 8865. If more than one United States person is required to report as a controlling partner, then one such controlling partner may file the required information in lieu of all such partners having to file separately. However, a controlling partner with respect only to losses or deductions may only satisfy this requirement if there are no controlling partners with respect to capital or profits. The controlling partners not required to file, must file the statement required by the regulations with their tax return indicating that the filing requirement will be met by another person and identifying that person.

Pursuant to section 6038(a)(5), the proposed regulations provide that each United States person that owns at least a 10-percent interest in a foreign partnership that is controlled by United States persons holding at least 10-percent interests must file an annual information return with respect to the partnership. In accordance with the statute, however, such 10-percent partners will not be required to report such information where there is a United States person that is a controlling partner. The proposed regulations define a 10-percent interest in a partnership as an interest equal to 10 percent of the capital or profits interest, and an interest to which 10 percent of the deductions or losses are allocated.

Because no one United States person controls the partnership, Form 8865 will require less information to be reported than it will for controlling United States partners, and will be more similar to the information contained in Schedule K–1 to Form 1065. If there is a controlling partner (and, thus, any other 10-percent partners are not required to file), the controlling partner must, generally, file the information that would otherwise have been required from such 10-percent partners.

Exceptions to Filing Requirements

The proposed regulations provide that certain United States persons that are indirect partners need not file under section 6038 so long as the United States person from whom ownership is attributed does file the information, and the indirect partner files a statement with its income tax return identifying the United States person that will meet the filing requirements.

The reporting requirements of this section shall not apply in respect of any foreign partnership which is an eligible partnership described in § 1.761–2(a) that has validly elected pursuant to § 1.761–2(b)(2)(i) to be wholly excluded from the application of subchapter K. Nor shall the reporting requirements of these proposed regulations apply to any foreign partnership validly deemed to have wholly elected out of the provisions of subchapter K as specified in § 1.761–2(b)(2)(ii). Taxpayers are reminded, however, that a precondition to being an ''electing-out'' partnership is that, as provided in § 1.761–2(a)(1), ''[t]he members of such organization must be able to compute their income without the necessity of computing partnership taxable income.'' The IRS and Treasury are concerned that in certain cases the necessary books and records are not being maintained to allow verification that such computations can indeed be made without regard to the partnership. If it appears that, in the absence of a reporting requirement under this section, the members of the ''electing-out'' partnership cannot make such separate computations, this exception to the reporting requirements will be reconsidered.

Information Required

The proposed regulations require certain United States persons to provide information relating to the foreign partnership on Form 8865 (or successor form). The form will require controlling partners of foreign partnerships to report information concerning the income and assets of the partnership, certain transactions with the partnership, the names of the partners in the partnership, and other specified information. The form will require a partner holding at least a 10-percent interest in a controlled foreign partnership (where there is no United States person that is a controlling partner) to report information with respect only to its own interest in the partnership.

Time and Place for Filing

The proposed regulations require Form 8865 to be filed with the United States person's income tax return (including a partnership return of income) for the taxable year in which the partnership's annual accounting period ends. If required by the instructions to Form 8865, a duplicate Form 8865 must also be filed.

Failure to Provide Information

As described in section 6038(b), the proposed regulations provide that a failure to comply with the reporting requirements of section 6038 will result in a penalty of $10,000 for each annual accounting period. Additional penalties apply for failure to comply after notification by the IRS, up to a total of $50,000 for each annual accounting period. Also, as provided in section 6038(c), the proposed regulations additionally provide a penalty of reducing the United States person's foreign tax credit (also with further penalties for continued failure to report after notification).

Effective Dates

The proposed regulations would apply for annual accounting periods beginning after the date that these regulations are published as final regulations in the **Federal Register**.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these proposed regulations. It is hereby certified that the collection of information contained in these proposed regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the amount of time required to complete the form and file the information required under these regulations is brief and will not have a significant impact on those small entities that are required to provide notification. Furthermore, the number of small entities that will be required to file the form is not significant. Accordingly, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (preferably a signed original and eight (8) copies) that are submitted timely to the Internal Revenue Service. All comments will be made available for public inspection and copying.

A public hearing has been scheduled for Tuesday, November 10, 1998, at 10 a.m., in room 2615, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Because of access restrictions, visitors will not be admitted beyond the Internal Revenue Building lobby more than 15 minutes before the hearing starts.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons that wish to present oral comments at the hearing must submit written comments by November 9, 1998 and an outline of the topics to be discussed (a signed original and eight (8) copies) by October 20, 1998.

A period of 10 minutes will be allotted for each person making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information. The principal author of this regulation is Victoria Scotto Balacek, Office of the Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in its development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding an entry in numerical order to read as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.6038–3 is also issued under 26 U.S.C. 6038.* * *

Par. 2. Section 1.6038–3 is added to read as follows:

§ 1.6038–3 Information returns required of United States persons with respect to foreign partnerships.

(a) *Persons required to make return*—(1) *Controlling partners.* Every United States person that controls a foreign partnership must file an annual information return on Form 8865 ''Information Return of U.S. Persons With Respect To Certain Foreign Partnerships'' containing so much of the information described in paragraph (f) of this section, and such other information, as the form (or accompanying instructions) may prescribe. The information required to be filed by such controlling partner will include such information regarding any other United States persons that are 10-percent or greater partners in the foreign partnership as Form 8865 may require. (For exceptions to this rule, see paragraph (c) of this section.)

(2) *Certain 10-percent partners.* Every United States person that holds a 10-percent or greater interest in a foreign partnership controlled by United States persons holding at least 10-percent interests must complete and file an annual information return on Form 8865 containing so much of the information described in paragraph (f) of this section, and such other information, as the form (or accompanying instructions) may prescribe. (For exceptions to this rule, see paragraph (c) of this section.) However, no such person will be required to file under this section if a United States person is a controlling partner of such partnership.

(3) *Separate returns for each partnership.* A United States person required to report under this paragraph (a) must file a separate annual information return for each foreign partnership with respect to which the person has a reporting obligation.

(b) *Ownership determinations*—(1) *Control.* A person (or persons) is deemed to be in control of a partnership if that person (or persons) owns, directly or indirectly, more than a 50-percent interest in the partnership (a controlling partner).

(2) *50-percent interest.* A 50-percent interest in a partnership is an interest equal to 50 percent of the capital interest, 50 percent of the profits interest, or an interest to which 50 percent of the deductions or losses are allocated.

(3) *10-percent interest.* A 10-percent interest in a partnership is an interest equal to 10 percent of the capital interest, 10 percent of the profits interest, or an interest to which 10 percent of the deductions or losses are allocated.

(4) *Attribution rules.* For purposes of determining an interest in a partnership, the rules of section 267(c) (other than section 267(c)(3)) apply (taking into account such rules refer to corporations and not to partnerships).

(5) *Determination of amount of interest.* Whether a person has a 50-percent interest, or a 10-percent interest, as described in paragraphs (b)(2) and (3) of this section, will be determined for each taxable year by reference to the agreement of the partners relating to such interests during the taxable year.

(c) *Exceptions when more than one partner is required to file duplicative information*—(1) *More than one controlling partner*—(i) *In general.* If, with respect to the same foreign partnership for the same annual accounting period, more than one United States person is required to file an information return under paragraph (a)(1) of this section by reason of being a controlling partner, then in lieu of all such controlling partners making separate returns, only one return from one of the controlling partners will be required. However, a return by a United States person that is a controlling partner by reason of an interest to which losses or deductions are allocated may only satisfy this exception if there is no United States person that is a controlling partner by reason of an interest in capital or profits.

(ii) *Manner of reporting.* The return must be filed with the income tax return of the person making the return in the manner provided by Form 8865 and the accompanying instructions. The return must contain all of the information which would have been required to be reported by this section if separate information returns had been filed.

(iii) *Controlling partners not required to file.* Those partners not required to file under paragraph (c)(1)(i) of this section must file the statement required by paragraph (c)(3) of this section.

(2) *Certain indirect owners excepted from furnishing information.* Any United States person required to file an information return under this section need not furnish a return, if all of the following conditions are met—

(i) The person does not directly own any interest in the foreign partnership;

(ii) The person is required to file the information return solely by reason of attribution of ownership from a United States person under paragraph (b)(4) of this section; and

(iii) The United States person from whom the ownership interest is attributed files all of the information required under this section.

(3) *Statement required.* A United States person that does not furnish an information return under the provisions of paragraph (c)(1) or (2) of this section must file a statement with the person's income tax return—

(i) Indicating that the filing requirement has been or will be satisfied;

(ii) Identifying the person required to file the return;

(iii) Identifying the IRS Service Center where the return is required to be filed; and

(iv) Providing any additional information as Form 8865 and the accompanying instructions may require.

(d) *Reporting under this section not required of partnerships excluded from the application of subchapter* —(1) *Election to be wholly excluded.* The reporting requirements of this section will not apply to any United States person in respect of an eligible partnership as described in § 1.761–2(a) in which that United States person is a partner, if such partnership has validly elected to be excluded from all of the provisions of subchapter K of chapter 1 of the Internal Revenue Code in the manner specified in § 1.761–2(b)(2)(i).

(2) *Deemed excluded.* The reporting requirements of this section will not apply to any United States person in respect of an eligible partnership as described in § 1.761–2(a) in which that United States person is a partner, if such partnership is validly deemed to have elected to be excluded from all of the provisions of subchapter K of chapter 1 of the Internal Revenue Code in accordance with the provisions of § 1.761–2(b)(2)(ii).

(e) *Period covered by return.* The information required under this section must be furnished for the annual accounting period of the foreign partnership ending with or within the United States person's taxable year. The partnership's annual accounting period is the annual period on the basis of which it regularly computes its income in keeping its books. (See section 706 for the partnership's taxable year.)

(f) *Contents of return.* The return required to be filed under this section must contain information in such form or manner as Form 8865 (and its accompanying instructions) prescribes with respect to each foreign partnership, including—

(1) The name, address, and employer identification number, if any, of the partnership;

(2) The nature of the partnership's business and principal place where conducted;

(3) The date of organization and country under whose laws the partnership was organized;

(4) A balance sheet showing assets, liability, and capital of the partnership as of the end of the annual accounting period;

(5) A summary of the outstanding ownership interests in the partnership;

(6) A summary showing the total amount of transactions between the partnership and the person required to file the return, any other partnership or corporation controlled by that person, or any United States person owning at the time of the transaction at least a 10-percent interest in the foreign partnership;

(7) The amount of the partnership's foreign income taxes paid or accrued;

(8) A statement of the partnership's income for the annual accounting period;

(9) A statement of the partners distributive share items of income, gain, losses, deductions and credits; and

(10) A statement of income, gain, losses, deductions and credits allocated to each United States person holding at least a 10-percent interest in the foreign partnership.

(g) *Method of reporting.* Except as otherwise provided on Form 8865 or the accompanying instructions, all amounts required to be furnished on the information return must be expressed in United States dollars with a statement of the exchange rates used. All statements required on or with Form 8865 pursuant to this section must be in the English language.

(h) *Time and place for filing return*—(1) *In general.* Form 8865 must be filed with the United States person's income tax return (including a partnership return of income) on or before the due date required by law (including extensions) of that return.

(2) *Duplicate return.* If required by the instructions to Form 8865, a duplicate Form 8865 must also be filed.

(i) *Definition of United States person.* The term *United States person* is defined in section 7701(a)(30).

(j) *Failure to comply with reporting requirement*—(1) *Dollar amount penalty*—(i) *In general.* Any United States person required to file an information return under Section 6038 and paragraph (a) of this section that fails to comply (as defined in paragraph (j)(3) of this section) with the applicable reporting requirements of this section, must pay a penalty of $10,000 for each annual accounting period of each foreign partnership with respect to which the failure occurs.

(ii) *Increase in penalty.* If a failure to comply with the applicable reporting requirements of section 6038 and this section continues for more than 90 days after the date on which the district director mails notice of the failure to the United States person required to file Form 8865, the person must pay an additional penalty of $10,000 for each 30-day period (or fraction thereof) during which the failure continues after the 90-day period has expired.

(iii) *Limitation.* The additional penalty imposed on any United States person by section 6038(b)(2) and paragraph (j)(1)(ii) of this section is limited to a maximum of $50,000 for each partnership for each annual accounting period with respect to which the failure occurs.

(2) *Penalty of reducing foreign tax credit*—(i) *Effect on foreign tax credit.* Failure to comply with the reporting requirements of section 6038 and this section may cause a reduction of foreign tax credits under section 901 (taxes of foreign countries and of possessions of the United States). In applying section 901 to a United States person for any taxable year within which its foreign partnership's annual accounting period ended, the amount of taxes paid (and deemed paid under sections 902 and 960) by the United States person will be reduced by 10 percent if the person fails to comply. However, no tax deemed paid under section 904(c) will be reduced under the provisions of this paragraph (j)(2)(i).

(ii) *Reduction for continued failure.* If a failure to comply with the reporting requirements of section 6038 and this section continues for more than 90 days after the date on which the district director mails notice of the failure to the person required to file Form 8865, then the amount of the reduction in paragraph (j)(2)(i) of this section will be 10 percent, plus an additional 5 percent for each 3-month period (or fraction thereof) during which the failure continues after the 90-day period has expired.

(iii) *Limitation on reduction.* The amount of the reduction under paragraph (j)(2)(ii) of this section for each failure to furnish information required under this section will not exceed the greater of $10,000, or the income of the foreign partnership for its annual accounting period with respect to which the failure occurs.

(iv) *Offset for dollar amount penalty imposed.* The total amount of the reduction which, but for this paragraph (j)(2)(iv), may be made under this paragraph (j)(2) with respect to any separate failure, may not exceed the maximum amount of the reductions which may be imposed, reduced (but not below zero) by the dollar amount penalty imposed by paragraph (j)(1) of this section with respect to the failure.

(3) *Failure to comply.* A failure to comply is separately determined for each foreign partnership for which a United States person has a reporting obligation. A failure to comply with the requirements of section 6038 includes—

(i) The failure to report at the proper time and in the proper manner any information required to be reported under the rules of this section; or

(ii) The provision of false or inaccurate information in purported compliance with the requirements of this section.

(4) *Reasonable cause limitation.* The time prescribed for furnishing information under paragraph (h) of this section, and the beginning of the 90-day period after the district director mails notice under paragraphs (j) (1)(ii) and (2)(ii) of this section, will be treated as being not earlier than the last day on which reasonable cause existed for failure to furnish the information. The United States person may show reasonable cause by providing a written statement to the district director having jurisdiction of the person's return for the year of the transfer, setting forth the reasons for the failure to comply. Whether a failure to comply was due to reasonable cause will be determined by the district director under all facts and circumstances.

(5) *Statute of limitations.* For exceptions to the limitations on assessment and collection in the event of a failure to provide information under section 6038, see section 6501(c)(8).

(k) *Effective date.* This section applies to annual accounting periods of a partnership beginning on or after the date final regulations on this subject are published in the **Federal Register**.

Michael P. Dolan,

Deputy Commissioner of Internal Revenue.

[FR Doc. 98–23881 Filed 9–8–98; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–118926–97]

RIN 1545–AV70

Notice of Certain Transfers to Foreign Partnerships and Foreign Corporations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations under section 6038B of the Internal Revenue Code on information reporting requirements for certain transfers by United States persons to foreign partnerships. The proposed regulations would implement the amendments made by the Taxpayer Relief Act of 1997 that require a United States person who transfers property to a foreign partnership to furnish certain information with respect to such transfers. This document also contains proposed regulations that would amend the information reporting requirements for certain transfers by United States persons to foreign corporations to require the reporting of the transfer of cash. The proposed regulations would provide guidance to United States persons who must furnish this information. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written comments must be received by November 9, 1998. Outlines of topics to be discussed at the public hearing scheduled for November 10, 1998, at 10 a.m., must be received by October 20, 1998.

ADDRESSES: Send submissions to: CC:DOM:CORP:R (REG–118926–97), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered between the hours of 8 a.m. and 5 p.m. to CC:DOM:CORP:R (REG–118926–97), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the ''Tax Regs'' option of the IRS Home Page, or by submitting comments directly to the IRS Internet site at: http://www.irs.ustreas.gov/prod/tax__regs/comments.html.

A public hearing has been scheduled to be held in room 2615, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning transfers of cash to foreign corporations, Philip L. Tretiak, and concerning transfers to foreign partnerships, Christopher Kelley, 202–622–3860; concerning the hearing and submissions of written comments, Michael Slaughter, 202–622–7190 (not toll-free calls).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has 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, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attention: IRS Reports Clearance Officer OP:FS:FP, Washington, DC 20224. Comments on the collection of information must be received by November 9, 1998. Comments are specifically requested on:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of the capital or start-up costs of operation, maintenance, and purchase of services to provide information.

The collection of information in these regulations is in §§ 1.6038B–1(b) and 1.6038B–2. This information is required by the IRS to identify United States persons who contribute property to foreign partnerships and to ensure the correct reporting of items with respect to those partnerships. The collection of information is mandatory. The likely respondents will be individuals and businesses or other for-profit organizations.

The burden of complying with the proposed collection of information required to be reported on Form 8865 is reflected in the burden for Form 8865.

The burden of complying with the proposed collection of information required to be reported on Form 926 is reflected in the burden for Form 926.

The burden of complying with the proposed collection of information in § 1.6038B–2(f)(2) is as follows:

Estimated total annual reporting burden: 250 hours.

Estimated annual burden per respondent: 0.25 hours to 1 hour, with an average of 0.5 hours.

Estimated number of respondents: 500.

Estimated frequency of responses: Once per year.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

Taxpayer Relief Act of 1997

In the Taxpayer Relief Act of 1997 (TRA 1997), Public Law 105–34 (111 Stat. 983 (1997)), Congress significantly modified the information reporting requirements with respect to foreign partnerships under sections 6038, 6038B and 6046A (and also amended section 6501(c)(8) to provide that the statute of limitations on the assessment of tax under section 6038, 6038B and 6046A does not expire until three years after the information required under those sections is reported). Certain of these modifications also affect reporting requirements with respect to foreign corporations. These regulations under section 6038B are being proposed along with regulations under sections 6038 (reporting with respect to certain foreign partnerships) and 6046A (reporting of certain ownership interests in foreign partnerships). The IRS is also developing a comprehensive form (Form 8865) for reporting under all of these provisions. A draft version of the form will be issued for public comment while the proposed regulations are outstanding.

Section 6038B and Transfers to Foreign Corporations

Section 6038B, as enacted in 1984, provided that United States persons that made certain transfers of property to foreign corporations were required to report those transfers in the manner prescribed by regulations. Prior to the enactment of TRA 1997, section 6038B imposed a penalty for failure to comply with the regulations equal to 25 percent of the gain realized on the exchange, unless the failure was due to reasonable cause and not to willful neglect. Thus, in the case of a transfer of cash or other unappreciated property to a foreign corporation, no penalty was imposed under section 6038B if the transfer was not reported. Section 1144(c) of TRA 1997 modified the penalty applicable to

the failure to furnish information required to be reported under section 6038B. The modified penalty is equal to 10 percent of the fair market value of the property at the time of the transfer.

In response to TRA 1997, Treasury and the IRS issued final regulations under section 6038B (TD 8770 at 63 FR 33568; June 19, 1998), in conjunction with regulations under section 367(a), to clarify that transfers to corporations of unappreciated property other than cash that occur on or after July 20, 1998, generally are required to be reported in accordance with § 1.6038B–1(b). The preamble to the final regulations stated that rules regarding transfers of cash to foreign corporations would be provided in future regulations.

Section 6038B and Transfers to Foreign Partnerships

Prior to the enactment of TRA 1997, section 1491 imposed an excise tax on certain transfers of property by United States persons to foreign corporations, partnerships, estates, or trusts. The tax was equal to 35 percent of the fair market value of the property transferred in excess of adjusted basis and any gain recognized on the transfer (built-in gain). Section 1494(c), effective for transfers made after August 20, 1996, imposed a further penalty for a failure to report.

Section 1131(a) of TRA 1997 repealed sections 1491 through 1494. Section 1144 of TRA 1997 amended section 6038B to require a United States person who transfers property to a foreign partnership to report the transfer in the time and manner provided in regulations. The 1997 amendments apply to transfers of property made after August 5, 1997. Notice 98–17 (1998–11 C.B. 6) provided the manner of reporting a transfer under section 6038B made after August 5, 1997, and before January 1, 1998.

Explanation of Provisions

Reporting of Cash Transfers to Foreign Corporations

These proposed regulations provide that transfers of cash to foreign corporations are required to be reported if the U.S. transferor holds, immediately after the transfer, directly or indirectly, a 10-percent interest in the foreign corporation, or the amount of the cash transferred by the transferor or any related person to such foreign corporation or a related foreign corporation during the 12-month period ending on the date of the transfer exceeds $100,000. The transfer of cash to a foreign corporation will not be required to be reported unless made in a taxable year beginning after the date that final regulations requiring reporting are published in the **Federal Register**.

The IRS and Treasury invite comments on these requirements and the corresponding requirement for foreign partnerships, including a description of the types of transfers which could appropriately be excepted (for example, capital contributions and returns of cash made as part of the normal course of business operations).

Reporting of Transfers to Foreign Partnerships

The proposed regulations would implement the rules of section 6038B by generally requiring that a United States person that transfers property (including cash) to a foreign partnership in a contribution described in section 721 in exchange for a partnership interest, file a return on Form 8865 ''Information Return of U.S. Persons With Respect To Certain Foreign Partnerships'', reporting the transfer. Under the statutory exceptions in section 6038B(b)(1), a United States person must report such a contribution only if (1) the United States person holds (immediately after the transfer), directly or indirectly, at least a 10-percent interest in the partnership, or (2) the value of the property transferred (when added to the value of the property transferred by such person to the partnership within the preceding 12 months) exceeds $100,000 (including the value of property transferred in any transfer not described in section 721, a principal purpose of which is the avoidance of the reporting requirements of these regulations). The proposed regulations would also require a transferor, if still a partner, to notify the IRS when a foreign partnership disposes of appreciated property contributed by the transferor. This information will help in determining whether built-in gain has been properly allocated to and recognized by the U.S. transferor. The proposed regulations provide that certain indirect transferors need not report under this section if certain conditions are met.

A 10-percent interest is defined by cross-reference to section 6046A(d), which in turn cross-references section 6038(e)(3)(C) and regulations issued under that provision. The term means direct or indirect ownership of an interest equal to 10 percent of the capital interest or profits interest in a partnership, and an interest to which 10 percent of the deductions or losses of a partnership are allocated.

Partnerships Excluded From Application of Subchapter K

The reporting requirements of this section shall not apply in respect of any foreign partnership which is an eligible partnership described in § 1.761–2(a) that has validly elected pursuant to § 1.761–2(b)(2)(i) to be wholly excluded from the application of subchapter K. Nor shall the reporting requirements of these proposed regulations apply to any foreign partnership validly deemed to have wholly elected out of the provisions of subchapter K as specified in § 1.761–2(b)(2)(ii). Taxpayers are reminded, however, that a precondition to being an ''electing-out'' partnership is that, as provided in § 1.761–2(a)(1), ''[t]he members of such organization must be able to compute their income without the necessity of computing partnership taxable income.'' The IRS and Treasury are concerned that in certain cases the necessary books and records are not being maintained to allow verification that such computations can indeed be made without regard to the partnership. If it appears that, in the absence of a reporting requirement under this section, the members of the ''electing-out'' partnership cannot make such separate computations, this exception to the reporting requirements will be reconsidered.

Reporting of Cash Transfers to Foreign Partnerships

The proposed regulations require the reporting of a cash transfer to a foreign partnership in a contribution otherwise required to be reported under section 6038B and these regulations. Such transfers were required to be reported under Notice 98–17. Reporting of cash transfers will help to ensure that any earnings and appreciation attributable to the cash are reported by the U.S. transferor, and help to prevent United States persons from avoiding the rules applicable to foreign trusts. As noted above with respect to cash contributions to foreign corporations, Treasury and the IRS are interested in receiving comments on specific issues in addition to general comments on this requirement.

Information Required

The proposed regulations would require a United States person to provide certain information with respect to property transferred in a reportable contribution. Appreciated property and intangible property must be listed item by item on the Form 8865. Other items of property may be aggregated and listed according to the following categories: (1)

inventory; (2) other tangible trade or business property; (3) cash; (4) securities; and (5) other property.

The proposed regulations provide that a United States person reporting a transfer to a foreign partnership under section 6038B must identify the other partners in the partnership. This allows the IRS, for example, to determine whether built-in gain is being properly allocated to and recognized by the U.S. transferor under section 704(c). The proposed regulations except from this rule a United States person only required to report because of a transfer of cash, if the transferor holds less than a 10-percent interest in the partnership immediately following the transfer.

Time and Place for Filing

The proposed regulations would require Form 8865 to be filed with the United States person's income tax return (including a partnership return of income) for the year in which the reportable contribution occurs. However, if the transferor is also required to report under proposed regulation § 1.6038–3(a), then the transfer must be reported on the Form 8865 (and filed in accordance with §§ 1.6038–3(e) and (h)) for the foreign partnership's taxable year in which the reportable contribution occurs. Additionally, if required by the instructions to Form 8865, a duplicate Form 8865 must also be filed. The proposed regulations would provide alternative filing deadlines with respect to reportable contributions that occur on or before the date final regulations on this subject are published in the **Federal Register** (see Effective Dates portion of this preamble).

Failure to Provide Information

Section 6038B(c)(1) and the proposed regulations provide that a failure by the transferor to properly report a transfer that is required to be reported under section 6038B and these regulations is subject to a penalty equal to 10 percent of the fair market value of the property transferred. This penalty is subject to a $100,000 limit under section 6038B(c)(3), unless the failure is due to intentional disregard. In addition, the transferor must recognize gain (reduced by gain recognized, with respect to that property, by the transferor after the transfer) as if the property had been sold for its fair market value at the time of the transfer. In addition, section 6501(c)(8) keeps the statute of limitations open with respect to the transferor in the case of a failure to report. Any adjustments to the basis of the partnership or any partner (direct or indirect) as a result of the gain recognized under this provision, shall be made as though the gain was recognized in the year in which the failure to report was finally determined. Section 6038B(c)(2) and the proposed regulations provide a reasonable cause exception to the penalty and gain recognition provisions.

Effective Dates

The amendments to the regulations on the reporting of cash transfers to foreign corporations apply to taxable years beginning after these regulations are published as final regulations in the **Federal Register**.

The proposed regulations on the reporting of transfers to foreign partnerships apply to transfers made on or after January 1, 1998. Notice 98–17 (1998–11 I.R.B. 6) provides reporting requirements for transfers made after August 5, 1997, and before January 1, 1998. The proposed regulations would permit United States persons who made transfers in that period to rely on either Notice 98–17 or the final regulations.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these proposed regulations. It is hereby certified that the collection of information contained in these proposed regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the amount of time required to complete the form and file the information required under these regulations is brief and will not have a significant impact on those small entities that are required to provide notification. Furthermore, the number of small entities that will be required to file the form is not significant. Accordingly, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be give to any written comments (preferably a signed original and eight (8) copies) that are submitted timely to the IRS. All comments will be made available for public inspection and copying.

A public hearing has been scheduled for Tuesday, November 10, 1998, at 10 a.m., in room 2615, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC. Because of access restrictions, visitors will not be admitted beyond the Internal Revenue Building lobby more than 15 minutes before the hearing starts.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons that wish to present oral comments at the hearing must submit written comments and an outline of the topics to be discussed (preferably a signed original and eight (8) copies) by October 20, 1998.

A period of 10 minutes will be allotted for each person making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information. The principal authors of these proposed regulations are Christopher Kelley and Philip Tretiak of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding an entry in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.6038B–1 also issued under 26 U.S.C. 6038B.

Section 1.6038B–2 also issued under 26 U.S.C. 6038B. * * *

Par. 2. Section 1.6038B–1 is amended as follows:

1. The section heading is revised.
2. Paragraph (b)(1)(i), first sentence, is revised.
3. The text of paragraph (b)(3) is added.
4. Paragraph (c), first sentence, is revised.
5. Paragraph (g) is revised.

The additions and revisions read as follows:

§ 1.6038B–1 Reporting of certain transfers to foreign corporations.

* * * * *

(b) *Time and manner of reporting*—(1) *In general*—(i) *Reporting procedure*. Except for stock or securities qualifying under the special reporting rule of paragraph (b)(2) of this section, or cash, which is subject to special rules contained in paragraph (b)(3) of this section, any U.S. person that makes a transfer described in section 6038B(a)(1)(A), 367 (d) or (e)(1) is required to report pursuant to section 6038B and the rules of this section and must attach the required information to Form 926 ''Return by Transferor of Property to a Foreign Corporation''. * * *

* * * * *

(3) *Special rule for transfers of cash*. A U.S. person that transfers cash must report the transfer of cash to a foreign corporation if—

(i) Such U.S. person holds (immediately after the transfer) directly or indirectly (determined under the rules of sections 318(a) and 6038(e)(2)) at least 10 percent of the total voting power or the total value of the foreign corporation; or

(ii) The amount of cash transferred by such person or any related person (determined under section 267(b)) to such foreign corporation or a related foreign corporation during the 12-month period ending on the date of the transfer exceeds $100,000.

* * * * *

(c) *Information required with respect to transfers described in section 6038B(a)(1)(A)*. A U.S. person that transfers property to a foreign corporation in an exchange described in section 6038B(a)(1)(A) (including cash and other unappreciated property) must provide the following information, in paragraphs labeled to correspond with the number or letter set forth in this paragraph (c) and § 1.6038B–1T(c) (1) through (5). * * *

* * * * *

(g) *Effective dates*. This section applies to transfers occurring on or after July 20, 1998, except the first sentence of paragraph (b)(1)(i), paragraph (b)(3), and the first sentence of paragraph (c) apply to taxable years beginning after the date that final regulations are published in the **Federal Register**. See § 1.6038B–1T for transfers occurring prior to July 20, 1998.

Par. 6. Section 1.6038B–2 is added to read as follows:

§ 1.6038B–2 Reporting of certain transfers to foreign partnerships.

(a) *Reporting requirements*—(1) *Requirement to report transfers*. Any United States person that makes a transfer to a foreign partnership in a contribution described in section 721 is required to report pursuant to section 6038B and the rules of this section by filing Form 8865 ''Information Return of U.S. Persons With Respect To Certain Foreign Partnerships'' attached to the transferor's income tax return (including a partnership return of income) for the taxable year that includes the date of the transfer by the due date (including extensions) for that return, if—

(i) The United States person holds (immediately after the transfer) directly or indirectly at least a 10-percent interest in the partnership; or

(ii) The value of the property transferred, when added to the value of the property transferred by such person or any related person (described in section 267(b) or 707(b)(1)) to such partnership or a related partnership (described in section 707(b)(1)(B)) during the 12-month period ending on the date of the transfer, exceeds $100,000. For purposes of determining the relevant amounts, there shall also be taken into account the value of any property transferred in a transfer not subject to section 721, where a principal purpose of such transfer was the avoidance of these reporting requirements.

(2) *Requirement to report dispositions*—(i) *In general*. If a United States person was required to report a transfer to a foreign partnership under paragraph (b)(1) of property with a fair market value in excess of basis (built-in gain property), and the partnership disposes of the property while such United States person remains a partner, that United States person must report the disposition by filing Form 8865. The form must be attached to, and filed by the due date (including extensions) of, the transferor's income tax return for the year in which the disposition occurred.

(ii) *Disposition of property in nonrecognition transaction*. If a foreign partnership disposes of contributed built-in gain property in a nonrecognition transaction and substituted basis property is received in exchange, and the substituted basis property has built-in gain under § 1.704–3(a)(8), the transferor must report the disposition of the substituted basis property in the same manner as provided for the contributed property.

(3) *Returns to be made*—(i) *Separate returns for each partnership*. If a United States person transfers property to more than one foreign partnership in a taxable year, a separate return must be made by the United States for each partnership.

(ii) *Duplicate form to be filed*. If required by the instructions to Form 8865, a duplicate Form 8865 (including attachments and schedules) must also be filed.

(4) *Time for filing when transferor also required to report under § 1.6038–3(a)*. If the United States person required to file under this section is also required to file under § 1.6038–3(a) for the period in which the transfer occurs, then the United States person must report under this section on the Form 8865 for the foreign partnerships annual accounting period in which the transfer occurred (not its own taxable year) and file with its income tax return for that year as provided in §§ 1.6038–3(e) and (h).

(b) *Relief for indirect transferors*—(1) *Requirements*. A United States person otherwise required to file a return under this section with respect to a transfer to a foreign partnership need not file a return if all of the following conditions are met—

(i) The person does not directly own an interest in the foreign partnership;

(ii) The person is required to file a return solely by reason of attribution of ownership from a United States person (as determined under the rules of section 6038(e)(3) and the regulations thereunder); and

(iii) A United States person from whom the ownership is attributed files all of the information required under section 6038B and this section with respect to the transfer.

(2) *Statement required*. A United States person who does not furnish an information return under the provisions of paragraph (b)(1) of this section must file a statement with the person's income tax return—

(i) Indicating that the filing requirement has been or will be satisfied;

(ii) Identifying the person who has or will file the return;

(iii) Identifying the IRS Service Center where the return was or will be filed; and

(iv) Providing any additional information as Form 8865 and the accompanying instructions may require.

(c) *Information required with respect to transfers of property*. In respect of transfers described in section 6038B(a)(1)(B), the return must contain information in such form or manner as Form 8865 (and its accompanying instructions) prescribes with respect to reportable events, including—

(1) The name, address, and U.S. taxpayer identification number of the United States person making the transfer;

(2) The name, U.S. taxpayer identification number (if any), and address of the transferee foreign

partnership, and the type of entity and country under whose laws the partnership was created or organized;

(3) A general description of the transfer, and of any wider transaction of which it forms a part, including the date of transfer;

(4) The names and addresses of the other partners in the foreign partnership, unless the transfer is solely of cash and the transferor holds less than a 10-percent interest in the transferee foreign partnership immediately after the transfer;

(5) A description of the partnership interest received by the United States person, including a change in partnership interest;

(6) A separate description of each item of contributed property that is appreciated property subject to the allocation rules of section 704(c) (except to the extent that the property is permitted to be aggregated in making allocations under section 704(c)), or is intangible property, including its estimated fair market value and adjusted basis.

(7) A description of other contributed property, not specified in paragraph (c)(6) of this section, aggregated by the following categories (with, in each case, a brief description of the property)—

(i) Stock in trade of the transferor (inventory);

(ii) Tangible property (other than stock in trade) used in a trade or business of the transferor;

(iii) Cash;

(iv) Stock, notes receivable and payable, and other securities; and

(v) Other property.

(d) *Information required with respect to dispositions of property.* In respect of dispositions, the return must contain information in such form or manner as Form 8865 (and its accompanying instructions) prescribes with respect to reportable events, including—

(1) The date and manner of disposition;

(2) The gain and depreciation recapture amounts, if any, realized by the partnership; and

(3) Any such amounts allocated to the United States person.

(e) *Method of reporting.* Except as otherwise provided on Form 8865, or the accompanying instructions, all amounts reported as required under this section must be expressed in United States currency, with a statement of the exchange rates used. All statements required on or with Form 8865 pursuant to this section must be in the English language.

(f) *Reporting under this section not required of partnerships excluded from the application of subchapter K*—(1) *Election to be wholly excluded.* The reporting requirements of this section will not apply to any United States person in respect of an eligible partnership as described in § 1.761–2(a) in which that United States person is a partner, if such partnership has validly elected to be excluded from all of the provisions of subchapter K of chapter 1 of the Internal Revenue Code in the manner specified in § 1.761–2(b)(2)(i).

(2) *Deemed excluded.* The reporting requirements of this section will not apply to any United States person in respect of an eligible partnership as described in § 1.761–2(a) in which that United States person is a partner, if such partnership is validly deemed to have elected to be excluded from all of the provisions of subchapter K of chapter 1 of the Internal Revenue Code in accordance with the provisions of § 1.761–2(b)(2)(ii).

(g) *Deemed contributions.* If by reason of an adjustment under section 482 or otherwise, a contribution required to be reported under section 6038B(a)(1)(B) and this section is deemed to have been made, the information required to be reported will be furnished timely if filed by the due date (including extensions) of, the taxable year during which the adjustment is made.

(h) *Failure to comply with reporting requirements*—(1) *Consequences of failure.* If a United States person is required to file a return under paragraph (a) of this section and fails to comply with the reporting requirements of section 6038B and this section, then—

(i) The United States person is subject to a penalty equal to 10 percent of the fair market value of the property at the time of the contribution;

(ii) The United States person will recognize gain (reduced by the amount of any gain recognized, with respect to that property, by the transferor after the transfer) as if the contributed property had been sold for fair market value at the time of the contribution; and

(iii) Adjustments to the basis of the partnership and any relevant partner as a result of gain being recognized under this provision will be made as though the gain was recognized in the year in which the failure to report was finally determined.

(2) *Failure to comply.* A failure to comply with the requirements of section 6038B includes—

(i) The failure to report at the proper time and in the proper manner any information required to be reported under the rules of this section; and

(ii) The provision of false or inaccurate information in purported compliance with the requirements of this section.

(3) *Reasonable cause exception.* Under section 6038B(c)(3) and this section, the provisions of paragraph (h)(1) of this section will not apply if the transferor shows that a failure to comply was due to reasonable cause and not willful neglect. The transferor may attempt to do so by providing a written statement to the district director having jurisdiction of the taxpayer's return for the year of the transfer, setting forth the reasons for the failure to comply. Whether a failure to comply was due to reasonable cause will be determined by the district director under all facts and circumstances.

(4) *Limitation on penalties.* The penalty under paragraph (h)(1)(i) of this section with respect to any transfer cannot exceed $100,000, unless the failure to comply with respect to such transfer was due to intentional disregard.

(5) *Statute of limitations.* For exceptions to the limitations on assessment and collection in the event of a failure to provide information under section 6038B, see section 6501(c)(8).

(i) *Definitions*—(1) *10-percent interest.* 10-percent interest is defined in sections 6046A(d) and 6038(e)(3)(C) and the regulations thereunder.

(2) *United States person.* United States person is defined in section 7701(a)(30).

(3) *Foreign partnership.* Foreign partnership is defined in section 7701(a)(2) and (5).

(4) *Substituted basis property.* Substituted basis property is defined in section 7701(a)(42).

(5) *Value of the property transferred.* Under section 6038B and this section, the value of the property transferred is the fair market value of the property at the time of its transfer.

(j) *Effective dates*—(1) *In general.* This section applies to transfers made on or after January 1, 1998. However, for a transfer made prior to the date final regulations are published in the **Federal Register**, Form 8865 will be considered timely filed with respect to a transfer if filed with the taxpayer's income tax return for the first taxable year beginning after the date that final regulations are published in the **Federal Register**.

(2) *Transfers after August 5, 1997 and before January 1, 1998.* A U.S. person who made a transfer of property required to be reported under section 6038B prior to the effective date of these regulations may satisfy its reporting

requirements by reporting in accordance with the provisions of this section.

Michael P. Dolan,

Deputy Commissioner of Internal Revenue.

[FR Doc. 98–23882 Filed 9–8–98; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–209060–86]

RIN 1545–AK75

Return Requirement for United States Persons Owning Interests in Foreign Partnerships

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations under section 6046A of the Internal Revenue Code relating to return requirements for certain United States persons who acquire or dispose of an interest in a foreign partnership, or whose interest in a foreign partnership changes substantially. These proposed regulations would provide guidance to United States persons who must file such a return. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written comments must be received by November 9, 1998. Outlines of topics to be discussed at the public hearing scheduled for November 10, 1998, at 10 a.m., must be received by October 20, 1998.

ADDRESSES: Send submissions to: CC:DOM:CORP:R (REG–209060–86), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered between the hours of 8 a.m. and 5 p.m. to CC:DOM:CORP:R (REG–209060–86), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the ''Tax Regs'' option of the IRS Home Page, or by submitting comments directly to the IRS Internet site at: http://www.irs.ustreas.gov/prod/tax__regs/comments.html.

A public hearing has been scheduled to be held in room 2615, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Christopher Kelley, 202–622–3860; concerning the hearing and submissions of written comments, Michael Slaughter, 202–622–7190 (not toll-free calls).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has 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, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attention: IRS Reports Clearance Officer OP:FS:FP, Washington, DC 20224. Comments on the collection of information must be received by November 9, 1998. Comments are specifically requested on:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of the capital or start-up costs of operation, maintenance, and purchase of services to provide information.

The collection of information in these regulations is in § 1.6046A–1. This information is required by the IRS to identify United States persons with significant interests in foreign partnerships and to ensure the correct reporting of items with respect to these interests. The collection of information is mandatory. The likely respondents will be individuals and businesses or other for-profit organizations.

The burden of complying with the proposed collection of information required to be reported on Form 8865 is reflected in the burden for Form 8865.

The burden of complying with the proposed collection of information in § 1.6046A–1(f)(1)(ii) is as follows:

Estimated total annual reporting burden: 250 hours.

Estimated annual burden per respondent: .25 hours to 1 hour, with an average of .5 hours.

Estimated number of respondents: 500.

Estimated frequency of responses: On occasion.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

Taxpayer Relief Act of 1997

In the Taxpayer Relief Act of 1997 (TRA 1997), Public Law 105–34 (111 Stat. 983 (1997)), Congress significantly modified the information reporting requirements with respect to foreign partnerships under sections 6038, 6038B and 6046A (and also amended section 6501(c)(8) to provide that the statute of limitations on the assessment of tax under section 6038, 6038B and 6046A does not expire until three years after the information required under those sections is reported). These regulations under section 6046A are being proposed along with regulations under sections 6038 (reporting with respect to certain foreign partnerships) and 6038B (reporting of certain transfers to foreign partnerships). The IRS is also developing a comprehensive form (Form 8865) for reporting under all of these provisions. A draft version of the form will be issued for public comment while the proposed regulations are outstanding.

Section 6046A

Section 6046A was added to the Internal Revenue Code (Code) by section 405 of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Public Law 97–248 (96 Stat. 669 (1982)), and, prior to amendment by TRA 1997, required reporting of acquisitions and dispositions of interests in foreign partnerships as well as of substantial changes in proportional interests in such partnerships. Section 1143 of TRA 1997, Public Law 105–34 (111 Stat. 983 (1997)), amended section 6046A, to provide that reporting is required only when the interest acquired, disposed of, or substantially changed is at least a 10-percent interest in the partnership.

Explanation of Provisions

Filing Requirement

The proposed regulations require a United States person to report the information required under section 6046A with respect to a ''reportable event'' on Form 8865, ''Information Return of U.S. Persons With Respect To Certain Foreign Partnerships''. The proposed regulations follow the statute and define a reportable event to mean (1) an acquisition by a United States person of at least a 10-percent interest in a foreign partnership, (2) a disposition by a United States person of at least a 10-percent interest in a foreign partnership, or (3) a change in a United States person's proportional interest in a foreign partnership that is equivalent to at least a 10-percent interest in the partnership. However, the proposed regulations exclude from the definition of a reportable event any acquisition of an interest in, or change in proportional interest in a foreign partnership resulting from a transfer by a partner also subject to the reporting requirements under section 6038B.

Under section 6046A(d), a 10-percent interest is defined by cross-reference to section 6038(e)(3)(C) and regulations issued under that provision, and means direct or indirect ownership of a interest equal to 10 percent of the capital interest or profits interest in a partnership, and an interest to which 10 percent of the deductions or losses of a partnership are allocated.

Partnerships Excluded From Application of Subchapter K

The reporting requirements of this section shall not apply in respect of any foreign partnership which is an eligible partnership described in § 1.761–2(a) that has validly elected pursuant to § 1.761–2(b)(2)(i) to be wholly excluded from the application of subchapter K. Nor shall the reporting requirements of these proposed regulations apply to any foreign partnership validly deemed to have wholly elected out of the provisions of subchapter K as specified in § 1.761–2(b)(2)(ii). Taxpayers are reminded, however, that a precondition to being an ''electing-out'' partnership is that, as provided in § 1.761–2(a)(1), ''[t]he members of such organization must be able to compute their income without the necessity of computing partnership taxable income.'' The IRS and Treasury are concerned that in certain cases the necessary books and records are not being maintained to allow verification that such computations can indeed be made without regard to the partnership. If it appears that, in the absence of a reporting requirement under this section, the members of the ''electing-out'' partnership cannot make such separate computations, this exception to the reporting requirements will be reconsidered.

Exception for Certain International Satellite Partnerships

The proposed regulations contain an exception to the filing requirement for certain international satellite partnerships. Section 406 of TEFRA provides that section 6031 and 6046A do not apply to the International Telecommunications Satellite Organization, the International Maritime Satellite Organization, or any organization which is a successor of either organization. Although the International Maritime Satellite Organization has been subsequently renamed the International Mobile Satellite Organization, no legislation has been enacted that would eliminate the exception provided by section 406 of TEFRA.

Time and Place for Filing Return

Section 6046A(c) provides that any return required by section 6046A(a) must be filed on or before the 90th day after the day on which the United States person becomes liable to file it, or on or before a later day prescribed in regulations. After section 6046A was enacted, the IRS announced that the regulations would provide that any return would be considered timely filed if filed on or before the 90th day following the date of publication of the regulations, even if the date of filing was more than 90 days after a reportable event. Announcement 83–5 (1983–2 I.R.B. 31). Thus, no returns under section 6046A have been required to be filed to date.

Rather than require a return to be made within a specified period after a reportable event, under the proposed regulations a return under section 6046A would generally be required to be filed with the United States person's income tax return for the taxable year during which a reportable event occurs (or on the Form 8865 for the foreign partnership's taxable year in which the reportable event occurs (filed in accordance with §§ 1.6038–3(e) and (h)) if the United States person is also required to report under proposed regulation § 1.6038–3(a)). However, a return for a reportable event would not be required to be filed before the 90th day after the event. A reportable event occurring within 90 days of the due date for a taxpayer's return may be reported on a Form 8865 filed with that return, or may be reported on a separate Form 8865 filed with the taxpayer's return for the next taxable year. If required by the instructions to Form 8865, a duplicate return under section 6046A must also be filed.

In certain circumstances, the proposed regulations would also eliminate the need for two or more United States persons to file Form 8865 with respect to the same reportable event in the case of attribution of ownership.

Effective Dates

The proposed regulations are generally effective for reportable events occurring on or after January 1, 1998. The proposed regulations would relieve a United States person from having to file a return under section 6046A for reportable events occurring prior to January 1, 1998. Furthermore, the return period for reportable events occurring on or before the date that final regulations are published in the **Federal Register** would generally be extended for one taxable year.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these proposed regulations. It is hereby certified that the collection of information contained in these proposed regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the amount of time required to complete the form and file the information required under these regulations is brief and will not have a significant impact on those small entities that are required to provide notification. Furthermore, the number of small entities that will be required to file the form is not significant. Accordingly, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be giver to any written comments (preferably a signed original and eight (8) copies) that are

submitted timely to the Internal Revenue Service. All comments will be made available for public inspection and copying.

A public hearing has been scheduled for Tuesday, November 10, 1998, at 10 a.m., in room 2615, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC. Because of access restrictions, visitors will not be admitted beyond the Internal Revenue Building lobby more than 15 minutes before the hearing starts.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons that wish to present oral comments at the hearing must submit written comments and an outline of the topics to be discussed (preferably a signed original and eight (8) copies) by October 20, 1998.

A period of 10 minutes will be allotted for each person making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information. The principal author of these proposed regulations is Christopher Kelley of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding an entry in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.6046A–1 also issued under 26 U.S.C. 6046A. * * *

Par. 2. Section 1.6046A–1 is added to read as follows:

§ 1.6046A–1 Return requirement for United States persons owning interests in foreign partnerships.

(a) *Return requirement*—(1) *General rule.* If a reportable event occurs with respect to the interest of a United States person in a foreign partnership, the United States person is required to report the event on Form 8865, Information Return of U.S. Persons With Respect To Certain Foreign Partnerships'' except as provided in paragraphs (b)(1)(ii), (e), (g) or (h) of this section.

(2) *Separate return for each partnership.* If a United States person is required under section 6046A and this section to report an event with respect to an interest in more than one foreign partnership, the United States person must file a separate return for each partnership.

(b) *Definitions*—(1) *Reportable event*—(i) *General rule.* For purposes of section 6046A and this section, a *reportable event* means—

(A) An acquisition by a United States person of at least a 10-percent interest in a foreign partnership;

(B) A disposition by a United States person of at least a 10-percent interest in a foreign partnership; or

(C) Any change in a United States person's proportional interest in a foreign partnership that is equivalent to at least a 10-percent interest in the partnership.

(ii) *Exception.* If a United States person acquires an interest in a foreign partnership (or the amount of such interest changes) as a result of a transfer subject to the reporting requirements under section 6038B, the United States person will not be required to also report the acquisition (or change) under section 6046A(a).

(2) *10-percent interest.* Under section 6046A and this section, a *10-percent interest* in a partnership is an interest described in section 6038(e)(3)(C) and the regulations thereunder.

(3) *United States person. United States person* means a person described in section 7701(a)(30).

(4) *Foreign partnership. Foreign partnership* means any partnership that is a foreign partnership under sections 7701(a)(2) and (5).

(c) *Content of return.* In respect of acquisitions and dispositions of, and changes in interest described in section 6046A(a), the return must contain information in such form or manner as Form 8865 (and its accompanying instructions) prescribes with respect to reportable events, including—

(1) The name, address, and taxpayer identification number of the United States person required to file the return;

(2) The name, address, and taxpayer identification number, if any, of the foreign partnership;

(3) The name of the country under the laws of which the foreign partnership was organized, and the date of formation;

(4) For each reportable event, the date of the event, the type of event (acquisition, disposition, or change in partnership interest), and the United States person's percentage interest in the foreign partnership before and after the event; and

(5) For an acquisition, disposition or change affecting the United States person's interest in partnership capital, profits, losses, or deductions, the fair market value of the interest acquired, disposed of, or changed.

(d) *Time and manner for filing returns—(1) General rule.* Except as provided in paragraph (d)(2) of this section, the Form 8865 must be filed with the income tax return (including a partnership return of income) of the United States person for the taxable year in which the reportable event occurs, and must be filed by the due date (including extensions) of the income tax return.

(2) *Exceptions*—(i) *United States person also required to file under § 1.6038–3(a).* If the United States person required to file under this section is also required to file under § 1.6038–3(a) for the period in which the reportable event occurred, then the United States person must report under this section on the Form 8865 for the foreign partnership's annual accounting period in which the reportable event occurred (not its own taxable year) and file with its income tax return for that year as provided in § 1.6038–3(e) and (h).

(ii) *Reportable event less than 90 days before the due date of the United States person's income tax return.* If the date of a reportable event is less than 90 days before the due date of the United States person's income tax return for the taxable year in which the reportable event occurred, the United States person may file the Form 8865 in respect of that reportable event with its income tax return for that taxable year, or may file a separate Form 8865 in respect of that reportable event with its income tax return for the next taxable year.

(3) *Duplicate returns.* If required by the instructions to Form 8865, a duplicate Form 8865 (including attachments and schedules) must also be filed.

(e) *Persons excepted from filing return*—(1) *Requirements.* A United States person otherwise required to file a return under this section with respect to a foreign partnership need not file a return provided all of the following conditions are met—

(i) The person does not directly own an interest in the foreign partnership;

(ii) The person is required to file a return solely by reason of attribution of ownership from a United States person (as determined under the rules of section 6038(e)(3) and the regulations thereunder); and

(iii) A person from whom ownership is attributed furnishes all of the information required under this section with respect to the reportable event.

(2) *Statement required.* A United States person who does not furnish an information return under the provisions of paragraph (e)(1) of this section must file a statement with the person's income tax return—

(i) Indicating that the filing requirement has been or will be satisfied;

(ii) Identifying the person who has or will file the return;

(iii) Identifying the IRS Service Center where the return was or will be filed; and

(iv) Providing any additional information as Form 8865 and the accompanying instructions may require.

(f) *Method of Reporting.* Except as otherwise provided on Form 8865, or the accompanying instructions, any amounts required to be reported under section 6046A and this section must be expressed in United States dollars, with a statement of the exchange rates used. All statements required on or with Form 8865 pursuant to this section must be in the English language.

(g) *Reporting under this section not required of partnerships excluded from the application of subchapter K*—(1) *Election to be wholly excluded.* The reporting requirements of this section will not apply to any United States person in respect of an eligible partnership as described in § 1.761–2(a) in which that United States person is a partner, if such partnership has validly elected to be excluded from all of the provisions of subchapter K of chapter 1 of the Internal Revenue Code in the manner specified in § 1.761–2(b)(2)(i).

(2) *Deemed excluded.* The reporting requirements of this section will not apply to any United States person in respect of an eligible partnership as described in § 1.761–2(a) in which that United States person is a partner, if such partnership is validly deemed to have elected to be excluded from all of the provisions of subchapter K of chapter 1 of the Internal Revenue Code in accordance with the provisions of § 1.761–2(b)(2)(ii).

(h) *Exclusion for satellite organizations.* The return requirement of section 6046A does not apply to the International Telecommunications Satellite Organization (or a successor organization) or the International Mobile Satellite Organization (or any other organization that is a successor to the International Maritime Satellite Organization).

(i) *Failure to comply with reporting requirements*—(1) *Failure to comply.* A failure to comply with the requirements of section 6046A includes—

(i) The failure to report at the proper time and in the proper manner any information required to be reported under the rules of this section; and

(ii) The provision of false or inaccurate information in purported compliance with the requirements of this section.

(2) *Penalties.* For penalties for failure to comply with the reporting requirements of section 6046A and this section, see sections 6679 and 7203.

(3) *Statute of limitations.* For exceptions to the limitations on assessment and collection in the event of a failure to provide information under section 6046A, see section 6501(c)(8).

(j) *Effective date*—(1) *General rule.* This section applies to reportable events occurring on or after January 1, 1998.

(2) *Reportable event prior to issuance of final regulations.* If a reportable event occurs on or before the date final regulations on this subject are published in the **Federal Register**, the Form 8865 may be filed with the United States person's timely filed (including extensions) income tax return for the taxable year immediately following the taxable year in which the reportable event occurs.

Michael P. Dolan,

Deputy Commissioner of Internal Revenue.

[FR Doc. 98–23883 Filed 9–8–98; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 721

[OPPTS–50628C; FRL–6020–8]

RIN 2070–AB27

Certain Chemical Substances; Proposed Significant New Use Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing a significant new use rule (SNUR) under section 5(a)(2) of the Toxic Substances Control Act (TSCA) for twelve chemical substances which were the subject of premanufacture notices (PMNs). This proposal would require certain persons who intend to manufacture, import, or process these substances for a significant new use to notify EPA at least 90 days before commencing any manufacturing, importing, or processing activities for a use designated by this SNUR as a significant new use. The required notice would provide EPA with the opportunity to evaluate the intended use and, if necessary, to prohibit or limit that activity before it can occur.

DATES: Written comments must be received by EPA by October 9, 1998.

ADDRESSES: Each comment must bear the docket control number OPPTS–50628C and the name(s) of the chemical substance(s) subject to the comment. All comments should be sent in triplicate to: OPPT Document Control Officer (7407), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Rm. G–099, East Tower, Washington, DC 20460.

Comments and data may also be submitted electronically to: oppt.ncic@epa.gov. Follow the instructions under Unit VII. of this document. No Confidential Business Information (CBI) should be submitted through e-mail.

All comments which contain information claimed as CBI must be clearly marked as such. Three sanitized copies of any comments containing information claimed as CBI must also be submitted and will be placed in the public record for this rulemaking. Persons submitting information on any portion of which they believe is entitled to treatment as CBI by EPA must assert a business confidentiality claim in accordance with 40 CFR 2.203(b) for each portion. This claim must be made at the time that the information is submitted to EPA. If a submitter does not assert a confidentiality claim at the time of submission, EPA will consider this as a waiver of any confidentiality claim and the information may be made available to the public by EPA without further notice to the submitter.

FOR FURTHER INFORMATION CONTACT: Susan B. Hazen, Director, Environmental Assistance Division (7408), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E–531, 401 M St., SW., Washington, DC 20460, telephone: (202) 554–1404, TDD: (202) 554–0551; e-mail: TSCA-Hotline@epa.gov.

SUPPLEMENTARY INFORMATION:

Electronic Availability: Electronic copies of this document are available from the EPA Home Page at the **Federal Register**-Environmental Documents entry for this document under ''Laws and Regulations'' (http://www.epa.gov/fedrgstr/).

This proposed SNUR would require persons to notify EPA at least 90 days before commencing the manufacture, import, or processing of twelve substances for the significant new uses designated herein. The required notice would provide EPA with information

with which to evaluate an intended use and associated activities.

I. Authority

Section 5(a)(2) of TSCA (15 U.S.C. 2604(a)(2)) authorizes EPA to determine that a use of a chemical substance is a ''significant new use''. EPA must make this determination by rule after considering all relevant factors, including those listed in section 5(a)(2) of TSCA. Once EPA determines that a use of a chemical substance is a significant new use, section 5(a)(1)(B) of TSCA requires persons to submit a notice to EPA at least 90 days before they manufacture, import, or process the chemical substance for that use. Section 26(c) of TSCA authorizes EPA to take action under section 5(a)(2) of TSCA with respect to a category of chemical substances.

Persons subject to this SNUR would comply with the same notice requirements and EPA regulatory procedures as submitters of premanufacture notices under section 5(a)(1) of TSCA. In particular, these requirements include the information submission requirements of TSCA section 5(b) and (d)(1), the exemptions authorized by section 5(h)(1), (h)(2), (h)(3), and (h)(5) of TSCA, and the regulations at 40 CFR part 720. Once EPA receives a SNUR notice, EPA may take regulatory action under section 5(e), 5(f), 6, or 7 of TSCA to control the activities for which it has received a SNUR notice. If EPA does not take action, section 5(g) of TSCA requires EPA to explain in the **Federal Register** its reasons for not taking action.

Persons who intend to export a substance identified in a proposed or final SNUR are subject to the export notification provisions of TSCA section 12(b). The regulations that interpret section 12(b) appear at 40 CFR part 707.

II. Applicability of General Provisions

General regulatory provisions applicable to SNURs are codified at 40 CFR part 721, subpart A. On July 27, 1988 (53 FR 28354) and July 27, 1989 (54 FR 31298), EPA promulgated amendments to the general provisions which apply to this SNUR. In the **Federal Register** of August 17, 1988 (53 FR 31252), EPA promulgated a ''User Fee Rule'' (40 CFR part 700) under the authority of TSCA section 26(b). Provisions requiring persons submitting SNUR notices to submit certain fees to EPA are discussed in detail in that **Federal Register** document. Interested persons should refer to these documents for further information.

III. Background

In the **Federal Register** of January 22, 1998 (63 FR 3393) (FRL–5720–3), EPA issued several direct final SNURs, including SNURs for the twelve chemicals substances which are the subject of this proposal. EPA received notice of intent to submit adverse comments following publication for these twelve chemical substances. Therefore, as required by § 721.160, a final SNUR removing these substances is being issued elsewhere in this issue of the **Federal Register**, and this proposed rule on the substances is being issued. In addition, the proposed SNUR for § 721.658 has been changed based on submitted comments. The commenter noted that the direct final SNUR had required notification if the substances were released to water during processing and use, but the submitted PMNs had already identified potential water releases during use of the substance. Thus, EPA is now proposing to require notification if the substances are released to water during manufacturing and processing.

IV. Substance Subject to This Proposed Rule

EPA is proposing significant new use and recordkeeping requirements for the following chemical substances under part 721, subpart E.

PMN Number P–94–209

Chemical name: Phenol, 2,4-dimethyl-6-(1-methylpentadecyl)-.
CAS number: 134701–20–5.
Basis for action: The PMN substance will be used as an antioxidant. Based on submitted test data, there is concern for liver toxicity, kidney toxicity, adrenal toxicity, and blood toxicity. Based on submitted test data and analogy to phenols, EPA is also concerned that toxicity to aquatic organisms will occur at concentrations as low as 1 part per billion (ppb). EPA determined that use of the substance as described in the PMN did not present an unreasonable risk because workers would not be subject to significant dermal exposures and there were no significant environmental releases. EPA has determined that other uses of the substance may result in significant dermal exposures to workers and significant environmental releases. Based on this information the PMN substance meets the concern criteria at § 721.170 (b)(3)(i) and (b)(4)(i).
Recommended testing: EPA has determined that a dermal absorption study, a 90-day subchronic oral study in rats (40 CFR 798.2650 or OPPTS 870.3100 test guideline (63 FR 41845, August 5, 1998) (FRL–5740–1)), a chronic 60-day fish early life stage toxicity test in rainbow trout (40 CFR 797.1600 or OPPTS 850.1400 test guideline (public draft; 61 FR 16486, April 15, 1996) (FRL–5363–1)), and a 21-day daphnid chronic toxicity test (40 CFR 797.1330 or OPPTS 850.1300 test guideline (public draft; 61 FR 16486, April 15, 1996) (FRL–5363–1)) would help characterize the health and environmental effects of the PMN substance.
CFR citation: 40 CFR 721.5725.

PMN Number P–95–1466

Chemical name: (generic) Substituted aromatic aldehyde.
CAS number: Not available.
Basis for action: The PMN substance will be used as described in the PMN. Based on analogy to phenols and aldehydes, EPA is concerned that toxicity to aquatic organisms may occur at a concentration as low as 3 ppb of the PMN substance in surface waters. EPA determined that use of the substance as described in the PMNs did not present an unreasonable risk because the substance would not be released to surface waters. EPA has determined that other uses of the substance may result in releases to surface waters which exceed the concern concentration. Based on this information the PMN substance meets the concern criteria at § 721.170(b)(4)(ii).
Recommended testing: EPA has determined that a fish acute toxicity study (40 CFR 797.1400 or OPPTS 850.1075 test guideline (public draft; 61 FR 16486, April 15, 1996) (FRL–5363–1)), a daphnid acute toxicity study (40 CFR 797.1300 or OPPTS 850.1010 test guideline (public draft; 61 FR 16486, April 15, 1996) (FRL–5363–1)), and an algal acute toxicity study (40 CFR 797.1050 or OPPTS 850.5400 test guideline (public draft; 61 FR 16486, April 15, 1996) (FRL–5363–1)) would help characterize the environmental effects of the PMN substance.
CFR citation: 40 CFR 721.526.

PMN Number P–95–1467

Chemical name: Benzaldehyde, 2-hydroxy-5-nonyl-, oxime, branched.
CAS number: 174333–80–3.
Basis for action: The PMN substance will be used as described in the PMN. Based on analogy to phenols, EPA is concerned that toxicity to aquatic organisms may occur at a concentration as low as 1 ppb of the PMN substance in surface waters. EPA determined that use of the substance as described in the PMN did not present an unreasonable risk because the substance would not be released to surface waters. EPA has

determined that other uses of the substance may result in releases to surface waters which exceed the concern concentration. Based on this information the PMN substance meets the concern criteria at § 721.170(b)(4)(ii).

Recommended testing: EPA has determined that a fish acute toxicity study (40 CFR 797.1400 or OPPTS 850.1075 test guideline (public draft; 61 FR 16486, April 15, 1996) (FRL–5363–1)), a daphnid acute toxicity study (40 CFR 797.1300 or OPPTS 850.1010 test guideline (public draft; 61 FR 16486, April 15, 1996) (FRL–5363–1)), and an algal acute toxicity study (40 CFR 797.1050 or OPPTS 850.5400 test guideline (public draft; 61 FR 16486, April 15, 1996) (FRL–5363–1)) would help characterize the environmental effects of the PMN substance.

CFR citation: 40 CFR 721.528.

PMN Number P–96–585

Chemical name: (generic) Salt of a substituted polyalkylenepolyamine.

CAS number: Not available.

Basis for action: The PMN substance will be used as a processing aid. Based on analogy to aliphatic amines, EPA is concerned that toxicity to aquatic organisms may occur at a concentration as low as 1 ppb of the PMN substance in surface waters. EPA determined that use of the substance as described in the PMN did not present an unreasonable risk because the substance was not released to surface waters. EPA has determined that other uses may result in releases to surface waters. Based on this information the PMN substance meets the concern criteria at § 721.170(b)(4)(ii).

Recommended testing: EPA has determined that a fish acute toxicity study (40 CFR 797.1400 or OPPTS 850.1075 test guideline (public draft; 61 FR 16486, April 15, 1996) (FRL–5363–1)), a daphnid acute toxicity study (40 CFR 797.1300 or OPPTS 850.1010 test guideline (public draft; 61 FR 16486, April 15, 1996) (FRL–5363–1)), and an algal acute toxicity study (40 CFR 797.1050 or OPPTS 850.5400 test guideline (public draft; 61 FR 16486, April 15, 1996) (FRL–5363–1)) would help characterize the environmental effects of the PMN substance.

CFR citation: 40 CFR 721.6197.

PMN Number P–96–795

Chemical name: (generic) Mixed fatty alkylamines, salt.

CAS number: Not available.

Basis for action: The PMN substance will be used as a processing aid. Based on analogy to aliphatic amines, EPA is concerned that toxicity to aquatic organisms may occur at a concentration as low as 1 ppb of the PMN substance in surface waters. EPA determined that use of the substance as described in the PMN did not present an unreasonable risk because the substance was not released to surface waters. EPA has determined that other uses may result in releases to surface waters. Based on this information the PMN substance meets the concern criteria at § 721.170(b)(4)(ii).

Recommended testing: EPA has determined that a fish acute toxicity study (40 CFR 797.1400 or OPPTS 850.1075 test guideline (public draft; 61 FR 16486, April 15, 1996) (FRL–5363–1)), a daphnid acute toxicity study (40 CFR 797.1300 or OPPTS 850.1010 test guideline (public draft; 61 FR 16486, April 15, 1996) (FRL–5363–1)), and an algal acute toxicity study (40 CFR 797.1050 or OPPTS 850.5400 test guideline (public draft; 61 FR 16486, April 15, 1996) (FRL–5363–1)) would help characterize the environmental effects of the PMN substance.

CFR citation: 40 CFR 721.567.

PMN Number P–96–866

Chemical name: (generic) Derivative of substituted carbomonocyclic acid-amine distillation stream byproduct reaction product.

CAS number: Not available.

Basis for action: The PMN substance will be used as a processing aid. Based on analogy to aliphatic amines, EPA is concerned that toxicity to aquatic organisms may occur at a concentration as low as 1 ppb of the PMN substance in surface waters. EPA determined that use of the substance as described in the PMN did not present an unreasonable risk because the substance was not released to surface waters. EPA has determined that other uses may result in releases to surface waters. Based on this information the PMN substance meets the concern criteria at § 721.170(b)(4)(ii).

Recommended testing: EPA has determined that a fish acute toxicity study (40 CFR 797.1400 or OPPTS 850.1075 test guideline (public draft; 61 FR 16486, April 15, 1996) (FRL–5363–1)), a daphnid acute toxicity study (40 CFR 797.1300 or OPPTS 850.1010 test guideline (public draft; 61 FR 16486, April 15, 1996) (FRL–5363–1)), and an algal acute toxicity study (40 CFR 797.1050 or OPPTS 850.5400 test guideline (public draft; 61 FR 16486, April 15, 1996) (FRL–5363–1)) would help characterize the environmental effects of the PMN substance.

CFR citation: 40 CFR 721.2082.

PMN Number P–96–1588

Chemical name: (generic) Hydrochloride salt of a mixed fatty amidoamide.

CAS number: Not available.

Basis for action: The PMN substance will be used as a processing aid. Based on analogy to aliphatic amines, EPA is concerned that toxicity to aquatic organisms may occur at a concentration as low as 2 ppb of the PMN substance in surface waters. EPA determined that use of the substance as described in the PMN did not present an unreasonable risk because the substance was not released to surface waters. EPA has determined that other uses may result in releases to surface waters. Based on this information the PMN substance meets the concern criteria at § 721.170(b)(4)(ii).

Recommended testing: EPA has determined that a fish acute toxicity study (40 CFR 797.1400 or OPPTS 850.1075 test guideline (public draft; 61 FR 16486, April 15, 1996) (FRL–5363–1)), a daphnid acute toxicity study (40 CFR 797.1300 or OPPTS 850.1010 test guideline (public draft; 61 FR 16486, April 15, 1996) (FRL–5363–1)), and an algal acute toxicity study (40 CFR 797.1050 or OPPTS 850.5400 test guideline (public draft; 61 FR 16486, April 15, 1996) (FRL–5363–1)) would help characterize the environmental effects of the PMN substance.

CFR citation: 40 CFR 721.637.

PMN Numbers P–97–57/58/59/60/61

Chemical name: (generic) Alkyl substituted quaternary ammonium chloride.

CAS number: Not available.

Basis for action: The PMN substances will be used as surface active agents. Based on submitted test data and analogy to monoalkyl quaternary surfactants EPA is concerned that toxicity to aquatic organisms may occur at a concentration as low as 4 ppb of the PMN substances in surface waters. EPA determined that use of the substances as described in the PMNs did not present an unreasonable risk because the substances would not be released to surface waters during manufacturing and processing. EPA has determined that other uses of the substances may result in releases to surface waters which exceed the concern concentration. Based on this information the PMN substances meets the concern criteria at § 721.170 (b)(4)(i) and (b)(4)(ii).

Recommended testing: EPA has determined that a fish acute toxicity study (40 CFR 797.1400 or OPPTS 850.1075 test guideline (public draft; 61

FR 16486, April 15, 1996) (FRL–5363–1)), a daphnid acute toxicity study (40 CFR 797.1300 or OPPTS 850.1010 test guideline (public draft; 61 FR 16486, April 15, 1996) (FRL–5363–1)), and an algal acute toxicity study (40 CFR 797.1050 or OPPTS 850.5400 test guideline (public draft; 61 FR 16486, April 15, 1996) (FRL–5363–1)) would help characterize the environmental effects of the PMN substances.
CFR citation: 40 CFR 721.658.

V. Applicability of SNUR to Uses Occurring Before Effective Date of the Final SNUR

EPA has decided that the intent of section 5(a)(1)(B) of TSCA is best served by designating a use as a significant new use as of the date of proposal rather than as of the effective date of the rule. Because this SNUR was first published on January 22, 1998, as a direct final rule, that date will serve as the date after which uses would be considered to be new uses. If uses which had commenced between that date and the effective date of this rulemaking were considered ongoing, rather than new, any person could defeat the SNUR by initiating a significant new use before the effective date. This would make it difficult for EPA to establish SNUR notice requirements. Thus, persons who begin commercial manufacture, import, or processing of the substances for uses that would be regulated through this SNUR after January 22, 1998, would have to cease any such activity before the effective date of this proposed rule. To resume their activities, such persons would have to comply with all applicable SNUR notice requirements and wait until the notice review period, including all extensions, expires. EPA, not wishing to unnecessarily disrupt the activities of persons who begin commercial manufacture, import, or processing for a proposed significant new use before the effective date of the SNUR, has promulgated provisions to allow such persons to comply with this proposed SNUR before it is promulgated. If a person were to meet the conditions of advance compliance as codified at § 721.45(h) (53 FR 28354, July 17, 1988), the person would be considered to have met the requirements of the final SNUR for those activities. If persons who begin commercial manufacture, import, or processing of the substances between proposal and the effective date of the SNUR do not meet the conditions of advance compliance, they must cease that activity before the effective date of the rule. To resume their activities, these persons would have to comply with all applicable SNUR notice requirements and wait until the notice review period, including all extensions, expires.

VI. Economic Analysis

EPA has evaluated the potential costs of establishing significant new use notice requirements for potential manufacturers, importers, and processors of the chemical substances at the time of the direct final rule. The analysis is unchanged for the substances in this proposed rule. The Agency's complete economic analysis is available in the public record for this proposed rule (OPPTS–50628C).

VII. Public Record and Electronic Submissions

The official record for this rulemaking, as well as the public version, has been established for this rulemaking under docket control number OPPTS–50628C (including comments and data submitted electronically as described below). The record includes basic information considered by the Agency in developing this proposed rule. EPA will supplement the record with additional information as it is received.

EPA will accept additional materials for inclusion in the record at any time between this proposal and designation of the complete record. EPA will identify the complete rulemaking record by the date of promulgation A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 12 noon to 4 p.m., Monday through Friday, excluding legal holidays. The official rulemaking record is located in the TSCA Nonconfidential Information Center, Rm. NE–B607, 401 M St., SW., Washington, DC.

Electronic comments can be sent directly to EPA at:
oppt.ncic@epa.gov

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted on disks in WordPerfect 5.1/6.1 or ASCII file format. All comments and data in electronic form must be identified by the docket control number OPPTS–50628C. Electronic comments on this proposed rule may be filed online at many Federal Depository Libraries.

The OPPTS harmonized test guidelines referenced in this document are available on EPA's World Wide Web site (http://www.epa.gov/epahome/research.htm) under the heading ''Test Methods and Guidelines/OPPTS Harmonized Test Guidelines''.

VIII. Regulatory Assessment Requirements

A. Certain Acts and Executive Orders

Under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' subject to review by the Office of Management and Budget (OMB). In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Nor does it involve special considerations of environmental justice related issues as required by Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994), or additional OMB review in accordance with Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997).

According to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, an agency may not conduct or sponsor, and a person is not required to respond to a collection of information that requires OMB approval under the PRA, unless it has been approved by OMB and displays a currently valid OMB control number. The OMB control numbers for EPA's regulations, after initial display in the preamble of the final rules, are listed in 40 CFR part 9. The information collection requirements related to this action have already been approved by OMB pursuant to the PRA under OMB control number 2070–0012 (EPA ICR No. 574). This action does not impose any burden requiring additional OMB approval.

If an entity were to submit a significant new use notice to the Agency, the annual burden is estimated to average between 30 and 170 hours per response. This burden estimate includes the time needed to review instructions, search existing data sources, gather and maintain the data needed, and complete, review and submit the required significant new use notice.

Send any comments about the accuracy of the burden estimate, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques, to the Director, OPPE Regulatory Information Division, U.S. Environmental Protection Agency (Mail Code 2137), 401 M St., SW.,

Washington, DC 20460, with a copy to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th St., NW., Washington, DC 20503, marked ''Attention: Desk Officer for EPA''. Please remember to include the OMB control number in any correspondence, but do not submit any completed forms to these addresses.

In addition, pursuant to section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agency has previously certified, as a generic matter, that the promulgation of a SNUR does not have a significant adverse economic impact on a substantial number of small entities. The Agency's generic certification for promulgation of new SNURs appears on June 2, 1997 (62 FR 29684) (FRL–5597–1) and was provided to the Chief Counsel for Advocacy of the Small Business Administration.

B. Executive Order 12875

Under Executive Order 12875, entitled *Enhancing Intergovernmental Partnerships* (58 FR 58093, October 28, 1993), EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments. If the mandate is unfunded, EPA must provide to the OMB a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments ''to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.''

Today's proposed rule does not create an unfunded federal mandate on State, local or tribal governments. The proposed rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of Executive Order 12875 do not apply to this proposed rule.

C. Executive Order 13084

Under Executive Order 13084, entitled *Consultation and Coordination with Indian Tribal Governments* (63 FR 27655, May 19,1998), EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide OMB, in a separately identified section of the preamble to the proposed rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.''

Today's proposed rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this proposed rule.

List of Subjects in 40 CFR Part 721

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: August 31, 1998.

Charles M. Auer,

Director, Chemical Control Division, Office of Pollution Prevention and Toxics.

Therefore, it is proposed that 40 CFR part 721 be amended as follows:

PART 721—[AMENDED]

1. The authority citation for part 721 would continue to read as follows:

Authority: 15 U.S.C. 2604, 2607, and 2625(c).

2. By adding new § 721.526 to subpart E to read as follows:

§ 721.526 Substituted aromatic aldehyde (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as a substituted aromatic aldehyde (PMN P–95–1466) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Release to water.* Requirements as specified in § 721.90 (a)(1), (b)(1), and (c)(1).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125 (a), (b), (c), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

3. By adding new § 721.528 to subpart E to read as follows:

§ 721.528 Benzaldehyde, 2-hydroxy-5-nonyl-, oxime, branched.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as benzaldehyde, 2-hydroxy-5-nonyl-, oxime, branched (PMN P–95–1467; CAS No. 174333–80–3) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Release to water.* Requirements as specified in § 721.90 (a)(1), (b)(1), and (c)(1).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125 (a), (b), (c), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

4. By adding new § 721.567 to subpart E to read as follows:

§ 721.567 Mixed fatty alkylamines, salt (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as mixed fatty alkylamines, salt (PMN P–96–795) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Release to water.* Requirements as specified in § 721.90 (a)(1), (b)(1), and (c)(1).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125

(a), (b), (c), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

5. By adding new § 721.637 to subpart E to read as follows:

§ 721.637 Hydrochloride salt of a mixed fatty amidoamide (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as a hydrochloride salt of a mixed fatty amidoamide (PMN P–96–1588) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Release to water.* Requirements as specified in § 721.90 (a)(1), (b)(1), and (c)(1).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125 (a), (b), (c), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

6. By adding new § 721.658 to subpart E to read as follows:

§ 721.658 Alkyl substituted quaternary ammonium chloride (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substances identified generically as alkyl substituted quaternary ammonium chloride (PMNs P–97–57/58/59/60/61) are subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Release to water.* Requirements as specified in § 721.90 (a)(1) and (b)(1).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125 (a), (b), (c), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

7. By adding new § 721.2082 to subpart E to read as follows:

§ 721.2082 Derivative of substituted carbomonocyclic acid-amine distillation stream byproduct reaction product (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as a derivative of substituted carbomonocyclic acid-amine distillation stream byproduct reaction product (PMN P–96–866) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Release to water.* Requirements as specified in § 721.90 (a)(1), (b)(1), and (c)(1).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125 (a), (b), (c), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

8. By adding new § 721.5725 to subpart E to read as follows:

§ 721.5725 Phenol, 2,4-dimethyl-6-(1-methylpentadecyl)-.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as phenol, 2,4-dimethyl-6-(1-methylpentadecyl)- (PMN P–94–209; CAS No. 134701–20–5) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63 (a)(2)(i) and (a)(3).

(ii) *Release to water.* Requirements as specified in § 721.90 (a)(1), (b)(1), and (c)(1).

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125 (a), (b), (c), (d), (e), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

9. By adding new § 721.6197 to subpart E to read as follows:

§ 721.6197 Salt of a substituted polyalkylenepolyamine (generic).

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified generically as a salt of a substituted polyalkylenepolyamine (PMN P–96–585) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Release to water.* Requirements as specified in § 721.90 (a)(1), (b)(1), and (c)(1).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph.

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125 (a), (b), (c), and (k) are applicable to manufacturers, importers, and processors of this substance.

(2) *Limitations or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

[FR Doc. 98–24036 Filed 9–8–98; 8:45 am]

BILLING CODE 6560–50–F

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 90-Day Finding for a Petition To List the Henslow's Sparrow as Threatened

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces a 90-day finding for a petition to list the Henslow's sparrow (*Ammodramus henslowii*) in the contiguous United States under the Endangered Species Act of 1973, as amended (Act). The Service finds that the petition does not present substantial information indicating that listing this species as threatened may be warranted.

DATES: The finding announced in this document was made on August 22, 1998.

ADDRESSES: Questions, comments, or information concerning this petition should be sent to the Acting Field

Supervisor, Ecological Services Field Office, U.S. Fish and Wildlife Service, 620 S. Walker Street, Bloomington, Indiana 47403–2121. The petition finding, supporting data, and comments are available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Mr. Scott Pruitt, see **ADDRESSES** section or telephone 812–334–4261.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Act requires that the Service make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to demonstrate that the petitioned action may be warranted. This finding is to be based on all information available to the Service at the time the finding is made. To the maximum extent practicable, the finding shall be made within 90 days following receipt of the petition and promptly published in the **Federal Register**. Following a positive finding, section 4(b)(3)(B) of the Act requires the Service to promptly commence a status review of the species.

The Service has made a 90-day finding on a petition to list the Henslow's sparrow (*Ammodramus henslowii*). The petition, dated March 31, 1998, was submitted by Mr. D.C. Carlton, Director of the Biodiversity Legal Foundation, Boulder, Colorado, and was received on April 6, 1998. The petition requested that the Service list the Henslow's sparrow as threatened where it continues to exist in the contiguous United States and to designate critical habitat.

The petition states that the Henslow's sparrow has experienced a steep and continuing downward population trend across its broad range. The petition maintains that this trend will continue due to ongoing loss of the tallgrass prairie habitat needed by the sparrow. It points to studies estimating rangewide native prairie loss as high as 99.9 percent, as well as the loss of ''substitute prairie of pasture and hayfields'' in some parts of the sparrow's range. In addition to habitat loss and fragmentation, human disturbance, predation, and nest parasitism, the petition also identifies cats, pesticide hazards, and collisions with manmade structures as significant mortality factors for birds, in general, and which may be problems for the Henslow's sparrow, as well.

The Service recently completed an exhaustive review of the literature and unpublished data on the species and summarized the results in a 1996 status assessment report (Pruitt 1996). That report evaluated the information available at that time across the entire range of the species. The data compiled in that report led the Service to conclude in 1997 that elevating the Henslow's sparrow to candidate status was not justified (U.S. Fish and Wildlife Service 1997). Thus, the review of this petition was primarily an evaluation of whether new information, or other information not reviewed by the Service in the 1996 status assessment, should cause the Service to reverse its 1997 determination that there was insufficient information to justify proposing the species for threatened or endangered status.

A careful review has shown that the petition does not cite, reference, or provide status, trend, or threat data that indicate any further deterioration in the status of the Henslow's sparrow since completion of the Service's 1996 status assessment of the Henslow's sparrow (Pruitt 1996). While the petition provides detailed discussion on the disappearance of the tallgrass prairie and on the biology and habitat needs of the species, the petition provides little data that support its contention that the steep decline of Henslow's sparrow is continuing and that the species has declined to the threshold of threatened status (likely to become an endangered species throughout all or a significant portion of its range).

In contrast, the Service's review of available recent data in addition to those supplied with the petition indicates that the decline may have stopped, and may even be reversing, at several important areas across a significant portion of the species' range. Hints of this possible change in population trend in some areas were detected during the 1996 status assessment and were partially responsible for the Service's 1997 decision (U.S. Fish and Wildlife Service 1997). From a range-wide perspective, these data indicate that the status of the Henslow's sparrow may have stabilized, and possibly may have improved, since completion of the 1996 status assessment. However, these data are primarily from short-term studies or are difficult to interpret with confidence for other reasons (e.g., normal annual variation in population numbers; changes in observation intensity; insufficient data on reproduction; uncertain future status of newly-colonized habitat). Thus, any conclusions drawn from them must be considered to be preliminary.

The most important site-specific examples of these recent data are described as follows:

Jefferson Proving Grounds (JPG), Indiana. As reported by Pruitt (1996), the population in 1995 was estimated conservatively at 400 singing males; subsequent analysis of the data resulted in an estimate of 611 singing males (Miller, Pruitt, and Pruitt 1997). Estimates for 1996 and 1997 were 970 and 683 singing males, respectively (Miller, Pruitt, and Pruitt 1997).

Fort Riley Military Reservation, Kansas. The Henslow's sparrow population in 1994 was estimated at 2,000 singing males. Jeff Keating (Ft. Riley, pers. comm. 1998) estimated that over 3,000 singing males were present on the installation in 1997.

Southwestern Missouri. As reported by Pruitt (1996), the population of Henslow's sparrow on southwestern Missouri prairies was estimated at 5,000–6,000 pairs during the period 1992–95; the status of this population appears to be stable. Maiken Winter (University of Missouri, pers. comm. 1998) conducted research on Henslow's sparrow in these prairies from 1995–97. The prairies remain a stronghold for the species; it is the most abundant breeding bird in some of the prairies evaluated.

Tallgrass Prairie Preserve, Oklahoma. The status of the Henslow's sparrow at The Nature Conservancy's Tallgrass Prairie Preserve, estimated at approximately 3,000 singing males, has not changed. It has been documented that the species is colonizing suitable habitat outside the preserve. During roadside point counts in surrounding northeastern Oklahoma counties in 1996, Henslow's sparrows were documented at 28 sites in 6 counties (Reinking 1997).

Reclaimed Mine Land, Indiana. Bajema *et al.* (1998) found a substantial, previously unknown, population of Henslow's sparrow in 1997 on reclaimed mine lands in southwestern Indiana and estimated the population at over 1,600 singing males.

Reclaimed Mine Land, Ohio. Koford (1997) reported that 444 singing male Henslow's sparrows were found in 12 counties in southeastern Ohio during 1997. These birds were found primarily on reclaimed strip mines.

From state-by-state perspectives, since the conclusion of Pruitt's (1996) status assessment Henslow's sparrow populations appear to have increased at some locations in as many as 10 states. In addition to the large populations described above, the following improvements have been noted.

Illinois. James Herkert (Illinois Endangered Species Protection Board, pers. comm. 1998) noted that both 1996 and 1997 were good years for the Henslow's sparrow in Illinois. Illinois Spring Bird Count trend analysis suggests that Henslow's sparrow populations have been generally increasing in the state for the past 4–5 years. The data also reflect a population surge in southern Illinois, primarily on land enrolled in the Conservation Reserve Program (CRP) (Herkert 1998). These areas had few, if any, Henslow's sparrows just a few years ago.

Indiana. In addition to the population at JPG and on reclaimed mine lands in Indiana, Koford (1997) reported that over 100 singing males were detected on Atterbury State Fish and Wildlife Area and the adjacent Atterbury Reserve Forces Training Area. The status of this population was unknown when the 1996 status assessment (Pruitt 1996) was completed. Henslow's sparrows are also colonizing CRP fields in southern Indiana, but the extent of use has not been documented (Jeff Kiefer, USFWS, pers. comm. 1998).

Kentucky. Habitat is actively managed for Henslow's sparrow at the Fort Knox Military Reserve. A 3-year rotational burning scheme was initiated in 1995. Approximately 12 singing males were heard in managed areas during the 1997 breeding season. There is also a breeding population of Henslow's sparrow on the West Kentucky Army National Guard Training Site; this population appears to be expanding (Sunni Lawless, Kentucky Department of Fish and Wildlife Resources, pers. comm. 1998).

Michigan. The species appears to be colonizing some CRP lands in Michigan, but this has not been quantitatively assessed (Thomas Weise, Michigan Department of Natural Resources, pers. comm. 1998).

Missouri. James D. Wilson (Missouri Department of Conservation, pers. comm. 1998) noted that the number of sites on which Henslow's sparrows were reported on Breeding Bird Surveys and other surveys increased over the past 5 years. Most new sites were associated with CRP land in northern Missouri.

New York. Currently, the largest concentration of breeding Henslow's sparrow in New York is a recently discovered population at Fort Drum. The number of birds at the site is estimated at 50 pairs (Steven Joule, Fort Drum, pers. comm. 1998). Smith and Smith (1992) found Henslow's sparrow in 5 of 33 pastures surveyed in the Finger Lakes National Forest during 1989. Charles Smith (Cornell University, pers. comm. 1998) resurveyed these pastures in 1997 and counted 30 territorial male Henslow's sparrows in one pasture that had supported 5–7 territorial males the previous summer. In contrast, Mazur and Underwood (1995) reported that Saratoga National Historic Park supported 11–15 territorial males in 1995; Jeff Wells (National Audubon Society, pers. comm. 1998) noted that no Henslow's sparrows were found at the Park in 1997.

North Carolina. Wright (1997) reported on the status of Henslow's sparrows at the Voice of America site in North Carolina. The site has been surveyed since 1994; 100–200 singing males have been counted annually. In 1998, 198 singing males were found (John Wright, pers. comm. 1998).

Pennsylvania. The State of Pennsylvania has indicated that there are hundreds of breeding pairs of Henslow's sparrow in numerous counties throughout the State, thus the species has no State status. When information was solicited for the status assessment in 1995, the species was considered a Special Concern species (Daniel Brauning, Pennsylvania Game Commission, pers. comm. 1995).

Wisconsin. Buena Vista Prairie Chicken Management Area (Portage County), reported to support 15–40 pairs in recent years, had a larger population, potentially in excess of 100 pairs, in 1997 (D. Sample, pers. comm. 1995); additional monitoring is needed to document the size of this population.

Research is ongoing on three large wintering populations of Henslow's sparrows in Mississippi, Louisiana, and Florida; these study areas represent the largest known winter concentrations of Henslow's sparrow. Data collection and/or analyses for these studies are ongoing. These efforts are expected to further increase our understanding of the needs of, and threats to, the species.

Finally, although the petition identified predation by cats, hazards from pesticide usage, and collisions with manmade structures as significant mortality factors for birds, in general, the petitioner neither provided, nor referenced, any data that indicated these factors are significant threats to the Henslow's sparrow. Furthermore, the additional recent data obtained by the Service from Henslow's sparrow researchers did not identify these as significant past, present, or anticipated future threats to the species.

Contrary to the petition's statement that the Henslow's sparrow ''was left in a protectionless limbo'' by the Service's elimination of the category 2 candidate species list in early 1996 (a list that provided no legal protection to the species which appeared on it), the species retains Federal protection under the Migratory Bird Treaty Act, remains on the Service's list of Nongame Migratory Bird Species of Management Concern, and is the subject of numerous research efforts and conservation actions across its range. Information reviewed by the Service during the processing of this petition indicate that the level of concern generated by these designations has been sufficient to generate heightened research and management interest in the Henslow's sparrow. The Service will continue to promote these efforts to improve the biological status of the Henslow's sparrow. The Service will also encourage the continuation of monitoring activities at all sites which recently have shown signs of increased species' numbers and range; such studies are necessary to determine if the recent improvement in status will be sustained.

The Service has reviewed the petition, the literature cited in the petition, the relevant references in the bibliography that accompanied the petition, and additional information from biologists and researchers familiar with this species. The Service also solicited comments and data from States and Tribes within the area included in the petition and reviewed the information received from those sources. On the basis of the best scientific and commercial data available, the Service finds that the petition does not present substantial information that listing the Henslow's sparrow may be warranted.

References Cited

A complete list of all references cited herein is available upon request from the Bloomington Field Office (see **ADDRESSES** section).

Author: The primary author of this document is Ronald L. Refsnider of the Service's Regional Office (U.S. Fish and Wildlife Service, Division of Endangered Species, Bishop Henry Whipple Federal Building, 1 Federal Drive, Ft. Snelling, Minnesota 55111–4056; 612–713–5346).

Authority

The authority for this action is the Endangered Species Act (16 U.S.C. 1531 *et seq.*).

Dated: August 22, 1998.

Jamie Rappaport Clark,

Director, Fish and Wildlife Service.

[FR Doc. 98–24122 Filed 9–8–98; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 90-Day Finding for a Petition to List the Big Cypress Fox Squirrel as Threatened With Critical Habitat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding and initiation of status review.

SUMMARY: The Fish and Wildlife Service announces a 90-day finding on a petition to list the Big Cypress fox squirrel (*Sciurus niger avicennia*) of Florida as a threatened species pursuant to the Endangered Species Act of 1973, as amended. After a review of all available scientific and commercial information, the Service finds the petition presented substantial information indicating that listing this species may be warranted.

DATES: The finding announced in this document was made on August 22, 1998. To be considered in the 12-month finding for this petition, information and comments should be submitted to the Service by December 8, 1998.

ADDRESSES: Data, information, comments, or questions concerning this petition should be submitted to the Field Supervisor, U.S. Fish and Wildlife Service, 6620 Southpoint Drive South, Suite 310, Jacksonville, Florida 32216. The petition finding, supporting data, and comments are available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Dr. Michael M. Bentzien, Assistant Field Supervisor, see **ADDRESSES** section above or telephone 904/232–2580 ext. 106.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires that the Service make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to demonstrate that the petitioned action may be warranted. This finding is to be based on all information available to the Service at the time the finding is made. To the maximum extent practicable, this finding is to be made within 90 days of receipt of the petition, and the finding is to be published promptly in the **Federal Register**. If the finding is that substantial information was presented, the Service is also required to promptly commence a review of the status of the species involved if one has not already been initiated under the Services' internal candidate assessment process.

The processing of this petition conforms with the Service's final listing priority guidance for fiscal years 1998 and 1999 published in the **Federal Register** on May 8, 1998 (63 FR 25502). The guidance calls for giving highest priority to handling emergency situations (Tier 1); second highest priority (Tier 2) to resolving the listing status of the outstanding proposed listings, resolving the conservation status of candidate species, processing administrative findings on petitions, and processing a limited number of delistings and reclassifications; and third priority (Tier 3) to processing proposed and final designations of critical habitat. The processing of this petition falls under Tier 2.

The Service has made a 90-day finding on a petition to list the Big Cypress fox squirrel. The petition, dated December 30, 1997, was submitted by Mr. Sidney B. Maddock, Biodiversity Legal Foundation, Buxton, North Carolina, and was received by the Service on January 5, 1998. The petitioner requested the Service to list the Big Cypress fox squirrel as a threatened species and to designate critical habitat for the species. The Big Cypress fox squirrel is the southernmost subspecies of the fox squirrel (*Sciurus niger*) of the eastern and central United States. It is restricted to the southwestern Florida peninsula (Hall 1981, Humphrey and Jodice 1992). The petition stated that the Big Cypress fox squirrel is threatened by habitat loss, fragmentation, and modification; exclusion of fire; predation; road mortality; and poaching. According to the petitioner, the trend in habitat loss is expected to continue, and while the species exists on Federal conservation lands, the populations there are fragmented and occur at very low densities. The Big Cypress fox squirrel is listed as a threatened species by the Florida Game and Fresh Water Fish Commission (Commission), under Rule 39–27.004 of the Florida Administrative Code. The Commission analyzed the conservation needs of fox squirrels in Florida (Cox et al. 1994) and concluded that the Big Cypress fox squirrel lacked an adequate habitat base in current conservation areas.

The Big Cypress fox squirrel was considered a category 2 candidate for listing under the Endangered Species Act of 1973, as amended, in Service notices of review dated December 30, 1982 (47 FR 58454), September 18, 1985 (50 FR 37958), January 6, 1989 (54 FR 554), November 21, 1991 (56 FR 58804), and November 15, 1994 (59 FR 58982). At that time, a category 2 species was one for which information in the possession of the Service indicated that proposing to list as endangered or threatened was possibly appropriate, but for which sufficient data were not available to support a proposed rule. Designation of Category 2 species was discontinued in the February 28, 1996, **Federal Register** notice (61 FR 7596).

The Service has reviewed the petition, the literature cited in the petition, and information available in Service files. On the basis of the best scientific and commercial information available, the Service finds that the petition presents substantial information that listing this species may be warranted. While the Act does not provide for petitions to designate critical habitat, the designation of critical habitat is petitionable under the Administrative Procedures Act. As required by section 4(a)(3) of the Act, critical habitat designation will be considered if it is determined that listing is warranted. Although habitat decline for the Big Cypress fox squirrel has not been quantified, available trend information suggests that habitat loss or alteration has significantly reduced numbers of this subspecies and this trend can be predicted to continue. At least two populations have disappeared, and the squirrel occurs at very low densities over much of its range. It occurs on public conservation lands but these may not be adequate for the long-term survival of the subspecies.

References Cited

Cox, J., R. Kautz, M. MacLaughlin, and T. Gilbert. 1994. Closing the gaps in Florida's wildlife habitat conservation system. Office of Environmental Services, Florida Game and Fresh Water Fish Commission, Tallahassee, Florida. 239 pp.

Hall, E.R. 1981. The mammals of North America. John Wiley and Sons, New York. Vol. 1:386–387.

Humphrey, S.R. and P.G.R. Jodice. 1992. Big Cypress fox squirrel. Pp. 224–233 in S.R. Humphrey (ed.) Rare and Endangered biota of Florida. Vol.1: Mammals.

Author. The primary author of this document is Dr. Michael M. Bentzien (see **ADDRESSES** section).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: August 22, 1998.

Jamie Rappaport Clark,

Director, Fish and Wildlife Service.

[FR Doc. 98–24121 Filed 9–8–98; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 90-day Finding for a Petition to List the Robust Blind Salamander, Widemouth Blindcat, and Toothless Blindcat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding.

SUMMARY: The Fish and Wildlife Service (Service) announces a 90-day finding for a petition to list the robust blind salamander (*Typhlomolge robusta*), widemouth blindcat (*Satan eurystomus*), and toothless blindcat (*Trogloglanis pattersoni*) under the Endangered Species Act of 1973, as amended. The Service finds that the petition did not present substantial information indicating that listing these species may be warranted. The Service will continue to maintain files on these species and is interested in receiving additional information on their status.

DATES: The finding announced in this document was made on August 21, 1998.

ADDRESSES: Send information, comments, or questions concerning this petition to the Field Supervisor, U.S. Fish and Wildlife Service, Ecological Services Field Office, 10711 Burnet Road, Suite 200, Austin, Texas 78758. The petition finding, supporting information, and comments will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Lisa O'Donnell, Biologist, at the above address or telephone 512/490–0057.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*)(Act), requires that the Service make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to demonstrate that the petitioned action may be warranted. To the maximum extent practicable, this finding is to be made within 90 days of the date the petition was received, and the finding is to be published promptly in the **Federal Register**. If the finding is that substantial information was presented, the Service is also required to promptly commence a status review of the species, if one has not already been initiated under the Service's internal candidate assessment process.

On August 21, 1995, the Service received a petition to list the robust blind salamander, widemouth blindcat, and toothless blindcat as endangered. The petition, dated August 15, 1995, was submitted by Dr. Walter R. Courtney, on behalf of the American Society of Ichthyologists and Herpetologists. However, because the Service's listing program was unfunded from October 1, 1995, through April 26, 1996, the Service was precluded from making a timely 90-day finding on this petition.

As a result of the severe funding restraints for the Service's listing program in 1995 and 1996, the Service accumulated a substantial backlog of listing actions, including petition findings. In order to prioritize the order in which the Service would process this backlog of listing actions, the Service issued listing priority guidance for Fiscal Year 1996 (May 16, 1996; 61 FR 24722). That listing priority system placed petition findings in Tier 3, behind emergency listings (Tier 1), and final action on pending proposals (Tier 2). The Service issued listing priority guidance for Fiscal Year 1997 on December 5, 1996 (61 FR 64475) and extended it on October 23, 1997 (62 FR 55268). That guidance also placed petition findings in Tier 3. Under the listing priority systems for Fiscal Years 1996 and 1997, the Service's Southwest Region, assigned lead responsibility for listing actions in Texas, only recently began processing Tier 3 actions.

The Service is now operating under its Fiscal Years 1998 and 1999 listing priority guidance (May 8, 1998; 63 FR 25502). Under this guidance, processing of petition findings was placed in Tier 2. The Service's Southwest Region is now processing Tier 2 actions under this current guidance.

The petition states that the three species are faced with habitat loss due to declining water quality and quantity in the Edwards aquifer and inadequacy of existing regulatory mechanisms and should be added to the list of Threatened and Endangered Wildlife. The Service has reviewed the petition and other available information and finds that there is not substantial information to indicate that listing the robust blind salamander, widemouth blindcat, and toothless blindcat may be warranted.

The Service has been assessing these species since their designation as category 2 candidates in 1982 (47 FR 58454). Category 2 candidates, were defined as taxa for which the Service had information indicating that protection under the Act may be warranted but for which it lacked sufficient information on status and threats to support listing proposals. On February 28, 1996, the Service discontinued the designation of multiple categories of candidates (61 FR 7596), and only those taxa for which the Service has sufficient information to support issuance of listing proposals are now considered candidates (formerly category 1).

Although the Service concurs that many Edwards aquifer species face threats from increased groundwater withdrawals and groundwater contamination, uncertainties still exist regarding the taxonomic validity and distribution of the robust blind salamander and the distributions of and extent of threats to the toothless blindcat and widemouth blindcat. The petition presented no information to resolve these uncertainties. Therefore, the Service believes that the petition did not present substantial information indicating that listing may be warranted.

The sole remaining specimen of the robust blind salamander was obtained in 1951 from a well in the dry bed of the Blanco River northeast of San Marcos, Hays County, Texas (Russell 1976, Potter and Sweet 1981). No individuals have been observed since then, and the type locality was later filled with gravel and silt. The specimen, a mature female measuring 5.7 centimeters in length, was designated as the holotype. Based on morphological differences between this individual and the Texas blind salamander (*Typhlomolge rathbuni*), which it most closely resembles, the robust blind salamander was described as a distinct species (Potter and Sweet 1981). Primary differences from the Texas blind salamander include a longer, more robust body and slightly shorter, stouter limbs. However, because the description of the robust blind salamander was based solely on the morphological characteristics of a single specimen (Russell 1976; Potter and Sweet 1981), because the type locality of the robust blind salamander is close to the known range of the Texas blind salamander, and because the appearance of the robust blind salamander is similar to that of the Texas blind salamander, the Service believes that additional research is warranted to verify whether

or not the robust blind salamander is specifically distinct from the Texas blind salamander. Furthermore, since no salamanders resembling the description of the robust blind salamander have been observed since 1951, the current existence and distribution of this form, if valid, is unknown.

Both the toothless blindcat and the widemouth blindcat are recognized as distinct species and occur in the deep portions of the Edwards aquifer (over 300 meters below the surface) in Bexar County, Texas. A status report was prepared for both species in 1979 (Longley and Karnei 1979), which recommended additional sampling of artesian wells in Medina, Uvalde, and Kinney counties to determine the blindcats' ranges. This information is not updated in the petition, and the Service is unaware of any attempts to conduct further sampling efforts. Although the petition states that both blindcats have experienced population declines, no data were provided for the Service to evaluate. The petition also cites dewatering, intrusion from the saline water zone, direct mortality due to pumping from the aquifer, as well as contamination from human activities over the aquifer as threats, but provides no supporting documentation. Information regarding the distribution of the blindcats and documentation and assessment of threats to these species are needed.

As additional data become available, the Service will reassess the need for listing the robust blind salamander, widemouth blindcat, and toothless blindcat. Thus, the Service would appreciate any additional data, information, or comments from the public, government agencies, the scientific community, industry, or any other interested party concerning the status of these species. In particular, the Service needs additional information to determine (1) the taxonomic status of the robust blind salamander, whether or not it still exists, and, if it still exists, the extent of its distribution; (2) the distribution of the toothless and widemouth blindcats; and, (3) the threats to these species.

References Cited

Longley, G. and H. Karnei. 1979. Status of *Trogloglanis pattersoni* Eigenmann, the toothless blindcat, and status of *Satan eurystomus* Hubbs and Bailey, the widemouth blindcat. Endangered Species Report, U.S. Fish and Wildlife Service, Albuquerque, NM.

Potter, F.E. and S.S. Sweet. 1981. Generic boundaries in Texas cave salamanders, and a redescription of *Typhlomolge robusta* (Amphibia: Plethodontidae). Copeia 1:64–75.

Russell, W.H. 1976. Distribution of troglobitic salamanders in the San Marcos area, Hays County, Texas. Unpubl. Report 7601, Texas Association for Biological Investigations of Troglobitic *Eurycea*. University of Texas Station, Austin, TX. 35 pp.

Author. The primary author of this document is Lisa O'Donnell, Austin Ecological Services Field Office (see **ADDRESSES** section).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: August 21, 1998.

Jamie Rappaport Clark,

Director, Fish and Wildlife Service.

[FR Doc. 98–24120 Filed 9–8–98; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[I.D. 061998C]

Fisheries of the Northeastern United States; Petition for Rulemaking for Rotational Opening of Georges Bank Closed Areas for Scallop Fishing; Reopening of Comment Period

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

ACTION: Notice of receipt of petition for rulemaking; reopening of comment period.

SUMMARY: NMFS announces that it is reopening the public comment period for the petition for rulemaking requesting that sea scallop harvest be allowed on a rotational basis in areas of Georges Bank that are currently closed to all vessels capable of catching groundfish.

DATES: Written comments will be accepted through October 9, 1998.

ADDRESSES: Comments on the petition should be directed to Dr. Gary C. Matlock, Office of Sustainable Fisheries, NMFS, 1315 East-West Highway, Silver Spring, MD 20910. Copies of the petition for rulemaking are available upon request from the same address.

FOR FURTHER INFORMATION CONTACT: Mark R. Millikin, 301–713–2341.

SUPPLEMENTARY INFORMATION: As a result of requests received from the Conservation Law Foundation, Rockland, Maine, in a letter dated August 14, 1998, from David E. Frulla, of Brand, Lowell, and Ryan (the Petitioner), in a letter dated August 25, 1998, and from the Environmental Defense Fund in a letter dated August 31, 1998, NMFS is reopening the comment period for the petition for rulemaking, which closed August 31, 1998. The notice of receipt of petition for rulemaking was published in the **Federal Register** on June 30, 1998 (63 FR 35560). The Conservation Law Foundation advised NMFS that it needs more time to investigate issues that were raised at an August 11, 1998, meeting of the New England Fishery Management Council regarding the details of an experimental fishery. The experimental fishery was requested by Brian Rothschild of the Center for Marine Science and Technology of the University of Massachusetts, Dartmouth (CMAST), and is mapping sea scallop distribution and abundance, as well as bycatch of other protected species (particularly groundfish) in Closed Area II. The Petitioner requests an extension of the comment period for its petition so that the information obtained from the sampling of the CMAST experimental fishery can be included in the decisional record and analyzed prior to NMFS's decision on its request for rulemaking. The Environmental Defense Fund requested a reopening of the comment period to allow additional time for persons who were either traveling or otherwise unavailable during August to submit comments on the petition. Because of these requests, NMFS is reopening the public comment period for the petition for rulemaking for an additional 30 days effective September 9, 1998, through October 9, 1998.

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

Dated: September 2, 1998.

Bruce Morehead,

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

[FR Doc. 98–24179 Filed 9–8–98; 8:45 am]

BILLING CODE 3510–22–F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[I.D. 082898C]

New England Fishery Management Council; Public Hearings

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

ACTION: Public hearings; request for comments.

SUMMARY: The New England Fishery Management Council (Council) will hold a series of public hearings to solicit comments on proposals to be included in Amendment 11 to the Northeast Multispecies (Groundfish) Fishery Management Plan (FMP). This amendment contains measures that address the management of silver hake (whiting), offshore hake, and red hake.

DATES: Written comments on the proposals will be accepted through October 25, 1998. The public hearings are scheduled to be held September 21 through October 2, 1998. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

ADDRESSES: To obtain copies of the public hearing document or to submit comments, contact Paul J. Howard, Executive Director, New England Fishery Management Council, 5 Broadway, Saugus, MA 01906–1097. Identify correspondence as ''Comments on Whiting Management.''

The hearings will be held in Maine, Massachusetts, Rhode Island, New York, New Jersey, and Virginia. See **SUPPLEMENTARY INFORMATION** for locations of the hearings. Requests for special accommodations should be addressed to the New England Fishery Management Council, 5 Broadway, Saugus, MA 01906–1097; telephone: (781) 231–0422.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, (781) 231–0422.

SUPPLEMENTARY INFORMATION: The Council proposes to take action to address overfishing of silver hake and red hake, and to provide basic protection for offshore hake, all of which address the new and revised requirements of the Magnuson-Stevens Fishery Conservation and Management Act, as amended by the Sustainable Fisheries Act of 1996. The Council will consider comments from fishermen, interested parties, and the general public on the proposals and alternatives described in the public hearing document for Amendment 11 to the Northeast Multispecies FMP. Once it has considered public comments, the Council will approve final management measures and prepare a submission package for NMFS. There will be an additional opportunity for public comment when the proposed rule for this action is published in the **Federal Register**.

Major elements of the proposals in this public hearing document include: (1) Management options containing minimum mesh requirements and whiting/offshore hake possession limits; (2) the inclusion of offshore hake in the multispecies management unit; (3) new or revised overfishing definitions for two stocks of silver hake, two stocks of red hake, and offshore hake; (4) specification of optimum yield (OY) for the fishery; (5) whiting stock definitions for management purposes; (6) a moratorium on commercial permits to fish for whiting, offshore hake, and red hake; (7) an open access bycatch allowance permit; (8) modifications to the Cultivator Shoal Whiting Fishery season and restrictions; (9) delineation of eastern and western zones in the southern management area; (10) restrictions on the transfer of whiting, offshore hake, and red hake at sea; (11) specification of essential fish habitat for offshore hake; (12) additional framework adjustment specifications; (13) development of a monitoring and adjustment mechanism for this plan; and (14) additional measures which the Council may consider implementing at a future date. The Council will consider all comments received on these proposals until the end of the comment period on October 25, 1998.

Public Hearings

The dates, times, locations, and telephone numbers of the hearings are as follows:

1. Monday, September 21, 1998, 6 p.m.—Holiday Inn by the Bay, 88 Spring Street, Portland, ME 04101. telephone (207) 775–2311;
2. Tuesday, September 22, 1998, 6 p.m.—Provincetown Town Hall, 260 Commercial Street, Provincetown, MA 02657, telephone (508) 487–7013;
3. Wednesday, September 23, 1998, 6 p.m. (following adjournment of the Council meeting)—Tavern on the Harbor, 30 Western Avenue, Gloucester, MA 01930, telephone (978) 283–4200;
4. Monday, September 28, 1998, 7:30 p.m.—Holiday Inn, 290 State Highway 37 East, Tom's River, NJ 08753, telephone (732) 244–4000;
5. Tuesday, September 29, 1998, 7:30 p.m.—Ramada Inn, 1830 Route 25, Riverhead, NY 11901, telephone (516) 369–2200;
6. Wednesday, September 30, 1998, 4 p.m.—Narragansett Town Hall, Fifth Avenue, Narragansett, RI 02882, telephone (401) 789–1044; and
7. Friday, October 2, 1998, 5 p.m.—Virginia Marine Resources Commission, 2600 Washington Avenue, Fourth Floor, Newport News, Virginia 23607, telephone (757) 247–2200.

Special Accommodations

These hearings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (see **ADDRESSES**) at least 5 days prior to the meeting dates.

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

Dated: September 2, 1998.

Bruce Morehead,

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

[FR Doc. 98–24178 Filed 9–8–98; 8:45 am]

BILLING CODE 3510–22–F

Notices

Federal Register
Vol. 63, No. 174
Wednesday, September 9, 1998

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

[Docket No. 98–049N]

National Advisory Committee on Meat and Poultry Inspection; Public Meeting

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice.

SUMMARY: The Food Safety and Inspection Service (FSIS) is announcing that the National Advisory Committee on Meat and Poultry Inspection will be meeting to consider five new issues: (1) Revisions to Meat, Poultry, and Related Laws; (2) Equivalency of Foreign Inspection Programs; (3) Animal Production Food Safety; (4) Review of the FSIS Budget and User Fees; and (5) Consumer Education. All interested persons are welcome to attend the meeting and to submit written comments and suggestions on these issues and others the Committee might consider.

DATES: The meeting will be held on November 4 and 5, 1998. The full Committee will meet from 8:30 a.m. to 5:30 p.m. on November 4 and 5. Subcommittees will meet from 7:00 to 9:00 p.m. on November 4 to continue work on issues discussed during the full Committee meeting.

ADDRESSES: The meeting will be held at the Quality Hotel & Suites, Courthouse Plaza, 1200 North Courthouse Road, Arlington, VA 22201; telephone (703) 524–4000. Submit written comments on the discussion topic to the FSIS Docket Clerk, Docket No. 98–049N, Room 102, Cotton Annex Building, 300 12th Street, SW, Washington, DC 20250–3700. The comments and official transcript of the meeting will be kept in the Docket Clerk's office when they become available.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Micchelli at (202) 720–6269, by FAX at (202) 690–1030 or E-mail to Michael.Micchelli@usda.gov. A schedule for discussion of each of the topics is available on the FSIS Homepage at http://www.usda.gov/agency/fsis/homepage.htm. This schedule also is available by FAST FAX, FSIS'' automated FAX retrieval system, at (800) 238–8281 or (202) 690–3754. The reference number to access FAST FAX is 4000.

SUPPLEMENTARY INFORMATION: On February 12, 1997, the Secretary of Agriculture renewed the charter for the Advisory Committee on Meat and Poultry Inspection. The Committee provides advice and recommendations to the Secretary on Federal and State meat and poultry programs pursuant to sections 7(c), 24, 205, 301(c) of the Federal Meat Inspection Act and sections 5(a)(3), 5(c), 8(b), and 11(e) of the Poultry Products Inspection Act. The Committee has three standing subcommittees to deliberate on specific issues and make recommendations through the whole Committee to the Secretary of Agriculture. The FSIS Administrator is the Committee Chair. Committee membership is drawn from representatives of consumer groups, producers, processors, and marketers from the meat and poultry industry and State government officials. The current members of the Committee are:

Dr. Deloran M. Allen, Excel Corporation
Dr. William L. Brown, ABC Research Corporation
Terry Burkhardt, Wisconsin Bureau of Meat Safety and Inspection
Caroline Smith-DeWaal, Center for Science in the Public Interest
Nancy Donley, Safe Tables Our Priority
Michael J. Gregory, Tyson's Foods Inc.
Dr. Cheryl Hall, Zacky Farms, Inc.
Dr. Margaret Hardin, National Pork Producers
Alan Janzen, Circle Five Feedyards, Inc.
Dr. Daniel E. LaFontaine, South Carolina Meat-Poultry Inspection Department
Dr. Dale Morse, New York Office of Public Health
Rosemary Mucklow, National Meat Association
William Rosser, Texas Department of Public Health
J. Myron Stolzfus, Stolzfus Meats
Dr. David M. Theno, Jr., Foodmaker Inc.

The meeting is open to the public on a space-available, first-come basis. Registration is required and will take place at the meeting. Pre-registration is not required. Interested persons are encouraged to comment on the discussion issues and to file written comments.

Done in Washington, DC, on: September 1, 1998.

Thomas J. Billy,

Administrator.

[FR Doc. 98–24126 Filed 9–8–98; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

[Docket No. 98–051N]

HACCP Implementation for Small Plants; Public Meetings

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice.

SUMMARY: The Food Safety and Inspection Service (FSIS) is holding two public meetings in September to discuss ways to help owners and managers of small plants prepare for the HACCP implementation date of January 25, 1999. The meetings will give all stakeholders an opportunity to hear what is currently being done to help small plants and to discuss additional ways of ensuring that small plants receive the assistance they need to make the timely transition to HACCP. In addition to the September meetings, FSIS will hold eight meetings in October, six meetings in November, and two meetings in December at various locations throughout the country in preparation for the 1999 implementation date for small plants.

DATES: The meetings will be held on September 19 and September 26, 1998.

ADDRESSES: The September 19 meeting will be held from 9:00 a.m. to 1:00 p.m. in Raleigh, NC, at the Ramada Inn/Blue Ridge, 1500 Blue Ridge Rd., Raleigh, NC 27607; telephone (919) 832–4100. The September 26 meeting will be held from 9:00 a.m. to 1:00 p.m. in College Park, MD, at the Holiday Inn College Park, 10000 Baltimore Blvd., College Park, MD 20740; telephone (301) 345–6700.

FOR FURTHER INFORMATION CONTACT: To register for the meeting, contact Ms. Sheila Johnson of the FSIS Planning Staff at (202) 501–7138 or by FAX at (202) 501–7642. If a sign language interpreter or other special accommodation is required, please contact Ms. Johnson as soon as possible.

SUPPLEMENTARY INFORMATION: On July 25, 1996, FSIS published a final rule, ''Pathogen Reduction: Hazard Analysis and Critical Control Point (HACCP) Systems,'' (61 FR 38806). The rule established a HACCP implementation schedule for establishments based on their size. Large plants began implementing HACCP on January 26, 1998. Small plants have a scheduled implementation date of January 25, 1999, and very small plants are required to implement HACCP by January 25, 2000.

After publication of its final HACCP rule, FSIS has been holding a series of public meetings to facilitate implementation of HACCP plans, especially by small and very small plants. The Agency also has provided extensive information and technical assistance that would be helpful to plant managers in development of HACCP plans. FSIS also has developed and distributed generic HACCP models and guidance materials specifically to aid small plant managers.

The upcoming meetings will discuss small plant initiatives, including contacts and a coordinators assistance network, small plant demonstration projects, plant sponsorship, and land grant university workshops. A panel will address the key elements of implementation, and there will be an opportunity to ask questions and seek additional information.

Times and locations of additional small plant implementation meetings scheduled for October through December 1998 will be announced in a future **Federal Register** notice.

Done in Washington, DC, on: September 2, 1998.

Thomas J. Billy,

Administrator.

[FR Doc. 98–24125 Filed 9–8–98; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Forest Service

Blue Mountains Natural Resources Institute, Board of Directors, Pacific Northwest Research Station, Oregon

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Blue Mountains Natural Resources Institute (BMNRI) Board of Directors will meet on September 25, 1998, at Agriculture Service Center Conference Room, 10507 N. McAlister Road, La Grande, Oregon. The meeting will begin at 9:00 a.m. and continue until 3:30 p.m. Agenda items to be covered will include: (1) Program status; (2) research results of specific projects; (3) outreach activities; (4) report on Initiatives; (5) presentations by guest speakers; (6) forum for issues discussion; (7) public comments. All BMNRI Board Meetings are open to the public. Interested citizens are encouraged to attend. Members of the public who wish to make a brief oral presentation at the meeting should contact Larry Hartmann, BMNRI, 1401 Gekeler Lane, La Grande, Oregon 97850, 541–962–6537, no later than 5:00 p.m. September 22, 1998, to have time reserved on the agenda.

FOR FURTHER INFORMATION CONTACT: Direct questions regarding this meeting to Larry Hartmann, Manager, BMNRI, 1401 Gekeler Lane La Grande, Oregon 97850, 541–962–6537.

Dated: September 1, 1998.

Lawrence A. Hartmann,

Manager.

[FR Doc. 98–24175 Filed 9–8–98; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

RIN 0596–AB65

Categorical Exclusion for Certain Ski Area Permit Actions

AGENCY: Forest Service, USDA.

ACTION: Notice; adoption of interim directive.

SUMMARY: The Forest Service is issuing an interim directive to guide its employees in complying with the National Environmental Policy Act when issuance of a ski area permit is a purely ministerial action and no changes are proposed in permitted activities or facilities. The interim directive implements a provision of the Omnibus Parks and Public Lands Management Act of 1996, which states that reissuance of a ski area permit for activities similar in nature and amount to the activities authorized under the previous permit shall not constitute a major Federal action. Public comment on the proposed interim directive published in the **Federal Register** on October 27, 1997 (62 FR 55571) was considered in development of this interim directive.

EFFECTIVE DATE: The interim directive is effective September 24, 1998.

FOR FURTHER INFORMATION CONTACT: Questions about this action should be addressed to Alice Carlton, Recreation, Heritage, and Wilderness Resources Staff, (MAIL STOP 1125), Forest Service, USDA, PO Box 96090, Washington, DC 20090–6090, (202)–205–1399.

SUPPLEMENTARY INFORMATION: To reduce administrative costs, section 701(i) of the Omnibus Parks and Public Lands Management Act of 1996 (16 U.S.C. 497c) states that the reissuance of a ski area permit for activities similar in nature and amount to the activities provided under the previous permit shall not constitute a major Federal action for the purposes of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4331 *et seq.*). Agency direction regarding this provision is needed to guide Forest Service employees in complying with NEPA and the Omnibus Parks and Public Lands Management Act of 1996 when ski area permits are issued.

Section 701(i) of the 1996 act applies to issuance of permits for up to the maximum tenure allowable under the National Forest Ski Area Permit Act of 1986 (the Ski Area Permit Act) (16 U.S.C. 497b) for existing ski areas when permit issuance involves only administrative changes, such as issuance of a permit when no changes to the Master Development Plan and no new facilities or activities are authorized, to the following: (1) To a new owner of the ski area improvements; (2) to the existing owner upon expiration of the current permit; or (3) to a holder of a permit issued under the Term Permit and Organic Acts converting to a permit under the Ski Area Permit Act. The effect of section 701(i) is that an environmental impact statement is not required for issuance of permits under these circumstances.

The Forest Service currently authorizes ski areas on National Forest System lands through permit issuance under the Ski Area Permit Act. The permit provides the legal framework for the use and occupancy of National Forest System lands, including terms for renewal; conditions for issuance of a new permit in the event of sale of the ski area improvements to another owner; permit tenure; fee schedules and payment methods; accountability and reporting requirements; liability and bonding requirements; and any other customized terms and conditions needed to ensure consistency with applicable forest land and resource management plans or to meet the requirements of other applicable laws.

The Ski Area Permit Act, its implementing regulations at 36 CFR 251.56, and existing policy in Forest Service Manual (FSM) section 2721.61e provide that under ordinary

circumstances ski area permits will be issued for a duration of 40 years unless specific situations, such as financial aspects of the transaction or the adequacy of the Master Development Plan, suggest a shorter duration.

The National Forest Management Act (NFMA) (16 U.S.C. 1600, 1604) requires that resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans. Ski area permits are subject to this requirement.

The forest planning process provides for public involvement in land allocation decisions, including those affecting ski areas. Where appropriate, forest land and resource management plans and associated environmental impact statements (EIS's) consider long-term consequences of allocating public lands for a ski resort and may establish standards and guidelines for lands allocated for ski area development. NFMA also requires revision of forest plans at least every 15 years.

To ensure that forest plans remain current, implementing regulations at 36 CFR 219.10(g) require (1) review of the conditions on the land covered by a forest plan every 5 years to determine whether conditions or public demands have changed significantly and (2) revision of the forest plans ordinarily every 10 years, and at least every 15 years.

A ski area Master Development Plan is required for all ski areas authorized under the Ski Area Permit Act. The Master Development Plan determines the boundaries of the ski area and appropriate development of the area, including facilities and activities, over time. All Master Development Plans require NEPA analysis, usually documented in an EIS, which includes consideration of the relatively permanent nature of ski areas and estimates of the reasonably foreseeable cumulative effects. Due to the long-term nature of Master Development Plans, much of the initial NEPA analysis is programmatic. Subsequent site-specific NEPA analysis is required for Master Development Plans for most ski areas prior to authorizing activities or changes to facilities or ski area operations. Master Development Plans must be reviewed periodically, approximately every 5 years, as required by the permit issued under the authority of the Ski Area Permit Act. This review determines whether NEPA analysis is current or whether changing resource conditions or changes in management standards and guidelines may necessitate subsequent NEPA analysis and appropriate changes to ski area operations.

Operating Plans also are required by the Ski Area Permit Act for ski area permits. These plans, which govern ski area operations and maintenance, are updated annually. Operating Plans may identify proposed activities, such as significant hazard removal and erosion control, which may require additional NEPA analysis.

Requirements related to forest land and resource management plans, Master Development Plans, and activities proposed under Operating Plans that may have resource effects already provide for full NEPA analysis and periodic reviews for ski areas. Therefore, in reviewing the language and intent of the Omnibus Parks and Public Lands Management Act of 1996, which provides in section 701(i) that issuance of permits authorizing activities similar in nature and amount to activities authorized under the previous permit shall not constitute a major Federal action for NEPA purposes, the agency has concluded that such strictly ministerial actions should be categorically excluded from documentation in either an EIS or an environmental assessment (EA) and should be added to the existing categorical exclusions already set out in Forest Service policy. Accordingly, the agency proposed to issue an interim directive adding a categorical exclusion which would cover ski area permit reissuance with only administrative changes to the existing list of categorical exclusions established by the Chief in section 31.1b of the Environmental Policy and Procedures Handbook (FSH 1909.15). The handbook contains direction for Forest Service employees in meeting agency NEPA compliance obligations. Section 31.1b currently contains eight categories for routine administrative, maintenance, and other actions that normally do not individually or cumulatively have a significant effect on the quality of the human environment and, therefore, may be categorically excluded from documentation in an EIS or an EA unless scoping indicates extraordinary circumstances exist.

Pursuant to Council on Environmental Quality regulations at 40 CFR parts 1500–1508, the Forest Service published the proposed interim directive in the **Federal Register** on October, 27, 1997 (62 FR 55571), to provide notice and opportunity to comment. The 60-day comment period closed on December 26, 1997. The comments received were considered in development of the interim directive, the text of which is set out at the end of this notice.

Because the agency plans to propose additional revisions to this handbook within the next year, the agency has concluded that this new ski area permit categorical exclusion should be issued as an interim directive. Upon completion of other revisions to this handbook, this interim directive will be incorporated into an amendment at that time.

The categorical exclusion will help expedite issuance of permits associated with sales of ski areas to new owners, which account for some 50 to 75 percent of all ski area permit issuances annually. Nationally, 15 to 30 permit issuances under the authority of the Ski Area Permit Act are completed each year. That number is expected to continue rising based on corporate restructuring and the continuing trend toward consolidation in the ski industry.

The categorical exclusion also will facilitate conversion from permits that were issued under prior authorities to permits under the Ski Area Permit Act. It was the intent of the Ski Area Permit Act to convert permits issued under prior authority to the Ski Area Permit Act as rapidly as possible. The Ski Area Permit Act permit provides better environmental protection than previous authorities by requiring NEPA analyses to be conducted, reviewed, and revised frequently as resource conditions and proposed changes to ski area operations warrant. The Forest Service has greater discretion with permits authorized under the Ski Area Permit Act to ensure that updates to operations occur under terms that require periodic review and NEPA analysis. Approximately 75 to 80 percent of the 135 ski areas located on National Forest System lands have permits issued under the Ski Area Permit Act. It is in the public interest to encourage the remaining 20 to 25 percent to convert as soon as possible to permits issued under the authority of the Ski Area Permit Act.

Analysis and Response to Public Comments

One letter was received during the comment period from a trade association representing ski area owners and operators. Of the 135 ski resorts authorized to operate on National Forest System Lands, 122 are members of this association. The comments in the letter were given full consideration in adoption of the final interim directive.

The association expressed general support of the proposed interim directive. They also expressed some concern about the applicability of

''extraordinary circumstances'' in relation to the proposed categorical exclusion and suggested the Forest Service add clarifying language. The association commented that they believe section 701(i) of the Omnibus Parks and Public Lands Management Act of 1996 excludes the reissuance of a ski area permit from the NEPA process. They said that creation of a categorical exclusion for such actions, however, accomplishes the intent of Congress in the act to allow no new development or environmental impacts beyond projects already approved in an existing Master Development Plan. They said the categorical exclusion would allow the expeditious transfer and term extension of current ski permits and would place the environmental decisions where they belong: At the time of the forest planning process and the master development planning analysis. Therefore they are in general support of the interim directive as proposed.

The association voiced concern that application of ''extraordinary circumstances'' should not preclude the use of a categorical exclusion for permit reissuance which is purely ministerial in nature. They said the interim directive should make it clear that the ''extraordinary circumstances'' provisions do not apply to permit term reissuance with purely administrative changes and should not delay reissuance of the permit.

The Forest Service agrees that this categorical exclusion for permit reissuances, when no changes have occurred in the Master Development Plan and no new facilities or activities are authorized, meets the requirements and the intent of the act. The Forest Service further agrees with the association that use of a categorical exclusion for permit reissuance when changes are purely ministerial meets the requirements of NEPA. Regulations of the Council on Environmental Quality (CEQ) at 40 CFR 1508.4 set the requirements regarding application of ''extraordinary circumstances'' provisions. Detailed direction on how to apply the ''extraordinary circumstances'' provisions to categorical exclusions is set out in section 30.3 of FSH 1909.15 and is not within the scope of this interim directive. This interim directive is limited to adding the categorical exclusion to the list of categories established by the Chief of the Forest Service and set out in section 31.1b of Forest Service Handbook (FSH) 1909.15. The interim directive has been reviewed by the Council on Environmental Quality pursuant to regulations at 40 CFR 1507.3. The text of the interim directive is set out at the end of this notice.

Regulatory Impact

This interim directive has been reviewed under USDA procedures and Executive Order 12866 on Regulatory Planning and Review. It has been determined that this is not a significant rulemaking. This interim directive will not have an annual effect of $100 million or more on the economy nor adversely affect productivity, competition, jobs, the environment, public health or safety, nor State or local governments. This interim directive will not interfere with an action taken or planned by another agency nor raise new legal or policy issues. Finally, this action will not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients of such programs. Accordingly, this interim directive is not subject to OMB review under Executive Order 12866.

Moreover, this interim directive has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), and it has been determined that this action will not have a significant economic impact on a substantial number of small entities as defined by that act.

Environmental Impact

This interim directive establishes a categorical exclusion for permit issuance under the authority of the Ski Area Permit Act that is a purely ministerial action. Programmatic and site-specific decisions and disclosure of environmental effects concerning ski area allocations, facilities, and activities are made in forest land and resource management plans, in ski area Master Development Plans, and in connection with activities proposed under Operating Plans that may have resource effects, with full public involvement and in compliance with NEPA procedures. Section 31.1b of Forest Service Handbook 1909.15 (57 FR 431, September 18, 1992) excludes from documentation in an environmental assessment or impact statement rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instruction. The agency's assessment is that this interim directive falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or an environmental impact statement.

No Takings Implications

This interim directive has been analyzed in accordance with the principles and criteria contained in Executive Order 12630, and it has been determined that the interim directive does not pose the risk of a taking of Constitutionally protected private property. Executive Order 12630 does not apply to this interim directive because it consists primarily of technical and administrative changes governing authorization of occupancy and use of National Forest System lands. Forest Service special use authorizations for ski areas do not grant any right, title, or interest in or to lands or resources held by the United States.

Controlling Paperwork Burdens on the Public

This interim directive does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 and, therefore, imposes no paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and implementing regulations at 5 CFR 1320 do not apply.

Unfunded Mandates Reform

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), which the President signed into law on March 22, 1995, the agency has assessed the effects of this interim directive on State, local, and tribal governments and the private sector. This interim directive does not compel the expenditure of $100 million or more by any State, local, or tribal governments or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

Civil Justice Reform Act

This interim directive has been reviewed under Executive Order 12988, Civil Justice Reform. When this interim directive is adopted, (1) all State and local laws and regulations that are in conflict with this interim directive or which would impede its full implementation would be preempted; (2) no retroactive effect would be given to this interim directive; and (3) it would not require administrative proceedings before parties may file suit in court challenging its provisions.

Dated: August 27, 1998.

Robert Lewis, Jr.,

Acting Associate Chief.

Interim Directive to Forest Service Handbook

Note: The Forest Service organizes its directive system by alpha-numeric codes and subject headings. Only those sections of chapter 30 in Forest Service Handbook (FSH) 1909.15, Environmental Policy and Procedures Handbook, which include the interim directive that is the subject of this notice, are set out here. The audience for this interim directive is Forest Service employees charged with issuing and administering ski area permits. This interim directive adds the following category to the list of categorical exclusions in FSH 1909.15, section 31.1b:

9. Issuance of a new permit for up to the maximum tenure allowable under the National Forest Ski Area Permit Act of 1986 (16 U.S.C. 497b) for an existing ski area when such issuance is a purely ministerial action to account for administrative changes, such as a change in ownership of ski area improvements, expiration of the current permit, or a change in the statutory authority applicable to the current permit. Examples of actions in this category include, but are not limited to:

a. Issuing a permit to a new owner of ski area improvements within an existing ski area with no changes to the Master Development Plan, including no changes to the facilities or activities for that ski area.

b. Upon expiration of a ski area permit, issuing a new permit to the holder of the previous permit where the holder is not requesting any changes to the Master Development Plan, including changes to the facilities or activities.

c. Issuing a new permit under the National Forest Ski Area Permit Act of 1986 to the holder of a permit issued under the Term Permit and Organic Acts, where there are no changes in the type or scope of activities authorized and no other changes in the Master Development Plan.

[FR Doc. 98–24181 Filed 9–8–98; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–815 & A–580–816]

Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Preliminary Results of Antidumping Duty Administrative Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary results of antidumping duty administrative reviews.

SUMMARY: In response to requests from three respondents and from the petitioners in the original investigation, the Department of Commerce (''the Department'') is conducting administrative reviews of the antidumping duty orders on certain cold-rolled and corrosion-resistant carbon steel flat products from Korea. These reviews cover three manufacturers and exporters of the subject merchandise. The period of review (''POR'') is August 1, 1996, through July 31, 1997.

We preliminarily determine that sales have been made below normal value (''NV''). If these preliminary results are adopted in our final results of administrative reviews, we will instruct U.S. Customs to assess antidumping duties equal to the difference between export price (''EP'') or constructed export price (''CEP'') and NV.

Interested parties are invited to comment on these preliminary results. Parties who submit argument in this proceeding are requested to submit with the argument: (1) a statement of the issue; and (2) a brief summary of the argument.

EFFECTIVE DATE: September 9, 1998.

FOR FURTHER INFORMATION CONTACT: Cindy Sonmez (Union), Becky Hagen or Steve Bezirganian (the POSCO Group), Lisette Lach (Dongbu), or James Doyle, Enforcement Group III—Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Room 7866, Washington, D.C. 20230; telephone (202) 482–0961 (Sonmez), –1102 (Hagen), –0162 (Bezirganian), –0190 (Lach), or–0159 (Doyle).

SUPPLEMENTARY INFORMATION:

Applicable Statute

Unless otherwise indicated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930 (''the Act'') by the Uruguay Round Agreements Act (''URAA''). In addition, unless otherwise indicated, all citations to the Department's regulations are references to the provisions codified at 19 CFR Part 351 (62 FR 27296—May 19, 1997).

Background

The Department published antidumping duty orders on certain cold-rolled and corrosion-resistant carbon steel flat products from Korea on August 19, 1993 (58 FR 44159). The Department published a notice of ''Opportunity to Request an Administrative Review'' of the antidumping duty orders for the 1996/97 review period on August 4, 1997 (62 FR 41925). On August 29, 1997, respondents Dongbu Steel Co., Ltd. (''Dongbu'') and Union Steel Manufacturing Co., Ltd. (''Union'') requested that the Department conduct an administrative review of the antidumping duty order on corrosion-resistant carbon steel flat products from Korea. Also, on August 29, 1997, Pohang Iron and Steel Co., Ltd. (''POSCO'') requested that the Department conduct administrative reviews of the antidumping duty orders on cold-rolled and corrosion-resistant carbon steel flat products from Korea. On September 2, 1997, petitioners in the original less-than-fair-value (''LTFV'') investigations (AK Steel Corporation; Bethlehem Steel Corporation; Inland Steel Industries, Inc.; LTV Steel Company; National Steel Corporation; and U.S. Steel Group A Unit of USX Corporation) requested that the Department conduct administrative reviews of the antidumping duty orders on cold-rolled and corrosion-resistant carbon steel flat products from Korea with respect to all three of the aforementioned respondents. We initiated these reviews on September 19, 1997 (62 FR 52092—September 25, 1997).

Under the Act, the Department may extend the deadline for completion of administrative reviews if it determines that it is not practicable to complete the review within the statutory time limit of 365 days. On March 31, 1998, the Department extended the time limits for the preliminary results in these cases. *See Certain Cold-Rolled Carbon Steel Flat Products and Certain Corrosion-Resistant Carbon Steel Flat Products from Korea: Antidumping Duty Administrative Reviews: Extension of Time Limit,* 63 FR 16971 (April 7, 1998).

The Department is conducting these administrative reviews in accordance with section 751 of the Act.

Scope of the Reviews

The review of ''certain cold-rolled carbon steel flat products'' covers cold-rolled (cold-reduced) carbon steel flat-rolled products, of rectangular shape, neither clad, plated nor coated with metal, whether or not painted, varnished or coated with plastics or other nonmetallic substances, in coils (whether or not in successively superimposed layers) and of a width of 0.5 inch or greater, or in straight lengths which, if of a thickness less than 4.75 millimeters, are of a width of 0.5 inch or greater and which measures at least 10 times the thickness or if of a thickness of 4.75 millimeters or more are of a width which exceeds 150 millimeters and measures at least twice the thickness, as currently classifiable in the Harmonized Tariff Schedule (''HTS'') under item numbers 7209.15.0000, 7209.16.0030, 7209.16.0060, 7209.16.0090, 7209.17.0030, 7209.17.0060, 7209.17.0090, 7209.18.1530, 7209.18.1560, 7209.18.2550, 7209.18.6000, 7209.25.0000, 7209.26.0000, 7209.27.0000, 7209.28.0000, 7209.90.0000, 7210.70.3000, 7210.90.9000, 7211.23.1500, 7211.23.2000, 7211.23.3000, 7211.23.4500, 7211.23.6030, 7211.23.6060, 7211.23.6085, 7211.29.2030, 7211.29.2090, 7211.29.4500, 7211.29.6030, 7211.29.6080, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7215.50.0015, 7215.50.0060, 7215.50.0090, 7215.90.5000, 7217.10.1000, 7217.10.2000, 7217.10.3000, 7217.10.7000, 7217.90.1000, 7217.90.5030, 7217.90.5060, 7217.90.5090. Included in this review are flat-rolled products of nonrectangular cross-section where such cross-section is achieved subsequent to the rolling process (*i.e.*, products which have been ''worked after rolling'')—for example, products which have been beveled or rounded at the edges. Excluded from this review is certain shadow mask steel, *i.e.*, aluminum-killed, cold-rolled steel coil that is open-coil annealed, has a carbon content of less than 0.002 percent, is of 0.003 to 0.012 inch in thickness, 15 to 30 inches in width, and has an ultra flat, isotropic surface.

The review of ''certain corrosion-resistant carbon steel flat products'' covers flat-rolled carbon steel products, of rectangular shape, either clad, plated, or coated with corrosion-resistant metals such as zinc, aluminum, or zinc-, aluminum-, nickel- or iron-based alloys, whether or not corrugated or painted, varnished or coated with plastics or other nonmetallic substances in addition to the metallic coating, in coils (whether or not in successively superimposed layers) and of a width of 0.5 inch or greater, or in straight lengths which, if of a thickness less than 4.75 millimeters, are of a width of 0.5 inch or greater and which measures at least 10 times the thickness or if of a thickness of 4.75 millimeters or more are of a width which exceeds 150 millimeters and measures at least twice the thickness, as currently classifiable in the HTS under item numbers 7210.30.0030, 7210.30.0060, 7210.41.0000, 7210.49.0030, 7210.49.0090, 7210.61.0000, 7210.69.0000, 7210.70.6030, 7210.70.6060, 7210.70.6090, 7210.90.1000, 7210.90.6000, 7210.90.9000, 7212.20.0000, 7212.30.1030, 7212.30.1090, 7212.30.3000, 7212.30.5000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7212.60.0000, 7215.90.1000, 7215.90.3000, 7215.90.5000, 7217.20.1500, 7217.30.1530, 7217.30.1560, 7217.90.1000, 7217.90.5030, 7217.90.5060, 7217.90.5090. Included in this review are flat-rolled products of nonrectangular cross-section where such cross-section is achieved subsequent to the rolling process (*i.e.*, products which have been ''worked after rolling'')—for example, products which have been beveled or rounded at the edges. Excluded from this review are: flat-rolled steel products either plated or coated with tin, lead, chromium, chromium oxides, both tin and lead (''terne plate''), or both chromium and chromium oxides (''tin-free steel''), whether or not painted, varnished or coated with plastics or other nonmetallic substances in addition to the metallic coating; clad products in straight lengths of 0.1875 inch or more in composite thickness and of a width which exceeds 150 millimeters and measures at least twice the thickness; and certain clad stainless flat-rolled products, which are three-layered corrosion-resistant carbon steel flat-rolled products less than 4.75 millimeters in composite thickness that consist of a carbon steel flat-rolled product clad on both sides with stainless steel in a 20%–60%–20% ratio.

These HTS item numbers are provided for convenience and customs purposes. The written descriptions remain dispositive.

The POR is August 1, 1996 through July 31, 1997. These reviews cover entries associated with sales of certain cold-rolled and corrosion-resistant carbon steel flat products by Dongbu, Union, and the POSCO Group.

Verification

We verified information provided by POSCO with respect to its costs, including on-site inspection of facilities, the examination of relevant accounting and financial records, and selection of original documentation containing relevant information. Our verification results are outlined in the cost verification report (*see* the August 5, 1998, Cost Verification Report—Pohang Iron and Steel Company, Ltd. from Bill Jones and Symon Monu to Christian Marsh).

Transactions Reviewed

In determining NV, based on our review of the submissions by Dongbu, the Department determined that Dongbu need not report ''downstream'' sales by affiliated resellers in the home market because of their small quantity. In addition, the Department determined that POSCO need not report the home market downstream sales of only those affiliated service centers in which POSCO owns a minority stake, because it appears that they would have a minimal effect upon the calculation of NV, and such reporting, to the extent it would be possible, would constitute an enormous burden. (*See* the July 24, 1998, memorandum from Becky Hagen to Roland MacDonald).

Consistent with prior reviews, for Union and the POSCO Group we excluded from our analysis home market sales identified by respondents as overruns because such sales were outside the ordinary course of trade. Petitioners have argued that the Department should also exclude Dongbu's lowest-priced home market sales because Dongbu refused to identify which of its home market sales involved overruns. However, Dongbu explained that it no longer tracked overruns in the ordinary course of business and that it sold its prime overruns as normal prime merchandise. In past reviews of Dongbu, we have excluded sales characterized as overrun sales, but we have not excluded sales simply because they appear to have been low-priced. We have preliminarily determined that it would be inappropriate to conclude that a broad portion of relatively low-priced Dongbu home market sales database should be treated as overruns and excluded from our analysis. However, we have also preliminarily determined that certain Dongbu home market sales

were outside the ordinary course of trade, and have excluded those transactions from our analysis. These sales were categorized by Dongbu as slow moving prime grade painted material of undesired colors which appear to have been either obsolete or clearance merchandise, and were at aberrationally low prices. *See* the August 31, 1998, analysis memorandum from Lisette Lach through James Doyle to the File.

Affiliated Parties

For purposes of these reviews, we are treating POSCO, Pohang Coated Steel Co., Ltd. (''POCOS''), and Pohang Steel Industries Co., Ltd. (''PSI'') as affiliated parties and have ''collapsed'' them as a single producer of certain cold-rolled carbon steel flat products (POSCO and PSI) and certain corrosion-resistant carbon steel flat products (POSCO, POCOS, and PSI). We refer to the collapsed respondent as the POSCO Group. POSCO, POCOS, and PSI were already collapsed in previous segments of these proceedings. *See, e.g., Final Determinations of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-Resistant Carbon Steel Flat Products, and Certain Cut-to-Length Carbon Steel Plate from Korea,* 58 FR 37176 (July 9, 1993). POSCO has submitted no information which would cause us to change that treatment.

As in prior reviews, during this, the fourth POR, both Dongbu and Union were involved in commercial relationships with the POSCO Group. For example, both Dongbu and Union purchased hot-rolled steel coil inputs from POSCO, and Union and POCOS have a common owner, Dongkuk Steel Mill (''DSM''). Because the parties have submitted no new information regarding these commercial relationships, we have not altered our finding that these relationships do not give rise to affiliation between either Dongbu or Union and the POSCO Group.

During this review, the parties submitted information and argument regarding a joint venture in Venezuela—POSCO Venezuela C.A. (''POSVEN'')—in which Dongbu U.S.A., POSCO and other investors, held interests during the POR. When on line, POSVEN will produce hot-briquetted iron, an input into the steelmaking process. Petitioners argue that Dongbu and POSCO are affiliated by virtue of Dongbu U.S.A.'s and POSCO's participation in POSVEN. We preliminarily disagree. While two or more persons that jointly control another person are affiliated under section 771(33)(F) of the Act, in this case the entity that is jointly controlled is only indirectly connected with the manufacture and sale of the subject merchandise. The joint venture was created to produce an input that can be used as part of the production process for a wide array of steel products. We note also that Dongbu itself is not a shareholder in POSVEN, and that Dongbu U.S.A. no longer holds any interest.

Product Comparisons

In accordance with section 771(16) of the Act, we considered all cold-rolled carbon steel flat products produced by the respondents, covered by the descriptions in the ''Scope of the Reviews'' section of this notice, *supra,* and sold in the home market during the POR, to be foreign like products for the purpose of determining appropriate product comparisons to U.S. sales of cold-rolled carbon steel flat products. Likewise, we considered all corrosion-resistant carbon steel flat products produced by the respondents and sold in the home market during the POR to be foreign like products for the purpose of determining appropriate product comparisons to corrosion-resistant carbon steel flat products sold in the United States. Where there were no sales of identical merchandise in the home market to compare to U.S. sales, we compared U.S. sales to the next most similar foreign like product on the basis of the characteristics listed in Appendix V of the Department's antidumping questionnaire. In making the product comparisons, we matched foreign like products based on the physical characteristics reported by the respondent. Where sales were made in the home market on a different weight basis from the U.S. market (theoretical versus actual weight), we converted all quantities to the same weight basis, using the conversion factors supplied by the respondents, before making our fair-value comparisons.

Fair-Value Comparisons

To determine whether sales of certain cold-rolled and corrosion-resistant carbon steel flat products by the respondents to the United States were made at less than fair value, we compared CEP to NV, as described in the ''Constructed Export Price'' and ''Normal Value'' sections of this notice. In accordance with section 777A(d)(2) of the Act, we calculated monthly weighted-average prices for NV and compared these to individual U.S. transactions.

Interested Party Comments

On July 24, 1998, and August 7, 1998, the petitioners submitted comments regarding Union. On July 24, 1998, August 7, 1998, and August 20, 1998, the petitioners submitted comments regarding Dongbu. On August 10, 1998, and August 13, 1998, the petitioners submitted comments regarding the POSCO Group. On July 31, 1998, August 18, 1998, and August 21, 1998, the POSCO Group submitted comments. On August 18, 1998, Union and Dongbu submitted comments. While we have considered these comments for purposes of our preliminary results, because of the lateness of these submissions, we are not able to fully address the comments for these results.

Intent to Revoke

POSCO

On August 29, 1997, POSCO submitted a request, in accordance with 19 CFR 351.222(e), that the Department revoke the orders covering certain cold-rolled carbon steel flat products and certain corrosion-resistant carbon steel flat products from Korea with respect to its sales of this merchandise.

In accordance with 19 CFR 351.222(e), these requests were accompanied by a certification from POSCO that it had not sold the subject merchandise at less than NV for a three-year period, including this review period, and would not do so in the future. POSCO also agreed to its immediate reinstatement in the relevant antidumping order, as long as any firm is subject to the order, if the Department concludes under 19 CFR 351.216 that, subsequent to revocation, POSCO sold the subject merchandise at less than NV.

The POSCO Group was not reviewed during the first administrative review period. In the second administrative reviews, we determined that the POSCO Group had *de minimis* margins on both cold-rolled and corrosion-resistant steel. However, in the third administrative reviews, we determined that the POSCO Group sold both cold-rolled and corrosion-resistant carbon steel flat products at less than fair value. *See Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Reviews,* 63 FR 13170 (March 18, 1998), as amended at 63 FR 20572 (April 27, 1998) (''*Third Reviews*''). Therefore the POSCO Group does not have three consecutive years of zero or *de minimis* margins on corrosion-resistant steel or cold-rolled steel, and thus is not eligible for revocation of the orders on

corrosion-resistant steel and cold-rolled steel under 19 CFR 351.222(e).

Dongbu

On August 29, 1997, Dongbu submitted a request, in accordance with 19 CFR 351.222(e), that the Department revoke the orders covering certain corrosion-resistant carbon steel flat products from Korea with respect to its sales of this merchandise.

In accordance with 19 CFR 351.222(e), the request was accompanied by a certification from Dongbu that it had not sold the subject merchandise at less than NV for a three-year period, including this review period, and would not do so in the future. Dongbu also agreed to its immediate reinstatement in the relevant antidumping order, as long as any firm is subject to the order, if the Department concludes under 19 CFR 351.216 that, subsequent to revocation, Dongbu sold the subject merchandise at less than NV.

In the third administrative review of corrosion-resistant steel, we determined that Dongbu sold corrosion-resistant carbon steel flat products at less than fair value. *See Third Reviews* at 63 FR 13170 (March 18, 1998), as amended at 63 FR 20572 (April 27, 1998). Additionally, as discussed below, we have preliminarily determined that during the fourth review period Dongbu sold certain corrosion-resistant carbon steel flat products at less than fair value. Consequently, we preliminarily determine that because Dongbu does not have three consecutive years of zero or *de minimis* margins on corrosion-resistant steel, it is not eligible for revocation of the order on corrosion-resistant steel under 19 CFR 351.222(e).

Date of Sale

It is the Department's current practice normally to use the invoice date as the date of sale, although we may use a date other than the invoice date if we are satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale. *See* 19 CFR 351.401(i). We have preliminarily determined that there is no reason to depart from the Department's normal practice with respect to date of sale. Consequently, for Union, Dongbu and the POSCO Group, we used the date of invoice as the date of sale: for home market sales, the reported date of the invoice from the Korean manufacturer; for U.S. sales, the reported date of invoice from the U.S. sales affiliate to the first unaffiliated U.S. customer, which is typical for CEP sales.

Constructed Export Price

We calculated the price of United States sales based on CEP, in accordance with section 772(b) of the Act. The Act defines the term ''constructed export price'' as ''the price at which the subject merchandise is first sold (or agreed to be sold) *in the United States* before or after the date of importation *by or for the account of* the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections (c) and (d).'' In contrast, ''export price'' is defined as ''the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation *by the producer or exporter* of the subject merchandise *outside of the United States*.'' Sections 772(a)–(b) of the Act (emphasis added). In these cases, the record establishes that the respondents' affiliates *in the United States* were in most instances the parties first contacted by unaffiliated U.S. customers desiring to purchase the subject merchandise and also that the sales affiliates in question signed the sales contracts and performed other selling functions. Respondents have submitted no new evidence warranting a change in our finding in the third reviews—based in part on exhaustive sales verifications—that the subject merchandise is first sold in the *United States* by the affiliated seller, and that the sales in question are therefore CEP transactions. *See Third Reviews,* 63 FR at 13172.

For all three respondents, we calculated CEP based on packed prices to unaffiliated customers in the United States. Where appropriate, we made deductions from the gross unit price for foreign inland freight, foreign inland insurance, foreign brokerage and handling, international freight, marine insurance, U.S. inland freight, U.S. brokerage and handling, U.S. Customs duties, commissions, discounts and rebates, pre-sale warehousing expenses, credit expenses, warranty expenses, inventory carrying costs incurred in the United States, and other direct and indirect selling expenses. Our calculation of indirect selling expenses does not include interest expenses of the U.S. sales affiliates because we have preliminarily determined that virtually all of those interest expenses relate to the financing of receivables or to borrowings involving non-subject merchandise. We adjusted the calculation of U.S. indirect selling expenses for Dongbu to exclude categories of expenses more properly categorized as other types of expenses (*e.g.,* movement) (see the August 31, 1998, analysis memorandum from Lisette Lach through James Doyle to the File). Pursuant to section 772(d)(3), we made an adjustment for CEP profit. For each respondent, where appropriate, we added interest revenue to the gross unit price. For each respondent, consistent with the Department's normal practice, we added duty drawback to the gross unit price. We did so in accordance with the Department's long-standing test, which requires: (1) that the import duty and rebate be directly linked to, and dependent upon, one another; and (2) that the company claiming the adjustment demonstrate that there were sufficient imports of imported raw materials to account for the duty drawback received on the exports of the manufactured product.

Normal Value

Based on a comparison of the aggregate quantity of home-market and U.S. sales, we determined that the quantity of the foreign like product sold in the exporting country was sufficient to permit a proper comparison with the sales of the subject merchandise to the United States, pursuant to section 773(a) of the Act. Therefore, in accordance with section 773(a)(1)(B)(i) of the Act, we based NV on the price at which the foreign like product was first sold for consumption in the home market, in the usual commercial quantities and in the ordinary course of trade.

Where appropriate, we deducted rebates, discounts, inland freight (offset, where applicable, by freight revenue), inland insurance, and packing. We made adjustments to NV, where appropriate, for differences in credit expenses (offset, where applicable, by interest income), warranty expenses, post-sale warehousing, and for differences in weight basis. Because the POSCO Group did not demonstrate that the rental payments made to one of its affiliated parties were at arm's length, we have revised the reported post-sale warehousing expense for the warehouse in question by the portion of the reported expense accounted for by those rental payments. We also made adjustments, where appropriate, for home-market indirect selling expenses to offset U.S. commissions in CEP comparisons. We examined the calculations of imputed credit expense for home market customers that were based on very long credit periods. Respondents indicated that they cannot systematically tie payments to actual shipments because they allow their customers to maintain open balances. To calculate credit days for their customers, respondents divided average

POR monthly receivables by average POR daily sales. This methodology used by respondents was identical to that used in prior segments. Petitioners have indicated that, as a general matter, this methodology may lead to distortions when there are not uniform volumes of sales and payments, and note that for certain customers in these reviews it results in credit days of several hundreds of days. For customers with such long calculated credit days, we requested that respondents recalculate the credit days using the most recent two completed fiscal years (1996 and 1997) rather than just the POR. In most instances, the calculated credit days using the two full years (January 1996 through December 1997) were less than one-half of the calculated credit days using only the POR (August 1996 through July 1997).

Petitioners indicated that for Dongbu and Union the Department should recalculate the credit days using this two-year information or using POR information that excludes receivables that existed at the beginning of the POR. However, the two-year methodology does not result in uniform volumes of sales and payments, and the shorter periods calculated based on such a two-year methodology could be the result of the fact that the sample we chose for analysis was composed of aberrationally high credit days. Using POR information that excludes receivables that existed at the beginning of the POR is not appropriate because it would maintain sales in the denominator that were sold in the POR but not paid for until after the POR. We have preliminarily determined that we are not adjusting credit days for sales made by Dongbu or Union. The methodology employed by Dongbu and Union was the same as in prior reviews, and the Department finds no reason to deviate from that methodology.

The POSCO Group explained its highest credit days by noting that it used 365 credit days when its credit day calculation resulted in values of either less than zero days or greater than 365 days. Petitioners state that for all POSCO Group home market sales the Department should use the reported sale-specific payment terms as the basis for home market credit days. Petitioners note that in a recent SEC filing POSCO expressed the importance of a change in the credit terms it was providing to its domestic customers in light of the recent deterioration of the Korean economy and the financial difficulties faced by POSCO customers. We have preliminarily determined to deny the imputed credit expense adjustment in instances where the POSCO Group arbitrarily set credit days to 365 days, noting that this aspect of its methodology was not explained in its response and does not appear to be appropriate. We have not made any additional adjustments, as the methodology employed by the POSCO Group was the same as in prior reviews, and the Department finds no reason to deviate from that methodology.

In comparisons to CEP sales, we also increased NV by U.S. packing costs in accordance with section 773(a)(6)(A) of the Act. We made adjustments to NV for differences in cost attributable to differences in physical characteristics of the merchandise, pursuant to section 773(a)(6)(C)(ii) of the Act. In accordance with the Department's practice, where all contemporaneous matches to a U.S sale observation resulted in difference-in-merchandise adjustments exceeding 20 percent, we based NV on constructed value (''CV'').

Differences in Levels of Trade

In accordance with section 773(a)(1)(B)(i) of the Act and the Statement of Administrative Action (''SAA'') at 829–831, to the extent practicable, the Department will calculate NV based on sales at the same level of trade as the U.S. sales (either EP or CEP). When the Department is unable to find sales in the comparison market at the same level of trade as the U.S. sale(s), the Department may compare sales in the U.S. and foreign markets at different levels of trade, and adjust NV if appropriate. The NV level of trade is that of the starting-price sales in the home market. As the Department explained in *Gray Portland Cement and Clinker From Mexico: Final Results of Antidumping Duty Administrative Review* (62 FR 17148, 17156—April 9, 1997), for both EP and CEP, the relevant transaction for the level-of-trade analysis is the sale from the exporter to the importer.

To determine whether comparison market NV sales are at a different LOT than EP or CEP, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and unaffiliated customer. If the comparison-market sales are at a different level of trade and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison-market sales at the level of trade of the export transaction, we make a level-of-trade adjustment under section 773(a)(&)(A) of the Act. Finally, if the NV level is more remote from the factory than the CEP level and there is no basis for determining whether the difference in the levels between NV and CEP affects price comparability, we adjust NV under section 773(a)(7)(B) of the Act (the CEP-offset provision). *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa,* 62 FR 61731, 61732 (November 17, 1997), and *Granular Polytetrafluoroethylene Resin From Italy; Preliminary Results of Antidumping Duty Administrative Review,* 63 FR 25826 (May 11, 1998).

A. Dongbu

Dongbu argues that with the change in classification of its U.S. sales from EP to CEP, it should now be granted a CEP offset. Dongbu has argued during this review that there are not significant differences in selling activities within or between each market, but notes that under CEP a deduction from U.S. price is made for those functions performed by the U.S. sales affiliate, Dongbu U.S.A., and that the expenses relating to such functions incurred in the home market are still reflected in home market price unless a CEP offset is granted. We disagree because, even after accounting for the functions performed by Dongbu U.S.A., there are no variations in level of trade within or between markets.

In identifying the level of trade for home market sales, we consider the selling functions reflected in the starting price of home market sales before any adjustments, pursuant to section 773(a)(1)(B)(i) of the Act. Dongbu's description of selling functions in the home market makes no distinction with regard to customer categories or channels of trade, and there is no evidence on the record indicating that such functions vary within the home market.

In identifying the level of trade for CEP sales, we considered only the selling activities reflected in the U.S. price after deduction of expenses and profit under section 772(d) of the Act. Dongbu stated that it performs the same functions for customers in both markets, such as arrangement for freight when the terms of sale include delivery. Dongbu indicated that after-sales services in both markets are limited to the processing of claims for delivery of defective merchandise. However, it notes that the expenses associated with functions performed by Dongbu U.S.A. (*i.e.,* the contact between the U.S. affiliate and the unaffiliated U.S. customers, and other ancillary functions—in particular, the arranging of credit terms) are deducted in the calculation of CEP as indirect selling expenses, but that such expenses

incurred by Dongbu for home market sales are not deducted in the calculation of NV. Dongbu argues that the Department should grant it a CEP offset to account for this variation in selling functions between markets. We disagree. For U.S. sales, Dongbu performed essentially the same functions for its Korean and U.S. affiliates (Dongbu Corp. and Dongbu U.S.A.) as Dongbu U.S.A. performed with respect to the unaffiliated U.S. customers. Although the expenses related to Dongbu U.S.A.'s activities have been deducted from CEP, the expenses incurred by Dongbu are still reflected in CEP. Because we find there are no substantive difference in selling functions performed in the different markets, there is no difference in level of trade and, therefore, no basis for granting a CEP offset.

B. Union

Union argues that with the change in classification of its U.S. sales from EP to CEP, it should now be granted a CEP offset. Union has argued during this review that there are not significant differences in selling activities within or between each market, but notes that under CEP a deduction from U.S. price is made for those functions performed by the U.S. sales affiliate, DKA, and that the expenses relating to such functions incurred in the home market are still reflected in home market price unless a CEP offset is granted. We disagree because, even after accounting for the functions performed by DKA, there are no variations in level of trade within or between markets.

In identifying the level of trade for home market sales, we consider the selling functions reflected in the starting price of home market sales before any adjustments, pursuant to section 773(a)(1)(B)(i) of the Act. Union's description of selling functions in the home market makes no distinction with regard to customer categories or channels of trade, and there is no evidence on the record indicating that such functions vary within the home market.

In identifying the level of trade for CEP sales, we considered only the selling activities reflected in the U.S. price after deduction of expenses and profit under section 772(d) of the Act. Union stated that it performs the same functions for customers in both markets (*e.g.*, after sales services/warranties, post-sale warehousing, technical advice, freight & delivery arrangement, and arrangement of credit terms). However, it notes that the expenses associated with functions performed by DKA (*i.e.*, contact between the U.S. affiliate and the unaffiliated U.S. customers, after sales services, arrangement of credit terms, and arrangement for freight and delivery under certain circumstances) are deducted in the calculation of CEP as indirect selling expenses, but that such expenses incurred by Union for home market sales are not deducted in the calculation of NV. Union argues that the Department should grant it a CEP offset to account for this variation in selling functions between markets. We disagree. For U.S. sales, Union performed essentially the same functions for DKA as DKA performed with respect to the unaffiliated U.S. customers. Although the expenses related to DKA's activities have been deducted from CEP, the expenses incurred by Union are still reflected in CEP. Because we find there are no substantive difference in selling functions performed in the different markets, there is no difference in level of trade and, therefore, no basis for granting a CEP offset.

C. The POSCO Group

The POSCO Group has argued during this review that the collapsed companies sold in the home market and to the United States at the same level of trade. Sales are made to order for both markets, and the same range of services (*e.g.*, arrangement for movement, technical advice, and warranty services) is provided for both markets and, within the home market, to each type of customer (*e.g.*, end-users vs. service centers). The POSCO Group has not claimed that any difference in level of trade exists between its reported sales in either market, and, based on our analysis of the selling functions reported, we determine that there is no basis to find there is any such difference. Additional functions performed by the U.S. affiliates with respect to U.S. sales (*e.g.*, expenses associated with contacts with unaffiliated customers) were also performed by POSCO and POCOS with respect to its transactions with its U.S. sales affiliates, so even after accounting for the functions performed by the U.S. sales affiliates there is no basis for determining differences in levels of trade between markets. While the POSCO Group has argued that the home market downstream sales of its service centers in which it owns a minority stake are at a different level of trade than all of its other sales, the level of trade of those downstream sales is irrelevant because the Department determined that the POSCO Group need not report the home market resales of those affiliated service centers (as noted above), and the POSCO Group in fact did not report those downstream sales.

Cost-of-Production/Constructed Value

At the time the questionnaires were issued in these reviews, the second annual administrative reviews were the most recently completed segments of these proceedings in which each of the three respondents had participated. In accordance with section 773(b)(2)(A)(ii) of the Act, because we disregarded certain below-cost sales by each of the three respondents in those reviews, we found reasonable grounds in these reviews to believe or suspect that those respondents made sales in the home market at prices below the cost of producing the merchandise. We therefore initiated cost investigations with regard to Dongbu, the POSCO Group, and Union in order to determine whether the respondents made home-market sales during the POR at prices below their COP within the meaning of section 773(b) of the Act.

Before making concordance matches and fair-value comparisons, we conducted the COP analysis described below.

A. Calculation of COP

We calculated the COP for Dongbu and Union based on the sum of each respondent's cost of materials and fabrication for the foreign like product, plus amounts for home-market selling expenses, general and administrative expenses (''G&A''), and packing costs in accordance with section 773(b)(3) of the Act. As discussed below, we have rejected POSCO's reported cost data and have relied on non-adverse facts available for purposes of calculating its COP.

The Department made adjustments to Dongbu's calculations of G&A and interest expenses to reflect the exclusion of certain transactions from the total cost of sales figure used in the denominator of the calculation of the G&A and interest expense factors; a corresponding adjustment to Dongbu's cost of manufacturing (''COM'') was not possible, given that the information needed for such an adjustment is not available (*see* the August 31, 1998, analysis memorandum from Lisette Lach through James Doyle to the File).

We made adjustments to Union's fixed overhead (''FOH'') due to our recalculation of depreciation to be consistent with the Department's treatment of depreciation for the previous review period. *See Third Reviews*, 63 FR at 13191. We rejected Union's reported depreciation costs which were calculated using an acceptable straight-line depreciation

methodology, but which were derived using net asset values and extended useful lives of assets. The application of this method would be inconsistent with longstanding Departmental treatment of depreciation in fixed overhead. For the preliminary margin calculations, we calculated an adjustment to Union's depreciation expense using the straight-line depreciation methodology, with the original asset values and original useful lives of the assets, as in the prior review. *See* the August 31, 1998, analysis memorandum from Cindy Sonmez through James Doyle to the File.

B. Facts Available

After careful consideration, we determined that we could not use POSCO's costs as reported in its Section D response. As explained below, we are using as non-adverse facts available an allocation methodology which we obtained during the cost verification. For the following reasons, we have determined that an adverse inference, pursuant to section 776(b) of the Act, is not warranted: the values weighted by POSCO to derive its CONNUM-specific costs included all costs and reconciled to its books and records; the overstatement of production quantities does not appear to contain a systematic bias in favor of POSCO; and POSCO officials prepared, at the Department's request, an extensive matrix to estimate the potential distortion in its cost submission.

POSCO grouped its products together using the physical characteristics designated by the Department and calculated weighted-average control number (''CONNUM'') specific costs. These CONNUM-specific costs were combined with the costs of POSCO's affiliated producers to derive weighted-average costs for the collapsed POSCO Group. In calculating its own weighted-average CONNUM-specific costs, POSCO overstated the production quantities used in the weight-averaging. The overstatement occurred because the total production quantities of certain products were assigned to more than one CONNUM. POSCO's weighting methodology therefore used a weighting factor that was, in aggregate, several times greater than actual amounts. The problem is compounded by the fact that the product values being weight-averaged within a CONNUM can vary substantially. In addition, since the overstated production quantities were used in the weight-averaging of POSCO's costs with the production costs of POSCO's affiliated producers, POSCO's costs were overstated relative to those of the other producers. POSCO's production quantities are weighted much more heavily than they would have been if the calculations were based on the actual production quantities of POSCO and its affiliates. The Department therefore is unable to use the per-unit costs reported by POSCO in its Section D questionnaire response as these costs were not properly weight-averaged using the actual production quantities associated with the Department's product groupings or between POSCO Group producers.

The Department requested in its September 16, 1997, Section D questionnaire that POSCO report COP and CV data, using model-specific production quantities as the weighting factor. In a supplemental questionnaire dated March 13, 1998, the Department asked POSCO to identify the level of detail at which it tracks production and the physical characteristics reflected in its production data. POSCO's supplemental response was unclear in regard to the availability of detailed production data. The Department included several verification steps in its June 8, 1998 agenda that involved identifying the level of detail at which POSCO tracks quantities throughout the production process. POSCO officials answered all questions posed by the Department's verifiers during the cost verification and, for the first time, explained that detailed production data is generated at the time of production and is retained on computer tapes in storage.

Section 776(a) of the Act directs the Department to use facts otherwise available when necessary information is not available on the record or when an interested party withholds information that has been requested, fails to provide information in a timely manner, significantly impedes a proceeding, or provides information that cannot be verified. In the instant case, detailed production data necessary for a recalculation of POSCO's costs is not on the record. The Department therefore must rely on facts available to calculate revised COP amounts for both POSCO and the POSCO Group.

At verification, we requested that POSCO officials prepare a comprehensive matrix in order to assess the magnitude of distortion inherent in POSCO's submitted costs. The requested matrix was prepared using POSCO's home market sales quantities to estimate production quantities associated with Department groupings and to calculate revised CONNUM-specific costs for both POSCO and the POSCO Group. As facts available, we have used the revised costs contained in the matrix to calculate COP and CV amounts for both POSCO and the POSCO Group. Although the matrix calculates costs using estimated rather than actual production quantities, it more appropriately reflects the actual production quantities associated with the Department's product groupings. The matrix also alleviates the problem of POSCO's costs being unfairly weighted in relation to the costs of other POSCO Group producers. We note that this is a very complex and difficult issue. The Department invites parties to submit information and comment on this issue. Any such information or argument should be included in parties' case and rebuttal briefs. We intend to examine this issue carefully for the final results of this review. Any information or arguments parties provide will be fully analyzed in making this final decision.

Additionally, we made adjustments to the COM for certain POSCO and POCOS products. Specifically, we adjusted the per-unit costs from the matrix to reflect differences in production costs associated with quality and coating weight. *See* the August 31, 1998, Preliminary Results Cost Calculation Memo from William Jones through Michael Martin to Neal Halper.

Finally, we have declined to consider the appropriateness of the startup adjustment claimed by the POSCO Group, as the effect of such an adjustment, if granted, would be insignificant within the meaning of section 777A(a)(2) of the Act and 19 CFR § 351.413.

C. Test of Home-Market Prices

We used the respondents' weighted-average COP, as adjusted (see above), for the period July 1996 to June 1997. We compared the weighted-average COP figures to home-market sales of the foreign like product as required under section 773(b) of the Act. In determining whether to disregard home-market sales made at prices below the COP, we examined whether (1) within an extended period of time, such sales were made in substantial quantities, and (2) such sales were made at prices which permitted the recovery of all costs within a reasonable period of time. On a product-specific basis, we compared the COP to the home-market prices (not including VAT), less any applicable movement charges, discounts, and rebates.

D. Results of COP Test

Pursuant to section 773(b)(2)(C) of the Act, where less than 20 percent of a respondent's sales of a given product were at prices less than the COP, we did not disregard any below-cost sales of

that product because we determined that the below-cost sales were not made in ''substantial quantities.'' Where 20 percent or more of a respondent's sales of a given product during the POR were at prices less than the COP, we found that sales of that model were made in ''substantial quantities'' within an extended period of time, in accordance with sections 773(b)(2)(B) and (C) of the Act, and were not at prices which would permit recovery of all costs within an extended period of time, in accordance with section 773(b)(2)(D) of the Act. When we found that below-cost sales had been made in ''substantial quantities'' and were not at prices which would permit recovery of all costs within a reasonable period of time, we disregarded the below-cost sales in accordance with section 773(b)(1) of the Act. Where all sales of a specific product were at prices below the COP, we disregarded all sales of that product, and calculated NV based on CV.

E. Calculation of CV

In accordance with section 773(e) of the Act, we calculated CV for Dongbu and Union based on the sum of each respondent's cost of materials, fabrication, SG&A, U.S. packing costs, interest expenses, and profit. In accordance with sections 773(e)(2)(A) of the Act, we based SG&A and profit on the amounts incurred and realized by the respondent in connection with the production and sale of the foreign like product in the ordinary course of trade, for consumption in the foreign country. For selling expenses, we used the weighted-average home-market selling expenses. As noted in the ''Calculation of COP'' section of this notice, we made adjustments to the reported COMs of Union and to the reported G&A and interest expenses of Dongbu. For the POSCO Group, we calculated CV using the non-adverse facts available approach described above, with adjustments to certain CONNUMs for differences in quality and coating weight. For all respondents, we made adjustments, where appropriate, for home-market indirect selling expenses to offset U.S. commissions in CEP comparisons.

Currency Conversion

For purposes of the preliminary results, we made currency conversions based on the official exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank of New York. Section 773A(a) directs the Department to use a daily exchange rate in order to convert foreign currencies into U.S. dollars, unless the daily rate involves a ''fluctuation.'' In accordance with the Department's practice, we have determined that a fluctuation exists when the daily exchange rate differs from a benchmark by 2.25 percent. *See, e.g., Certain Stainless Steel Wire Rods from France: Preliminary Results of Antidumping Duty Administrative Review* (61 FR 8915, 8918—March 6, 1996). The benchmark is defined as the rolling average of rates for the past 40 business days. When we determine a fluctuation exists, we substitute the benchmark for the daily rate. However, for the preliminary results we have not determined that a fluctuation existed during the POR, and we have not substituted the benchmark for the daily rate.

Preliminary Results of the Reviews

As a result of these reviews, we preliminarily determine that the following weighted-average dumping margins exist:

Producer/Manufacturer/Exporter	Weighted-average margin
Certain Cold-Rolled Carbon Steel Flat Products:	
Dongbu	No U.S. sales in POR.
The POSCO Group	0.00%.
Union	No U.S. sales in POR.
Certain Corrosion-Resistant Carbon Steel Flat Products:	
Dongbu	1.47%.
The POSCO Group	0.02%
Union	0.19%.

Pursuant to 19 CFR 351.224(b), the Department will disclose to parties to the proceeding any calculations performed in connection with these preliminary results within five days after the publication of this notice. Pursuant to 19 CFR 351.309, interested parties may submit written comments in response to these preliminary results. Case briefs must be submitted within 30 days after the date of publication of this notice, and rebuttal briefs, limited to arguments raised in case briefs, must be submitted no later than five days after the time limit for filing case briefs. Parties who submit argument in this proceeding are requested to submit with the argument: (1) A statement of the issue, and (2) a brief summary of the argument. Case and rebuttal briefs must be served on interested parties in accordance with 19 CFR 351.303(f). Also, pursuant to 19 CFR 351.310, within 30 days of the date of publication of this notice, interested parties may request a public hearing on arguments to be raised in the case and rebuttal briefs. Unless the Secretary specifies otherwise, the hearing, if requested, will be held two days after the date for submission of rebuttal briefs, that is, thirty-seven days after the date of publication of these preliminary results. The Department will publish the final results of this administrative review, including the results of its analysis of issues raised in any case or rebuttal brief or at a hearing.

The Department shall determine, and the U.S. Customs Service shall assess, antidumping duties on all appropriate entries. Because the number of transactions involved in these reviews and other simplification methods prevent entry-by-entry assessments, we have calculated exporter/importer-specific assessment rates. We divided the total dumping margins for the reviewed sales by the total entered value of those reviewed sales for each importer. We will direct the U.S. Customs Service to assess the resulting percentage margin against the entered customs values for the subject merchandise on each of that importer's entries under the relevant order during the review period. While the Department is aware that the entered value of the reviewed sales is not necessarily equal to the entered value of entries during the POR (particularly for CEP sales), use of entered value of sales as the basis of the assessment rate permits the Department to collect a reasonable approximation of the antidumping duties which would have been determined if the Department had reviewed those sales of merchandise actually entered during the POR.

Cash Deposit

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(1) of the Act: (1) the cash deposit rate for each respondent will be the rate established in the final results of these administrative reviews (except that no deposit will be required for firms with zero or *de minimis* margins, *i.e.*, margins lower than 0.5 percent); (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in these reviews, a prior review, or the original LTFV investigations, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) if neither the

exporter nor the manufacturer is a firm covered in these or any prior reviews, the cash deposit rate will be 14.44 percent (for certain cold-rolled carbon steel flat products) and 17.70 percent (for certain corrosion-resistant carbon steel flat products), the ''all others'' rate established in the LTFV investigations. These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative reviews.

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

These administrative reviews and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)) and 19 CFR 351.213 and 19 CFR 351.221(b)(4).

Dated: August 31, 1998.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. 98–24167 Filed 9–8–98; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–809]

Certain Cut-to-Length Carbon Steel Plate from Mexico: Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Preliminary Results of Antidumping Duty Administrative Review.

SUMMARY: In response to request from the respondent and petitioners in the original investigation, the Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on certain cut-to-length (CTL) carbon steel plate from Mexico. This review covers one manufacturer/exporter of the subject merchandise. The period of review (POR) is August 1, 1996, through July 31, 1997.

We preliminarily determine that sales have been made below normal value (NV). If these preliminary results are adopted in our final results of administrative review, we will instruct U.S. Customs to assess antidumping duties based on the difference between export price (EP) and NV.

Interested parties are invited to comment on these preliminary results. Parties who submit argument in this proceeding are requested to submit with the argument: (1) a statement of the issue; and (2) a brief summary of the argument.

EFFECTIVE DATE: September 9, 1998.

FOR FURTHER INFORMATION CONTACT: Heather Osborne or John Kugelman, Enforcement Group III, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone (202) 482–3019 (Osborne), 482–0649 (Kugelman).

SUPPLEMENTARY INFORMATION:

Applicable Statute

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (the Act) are references to the provision effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act. In addition, unless otherwise indicated, all reference to the Department's regulations are to 19 CFR 351, as published in the **Federal Register** on May 19, 1997 (62 FR 27296).

Background

The Department published an antidumping duty order on certain CTL carbon steel plate from Mexico on August 19, 1993 (58 FR 44165). The Department published a notice of opportunity to request an administrative review of the antidumping duty order for the 1996/97 review period on August 4, 1997 (62 FR 41925). On August 29, 1997, respondent Altos Hornos de México (AHMSA) requested that the Department conduct an administrative review of the antidumping duty order on certain CTL carbon steel plate from Mexico. On September 2, 1997, the petitioners in the original less-than-fair-value (LTFV) investigation (Bethlehem Steel Corporation, Geneva Steel, Gulf Lakes Steel, Inc., of Alabama, Inland Steel Industries Inc., Lukens Steel Company, Sharon Steel Corporation, and U.S. Steel Group (a unit of USX Corporation)) filed a similar request. We published a notice of initiation of the review on September 25, 1997 (62 FR 50292).

Under the Act, the Department may extend the deadline for completion of administrative reviews if it determines that it is not practicable to complete the review within the statutory time limit of 365 days. On March 13, 1998, the Department extended the time limit for the preliminary results in this case. *See Cut-to-Length Carbon Steel Plate from Mexico; Extension of Time Limits for Antidumping Duty Administrative Review,* 63 FR 13216 (March 18, 1998).

The Department is conducting this administrative review in accordance with section 751 of the Act.

Scope of the Review

The products covered in this review include hot-rolled carbon steel universal mill plates (*i.e.,* flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 millimeters but not exceeding 1,250 millimeters and of a thickness of not less than 4 millimeters, not in coil and without patterns in relief), of rectangular shape, neither clad, plated nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances; and certain hot-rolled carbon steel flat-rolled products in straight lengths, of rectangular shape, hot rolled, neither clad, plated, nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances, 4.75 millimeters or more in thickness and of a width which exceeds 150 millimeters and measures at least twice the thickness, as currently classifiable in the Harmonized Tariff Schedule (HTS) under item numbers 7208.31.0000, 7208.32.0000, 7208.33.1000, 7208.33.5000, 7208.41.0000, 7208.42.0000, 7208.43.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.11.0000, 7211.12.0000, 7211.21.0000, 7211.22.0045, 7211.90.0000, 7212.40.1000, 7212.40.5000, and 7212.50.0000. Included in this review are flat-rolled products of non-rectangular cross-section where such cross-section is achieved subsequent to the rolling process (*i.e.,* products which have been ''worked after rolling''); for example, products which have been beveled or rounded at the edges. Excluded from this review is grade X–70 plate.

These HTS item numbers are provided for convenience and U.S. Customs purposes. The written descriptions remain dispositive.

The POR is August 1, 1996, through July 31, 1997. This review covers entries of certain cut-to-length carbon steel plate by AHMSA.

Verification

As provided in section 782(i)(3) of the Act, we verified information provided by the respondent using standard verification procedures, including on-site inspection of the manufacturer's facilities, the examination of relevant sales and financial records, and selection of original documentation containing relevant information. Our verification results are outlined in the public version of the verification report.

Use of Facts Available

We preliminarily determine that, in accordance with sections 776(a)(2)(A) and 776(b) of the Act, the use of facts available is appropriate for AHMSA because it did not cooperate to the best of its ability in the course of this review. As discussed in more detail below, AHMSA failed to provide cost data from its normal accounting system. In addition, AHMSA withheld from the Department information from its normal cost accounting system until the end of verification. Because of these failures, the Department finds that AHMSA failed to comply to the best of its ability with the Department's requests for information.

In its initial Section D questionnaire, the Department specified that the COP and constructed value (CV) figures should be based on the actual costs incurred by the company during the POR and recorded in the normal accounting system. The initial questionnaire also specified that the submitted costs must reconcile to the actual costs recorded in the cost accounting system used by the company to prepare its financial statements. Moreover, the initial questionnaire specified that if the company did not intend to use its normal accounting system and cost allocation methods to compute COP and CV, the company *must* contact us before preparing the response; AHMSA did not contact us before it submitted the response on March 30, 1997. After reviewing AHMSA's response, we noted that the company did not use its normal accounting system to calculate COP and CV data. AHMSA stated in its questionnaire response that the company's normal cost accounting system did not capture costs to the level of detail requested by the Department. Therefore, AHMSA claimed that it was necessary to use its sales pricing model to develop the COP and CV data. AHMSA's sales pricing model is not used in its normal accounting system. Additionally, the sales pricing model accounted for steel-grade cost differences but did not account for any other physical characteristic cost differences (*e.g.*, thickness, width, surface finish).

In accordance with Section 782(d), on April 23, 1997, the Department issued a supplemental questionnaire, which requested AHMSA to explain the sales pricing model and to clarify information about the reported product-specific costs. In response to the Department's supplemental request, AHMSA stated that ''there is no narrower product breakdown of costs. That is, AHMSA does not maintain costs for specific grades of plate.''

On June 5, 1998, in advance of the scheduled COP/CV verification, the Department issued an agenda for the COP/CV verification. The agenda stated that, for selected products, the verifiers were to obtain and review data from AHMSA's normal cost accounting system. At verification, the Department found that AHMSA's normal cost accounting system did distinguish costs at a level more detailed than the level the company submitted in its questionnaire responses (*see* Cost Verification Report, August 27, 1998). Despite the Department's numerous requests during the verification, AHMSA officials withheld its normal cost accounting system product-specific cost records until the end of the verification. Without adequate time to analyze this information, the Department was unable to test the reliability of this data. We noted, however, that the normal cost accounting system costs were significantly different from the submitted grade-specific information.

Additionally, at verification we found that AHMSA's sales pricing model and its reported costs failed to include significant plate production costs for various cost centers. Moreover, the Department was unable to determine whether there were additional cost centers related to plate production that were not included in the reported costs.

Our verification testing and other evidence on the record regarding AHMSA's submitted cost methodology indicate that this methodology significantly distorted AHMSA's reported COP and CV. AHMSA's failure to use the product-specific costs recorded in its normal books and records prevents us from quantifying the magnitude of the distortions which exist in its submitted data. Sections 776(a)(2)(A) and 776(a)(2)(D) of the Act provide that if an interested party or any other person (A) withholds information, (B) fails to provide information within the time or in the form and manner requested, (C) significantly impedes a proceeding under this title, or (D) provides such information but the information cannot be verified, the administering authority, subject to section 782(d) of the Act, shall use the facts available.

Section 782(e) of the Act provides that the Department shall not decline to consider information that is submitted by an interested party and that is necessary to the determination but which does not meet all the applicable requirements established by the Department if—

(1) the information is submitted by the deadline established for its submission,
(2) the information can be verified,
(3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
(4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the Department with respect to the information, and
(5) the information can be used without undue difficulties.

AHMSA's failure to reconcile its submitted costs to its financial accounting system constitutes a verification failure under section 776(a)(2)(D) of the Act. We must therefore consider whether the submitted cost data is usable under section 782(e) of the Act.

First, as discussed above, the accuracy of AHMSA's submitted cost data could not be verified, as required by section 776(e)(2) of the Act. Second, because of the flaws in its cost data, which are detailed in the Cost Verification Report, AHMSA's submitted cost data ''cannot serve as a reliable basis for reaching the applicable determination'' under section 776(e)(3) of the Act, nor can it ''be used without undue difficulties'' under section 776(e)(5) of the Act. By its failure to provide cost information that could be reconciled to its normal accounting system, and its failure to give the Department fair notice of this defect, AHMSA has not acted to the ''best of its ability'' to meet the Department's requirements, pursuant to section 782(e)(4) of the Act.

Therefore, the Department has determined that, since AHMSA's cost data could not be verified, section 776(a) of the AHMSA requires the Department to use the facts available with respect to this data. However, the Department must also determine whether (1) the use of facts available for AHMSA's cost data renders the rest of AHMSA's submitted information (*i.e.*, the sales data) not usable, and (2) whether the use of adverse information as facts available is warranted.

First, we have determined that the required use of facts available for

AHMSA's cost data renders its sales data not usable. Because of the flawed nature of the cost data, home market sales cannot be tested to determine whether they were made at prices at or above production cost. Since the Department can only make price-to-price comparisons (NV to EP) using those home market sales that did not fail the cost test, the systematically flawed nature of the cost data makes these comparisons impossible.

In the absence of home market sales data (*i.e.,* when the home market is viable but there are insufficient sales above COP to compare with U.S. sales), the Department would normally resort to the use of CV as NV. However, the CV information reported by AHMSA includes the unverifiable cost data. Therefore, the necessity for use of facts available for COP data precludes the use of the submitted CV information.

The Department's prior practice has been to reject a respondent's submitted information *in toto* when flawed and unreliable cost data renders any price-to-price comparison impossible. *See Notice of Final Determination of Sales at Less than Fair Value: Grain-Oriented Electrical Steel From Italy,* 59 FR 33952 (July 1, 1994) (*Electrical Steel From Italy*) (where the respondent failed the cost verification). The Department explained that the rejection of a respondent's questionnaire response *in toto* is appropriate and consistent with past practice in instances where a respondent failed to provide verifiable COP information. *See also Certain Corrosion-Resistant Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Review,* 61 FR 18547, 18559 (April 26, 1996) (use of total BIA warranted where reliable price-to-price comparisons are not possible).

If the Department were to accept verified sales information when a respondent's cost information (a substantial part of the response) does not verify, respondents would be in a position to manipulate margin calculations by permitting the Department to verify only that information which the respondent wishes the Department to use in its margin calculation. AHMSA has provided sales information in proper form which could be verified, but has not provided cost data which could be verified (*see* detailed discussion of verification testing in the Cost Verification Report). Although *Electrical Steel from Italy* involved the use of best information available (BIA) under the prior statute, the Department's practice of regarding verified sales information as unusable when the corresponding cost data is so flawed that price-to-price comparisons are rendered impossible is still valid because the Department's concerns about potential manipulation are unchanged.

Accordingly, we find that there is no reasonable basis for determining NV for AHMSA in this review. As a result, we could not use AHMSA's U.S. sales data in determining a dumping margin. The Department, therefore, had no choice but to resort to total facts available.

With regard to which total facts available are appropriate, section 776(b) of the Act provides that adverse inferences may be used when a party has failed to cooperate by not acting to the best of its ability to comply with requests for information. *See also* the Statement of Administrative Action, H. Doc. 3216, 103rd Cong. 2d Sess. at 870 (1996) (SAA). Specifically, section 776(b) of the Act provides that, where the Department ''finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority [the Department] may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.'' As discussed above, AHMSA failed to reconcile the reported costs to its normal cost accounting system. Moreover, AHMSA made no effort to provide the Department with notice of this defect. We have thus determined that AHMSA has not acted to the best of its ability to comply with our requests for information. Accordingly, consistent with section 776(b) of the Act, we have applied total adverse facts available.

The statute provides no ''clear obligation'' or preference for relying on a particular source in determining adverse facts available. As determined in *Certain Cut-to-Length Carbon Steel Plate from Sweden: Final Results of Antidumping Review,* 62 FR 18396, at 18398 (April 15, 1997) (*Carbon Steel Plate from Sweden*), the Department may use as facts available the final determination in the LTFV proceeding, even when the LTFV determination is based on best information available. In this case, as adverse facts available we have used the highest rate from any prior segment of the proceeding, 49.25 percent. Because AHMSA is the only company subject to the review of CTL carbon steel plate from Mexico and did not participate in the LTFV investigation, the highest rate is derived from the original petition, and was used as the BIA rate in the LTFV investigation.

Whereas in this review, the Department must base the entire dumping margin for a respondent in an administrative review on the facts available because the respondent failed to cooperate, section 776(b) of the Act authorizes the Department to use an inference adverse to the interests of the respondent in choosing the facts available. Section 776(b) also authorizes the Department to use as adverse facts available information derived from the petition, the final determination, a previous administrative review, or other information placed on the record. The SAA clarifies that information from the petition and prior segments of the proceeding is ''secondary information.'' *See* SAA at 870. If the Department relies on secondary information as facts available, section 776(c) of the Act provides that the Department shall, to the extent practicable, corroborate such information using independent sources reasonably at its disposal. The SAA further provides that corroborate means simply that the Department will satisfy itself that the secondary information to be used has probative value. However, where corroboration is not practicable, the Department may use uncorroborated information.

To corroborate the LTFV BIA rate of 49.25 percent, we examined the basis of the rates contained in the petition. The U.S. price in the petition was based on actual prices from invoices, quotes to U.S. customers, and IM–145 import statistics. Additionally, the foreign market value was based on actual price quotations to home market customers, home market price lists, and published reports of domestic prices. Home market price quotations were obtained through a market research report. (*See Initiation of Antidumping Duty Investigations and Postponement of Preliminary Determinations: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-Resistant Carbon Steel Flat Products, and Certain Cut-to-Length Carbon Steel Plate From Various Countries,* 57 FR 33488 (July 29, 1992).) Export prices which are based on U.S. import statistics are considered corroborated. In addition, price lists and published reports of domestic prices which support the petition margin are independent sources. With regard to the normal values contained in the petition, the Department was provided no useful information by the respondent or other interested parties, and is aware of no other independent sources of information that would enable us to further corroborate the margin calculation in the petition. We note that the SAA at 870 specifically states that where ''corroboration may not be

practicable in a given circumstance,'' the Department may nevertheless apply an adverse inference. Based on these reasons, the Department considers the LTFV rate used as adverse facts available in this review to be corroborated.

Preliminary Results of the Review

As a result of this review, we preliminarily determine that the following margin exists for the period September 1, 1996, through August 31, 1997:

Manufacturer/exporter	Margin (percent)
AHMSA	49.25

The Department will issue disclosure documents within five days of the date of publication of this notice. Interested parties may also request a hearing within 30 days of publication. If requested, a hearing will be held as early as convenient for the parties but normally not later than 37 days after the date of publication or the first work day thereafter. Interested parties may submit case briefs not later than 30 days after the date of publication of this notice. Rebuttal briefs, which must be limited to issues raised in the case briefs, may be filed not later than 5 days after the filing of case briefs. The Department will issue a notice of the final results of this administrative review, which will include the results of its analysis of issues raised in any such briefs or at a hearing, within 120 days from the publication of these preliminary results.

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Upon completion of this review, the Department will issue appraisement instructions directly to the Customs Service.

Furthermore, the following deposit rates will be effective upon publication of the final results of this administrative review for all shipments of certain CTL carbon steel plate from Mexico entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(c) of the Act: (1) The cash deposit rate for the reviewed company will be the rate established in the final results of this review; (2) for merchandise exported by manufacturers or exporters not covered in this review but covered in the original investigation of sales at less than fair value (LTFV) or a previous review, the cash deposit will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this or a previous review, or the original LTFV investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) for all other producers and/or exporters of this merchandise, the cash deposit rate shall be 49.25 percent, the ''all others'' rate established in the LTFV investigation (58 FR 37192, July 9, 1993).

These deposit rates, when imposed, shall remain in effect until publication of the final results of the next administrative review.

This notice also serves as a preliminary reminder to importers of their responsibility to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This determination is issued and published in accordance with sections 751(a)(1) of the Act (19 U.S.C. 1675(a)) and 19 CFR 351.213.

Dated: August 31, 1998.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. 98–24166 Filed 9–8–98; 8:45 am]

BILLING CODE 3510–DS–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–808]

Certain Stainless Steel Wire Rod From India; Preliminary Results of Antidumping Duty Administrative and New Shipper Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary results of antidumping duty administrative and new shipper reviews.

SUMMARY: In response to a request by Mukand, Ltd. (''Mukand''), respondent, the Department of Commerce (''the Department'') is conducting an administrative review of the antidumping duty order on stainless steel wire rod (''SSWR'') from India. In addition, new shipper reviews were requested by respondents Viraj Group (''Viraj'') and Panchmahal Steel Ltd. (''Panchmahal''). The period of review (POR) is December 1, 1996, through November 30, 1997. At the request of both Viraj and Panchmahal (May 11, 1998), the schedules for the new shipper reviews have been aligned to those of the administrative review of Mukand. *See Letter to Mr. Peter Koenig of Ablondi, Foster, Sobin & Davidow* (May 12, 1998).

We have preliminarily determined that respondents Mukand, Viraj, and Panchmahal have not sold subject merchandise at less than normal value (NV) during the POR. If these preliminary results are adopted in our final results of this administrative review and new shipper reviews, we will instruct U.S. Customs not to assess antidumping duties.

We invite interested parties to comment on these preliminary results. Parties who submit arguments in this proceeding should also submit with the argument (1) a statement of the issue, and (2) a brief summary of the argument.

EFFECTIVE DATE: September 9, 1998.

FOR FURTHER INFORMATION CONTACT: Maria Dybczak (Mukand), Carrie Blozy (Viraj), N. Gerard Zapiain (Panchmahal) or Rick Johnson, AD/CVD Enforcement Group III, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–1398 (Dybczak), (202) 482–0165 (Blozy), (202) 482–1395 (Zapiain), or (202) 482–3818 (Johnson).

SUPPLEMENTARY INFORMATION:

The Applicable Statute

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (the Act) are references to the provisions effective January 1, 1995, the effective date of the amendments made by the Uruguay Rounds Agreements Act (URAA). In addition, unless otherwise indicated, all citations to the Department's regulations are to the regulations codified at 19 CFR Part 351 (62 FR 27296; May 19, 1997).

Background

On October 20, 1993, the Department published in the **Federal Register** the antidumping duty order on certain stainless steel wire rods from India (58 FR 54110). On December 5, 1997, the Department published in the **Federal Register** a notice of opportunity to request an administrative review of this antidumping duty order (62 FR 64353). On December 22, respondent Mukand requested that we conduct an administrative review in accordance with 19 CFR 351.213(b). We published the notice of initiation of this antidumping duty administrative review

on January 26, 1998 (62 FR 3702). On December 24, 1997, and December 31, 1997, Panchmahal and Viraj, respectively, submitted requests for new shipper administrative reviews. On February 5, 1998, the notice of initiation of these new shipper administrative reviews was published in the **Federal Register** (63 FR 5930).

The Department is conducting these reviews in accordance with section 751 of the Act.

Scope of the Review

Imports covered by this review are shipments of SSWR from India. SSWR are products which are hot-rolled or hot-rolled annealed and/or pickled rounds, squares, octagons, hexagons or other shapes, in coils. SSWR are made of alloy steels containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. These products are only manufactured by hot-rolling and are normally sold in coiled form, and are of solid cross-section. The majority of SSWR sold in the United States are round in cross-section shape, annealed and pickled. The most common size is 5.5 millimeters in diameter.

The SSWR subject to this review are currently classifiable under subheadings 7221.00.0005, 7221.00.0015, 7221.00.0020, 7221.00.0030, 7221.00.0040, 7221.00.045, 7221.00.0060, 7221.00.0075, and 7221.00.0080 of the Harmonized Tariff Schedule of the United States (''HTSUS''). Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the merchandise under review is dispositive.

The administrative review covers one company, Mukand, while both Viraj and Panchmahal are reviewed as new shippers. The period of review for all three companies is December 1, 1996 through November 30, 1997.

Fair Value Comparisons

To determine whether sales of subject merchandise to the United States were made at less than fair value, we compared the Export Price (''EP'') to the NV, as described in the ''Export Price'' and ''Normal Value'' sections of this notice. In accordance with section 777A(d)(2) of the Act, we calculated monthly weighted-average prices for NV and compared these to individual U.S. transactions.

Product Comparisons

In accordance with section 771(16) of the Act, we considered all products covered by the Scope of the Review, which were produced and sold by the respondent in the home market or a third country market during the POR, to be foreign like products for purposes of product comparisons to U.S. sales. For all U.S. sales of Mukand, Viraj, and Panchmahal, there were identical sales in the home or third market on which to make a comparison.

Export Price

Mukand

For Mukand, we used EP as defined in section 772(a) of the Act because the subject merchandise was first sold by Mukand to an unaffiliated purchaser in the United States before the date of importation and CEP treatment was not otherwise indicated. We calculated EP based on packed, delivered prices to the first unaffiliated purchaser in the United States. We made deductions to the starting price for movement expenses (Indian and U.S. inland freight, ocean freight, insurance, brokerage and handling) pursuant to section 772(c)(2) of the Act. Additionally, we added to the U.S. price an amount for duty drawback pursuant to section 772 (c)(1)(B) of the Act. For a further discussion of this issue, *see Memorandum to the File: Analysis Memo for the Preliminary Results of Review for Mukand, Ltd.*, pp. 2–3, September 2, 1998. We used Mukand's date of invoice as the date of sale for the U.S. in accordance with 19 CFR 351.401(i).

Viraj

For calculation of the price to the United States, we used EP, in accordance with section 772(a) of the Act because the subject merchandise was first sold by Viraj to an unaffiliated purchaser in the United States prior to importation and CEP treatment was not otherwise indicated. The Department calculated EP for Viraj based on packed, delivered prices to customers in the United States. We made deductions to the starting price for movement expenses (Indian inland freight, ocean freight, insurance, and brokerage and handling) in accordance with section 772(c)(2) of the Act. Additionally, we added to the U.S. price an amount for duty drawback pursuant to section 772 (c)(1)(B) of the Act. For a further discussion of this issue, *see Memorandum to the File: Analysis Memorandum for the Preliminary Results of Review for Viraj,* pp. 3–5, September 2, 1998. We used Viraj's date of invoice as the date of sale for the U.S. in accordance with 19 CFR 351.401(i).

Panchmahal

For Panchmahal, we used EP as defined in section 772(a) of the Act because the subject merchandise was first sold by Panchmahal to an unaffiliated purchaser in the United States prior to the date of importation and CEP treatment was not otherwise indicated. We calculated EP based on packed, delivered prices to the first unaffiliated purchaser in the United States. We made deductions to the starting price for movement expenses (foreign inland freight, international freight, and marine insurance) pursuant to section 772(c)(2) of the Act. We denied Panchmahal's claim for a duty drawback adjustment, as Panchmahal failed to provide evidence that illustrated either a claim for the rebate or actual payment of the rebate on the exported product. For a further discussion of this issue, *see Memorandum to the File: Analysis Memorandum for the Preliminary Results of Review for Panchmahal,* pp. 3–4, September 2, 1998. We used Panchmahal's date of invoice as the date of sale for its U.S. sale of subject merchandise in accordance with 19 CFR 351.401(i).

Normal Value

Mukand

We compared the aggregate volume of Mukand's home market sales of the foreign like product and U.S. sales of the subject merchandise to determine whether the volume of the foreign like product Mukand sold in India was sufficient, pursuant to section 773(a)(1)(C) of the Act, to form a basis for NV. Because Mukand's volume of home-market sales of foreign like product was greater than five percent of its U.S. sales of subject merchandise, in accordance with section 773(a)(1)(B)(i) of the Act, we based NV on the prices at which the foreign like products were first sold for consumption in India.

We based home-market prices on the packed, delivered prices to unaffiliated purchasers in the home market. We made adjustments for discounts and rebates. Where applicable, we made adjustments for packing and movement expenses in accordance with section 773(a)(6)(B) of the Act. In accordance with section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410, if appropriate, we made circumstance of sale adjustments by deducting home market direct selling expenses and adding U.S. direct selling expenses (credit). We offset home market commissions by the amount of indirect selling expenses incurred on the U.S. sale, up to the amount of the home market commission.

Viraj

Because Viraj had no sales of the subject merchandise in the home market during the POR, we compared the aggregate volume of sales of the foreign like product to Turkey (the only other market outside the U.S. to which Viraj sold) and U.S. sales of the subject merchandise to determine whether the volume of the foreign like product Viraj sold in Turkey was sufficient, pursuant to section 773(a)(1)(B)(ii)(II) of the Act, to form a basis for NV. Because Viraj's volume of third country market sales of foreign like product was greater than five percent of its U.S. sales of subject merchandise, in accordance with section 773(a)(1)(B)(ii) of the Act, we based NV on the prices at which the foreign like products were first sold for consumption in Turkey.

We based third country market prices on the packed, delivered prices to unaffiliated purchasers in the third country market. Where applicable, we made adjustments for packing and movement expenses in accordance with section 773(a)(6)(B) of the Act. Additionally, we added to the third country market price an amount for duty drawback. For a further discussion of this issue, *see Memorandum to the File: Analysis Memorandum for the Preliminary Results of Review for Viraj,* pp. 3–5, September 2, 1998. In accordance with section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410, if appropriate, we made circumstance of sale adjustments by deducting third country direct selling expenses and adding U.S. direct selling expenses.

Panchmahal

For Panchmahal we compared the aggregate volume of the company's comparison market sales of the foreign like product and U.S. sales of the subject merchandise to determine whether the volume of the foreign like product Panchmahal sold in India was sufficient, pursuant to section 773(a)(1)(C) of the Act, to form a basis for NV. Because Panchmahal's volume of comparison market sales of foreign like product was greater than five percent of its U.S. sales of subject merchandise, in accordance with section 773(a)(1)(B)(i) of the Act, we based NV on the prices at which the foreign like products were first sold for consumption in India.

We based comparison market prices on the packed, delivered prices to unaffiliated purchasers in the comparison market. Where applicable, we made adjustments for packing and movement expenses in accordance with section 773(a)(6)(B) of the Act. In accordance with section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410, if appropriate, we made circumstance of sale adjustments by deducting comparison market direct selling expenses and adding U.S. direct selling expenses (credit and other direct selling expenses). We offset home market commissions by the amount of indirect selling expenses incurred on the U.S. sales, up to the amount of the home market commission.

Level of Trade

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade (''LOT'') as the EP or CEP transaction. The NV LOT is that of the starting-price sales in the comparison market or, when NV is based on constructed value (''CV''), that of the sales from which we derive selling, general and administrative (''SG&A'') expenses and profit. For EP, the U.S. LOT is also the level of the starting-price sale, which is usually from exporter to importer. For CEP, it is the level of the constructed sale from the exporter to the importer.

To determine whether NV sales are at a different LOT than EP or CEP, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison market sales are at a different LOT, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison-market sales at the LOT of the export transaction, we make an LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales, if the NV level is more remote from the factory than the CEP level and there is no basis for determining whether the difference in the levels between NV and CEP affects price comparability, we adjust NV under section 773(a)(7)(B) of the Act (the CEP offset provision). *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-To-Length Carbon Steel Plate from South Africa,* 62 FR 61731 (November 19, 1997).

In the present review, none of the respondents requested a level of trade (LOT) adjustment. To ensure that no such adjustment was necessary, in accordance with the principles discussed above, we examined information regarding the distribution systems in both the United States and Indian markets, including the selling functions, classes of customer, and selling expenses for each respondent.

Mukand

In both the home market and the United States, Mukand reported two levels of trade: sales made directly to end-users and sales made through agents/resellers. Agents/resellers are further distinguished between consignment agents and marketing/''Del Credre'' agents. Consignment agents hold stock of Mukand's products, can make and accept offers, conduct negotiations, make arrangements for shipping, and collect payments for Mukand. A marketing agent markets and books orders only, while a ''Del Credre'' agent is defined as a marketing agent that also collects customer payments for Mukand. We examined the selling functions performed at each claimed level and found that there was a significant difference in selling functions offered between sales to end-users and sales made through agents/resellers. We noted that both quantitatively and qualitatively, the selling functions performed for sales to end-user customers in both the U.S. and the home market involve significantly greater resources and thus represent a distinct stage of marketing. Specifically, of the nine selling functions reported, Mukand claims regularly to have performed negotiations, shipping arrangements, and accounts receivable collections (and in some cases, made offers) for sales to end users, but not for sales involving agents/resellers. Therefore, given these differences, we preliminarily conclude that end-users and agents/resellers constitute separate levels of trade. However, there was not a significant difference in selling functions between sales made through consignment agents and marketing/''Del Credre'' agents, and as such we have made no level of trade distinction between sales made through agents.

Although two levels of trade exist, all home market sales that matched to the U.S. sale were made to end-users, the same level of trade as the U.S. sale used to determine export price. Thus, because there is no difference in LOT, no level of trade adjustment was necessary.

For a further discussion of the Department's LOT analysis with respect to Mukand, *see Memorandum to the File: Analysis Memorandum for the Preliminary Results of Review for Mukand,* pp. 1–2, September 2, 1998.

Viraj

In both the third country comparison market and the United States, Viraj reported one LOT and one distribution system with one class of customer (distributors). Viraj stated that it

manufactures the merchandise after receipt of a final confirmed order and sells directly to its customers in the comparison market and in the United States on a CIF basis. Viraj reported that it performs identical selling functions in both the third country comparison market and the United States. These selling functions include soliciting inquiries from customers, negotiating with customers, and procurement of export orders. Further, Viraj reported that it did not provide other sales-related services on any of its sales, such as inventory maintenance, technical advice, warranty services, or advertising. Therefore, we preliminarily conclude that Viraj performs identical selling functions in the comparison market and the United States and that a LOT adjustment is not warranted.

For a further discussion of the Department's LOT analysis with respect to Viraj, *see Memorandum to the File: Analysis Memorandum for the Preliminary Results of Review for Viraj,* pp. 1–2, September 2, 1998.

Panchmahal

In both the home market and the United States, Panchmahal reported one level of trade. Panchmahal reported that in the home market, it made sales from its plant directly to end users and to retailers. The company also stated that it made sales in the home market through consignment agents and branch offices to end users and retailers. Its sole sale to the United States was to a reseller. Panchmahal stated that it sells directly to its buyers in the comparison market and in the United States on a CIF basis on the receipt of a confirmed order. We examined the company's selling functions and saw that it did not provide any sales-related services on any of its sales, other than transporting the merchandise to the Indian port. Because there are no differences between the selling functions on sales made to either end users or retailers in the home market, sales to both of these customer categories represent a similar stage of marketing. Therefore, we preliminarily conclude that end users and retailers constitute one level of trade in the home market. Furthermore, because Panchmahal's sale to the United States involved the identical selling functions as those in the comparison market, we consider it to be made at the same level of trade. Therefore, no LOT adjustment for Panchmahal is appropriate. For a further discussion of the Department's LOT analysis with respect to Panchmahal, *see Memorandum to the File: Analysis Memorandum for the Preliminary Results of Review for Panchmahal,* pg. 2, September 2, 1998.

Preliminary Results of Review

As a result of our review, we preliminarily determine that the following weighted-average dumping margins exist for the period December 1, 1996, through November 30, 1997:

Manufacturer/exporter	Margin (percent)
Mukand, Ltd.	0.00
Viraj	0.00
Panchmahal	0.00

The Department will disclose calculations performed in connection with this preliminary determination within five days of the date of publication of this notice. Any interested party may request a hearing within 30 days of publication. Any hearing, if requested, will be held 2 days after the scheduled date for submission of rebuttal briefs. Issues raised in the hearing will be limited to those raised in the case briefs. Case briefs from interested parties may be submitted not later than 30 days after the date of publication of this notice in the **Federal Register**; rebuttal briefs may be submitted not later than five days thereafter. The Department will publish the final results of this administrative review, including its analysis of issues raised in any written comments or at a hearing, not later than 120 days after the date of publication of this notice.

Upon issuance of the final results of this review, the Department shall determine, and the U.S. Customs Service shall assess, antidumping duties on all appropriate entries. If these preliminary results are adopted in our final results, we will instruct the Customs Service not to assess antidumping duties on the merchandise subject to review. Upon completion of this review, the Department will issue appraisement instructions directly to the Customs Service. If applicable, we will calculate an importer-specific ad valorem duty assessment rate based on the ratio of the total amount of antidumping duties calculated for the examined sales made during the POR to the total customs value of the sales used to calculate those duties. This rate will be assessed uniformly on all entries of that particular importer made during the POR. This is equivalent to dividing the total amount of antidumping duties, which are calculated by taking the difference between statutory NV and statutory EP, by the total statutory EP value of the sales compared, and adjusting the result by the average difference between EP and customs value for all merchandise examined during the POR.

Furthermore, the following deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of these administrative reviews, as provided by section 751(a)(1) of the Act: (1) for Mukand, Viraj, and Panchmahal, no deposit will be required; (2) if the exporter is not a firm covered in this review, a prior review, or the original investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (3) the cash deposit rate for all other manufacturers or exporters will continue to be 48.80 percent, the ''All Others'' rate made effective by the original investigation.

These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This determination is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Date: August 28, 1998.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. 98–24168 Filed 9–8–98; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Finch University of Health Sciences; Notice of Decision on Application for Duty-Free Entry of Scientific Instrument

This decision is made pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 A.M. and 5:00 P.M. in Room 4211, U.S. Department of Commerce, 14th and

Constitution Avenue, N.W., Washington, D.C.

Docket Number: 98–036. *Applicant:* Finch University of Health Sciences, North Chicago, IL 60064–3095. *Instrument:* (4 each) Right and Left Hand Micromanipulators, Model SM–20. *Manufacturer:* Narishige Co., Japan. *Intended Use:* See notice at 63 FR 41227, August 3, 1998.

Comments: None received. *Decision:* Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as it is intended to be used, is being manufactured in the United States. *Reasons:* The foreign instrument provides the required stability, geometry and sensitivity and ability to change one electrode without disturbing operation of the others. The National Institutes of Health advises in its memorandum dated August 17, 1998 that: (1) This capability is pertinent to the applicant's intended purpose, and (2) it knows of no domestic instrument or apparatus of equivalent scientific value to the foreign instrument for the applicant's intended use.

We know of no other instrument or apparatus of equivalent scientific value to the foreign instrument which is being manufactured in the United States.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 98–24170 Filed 9–8–98; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Massachusetts Institute of Technology; Notice of Decision on Application for Duty-Free Entry of Scientific Instrument

This decision is made pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 A.M. and 5:00 P.M. in Room 4211, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, D.C.

Docket Number: 98–032. *Applicant:* Massachusetts Institute of Technology, Cambridge, MA 02139. *Instrument:* Fish Tank System. *Manufacturer:* Klaus-Jurgen Schwarz, Germany. *Intended Use:* See notice at 63 FR 36879, July 8, 1998.

Comments: None received. *Decision:* Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as it is intended to be used, is being manufactured in the United States. *Reasons:* The foreign instrument provides: (1) An optimal design based on small tank size, simple operation and uniformity for genetic analysis of early development using large numbers of zebra fish and (2) compatibility with an existing tank system. These capabilities are pertinent to the applicant's intended purposes and we know of no other instrument or apparatus of equivalent scientific value to the foreign instrument which is being manufactured in the United States.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 98–24169 Filed 9–8–98; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–423–806]

Cut-to-Length Carbon Steel Plate From Belgium Preliminary Results of Countervailing Duty Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary results of countervailing duty administrative review.

SUMMARY: The Department of Commerce is conducting an administrative review of the countervailing duty order on certain steel products from Belgium for the period January 1, 1996 through December 31, 1996. We preliminarily determine the net subsidy to be *de minimis.* For information on the net subsidy for non-reviewed companies, please see the *Preliminary Results of Review* section of this notice. If the final results remain the same as these preliminary results of administrative review, we will instruct the U.S. Customs Service to assess countervailing duties as detailed in the *Preliminary Results of Review* section of this notice. Interested parties are invited to comment on these preliminary results.

EFFECTIVE DATE: September 9, 1998.

FOR FURTHER INFORMATION CONTACT: Lorenza Olivas or Gayle Longest, Office CVD/AD Enforcement VI, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482–2786.

SUPPLEMENTARY INFORMATION:

Background

On August 7, 1993, the Department published in the **Federal Register** (58 FR 42749) the countervailing duty order on certain steel products from Belgium. On August 4, 1997, the Department published a notice of ''Opportunity to Request Administrative Review'' (62 FR 41925) of this countervailing duty order. We received a timely request for review and we initiated the review, covering the period January 1, 1996 through December 31, 1996, on September 25, 1997 (62 FR 50292).

In accordance with 19 CFR 351.213(b), this review covers only those producers or exporters of the subject merchandise for which a review was specifically requested. Accordingly, this review covers Fabrique de Fer de Charleroi, S.A. (Fabfer). This review covers 28 programs.

On April 13, 1998, we extended the period for completion of the preliminary results pursuant to section 751(a)(3) of the Tariff Act of 1930, as amended. *See Cut-to-Length Carbon Steel Plate From Belgium; Extension of Time Limit for Countervailing Duty Administrative Review* (63 FR 17990). The deadline for the final results of this review is no later than 120 days from the date on which these preliminary results are published in the **Federal Register**.

On August 13, 1998, Fabfer submitted a claim that the research and development loan provided under the Economic Expansion Law of 1970 constitutes a non-actionable green-light subsidy and therefore is not countervailable. The Government of Belgium (GOB) provided no support for this claim, and information in the record is not sufficient to determine whether the program under which the loan is provided satisfies the criteria in section 771(5B)(i) of the Act. Given the timing of Faber's claim and the deficiency of required information, we are denying Fabfer's request for green-light status in this review.

Applicable Statute

Unless otherwise indicated, all citations to the statute are references to the provisions of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act (URAA) effective January 1, 1995 (the Act). The Department is conducting this administrative review in accordance with section 751(a) of the Act. All citations to the Department's regulations reference 19 CFR Part 351 *et. seq.*, *Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27296 (May 19, 1997), unless otherwise indicated.

Scope of the Review

The products covered by this review are certain cut-to-length carbon steel plate. These products include hot-rolled carbon steel universal mill plates (i.e., flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 millimeters but not exceeding 1,250 millimeters and of a thickness of not less than 4 millimeters, not in coils and without patterns in relief), of rectangular shape, neither clad, plated nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances; and certain hot-rolled carbon steel flat-rolled products in straight lengths, of rectangular shape, hot rolled, neither clad, plated, nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances, 4.75 millimeters or more in thickness and of a width which exceeds 150 millimeters and measures at least twice the thickness, as currently classifiable in the Harmonized Tariff Schedule (HTS) under subheadings 7208.31.0000, 7208.32.0000, 7208.33.1000, 7208.33.5000, 7208.41.0000, 7208.42.0000, 7208.43.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.11.0000, 7211.12.0000, 7211.21.0000, 7211.22.0045, 7211.90.0000, 7212.40.1000, 7212.40.5000, and 7212.50.0000. Included in this review are flat-rolled products of non-rectangular cross-section where such cross-section is achieved subsequent to the rolling process (*i.e.*, products which have been ''worked after rolling'')—for example, products which have been beveled or rounded at the edges. Excluded from these investigations is grade X–70 plate. The HTS subheadings are provided for convenience and U.S. Customs Service (Customs) purposes. The written description of the scope remains dispositive.

Allocation Methodology

In *British Steel plc.* v. *United States,* 879 F.Supp. 1254 (February 9, 1995) (*British Steel*), the U.S. Court of International Trade (the Court) ruled against the allocation period methodology for non-recurring subsidies that the Department had employed for the past decade, a methodology that was articulated in the *General Issues Appendix* (58 FR 37227) appended to *Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria;* 58 FR 37217 (July 9, 1993) (*GIA*). In accordance with the Court's decision on remand, the Department determined that the most reasonable method of deriving the allocation period for nonrecurring subsidies is a company-specific average useful life (AUL) of non-renewable physical assets. This remand determination was affirmed by the Court on June 4, 1996. *British Steel,* 929 F.Supp 426,439 (CIT 1996). Accordingly, the Department has applied this methodology to those non-recurring subsidies that have not yet been countervailed.

Fabfer submitted an AUL calculation based on depreciation and asset values of productive assets reported in its financial statements. Fabfer's AUL was derived by adding depreciation charges for ten years, and dividing these charges by the sum of average gross book value of depreciable fixed assets for the related periods. We found this calculation to be reasonable and consistent with our company-specific AUL objective. Fabfer's calculation resulted in an average useful life of 26 years. For non-recurring subsidies received prior to the POR and which have already been countervailed based on an allocation period established in an earlier segment of the proceeding, it is not reasonable or practicable to reallocate those subsidies over a different period of time. Since the countervailing duty rate in earlier segments of the proceeding was calculated based on a certain allocation period and resulting benefit stream, redefining the allocation period in later segments of the proceeding would entail taking the original grant amount and creating an entirely new benefit stream for that grant. Such a practice may lead to an increase or decrease in the total amount countervailed and, thus, would result in the possibility of over-countervailing or under-countervailing the actual benefit. Therefore, for purposes of these preliminary results, the Department is using the original allocation period assigned to each nonrecurring subsidy received prior to the POR, which has already been countervailed. *See Certain Carbon Steel Products from Sweden; Final Results of Countervailing Duty Administrative Review,* 62 FR 16549 (April 7, 1997) (*Carbon Steel Products from Sweden*).

Analysis of Programs

I. Programs Conferring Subsidies

A. Programs Previously Determined To Confer Subsidies Cash Grants and Interest Subsidies Under the Economic Expansion Law of 1970

The Economic Expansion Law of December 30, 1970 (1970 Law), offers incentives to promote the establishment of new enterprises or the expansion of existing ones which contribute directly to the creation of new activities and new employment within designated development zones. Although funding for programs under the 1970 Law is provided by the GOB, the provisions of the 1970 Law are implemented and administered by regional authorities. In the *Final Affirmative Countervailing Duty Determinations: Certain Steel Products From Belgium (Final Determination)* 58 FR 37273 (July 9, 1993), the Department found this program countervailable because it provided benefits to enterprises or industries or groups of enterprises or industries located in certain regions. In this proceeding, we have received no new information or evidence of changed circumstances to warrant reconsideration of this finding.

Fabfer received grants between 1977 and 1985 under this program; none were provided since the investigation. To calculate the benefit in this review, we followed the methodology used in the *Final Determination.* In that proceeding, the Department determined that, absent the 1970 Law, most of the benefits provided under this law would have been available under the 1959 Economic Expansion Law (the 1959 Law). The 1959 Law was found to be non-specific and, thus, not countervailable, in *Final Affirmative Countervailing Duty Determinations: Certain Carbon Steel Products from Belgium;* 47 FR 39304, (September 7, 1982). Therefore, the Department countervailed benefits provided under the 1970 Law only to the extent that they exceeded the benefits available under the 1959 Law.

To calculate the subsidy rate for this review, we employed the standard grant methodology outlined in the allocation section of the GIA and allocated the benefit from each grant over fifteen years, the average useful life of the renewable physical assets in the steel industry as determined under the U.S. Internal Revenue Service's Asset Depreciation Range System. As the discount rate, we used the long-term fixed rates of the Kredietbank for each year in which grants were provided. We summed the benefit amounts attributable to the POR and divided the result by Fabfer's total sales during the POR. On this basis, we calculated a subsidy rate of 0.28 percent *ad valorem*.

B. Other Programs Preliminarily Determined To Confer Subsidies Research and Development Loan Provided Under the 1970 Economic Expansion Law

Under Article 25 of the 1970 Economic Expansion Law and the October 20, 1988 Decree of the

Executive of the Walloon Region, assistance is provided to promote research activities or the development of prototypes, new products or new production in the Walloon Region. Based on the questionnaire response, it appears that this program is funded by the GOB and administered by the Walloon regional authority. This understanding of the authority and funding of the 1970 Law relates only to the benefits examined in this review and is based upon record evidence of this case. We will seek more clarification on the administration and funding of these benefits prior to the final results of review. The program provides interest-free loans for up to 50 percent of the cost of the project for large enterprises and up to 80 percent for small and medium sized firms.

We examined the 1970 Economic Expansion Law with respect to cash grants and interest subsidies in the *Final Determination* and found that it was regionally specific because it provides incentives to promote economic development in designated development zones (see *Final Determination* at 37275). In the verification report (Memorandum to Susan Kuhbach, ''Verification Report of the Government of Belgium, public version on file in the Centra Records Unit (Room B–099 of the Main Commerce Building) dated April 1, 1993 at 6, we identify research and development as one of the types of ''incentives'' provided under this law. We also confirm in the verification report that Fabfer is located in a development zone. We examined the documentation provided in this review and we did not find any indication of changed circumstances which would warrant reconsideration of this finding. Therefore, we preliminarily determine that this program is regionally specific and therefore countervailable.

Under this program, Fabfer received an interest-free loan approved in 1989 and disbursed in four installments between 1990 and 1992, which was outstanding in the POR. To calculate the benefit on this loan we used our long-term loan methodology and measured the cost savings in each year the loan was outstanding using the long-term fixed rate of the Kredietbank as the benchmark. We then took the present value of each of these amounts as of the time the loan was disbursed and we reallocated the present value of the yearly benefits over the life of the loan, using our standard grant methodology and the 1989 long-term fixed rate of the Kredietbank as the discount rate. We then divided the amount allocated to the POR by Fabfer's total sales during the POR. On this basis, we determine the net subsidy for this program to be 0.15 percent *ad valorem*.

II. Programs Preliminarily Determined Not To Confer Subsidies

1. Societe Nationale de Credite a l'Industrie (SNCI) Loans

The SNCI is a public credit institution which, through medium-and long-term financing, encourages the development and growth of industrial and commercial enterprises in Belgium, including the national industries. SNCI is organized as a limited liability company and is 50-percent owned by the Belgian government. In 1979, SNCI's board of directors agreed to provide the GOB with the funds needed to assist the steel industry under the 1978 restructuring plan (the Claes Plan) and to grant loans to steel companies within the framework of the plan and under the economic expansion laws of 1959 and 1970. In the Final Determination, the Department determined that the SNCI loan program was countervailable because it was limited to a specific enterprise or industry, or group of enterprises or industries. In this review, no new information or evidence of changed circumstances has been submitted to warrant reconsideration of this finding.

Fabfer had two variable-interest long-term loans outstanding during the POR: one received in 1982, the other in 1983. The interest rates for the 1982 loan were renegotiated in 1987, 1992 and 1995. The interest rate for the 1983 loan was renegotiated in 1988. Consistent with *Carbon Steel Products from Sweden,* we calculated the benefit by comparing the amount of interest which was paid during the review period to the amount of interest which would have been paid at the benchmark rate. As in the *Final Determination* at 37291, we used as a benchmark the long-term fixed rates of the Kredietbank as of the last renegotiation date of the loan. (See *Final Determination* at page 37291.) Because the benchmark rate was lower that the program rate, we preliminarily determine the benefit from this program to be zero.

2. Exhibition Stands

Fabfer reported to have received grants from the GOW to pay for exhibition stands for participation in fairs hosted in foreign countries to promote the company's own products. The grants were received prior to the POR and did not exceed 0.5 percent of Fabfer's total exports in the year they were received. Therefore, in accordance with our practice, the entire amount was expensed in the year of receipt. On that basis, we preliminary determine the benefit from this program during the POR is zero.

3. Promotion Brochure

Fabfer reported to have received a fixed-rate long-term loan during the POR from GOW for the publication of advertising brochures for international markets. We compared the interest rate paid on this loan to the benchmark rate, the Kredietbank fixed-rate long-term rate provided in the response. Because the loan interest rate was higher than the benchmark rate in year the loan was approved, we preliminarily determine that the benefit from this program during the POR is zero.

III. Programs Preliminarily Determined To Be Not Used

We examined the following programs and preliminarily determine that the producers and/or exporters of the subject merchandise did not apply for or receive benefits under these programs during the period of review.

1. Resider Program

Petitioners alleged that Fabfer received aid from the European Regional Development Fund under the Resider program to promote reconversion in regions which have undergone substantial employment losses in the steel industry. Based on the information on the record, we preliminarily determine that Fabfer did not receive benefits from this program during the POR.

2. European Commission-approved Grants
3. Early Retirement
4. The ''Invests''
5. SNSN
6. FSNW
7. Belgian Industrial Finance Company (Belfin) Loans
8. Government-Guaranteed Loans issued pursuant to the Economic Expansion Laws of 1959 and 1970
9. Programs under the 1970 Law
   a. Exemption of the Corporate Income Tax for Grants
   b. Accelerated Depreciation Under Article 15
   c. Exemption from Real Estate Taxes
   d. Exemption from the Capital Registration
10. ECSC Article 54 Loans and Loan Guarantees
11. ECSC Redeployment Aid
12. European Social Funds Grants
13. Interest Rate Subsidies Provided by Copromex
14. Employment Premiums
15. Short-term Export Credit
16. New Community Instrument Loans

17. European Regional Development Fund Aid
18. ECSC Interest Rebates under Article 54
19. ECSC Conversion Loans under Article 56
20. ECSC Interest Rebates under Article 56

Preliminary Results of Review

In accordance with 19 CFR 351.221(b)(4)(i), we calculated an individual subsidy rate for each producer/exporter subject to this administrative review. For the period January 1, 1996 through December 31, 1996, we preliminarily determine the net subsidy for Fabfer to be 0.43 through December 31, 1996, we prelinarily determine the net subsidy for Fabfer to be 0.37 percent *ad valorem*. As provided for in the Act, any rate less than 0.5 percent *ad valorem* in an administrative review is *de minimis*. Accordingly, pursuant to 19 CFR 351.106(c)(2), if the final results of this review remain the same as these preliminary results, the Department intends to instruct Customs to liquidate, without regard to countervailing duties, shipments of the subject merchandise from Fabfer exported on or after January 1, 1996 and on or before December 31, 1996. Also, the cash deposits required for Fabfer will be zero.

Because the URAA replaced the general rule in favor of a country-wide rate with a general rule in favor of individual rates for investigated and reviewed companies, the procedures for establishing countervailing duty rates, including those for non-reviewed companies, are now essentially the same as those in antidumping cases, except as provided for in section 777A(e)(2)(B) of the Act. The requested review will normally cover only those companies specifically named. *See* 19 CFR 351.213(b). Pursuant to 19 CFR 351.212(c), for all companies for which a review was not requested, duties must be assessed at the cash deposit rate, and cash deposits must continue to be collected, at the rate previously ordered. As such, the countervailing duty cash deposit rate applicable to a company can no longer change, except pursuant to a request for a review of that company. *See Federal-Mogul Corporation and The Torrington Company* v. *United States*, 822 F.Supp. 782 (CIT 1993) and *Floral Trade Council* v. *United States*, 822 F.Supp. 766 (CIT 1993) (interpreting 19 CFR 353.22(e), the antidumping regulation on automatic assessment, which is identical to 19 CFR 355.22(g)). Therefore, the cash deposit rates for all companies except those covered by this review will be unchanged by the results of this review.

We will instruct Customs to continue to collect cash deposits for non-reviewed companies at the most recent company-specific or country-wide rate applicable to the company. Accordingly, the cash deposit rates that will be applied to non-reviewed companies covered by this order will be the rate established for these companies in the most recently completed administrative proceeding conducted under the URAA. If such a review has not been conducted, the rate established in the most recently completed administrative proceeding pursuant to the statutory provisions that were in effect prior to the URAA amendments is applicable. *See Final Determination*. These rates shall apply to all non-reviewed companies until a review of a company assigned these rates is requested. In addition, for the period January 1, 1996 through December 31, 1996, the assessment rates applicable to all non-reviewed companies covered by this order are the cash deposit rates in effect at the time of entry.

Public Comment

Pursuant to 19 CFR 351.224(b), the Department will disclose to parties to the proceeding any calculations performed in connection with these preliminary results within five days after the date of publication of this notice. Pursuant to 19 CFR 351.309, interested parties may submit written comments in response to these preliminary results. Case briefs must be submitted within 30 days after the date of publication of this notice, and rebuttal briefs, limited to arguments raised in case briefs, must be submitted no later than five days after the time limit for filing case briefs. Parties who submit argument in this proceeding are requested to submit with the argument: (1) A statement of the issues, and (2) a brief summary of the argument. Case and rebuttal briefs must be served on interested parties in accordance with 19 CFR 351.303(f). Also, pursuant to 19 CFR 351.310, within 30 days of the date of publication of this notice, interested parties may request a public hearing on arguments to be raised in the case and rebuttal briefs. Unless the Secretary specifies otherwise, the hearing, if requested, will be held two days after the date for submission of rebuttal briefs, that is, thirty-seven days after the date of publication of these preliminary results.

Representatives of parties to the proceeding may request disclosure of proprietary information under administrative protective order no later than 10 days after the representative's client or employer becomes a party to the proceeding, but in no event later than the date the case briefs, under 19 CFR § 351.309(c)(ii), are due. The Department will publish the final results of this administrative review, including the results of its analysis of issues raised in any case or rebuttal brief or at a hearing.

This administrative review and notice are issued and published in accordance with section 751(a)(1) and 777(i)(1) of the Act (19 U.S.C. 1675(a)(1) and 19 U.S.C. 1677f(i).

Dated: August 31, 1998.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. 98–24172 Filed 9–8–98; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–560–804]

Preliminary Negative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination: Extruded Rubber Thread From Indonesia

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: September 9, 1998.

FOR FURTHER INFORMATION CONTACT: Stephanie Moore or Eric B. Greynolds, Office of CVD/AD Enforcement VI, Import Administration, U.S. Department of Commerce, Room 3099, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone (202) 482–2786.

Preliminary Determination

The Department of Commerce (the Department) preliminarily determines that countervailable subsidies are not being provided to producers or exporters of extruded rubber thread from Indonesia.

Petitioner

The petition in this investigation was filed by North American Rubber Thread Co., Ltd. (the petitioner).

Case History

Since the publication of the notice of initiation in the **Federal Register**, the following events have occurred. *See Notice of Initiation of Antidumping and Countervailing Duty Investigations: Extruded Rubber Thread from*

Indonesia, 63 FR 23267 (April 28, 1998) (*Initiation Notice*). On May 4, 1998, we issued countervailing duty questionnaires to the Government of Indonesia (GOI), and the producers/exporters of the subject merchandise. On June 10, 1998, at the request of the petitioner, we postponed the preliminary determination of this investigation until August 28, 1998 (63 FR 31737).

We received responses to our initial questionnaire from the GOI, Bakrie Rubber Industry (Bakrie), P.T. Swasthi Parama Mulya (Swasthi), and P.T. Perkebunan III (Pesero) on June 26 and 29, 1998. The information provided indicates that Pesero did not export to the United States during 1997, and that P.T. Cilatexindo Graha Alam Pt., an exporter named in the petition, stopped producing rubber thread in January 1994. A query of the U.S. Customs databases confirmed that these two companies did not export subject merchandise to the United States during 1997, the period of investigation. Therefore, we are not requesting further information from these two companies. On July 17, 1998, we issued supplemental questionnaires to the GOI, Bakrie and Swasthi. We received responses to these supplemental questionnaires on July 27, 1998.

Scope of Investigation

For purposes of this investigation, the product covered is extruded rubber thread (ERT) from Indonesia. ERT is defined as vulcanized rubber thread obtained by extrusion of stable or concentrated natural rubber latex of any cross sectional shape, measuring from 0.18 mm, which is 0.007 inches or 140 gauge, to 1.42 mm, which is 0.056 inch or 18 gauge, in diameter.

ERT is currently classified under subheadings 4007.00.00 of the *Harmonized Tariff Schedule* (HTS). Although the HTS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

The Applicable Statute and Regulations

Unless otherwise indicated, all citations to the statute are references to the provisions of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act effective January 1, 1995 (the Act). In addition, unless otherwise indicated, all citations to the Department's regulations are to the current regulations as codified at 19 CFR 351 and published in the **Federal Register** on May 19, 1997 (62 FR 27295).

Injury Test

Because Indonesia is a ''Subsidies Agreement Country'' within the meaning of section 701(b) of the Act, the International Trade Commission (ITC) is required to determine whether imports of the subject merchandise from Indonesia materially injure, or threaten material injury to, a U.S. industry. On May 28, 1998, the ITC published its preliminary determination that there is a reasonable indication that an industry in the United States is being materially injured, or threatened with material injury, by reason of imports from Indonesia of the subject merchandise (63 FR 29250).

Alignment With Final Antidumping Duty Determination

On August 18, 1998, the petitioner submitted a letter requesting alignment of the final determination in this investigation with the final determination in the companion antidumping duty investigation. In accordance with section 705(a)(1) of the Act, we are aligning the final determination in this investigation with the final antidumping duty determination in the antidumping investigation of ERT. *See Initiation of Antidumping and Countervailing Duty Investigations: Extruded Rubber Thread From Indonesia,* 63 FR 23267 (April 28, 1998).

Period of Investigation

The period for which we are measuring subsidies (the POI) is calendar year 1997.

Company Histories

The GOI identified two producers of subject merchandise that exported the subject merchandise to the United States during the POI:

Bakrie

Bakrie was established on January 14, 1992, by the PT. Bakrie Nusantara Corporation and Globe Manufacturing Company, a U.S. producer of rubber thread, as a joint venture company. PT. Bakrie Nusantara Corporation was officially renamed PT. Bakrie Capitanindo Corporation on March 15, 1995. Bakrie manufactures and exports medium and heavy gauge rubber thread, coated with silicone emulsion which serves as a lubricant.

Swasthi

Swasthi was established in November 1989. The company produces and exports ERT of various gauges of talc finish, various colors, and special qualities.

De Minimis Standard Under Section 771(36) of the Statute

Pursuant to its authority under section 771(36) of the Act, the United States Trade Representative (USTR) has designated Indonesia as a ''least-developed country'' for purposes of the CVD law. *See USTR Interim Final Rule: Developing and Least-Developed Country Designations Under the Countervailing Duty Law* (15 CFR 2013) (63 FR 29945, June 2, 1998). Consequently, a net countervailable subsidy rate that does not exceed three percent *ad valorem* is considered *de minimis* in accordance with section 703(b)(4)(B) of the Act and Article 27 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). As discussed below, we preliminarily determine that the net countervailable subsidy bestowed on ERT from Indonesia is less than three percent *ad valorem,* and is, therefore, *de minimis.*

I. Program Preliminarily Determined To Be Countervailable Bank Indonesia (BI) Rediscount Loans

Under Decree No. 132/MPP/Kep/1996 of June 4, 1996, the Ministry of Industry and Trade, the Ministry of Finance, and the Bank of Indonesia (BI) provide support for certain exporters with the goal of achieving diversification of the Indonesian export base from oil and gas. Companies designated as Perusahaan Eksportir Tertentu (PET) are eligible to participate in this program. Under the program, PETs sell their letters of credit and export drafts at a discount to the BI through participating foreign exchange banks, which are commercial banks that have obtained a license to conduct activities in foreign currencies. The sale of the letters of credit and export drafts by the PETs provides them with working capital at lower interest rates than they would otherwise pay on short-term commercial loans.

We preliminarily determine that the loans provided under this program are countervailable in accordance with section 771(5)(A) of the Act. Through this program, the BI provides working capital to PETs at interest rates which are more favorable than those provided to non-PETs. The benefit is the difference between the amount the borrower of the loan pays on the loan and the amount the borrower would pay on a comparable commercial loan. Finally, because the program is contingent upon export performance, it is an export subsidy under section 771(5A)(B) and is, therefore, specific.

Only one exporter, Swasthi, used the BI rediscount loan program during the

POI. According to the GOI's June 29, 1998 questionnaire response at page 4, the interest rates in effect during the POI were the Singapore Interbank Offering Rate (SIBOR) for PETs, and SIBOR plus 1 percent for non-PETs. Therefore, to calculate the benefit for Swasthi, we compared the interest rates Swasthi paid on loans for shipments to the United States to the interest rates that non-PET companies would have had to pay for comparable commercial loans. This difference was divided by Swasthi's total exports of subject merchandise to the United States during the POI. On this basis, we preliminarily determine the countervailable subsidy from this program to be 0.13 percent *ad valorem* for Swasthi.

II. Programs Preliminarily Determined To Be Not Used

Based on information provided in the questionnaire responses, we preliminarily determine that the producers/exporters of subject merchandise did not apply for or receive benefits under the following programs during the POI.

A. Investment Credit for the Expansion of the Rubber Industry
B. Corporate Income Tax Holiday
C. Import Duty Exemption of Capital Equipment

Summary

The total preliminary net countervailable subsidy for Swasthi is 0.13 percent, which is *de minimis*. The rate for Bakrie is zero. Therefore, we preliminarily determine that countervailable subsidies are not being provided to producers or exporters of ERT from Indonesia.

Verification

In accordance with section 782(i) of the Act, we will verify the information submitted by respondents prior to making our final determination.

ITC Notification

In accordance with section 703(f) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all nonprivileged and nonproprietary information relating to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order, without the written consent of the Assistant Secretary, Import Administration.

In accordance with section 705(b)(3) of the Act, if our final determination is affirmative, the ITC will make its final determination within 75 days after the Department makes its final determination.

Public Comment

In accordance with 19 CFR 351.310, we will hold a public hearing, if requested, to afford interested parties an opportunity to comment on this preliminary determination. Individuals who wish to request a hearing must submit a written request within 30 days of the publication of this notice in the **Federal Register** to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room B–099, 14th Street and Constitution Avenue, N.W., Washington, DC 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time.

Requests for a public hearing should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and, (3) to the extent practicable, an identification of the arguments to be raised at the hearing. In addition, six copies of the business proprietary version and six copies of the nonproprietary version of the case briefs must be submitted to the Assistant Secretary no later than 50 days from the date of publication of the preliminary determination. As part of the case brief, parties are encouraged to provide a summary of the arguments not to exceed five pages and a table of statutes, regulations, and cases cited. Six copies of the business proprietary version and six copies of the nonproprietary version of the rebuttal briefs must be submitted to the Assistant Secretary no later than 55 days from the date of publication of the preliminary determination. An interested party may make an affirmative presentation only on arguments included in that party's case or rebuttal briefs. Written arguments should be submitted in accordance with 19 CFR 351.309 and will be considered if received within the time limits specified above.

This determination is published pursuant to section 703(f) of the Act.

Dated: August 28, 1998.

Joseph A. Spetrini

Acting Assistant Secretary for Import Administration.

[FR Doc. 98–24171 Filed 9–8–98; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–508–605]

Industrial Phosphoric Acid From Israel: Preliminary Results and Partial Recission of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary results of countervailing duty administrative review.

SUMMARY: The Department of Commerce (the Department) is conducting an administrative review of the countervailing duty order on industrial phosphoric acid from Israel for the period January 1, 1996 through December 31, 1996. For information on the net subsidy for each reviewed company, as well as for all non-reviewed companies, please see the *Preliminary Results of Review* section of this notice. If the final results remain the same as these preliminary results of administrative review, we will instruct the U.S. Customs Service to assess countervailing duties as detailed in the *Preliminary Results of Review*. Interested parties are invited to comment on these preliminary results. *See Public Comment* section of this notice.

EFFECTIVE DATE: September 9, 1998.

FOR FURTHER INFORMATION CONTACT: Stephanie Moore or Eric Greynolds, Office CVD/AD Enforcement VI, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–3692 or (202) 482–6071, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 19, 1987, the Department published in the **Federal Register** (52 FR 31057) the countervailing duty order on industrial phosphoric acid from Israel. On August 4, 1997, the Department published a notice of ''Opportunity to Request Administrative Review'' (62 FR 41925) of this countervailing duty order. We received a timely request for review, and we initiated the review, covering the period January 1, 1996 through December 31, 1996, on September 25, 1997 (62 FR 50292).

In accordance with 19 CFR 351.213(b), this review covers only those producers or exporters of the

subject merchandise for which a review was specifically requested. Accordingly, this review covers Rotem-Amfert Negev Ltd. (Rotem) and Haifa Chemicals Ltd. (Haifa). Haifa did not export the subject merchandise during the period of review (POR). Therefore, we are rescinding the review with respect to Haifa. This review covers nine programs.

Applicable Statute and Regulations

Unless otherwise indicated, all citations to the statute are references to the provisions of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act (URAA) effective January 1, 1995 (the Act). The Department is conducting this administrative review in accordance with section 751(a) of the Act. All citations to the Department's regulations reference 19 CFR Part 351, *et seq.* Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296 (May 19, 1997), unless otherwise indicated.

Scope of the Review

Imports covered by this review are shipments of industrial phosphoric acid (IPA) from Israel. Such merchandise is classifiable under item number 2809.20.00 of the *Harmonized Tariff Schedule* (HTS). The HTS item number is provided for convenience and U.S. Customs Service purposes. The written description of the scope remains dispositive.

Subsidies Valuation Information

Period of Review

The period for which we are measuring subsidies is calendar year 1996.

Allocation Period

In *British Steel plc.* v. *United States,* 879 F.Supp. 1254 (February 9, 1995) (*British Steel*), the U.S. Court of International Trade (the Court) rules against the allocation period methodology for non-recurring subsidies that the Department had employed for the past decade, as it was articulated in the *General Issues Appendix* appended to the *Final Countervailing Duty Determination; Certain Steel Products from Austria,* 58 FR 37225 (July 9, 1993) (*GIA*). In accordance with the Court's decision on remand, the Department determined that the most reasonable method of deriving the allocation period for nonrecurring subsides is a company-specific average useful life (AUL). This remand determination was affirmed by the Court on June 4, 1996. *British Steel,* 929 F.Supp 426, 439 (CIT 1996). Accordingly, the Department has applied this method to those non-recurring subsidies that have not yet been countervailed.

Rotem submitted an AUL calculation based on depreciation expenses and asset values of productive assets reported in its financial statements. Rotem's AUL was derived by adding the sum of average gross book value of depreciable fixed assets for ten years and dividing these assets by the total depreciation charges for the related periods. We found this calculation to be reasonable and consistent with our company-specific AUL objective. Rotem's calculation resulted in an average useful life of 23 years, which we have used as the allocation period for non-recurring subsidies received during the POR.

For non-recurring subsidies received prior to the POR and already countervailed based on an allocation period established in an earlier segment of the proceeding, it is not reasonable or practicable to reallocate those subsidies over a different period of time. Since the countervailing duty rate in earlier segments of the proceeding was calculated based on a certain allocation period and resulted in a certain benefit stream, redefining the allocation period in later segments of the proceeding would entail taking the original grant amount and creating an entirely new benefit stream for that grant. Such a practice may lead to an increase or decrease in the total amount countervailed and, thus, would result in the possibility of over- or under-countervailing the actual benefit. Therefore, for purposes of these preliminary results, the Department is using the original allocation period assigned to each non-recurring subsidy received prior to the POR. *See Certain Carbon Steel Products from Sweden; Final Results of Countervailing Duty Administrative Review,* 62 FR 16549 (April 7, 1997).

Privatization

(I) Background

Israel Chemicals Limited (ICL), the parent company which owns 100 percent of Rotem's shares, was partially privatized in 1992, 1993, 1994, and 1995. We have previously determined that the partial privatization of ICL represents a partial privatization of each of the companies in which ICL holds an ownership interest. *See Final Results of Countervailing Duty Administrative Review; Industrial Phosphoric Acid from Israel,* 61 FR 53351, 53352 (October 11, 1996) (*1994 Final Results*).

In this review and prior reviews of this order, the Department found that Rotem and/or its predecessor, Negev Phosphates Ltd., received non-recurring countervailable subsidies prior to these partial privatizations. Further, the Department found that a portion of the price paid by a private party for all or part of a government-owned company represents partial repayment of prior subsidies. *See GIA,* 58 FR at 37262. Therefore, in 1992, 1993, and 1995 reviews, we calculated the portion of the purchase price paid for ICL's shares that is attributable to repayment of prior subsidies. In the 1994 review, the portion of the ICL shares privatized was so small, less than 0.5 percent, that we determined that the percentage of subsidies potentially repaid through this privatization could have no measurable impact on Rotem's overall net subsidy rate. Thus, we did not apply our repayment methodology to the 1994 partial privatization. *See* the *1994 Final Results,* 61 FR at 53352.

(II) Modification of the Application of Repayment Methodology

In prior reviews, to calculate the portion of the purchase price which represented repayment of prior subsidies through partial privatizations in 1992, 1993 and 1995, the Department converted the net worth figures for Rotem from new Israeli shekels (NIS) to U.S. dollars, based on exchange rate information on the record. In this review, the respondent has submitted U.S. dollar denominated audited financial statements for 1983 through 1989. The notes to the financial statements indicate that the company maintains its accounts in NIS and in U.S. dollars. Amounts originating from transactions denominated in, or linked to, the dollar are stated at their original amounts. Amounts not originating from such transactions are determined on the basis of the exchange rate prevailing at the time of the transaction. As a result, we have recalculated the portion of the purchase price paid for ICL's shares that is attributable to repayment of prior subsidies using the U.S. dollar denominated net worth figures provided in Rotem's financial statements.

Grant Benefit Calculations

To calculate the benefit for the POR, we followed the same methodology used in the final results of the 1995 administrative review. We converted Rotem's shekel-denominated grants into U.S. dollars, using the exchange rate in effect on the date the grant was received. We then applied the grant methodology to determine the benefit for the POR. *See Industrial Phosphoric Acid from Israel; Final Results of Countervailing Duty Administrative*

Review, 63 FR 13626, 13633 (March 20, 1998) (*1995 Final Results*).

Facts Available

Section 776(a)(2) of the Act requires the Department to use facts available if ''an interested party or any other person * * * withholds information that has been requested by the administering authority * * *.'' In this case, the Government of Israel (GOI) did not comply with the Department's requests for information that was necessary to conduct a specificity analysis of the Environment Grant Program. On April 7, 1998 and on April 24, 1998, the Department issued questionnaires requesting information regarding eligibility for and actual use of the benefits provided under the Environment Grant Program. The GOI provided information regarding the total number of applicants that applied for or received grants, and the total amount of the grants given under the program. However, the GOI did not extract information from this data that would have allowed the Department to fully examine whether the program is, in fact, specific. Based on the information presented, the Department could only derive the absolute number of applicants for and recipients of grants under this program. The GOI also provided the Department with the criteria considered by the MOE in determining whether an application will be approved, including the financial and economic strength of the applicant, extent of the investment needed, and the extent of the improvement compared to the investment, but did not provide information as to how these criteria were applied.

Section 776(b) of the Act permits the administrative authority to use an inference that is adverse to the interests of an interested party if that party has ''failed to cooperate by not acting to the best of its ability to comply with a request for information.'' Such an adverse inference may include reliance on information derived from: (1) The petition, (2) a final determination in the investigation under this title, (3) any previous review under section 751 or determination under section 753 regarding the country under consideration, or (4) any other information placed on the record. Because respondents did not comply with the Department's requests for such information, and failed to explain why such information could not be provided, we find that respondents failed to cooperate by not acting to the best of their ability. Therefore, we are using an adverse inference in accordance with section 776(b) of the Act. The adverse inference is a finding that the Environment Grant Program is specific under section 771(5A)(D)(iii) of the Act. For further discussion, *see Memorandum regarding Specificity of the Environment Grant Program* dated August 12, 1998, which is on file in the Central Records Unit (Room B–099 of the Main Commerce Building.)

Analysis of Programs

I. Programs Conferring Subsidies

A. Programs Previously Determined To Confer Subsidies

1. Encouragement of Capital Investments Law (ECIL)

This ECIL program is designed to encourage the distribution of the population throughout Israel, to create new sources of employment, to aid the absorption of immigrants, and to develop the economy's production capacity. To be eligible for benefits under the ECIL, including investment grants, capital grants, accelerated depreciation, reduced tax rates, and certain loans, applicants must obtain approved enterprise status. Investment grants cover a percentage of the cost of the approved investment, and the amount of the grant depends on the geographic location of eligible enterprises. For purposes of the ECIL program, Israel is divided into three zones—Development Zones A and B, and the Central Zone. Under the ECIL program the Central Zone was not eligible for benefits.

In *Final Affirmative Countervailing Duty Determination: Industrial Phosphoric Acid From Israel*, 52 FR 25447 (July 7, 1987) (*IPA Investigation*), the Department found the ECIL grant program to be *de Jure* specific because the grants are limited to enterprises located in specific regions. In this review, no new information or evidence of changed circumstances has been submitted to warrant reconsideration of this determination.

Rotem is located in Development Zone A, and received ECIL investment, drawback, and capital grants in disbursements over a period of years for several projects. As explained in the ''Allocation Period'' section above, for grants that have been allocated in prior administrative reviews, we are continuing to use the allocation period assigned to these grants. For grants received during the POR, we have used the AUL calculated by Rotem in this review, which is 23 years.

To calculate the benefit for the POR, we followed the same methodology used in the final results of the 1995 administrative review, as indicated in the ''Grant Benefit Calculations'' section above. We considered Rotem's cost of long-term borrowing in U.S. dollars as reported in the company's financial statements for use as the discount rate used to allocate the countervailable benefit over time. However, this information includes Rotem's borrowing from its parent company, ICL, and thus does not provide appropriate discount rate. Therefore, we have turned to ICL's cost of long-term borrowing in U.S. dollars in each year from 1984 through 1996 as the most appropriate discount rate. ICL's interests rates are shown in the notes to the company's financial statements, public documents which are in the record of this review. *See* Comment 9 in the *1995 Final Results.*

To calculate the total subsidy in the POR, we first summed the grant amounts allocated to and received in 1996, after taking into account the partial privatizations in 1992, 1993, and 1995. To derive the subsidy rates, as discussed in the *1995 Final Results*, we attributed ECIL grants to a particular facility over the sales of the product produced by that facility plus sales of all products into which that product may be incorporated. Accordingly, we attributed ECIL grants to Rotem's phosphate rock mines to total sales, and grants to Rotem's green acid to total sales minus direct sales of phosphate rock and grants to Rotem's IPA facilities to sales of IPA, MKP, and fertilizers. We summed the rates obtained on this basis, and preliminarily determine the net subsidy from this program to be 5.58 per *ad valorem* for the POR.

2. Encouragement of Industrial Research and Development Grants (EIRD)

During the 1996 review period, Rotem received five EIRD grants. Two of them were received for projects which have no relation to the production of subject merchandise or inputs thereto; the three remaining grants are for research into phosphate rock production, which is an input to IPA production. Thus, they provide countervailable benefits to the production of subject merchandise. In the *1995 Final Results*, we determined that EIRD rants were specifically provided to Rotem, and that they conferred a benefit. In this review, no new information or evidence of changed circumstances has been submitted to warrant reconsideration of this determination.

We view these grants as ''non-recurring'' based on the analysis set forth in the ''Allocation'' section of the *GIA* (58 FR at 37226) because these benefits are exceptional, and Rotem cannot expect to receive benefits on an ongoing basis from review period to

review period. However, because the total benefit of the EIRD grants received in 1996 was less than 0.50 percent of Rotem's total sales, we allocated the entire benefit to the POR. To obtain the subsidy rate, we divided the benefit by Rotem's total sales. On this basis, we preliminarily determine the benefit from this program to be 0.02 percent *ad valorem*.

B. Other Programs Preliminarily Determined To Confer Subsidies

1. Infrastructure Grant Program

Under the Infrastructure Grant Program, the GOI establishes new industrial areas by partially reimbursing companies for their costs of developing the infrastructure in certain geographical zones. Rotem received assistance under this program during the POR. Therefore, within the meaning of section 771(5)(B)(i), a subsidy is bestowed because the GOI provided a financial contribution, which conferred a benefit. We analyzed whether this program is specific within the meaning of section 751(5A)(D) of the Act. Because the infrastructure grants are limited to an enterprise or industry located in certain zones within the jurisdiction of the authority providing the subsidy, we find this program to be regionally specific in accordance with section 771(5A)(D)(iv).

We view these grants as non-recurring based on the analysis set forth in the ''Allocation'' section of the *GIA* (58 FR at 37226) because these benefits are exceptional, and the company cannot expect to receive benefits on an ongoing basis from review period to review period. Therefore, we calculated the benefit under this program using the methodology for non-recurring grants noted above in the ''Grant Benefit Calculations'' section. We then divided the grant amount by Rotem's total sales because the grant benefited the Company's total production. On this basis, we preliminarily determine the benefit from this program to be 0.18 percent *ad valorem*.

2. Environmental Grant Program

Through the Ministry of the Environment, the GOI administers a program to provide financial assistance for the adaptation of existing industrial facilities to new environmental requirements. Companies undertaking programs to reduce air pollution, hazardous wastes, and noise levels, and to improve water quality, can receive assistance. The maximum amount of assistance available is the lesser of 35 percent of the approved investment or the actual investment, and is capped at 1.125 million NIS.

We analyzed whether this program is specific in law (*de jure*), or in fact (*de facto*), within the meaning of section 751(5A)(D) of the Act. We examined the Directive of the Director-General of the Ministry of the Environment for the program eligibility criteria and found that this program is not *de jure* specific, because there is no express intent to limit the availability of benefits under this program to an enterprise or industry or group of enterprises or industries.

We then examined the information provided by the GOI with respect to the actual provision of assistance under the program (since its inception in 1995) to see whether it meets the criteria for *de facto* Specificity. According to 771(5A)(D)(iii), ''a subsidy is *de facto* specific if one of the following factors exists: (1) The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number; (2) an enterprise or industry is a predominant user of the subsidy; (3) an enterprise or industry receives a disproportionately large amount of the subsidy; or (4) the manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others.''

The Department requested information regarding the number of companies and type of industries that applied for or received benefits under the program, and the amount of benefits received. The GOI provided no information on actual usage of the program by enterprise or industry nor did it identify any alternative information through which the Department could make an assessment of whether the program is *de facto* specific. Accordingly, based on the information on the record, we preliminarily determine that this program is *de facto* specific and is, therefore, countervailable within the meaning of section 771(5A)(D)(iii). (*See* Facts Available section of this notice.)

We view these grants as non-recurring based on the analysis set forth in the ''Allocation'' section of the *GIA* (58 FR at 37226) because these benefits are exceptional, and the company cannot expect to receive benefits on an ongoing basis from review period to review period. However, because the total value of the benefit received in 1996 was less then 0.50 percent of Rotem's total sales, we allocated the entire benefit to the POR. We divided the grant amount by Rotem's total sales because the grants benefited the company's total production. On this basis, we preliminarily determine the benefit from this program to be 0.11 percent *ad valorem*.

II. Programs Preliminarily Determined To Be Not Used

We examined the following programs and preliminarily determined that the producer and/or exporter of the subject merchandise did not apply for or receive benefits under these programs during the POR:

A. Reduced Tax Rates under ECIL
B. ECIL Section 24 loans
C. Dividends and Interest Tax Benefits under Section 46 of the ECIL
D. ECIL Preferential Accelerated Depreciation
E. Exchange Rate Risk Insurance Scheme
F. Labor Training Grants
G. Long-term Industrial Development Loans

Preliminary Results of Review

In accordance with 19 CFR 351.213(b), we calculated an individual subsidy rate for each producer/exporter subject to this administrative review. For the period January 1, 1996 through December 31, 1996, we preliminarily determine the net subsidy for rotem to be 5.89 percent *ad valorem*. If the final results of this review remain the same as these preliminary results, the Department intends to instruct the U.S. Customs Service (Customs) to assess countervailing duties as indicated above.

The Department also intends to instruct Customs to collect cash deposits of estimated countervailing duties as indicated above of the f.o.b. invoice price on all shipments of the subject merchandise from reviewed companies, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review.

Because the URAA replaced the general rule in favor of a country-wide rate with a general rule in favor of individual rates for investigated and reviewed companies, the procedures for establishing countervailing duty rates, including those for non-reviewed companies, are now essentially the same as those in antidumping cases, except as provided for in section 777A(e)(2)(B) of the Act. The requested review will normally cover only those companies specifically named. *See* 19 CFR 351.213(b). Pursuant to 19 CFR 351.212(c), for all companies for which a review was *not* requested, duties must be assessed at the cash deposit rate, and cash deposits must continue to be collected, at the rate previously ordered. As such, the countervailing duty cash

deposit rate applicable to a company can no longer change, except pursuant to a request for a review of that company. *See Federal-Mogul Corporation and The Torrington Company* v. *United States,* 822 F.Supp. 782 (CIT 1993) and *Floral Trade Council v. United States,* 822 F. Supp. 766 (CIT 1993). Therefore, the cash deposit rates for all companies except those covered by this review will be unchanged by the results of this review.

We will instruct Customs to continue to collect cash deposits for non-reviewed companies at the most recent company-specific or country-wide rate applicable to the company. Accordingly, the cash deposit rates that will be applied to non-reviewed companies covered by this order will be the rate for that company established in the most recently completed administrative proceeding under the URAA. If such a review has not been conducted, the rate established in the most recently completed administrative proceeding conducted pursuant to the statutory provisions that were in effect prior to the URAA amendments, is applicable. *See 1992/93 Final Results,* 61 FR 28842. These rates shall apply to all non-reviewed companies until a review of a company assigned these rates is requested. In addition, for the period January 1, 1996 through December 31, 1996, the assessment rates applicable to all non-reviewed companies covered by this order are the cash deposit rates in effect at the time of entry.

Public Comment

Pursuant to 19 CFR 351.224(b), the Department will disclose to parties to the proceeding any calculations performed in connection with these preliminary results within five days after the date of publication of this notice. Pursuant to 19 CFR 351.309, interested parties may submit written comments in response to these preliminary results. Case briefs must be submitted within 30 days after the date of publication of this notice, and rebuttal briefs, limited to arguments raised in case briefs, must be submitted no later than five days after the time limit for filing case briefs. Parties who submit argument in this proceeding are requested to submit with the argument: (1) a statement of the issues, and (2) a brief summary of the argument. Case and rebuttal briefs must be served on interested parties in accordance with 19 CFR 351.303(f). Also, pursuant to 19 CFR 351.310, within 30 days of the date of publication of this notice, interested parties may request a public hearing on arguments to be raised in the case and rebuttal briefs. Unless the Secretary specifies otherwise, the hearing, if requested, will be held two days after the date for submission of rebuttal briefs, that is, thirty-seven days after the date of publication of these preliminary results.

Representatives of parties to the proceeding may request disclosure of proprietary information under administrative protective order no later than 10 days after the representative's client or employer becomes a party to the proceeding, but in no event later than the date case briefs, under 19 CFR 351.309(c)(ii), are due. The Department will publish the final results of this administrative review, including the results of its analysis of issues raised in any case or rebuttal brief or at a hearing.

This administrative review is issued and published in accordance with section 751(a)(1) and 777(i)(1) of the Act (19 U.S.C. 1675(a)(1) and 19 U.S.C 1677f(i)(1)).

Dated: August 31, 1998.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. 98–24141 Filed 9–8–98; 8:45 am]

BILLING CODE 3510–DS–M

DEPARTMENT OF COMMERCE

International Trade Administration

Export Trade Certificate of Review

ACTION: Notice of Application to Amend Certificate.

SUMMARY: The Office of Export Trading Company Affairs (''OETCA''), International Trade Administration, Department of Commerce, has received an application to amend an Export Trade Certificate of Review (''Certificate''). This notice summarizes the proposed amendment and requests comments relevant to whether the amended Certificate should be issued.

FOR FURTHER INFORMATION CONTACT: Morton Schnabel, Director, Office of Export Trading Company Affairs, International Trade Administration, (202) 482–5131. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (15 U.S.C. 4001–21) the (''Act'') authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. A Certificate protects the holder and the members identified in the Certificate from state and federal government antitrust actions and from private, treble damage antitrust actions for the export conduct specified in the Certificate and carried out in compliance with its terms and conditions. Section 302(b)(1) of the Act and 15 CFR 325.6(a) require the Secretary to publish a notice in the **Federal Register** identifying the applicant and summarizing its proposed export conduct.

Request for Public Comments

Interested parties may submit written comments relevant to the determination whether an amended Certificate should be issued. If the comments include any privileged or confidential business information, it must be clearly marked and a nonconfidential version of the comments (identified as such) should be included. Any comments not marked privileged or confidential business information will be deemed to be nonconfidential. An original and five copies, plus two copies of the nonconfidential version, should be submitted no later than 20 days after the date of this notice to: Office of Export Trading Company Affairs, International Trade Administration, Department of Commerce, Room 1800H, Washington, DC 20230. Information submitted by any person is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552). However, nonconfidential versions of the comments will be made available to the applicant if necessary for determining whether or not to issue the certificate. Comments should refer to this application as ''Export Trade Certificate of Review, application number 90–5A006.''

An Export Trade Certificate of Review (Application No.90–00006) was issued to the Forging Industry Association on July 9, 1990 (55 FR 28801, July 13, 1990) and subsequently amended on April 30, 1991 (56 FR 21128, May 7, 1991); May 29, 1992 (57 FR 24022, June 5, 1992); April 1, 1994 (67 FR 16619, April 7, 1994); and July 28, 1995 (60 FR 41879, August 14, 1995).

Summary of the Application

Applicant: Forging Industry Association (''FIA''), 25 Prospect Avenue West, Suite 300, Cleveland, Ohio 44115–1040.

Contact: Donald J. Farley, Director of Marketing, Telephone: (216) 781–6260.

Application No.: 90–5A006.

Date Deemed Submitted: August 26, 1998.

Proposed Amendment

FIA seeks to amend its Certificate to:

1. Add as ''Members'' within the meaning of Section 325.2(1) of the Regulations (15 CFR 325.2(1)): Anderson Shumaker Company, Chicago, IL; Dana Corporation, for the activities

of its Spicer Heavy Axle & Brake Division, Marion Forge, Marion, OH.

2. Delete each of the following companies as a ''Member'' of the Certificate: Hussey Marine Alloys, Ltd., Leetsdale, PA; Schlosser Forge Company, Cucamonga, CA; and Western Forge & Flange Co., Santa Clara, CA.

3. Change the listing of the company name for each current ''Member'' cited in this paragraph to the new listing cited in parenthesis as follows: BethForge, Inc., Bethlehem, PA (Lehigh Heavy Forge Corporation, Bethlehem, PA); Eaton Corporation, Marion, OH (Eaton Corporation, South Bend, IN); Kaiser Aluminum & Chemical Corporation, Erie, PA (Kaiser Aluminum & Chemical Corporation, Oxnard, CA); Teledyne Portland Forge, Portland, IN (Portland Forge, An Allegheny Teledyne Company, Portland IN); The Harris-Thomas Drop Forge Co., Dayton, OH (Harris Thomas Industries, Inc., Dayton, OH); Waltec American Forgings, Inc., Waterbury, CT (Waltec Forgings, Inc.-Port Huron, Port Huron, MI).

Dated: September 2, 1998.

Morton Schnabel,

Director, Office of Export Trading Company Affairs.

[FR Doc. 98–24173 Filed 9–8–98; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 081198C]

North Pacific Fishery Management Council (NPFMC; Public Meeting; Correction

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

ACTION: Correction to a previously announced meeting notice.

SUMMARY: The NPFMC's Western/Central Gulf of Alaska Management Committee meeting scheduled for September 25, 1998, has been cancelled and will now be held as a teleconference.

DATES: The teleconference will be held on Friday, September 25, 1998, at 1:00 p.m., Alaska time.

ADDRESSES:

Council address: North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501–2252.

FOR FURTHER INFORMATION CONTACT: NPFMC staff at 907–271–2809.

SUPPLEMENTARY INFORMATION:

Need for Correction

In the **Federal Register** issue of September 1, 1998, in FR Doc. 98–23532, on page 46415, in the second column under **DATES**, the document stated that the meeting would be held on September 25, 1998. The meeting has been cancelled, and a teleconference has been scheduled instead.

All other previously published information remains unchanged.

Dated: September 3, 1998.

Bruce C. Morehead,

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

[FR Doc. 98–24180 Filed 9–8–98; 8:45 am]

BILLING CODE 3510–22–F

COMMODITY FUTURES TRADING COMMISSION

Application of the Chicago Mercantile Exchange for Designation as a Contract Market in Real Estate Investment Trust Futures and Options

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of availability of the terms and conditions of proposed commodity futures and options contracts.

SUMMARY: The Chicago Mercantile Exchange (CME or Exchange) has applied for designation as a contract market in real estate investment trust futures and options. The Director of the Division of Economic Analysis (Division) of the Commission, acting pursuant to the authority delegated by Commission regulation 140.96, has determined that publication of the proposals for comment is in the public interest, will assist the Commission in considering the views of interested persons, and is consistent with the purpose of the Commodity Exchange Act.

DATES: Comments must be received on or before October 9, 1998.

ADDRESSES: Interested persons should submit their views and comments to Jean A. Webb, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581. In addition, comments may be sent by facsimile transmission to facsimile number (202) 418–5521, or by electronic mail to secretary@cftc.gov. Reverence should be made to the CME real estate investment trust futures and options.

FOR FURTHER INFORMATION CONTACT: Please contact Thomas Leahy of the Division of Economic Analysis, Commodity Futures Trading Commission. Three Lafayette Centre, 1155 21st Street, NW, Washington, 20581, telephone (202) 418–5278. Facsimile number: (202) 418–5527. Electronic mail: tleahy@ctfc.gov.

SUPPLEMENTARY INFORMATION: Copies of the terms and conditions will be available for inspection at the Office of the Secretariat, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581. Copies of the terms and conditions can be obtained through the Office of the Secretariat by mail at the above address or by phone at (202) 418–5100.

Other materials submitted by the CME in support of the applications for contract market designation may be available upon request pursuant to the Freedom of Information Act (5 U.S.C. 552) and the Commission's regulations thereunder (17 CFR part 145 (1997)), except to the extent they are entitled to confidential treatment as set forth in 17 CFR 145.5 and 145.9. Requests for copies of such materials should be made to the FOI, Privacy and Sunshine Act Compliance Staff of the Office of Secretariat at the Commission's headquarters in accordance with 17 CFR 145.7 and 145.8.

Any person interested in submitting written data, views, or arguments on the proposed terms and conditions, or with respect to other materials submitted by the CME, should send such comments to Jean A. Webb, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 21st Street, NW, Washington, DC 20581 by the specified date.

Issued in Washington, DC, on September 2, 1998.

Steven Manaster,

Director.

[FR Doc. 98–24107 Filed 9–8–98; 8:45 am]

BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 2:00 p.m., Tuesday, September 29, 1998.

PLACE: 1155 21st St., NW., Washington, DC., 9th Floor Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Rule enforcement reviews.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 98–24279 Filed 9–4–98; 11:17 am]

BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 11:00 a.m., Wednesday, September 30, 1998.

PLACE: 1155 21st St., N.W., Washington, D.C., 9th Floor Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Enforcement matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 98–24280 Filed 9–4–98; 11:37 am]

BILLING CODE 6351–01–M

CONSUMER PRODUCT SAFETY COMMISSION

All-Terrain Vehicles; Comment Request—Proposed Resolution

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: The Consumer Product Safety Commission requests comments on a proposed Commission Resolution (''Resolution'') that responds to action plans that certain members of the all-terrain vehicle (''ATV'') industry will undertake. The proposed Resolution is attached at the end of this notice. (Unless otherwise noted, the action plans are referred to collectively as the ''ATV Action Plan.'') (ATVs are three- and four-wheeled motorized vehicles, generally characterized by large, low-pressure tires, a seat designed to be straddled by the operator, and handlebars for steering, which are intended for off-road use by an individual rider on various types of non-paved terrain.) The Commission staff has provided extensive input into the development of the ATV Action Plan, which the Commission believes will enhance consumer safety with respect to these products. The Resolution commends certain members of the industry for the ATV Action Plan, and announces that the Commission will actively monitor sales, promotion and training activities of the ATV industry insofar as those activities pertain to safety, assemble data on deaths and injuries associated with ATVs, and take appropriate action, where necessary, based on the results of such monitoring activity and data.[1]

DATES: Persons wishing to comment on the Resolution should send written comments to the Office of the Secretary not later than October 26, 1998.

ADDRESSES: Written comments should be captioned ''ATV Action Plan'' and mailed to the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207, or delivered to that office, room 502, 4330 East-West Highway, Bethesda, Maryland. Written comments may also be sent to the Office of the Secretary by facsimile at (301) 504–0127 or by e-mail at cpsc-os@cpsc.gov.

FOR FURTHER INFORMATION CONTACT: For information about the Resolution, call or write Leonard H. Goldstein, Office of the General Counsel, Consumer Product Safety Commission, Washington, DC 20207; (301) 504–0980, Ext. 2202.

SUPPLEMENTARY INFORMATION:

Background

The Commission's work on ATVs began in the mid-1980s after it learned of a rapidly growing number of deaths and injuries—particularly to children under 16 years old—involving these products. ATV sales had increased dramatically during that time, including more than a tripling of sales between 1980 and 1985. Most of the ATVs produced during that period were three-wheeled vehicles.

The Commission issued an Advance Notice of Proposed Rulemaking (''ANPR'') in May 1985 (50 FR 23139). In December 1987, the Department of Justice, at the Commission's request, filed a lawsuit in federal district court under section 12 of the Consumer Product Safety Act against the five major manufacturers and/or distributors of ATVs. *United States* v. *American Honda Motor Co., et al.*, Civ. No. 87–3525 (D.D.C., filed Dec. 30, 1987). The companies named in the lawsuit were American Honda Motor Co., Inc. (''Honda''), Yamaha Motor Corp., U.S.A. (''Yamaha''), Kawasaki Motors Corp., U.S.A. (''Kawasaki''), U.S. Suzuki Motor Corp. (nka American Suzuki Motor Corp.) (''Suzuki''), and Polaris Industries L.P. (nka Polaris Industries Inc.) (''Polaris''). The lawsuit sought a declaration by the court that then existing ATVs constituted an ''imminent hazard'' and requested certain remedial relief. The matter was settled with the court's approval of Final Consent Decrees on April 28, 1988 (''Final Consent Decrees''), and the ANPR was subsequently withdrawn (56 FR 47166). Among other things, the Final Consent Decrees required the companies to:

- Stop the sale of all new three-wheeled ATVs and repurchase them from dealer inventory;
- Promote and sell adult-size ATVs (i.e., ATVs with engine sizes greater than 90 cc) only for the use of riders age 16 and over;
- Promote and sell youth-size ATVs (i.e., ATVs with engine sizes between 70 cc and 90 cc) only for the use of riders age 12 and older;
- Provide free training to all ATV purchasers and members of their immediate families;
- Conduct a nationwide ATV safety public awareness media campaign;
- Adhere to guidelines for advertising and promotional materials;
- Include specified warnings on ATV labeling and in ATV owner's manuals; and
- Accelerate negotiations on a voluntary standard for ATVs. (The voluntary standard for ATVs (''Voluntary Standard''), as approved by the Commission, was published in the **Federal Register** on January 13, 1989. (54 FR 1407) Among other things, the Voluntary Standard includes configuration requirements for service and parking brakes, mechanical suspension, foot environment, lighting equipment, tire labeling, and various operational controls; there are pitch stability requirements and performance requirements for service and parking brakes; and there are requirements that relate specifically to youth size ATVs, including requirements for limitations on maximum speed capabilities.)

The CPSC staff subsequently negotiated a series of monitoring agreements with the companies to enforce compliance by their dealers with the requirement that adult-size ATVs not be marketed or sold to or for the use of children.

Arctic Cat Inc. (''Arctic Cat''), which started manufacturing ATVs in 1996, voluntarily entered into an Agreement and Action Plan with the Commission in September 1996 (''Arctic Cat Agreement''), whereby the firm agreed to take many of the same actions that were required of the companies under the Final Consent Decrees. Arctic Cat

[1] Chairman Ann Brown and Commissioner Thomas H. Moore approved this notice as here published; Commissioner Mary Sheila Gall approved publication of the notice with specified changes that were not adopted. The ballot vote sheets of the individual Commissioners are available to the public through the Office of the Secretary.

also agreed to undertake a dealer monitoring program that was similar to dealer monitoring programs of the other companies.

With the Final Consent Decrees and Arctic Cat Agreement nearing their end, Chairman Ann Brown hosted a ''Forum on All-Terrain Vehicles'' (''Forum'') in May 1997. The purpose of the Forum was to discuss what measures, if any, could reasonably be taken after the Consent Decrees and Arctic Cat Agreement expired to further reduce deaths and injuries associated with these products. Invitations were extended to, and views were obtained from, members of the public, technical experts in the ATV field, members of the private bar, and representatives of consumer groups, rider groups, and State agencies.

The staff engaged in a number of other information gathering activities concerning ATVs during 1997, including the following:

- The staff met with engineers for each company that was a party to one of the Consent Decrees to discuss evolutionary changes with regard to ATVs since 1988 as well as current technology;
- The staff reviewed, subject to confidentiality agreements, pertinent documents from each of the companies, including consumer complaints, documents containing technical information, and information relating to product liability cases;
- The staff met individually with several engineers with experience in testifying on behalf of plaintiffs in ATV cases to solicit their views concerning these products; and
- The staff communicated with certain foreign government agencies concerning any technical and/or legal requirements in those countries concerning ATVs.

The Final Consent Decrees and the Arctic Cat Agreement expired on April 28, 1998. After extensive discussions with Commission staff, each of the companies that was subject to a Final Consent Decree and Arctic Cat (collectively, the ''companies'') have agreed to undertake voluntary actions to continue to promote the safe and responsible use of ATVs. The Commission believes that these actions will enhance ATV rider safety.

Summary of Findings of Recent Exposure and Injury Surveys and Risk Analysis; and Analysis of ATV Death Reports

As part of its review of the ATV matter and in anticipation of the expiration of the Final Consent Decrees and Arctic Cat Agreement, the Commission staff recently completed exposure and injury surveys and a risk analysis with regard to these products. The surveys provide a description of current hazard and usage patterns. The staff has compared the results of these surveys to the results of the Commission's 1985 and 1989 ATV exposure and injury surveys, to evaluate trends in use and hazard patterns. Finally, as in the 1985 and 1989 ATV studies, the characteristics and use patterns of drivers who are involved in injury incidents (as inferred from the injury survey) have been compared against those who are not (as inferred from the exposure survey) to determine the factors associated with risk. The staff's review also included a study of ATV deaths between January 1, 1985 and December 31, 1996. The staff has described the characteristics of drivers and ATVs that have been involved in fatal injuries, and fatality trends since 1985. The staff's full report, titled ''All-Terrain Vehicle Exposure, Injury, Death, and Risk Studies,'' was made public on April 24, 1998, and may be obtained from the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207. Below is a brief summary of the findings in that report:

A. Exposure Survey

- 14% of ATV drivers are children under the age of 16 years (compared with about 23% in 1989);
- Almost two-thirds of drivers are male;
- The mean level of driver experience is 9.6 years (about 4.5% of drivers had less than one year of experience);
- 11% of drivers reported participating in an organized training program; another 12% said they had received some training by ATV dealers or sales people;
- 23% of drivers reported never carrying passengers;
- 35% of drivers reported always wearing a helmet; 32% reported never wearing a helmet;
- 74% of drivers reported some nonrecreational use, including farming or ranching, household chores, and occupational or commercial tasks;
- About 22% of the ATVs are the three-wheel models (this compares with about 54% in 1989);
- 26% of the four-wheel models are four-wheel drive vehicles, most with engines greater than 300 cc;
- 36% of the ATVs were reported to have engines with 300 cc or more (compared with about 10% in 1989); and
- 51% of the ATVs had been purchased as used vehicles; of this number, about 80% had been purchased from the previous owner, rather than from an ATV dealer.

B. Injury Survey

- 47% of the injuries occurring during the study period involved children under the age of 16; this was almost identical to the percentage in 1985 (46%);
- Despite the large proportion of children injured, the number of injuries involving children under age 16 declined approximately 50% from about 42,700 in 1985 to about 21,300 in 1997;
- 95% of injured children were driving ATVs larger than recommended for their age;
- An estimated 54,500 ATV-related injuries were treated in hospital emergency departments during 1997 (this was a decline of approximately 49% from the estimated 106,000 such injuries during 1986);
- The rate of ATV-related injury declined from 5.4 per hundred ATVs in use in 1985 to 2.5 in 1989 and to about 1.5 per hundred ATVs in 1997, an overall rate reduction of about 72%;
- 25% of the injuries were to passengers;
- 75% of the injuries occurred to males;
- 22% of the injuries involved the head; most of the head injuries were concussions or internal organ (i.e., brain) injuries; at least 65% of the persons suffering head injuries were not wearing helmets;
- The largest injury diagnosis categories were contusions and abrasions (27%), and fractures and dislocations (26%);
- 37% of the injuries involved the arm region; 28% involved the leg region;
- 13% of the emergency department injuries were hospital admitted (compared with 4% of all product-related injuries reported to the Commission under the National Electronic Injury Surveillance System (''NEISS''));
- About 4% of drivers involved in injury incidents reported formal ATV training or training by a dealer or sales person.

C. Report on ATV Deaths

The CPSC estimates that there have been over 3,200 ATV-related deaths since 1985. Estimated ATV-related deaths declined from about 350 in 1986 to an estimated 269 in 1996. In evaluating the characteristics of drivers and ATVs that have been involved in fatal injuries, the staff has found that:

- Over 35% of the deaths involved children under age 16;
- 87% of the deaths since 1985 were to males;

• 85% of those killed were drivers, 14% passengers (1% were drivers or passengers of other types of vehicles);

• The percentage of three-wheel ATVs involved in deaths declined from 80% in 1985 to less than 20% in 1996; and

• Incidents reported as collisions accounted for 56% of the deaths; overturns were involved in about 28% of all deaths.

D. Risk Analysis

The risk analysis showed that although the overall risk of ATV-related injury has declined since the 1980s (as indicated in the injury analysis), the factors associated with risk are consistent with those quantified in the earlier 1985 and 1989 risk analyses and include the same types of warned against behavior previously observed. As in the earlier analyses, risk patterns are related to the characteristics and use patterns of the drivers, and the types of ATVs that they drive. The results suggest that:

• Risk of injury declines with age (the younger the driver the higher the risk);

• Risk for children is about 2.5 times the risk for drivers aged 16 to 34, and about 4.5 times the risk for drivers aged 35 to 54;

• Risk declines with driving experience;

• Risk declines with the percentage of time that ATVs are used in nonrecreational (as opposed to recreational) activities;

• Risk is higher for males than for females (all else equal, risk is about 3 times higher for males than for females); and

• Holding all other factors constant, risk is 2.5 to 3 times higher on three-wheel ATVs than on four-wheel ATVs.

The Undertakings of the Companies

A. General Description

The ATV Action Plan is described in letters of undertaking submitted to the Commission staff by Yamaha, Kawasaki, Suzuki and Polaris and in an ''Extended Action Plan'' submitted by Arctic Cat. In addition, Honda has submitted a letter of undertaking that describes the post-Consent Decree actions that it proposes to take. Copies of these documents may be obtained from the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207.

In discussing issues regarding ATV safety, the Commission staff has placed special emphasis on measures to address the deaths and injuries to children who drive and ride adult-size ATVs. The staff also has emphasized the need to train inexperienced drivers. The actions of the companies will include measures that directly address these two areas of concern. Unless otherwise noted, each of the companies voluntarily has agreed that it will:

• Implement an informational/educational (''I&E'') effort to communicate safety-related information to consumers.

(There will be two I&E programs, one will be carried out by Honda, the other will be a joint effort of Yamaha, Kawasaki, Suzuki, Polaris and Arctic Cat. Honda's I&E effort will consist primarily of a nationwide advertising campaign that will address specific areas of safety (underage youth riding inappropriately sized ATVs, youths carrying passengers, and use of protective gear) with a message to adults and care givers that can be conveyed to young riders. Print advertisements will appear in various enthusiast, hunting and outdoors, and farming magazines, and magazines targeting parents of school-age children. Honda estimates that the cost of its program over the next three years will be approximately $3.5 million. Honda's I&E campaign is more fully described in its letter of undertaking. The I&E campaign of Yamaha, Kawasaki, Suzuki, Polaris and Arctic Cat will be a multi-faceted effort designed to emphasize various safety warnings related to ATVs, especially as they relate to ATV use by children. Among other things, the companies will develop and distribute with each new ATV a CD–ROM program. Materials will also be sent to selected schools and public libraries throughout the nation. The companies will also communicate ATV safety information through paid ads, direct mail, safety posters, teaching aids for school teachers, and websites. The companies estimate that the cost of the program over the next three years will be approximately $6 million to $7 million. The I&E campaign of Yamaha, Kawasaki, Suzuki, Polaris and Arctic Cat is more fully described in a August 12, 1998 letter to the Commission from David P. Murray, Esq. A copy of this letter may be obtained from the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207.)

• Continue to offer a free hands-on training course (using the same training programs and curricula that have been approved by the Commission) to all purchasers and members of their immediate families;

(All of the companies except Polaris will continue to offer the existing Specialty Vehicle Institute of America (''SVIA'') training program, using curriculum and procedures that have been approved by the Commission. Polaris' training program will continue to be conducted at the time of sale by a certified instructor at each Polaris dealership, also using Commission approved curriculum and procedures. Polaris' curriculum has been modified to include a required minimum number of repetitions of riding maneuvers for inexperienced riders. The company has also agreed that it will continue to retain the services of an independent firm to conduct monitoring of its dealers to assure that its training program is conducted properly.)

• All companies offering the SVIA training program (except Honda) will offer an increased incentive of $100 cash or equivalent value per ATV sold to every first time purchaser without prior operating experience where such purchaser or a family member takes training;

(Yamaha's incentive offer will give the purchaser the option of choosing either $75 cash or $50 cash and a $50 cash rebate on the purchase of a Yamaha ATV helmet. Suzuki will offer a $100 cash incentive to all first time purchasers and will continue to offer a $50 cash incentive to purchasers who are not first time purchasers.)

(The actions of Honda with regard to the training incentive are discussed below.)

In addition, each company, except where noted, will voluntarily continue to:

• Recommend, market, and sell adult size ATVs (i.e., ATVs with engine sizes greater than 90 cc) only for the use of persons age sixteen and older;

(Arctic Cat has established a minimum age of 16 for Arctic Cat ATVs with engine sizes greater than 90 cc up to 350 cc, and a minimum age of 18 for Arctic Cat ATVs with an engine size greater than 350cc.)

• Recommend, market, and sell youth size ATVs (i.e., ATVs with engine sizes between 70 cc and 90 cc) only for the use of persons age 12 and older;

• Use best efforts to obtain dealer compliance with the age recommendations, including through undercover monitoring of at least as many randomly selected dealers as was done under previous monitoring agreements with the Commission, and to terminate non-complying dealers in appropriate circumstances;

(Arctic Cat has agreed to extend for five years its detailed Commission-approved dealer monitoring agreement that expired on April 28, 1998. The other companies, except Honda, have stated that they will continue with the same level of dealer monitoring as under previous monitoring programs and will

use the same procedures. The actions of Honda with regard to dealer monitoring are discussed below.)

- Not market or sell three-wheel ATVs;
- Use existing warning labels that were approved by the Commission on all ATVs;
- Use hang tags that convey the same substantive safety messages as current hang tags;
- Include in owner's manuals the same substantive informational content set forth in the Consent Decrees and Arctic Cat Agreement;
- Assure that future advertising adheres to specified provisions of the advertising guidelines set forth in the Consent Decrees and Arctic Cat Agreement;
- Continue to provide a toll-free hotline for consumers interested in obtaining ATV safety information; and
- Provide to dealers for dissemination to prospective customers the same substantive safety messages contained in the ''ATV Safety Alert'' set forth in the Consent Decrees and Arctic Cat Agreement.

(The position of Honda with regard to dissemination of the ATV Safety Alert by its dealers is discussed below.)

Each company, except where noted, will also:

- Distribute to all future purchasers an updated ATV safety video that will contain the same substantive safety messages as the current video and will stress the importance of ATV training (the companies will continue to make available to all purchasers the current video until distribution of the updated video begins);
- Participate in efforts to update and revise the Voluntary Standard for ATVs; and
- Give the Commission at least 60 days notice of any material changes in the company's undertakings under the ATV Action Plan (Arctic Cat has agreed to extend its recently expired Action Plan for five more years).

(The position of Honda with regard to the giving of notice to the Commission is discussed below.)

B. Honda's ATV Program

Honda's commitments under its ATV program depart from those of the other companies in the following respects:

1. Safety Alert

Honda will not provide to dealers for dissemination to ATV purchasers the ''ATV Safety Alert'' that was required under the Consent Decrees. The Safety Alert has communicated important ATV safety information to the consumer at the time of sale, including updated information concerning ATV fatalities. Honda has taken the position that because information in the Safety Alert is duplicative of other warnings being provided to purchasers, continued dissemination of the Safety Alert is not necessary. The Commission staff believes that continued use of the Safety Alert is important because the Safety Alert is the only communication to purchasers that includes data on ATV-related deaths, thereby stressing the importance of following the warnings that are provided. The same information was required under the Consent Decrees in a safety poster in dealer showrooms, but the safety poster has been discontinued.

2. Dealer Monitoring

Honda has stated that representations by sales personnel are not the crucial point in determining underage riding habits, and that the problem is not a lack of awareness, but a failure to follow the age recommendations. Honda has indicated that, under these circumstances, a different use of resources might be more efficient in preventing underage riding.

Honda has indicated that, instead of selecting dealers for undercover monitoring using a statistically valid sampling methodology, its monitoring will be targeted at dealers that it suspects may be violating the age recommendations. The Commission staff does not oppose the targeting of suspect dealers for monitoring; however, the staff contends that a monitoring program in which a sufficient number of dealers are selected for monitoring based on a statistically valid sampling methodology is also necessary in order to measure any increase or decrease in the compliance rate of all Honda ATV dealers. Random monitoring has served in the past to ferret out non-complying dealers so that corrective measures could be taken to assure future compliance with the age recommendations in the promotion and sale of ATVs. Without random monitoring, the staff has no assurance that the monitoring program could not be unfairly manipulated to provide an inaccurate portrait of overall dealer compliance. Random selection of dealers ensures that a company's selection of dealers for monitoring will not come to be dominated by dealers known to comply with the age recommendations.

3. The Training Incentive

Honda has not agreed to offer cash incentives to first time purchasers as a means of encouraging participation in the training course. The company has indicated that it is aware of no credible evidence or studies suggesting that past cash incentives have been a significant inducement to purchasers and/or their families to take the training course. The company also indicated that it believes that there are other techniques that can be as effective, if not more so, than the current program of cash incentives. Honda's post-Consent Decree training incentive will consist of giving every Honda ATV purchaser who takes training the chance to enter a quarterly drawing for a cash reimbursement of the price of the ATV purchased and an annual drawing for a new car. The total annual value of the prizes to be awarded will be approximately $40,000. Honda contends that its contest for prizes will be more effective than a cash incentive of $100 or equivalent value in promoting participation in the training program. The Commission staff contends that the total annual value of prizes offered by Honda is too small, and the chances of winning too remote, for the contest to serve as a meaningful incentive. Honda's contest expenditures will be far less than the amount that would be expended if the company offered an incentive of $100 cash or equivalent value to first time purchasers of Honda ATVs.

4. Reporting Changes in Honda's ATV Program

Unlike the other distributors, Honda has not agreed to notify the Commission in advance of changes in its ATV program. The Commission staff contends that such notice is essential in order for the Commission to consider whether it should take action with regard to any such changes. Moreover, the staff believes that advance notice, together with the Commission's reservation of all of its enforcement rights with respect to ATVs, will discourage industry from making frequent material changes in the ATV Action Plan.

CPSC Monitoring of Companies' Actions

The CPSC staff will closely monitor the continuing actions of the companies. Among other things, the staff will periodically seek information from the companies concerning their current practices with regard to ATV advertisements, actions taken with regard to their informational/educational programs, the effectiveness of their respective training incentives in promoting training by first time purchasers without prior operating experience, and the results of their undercover dealer monitoring programs

(including information concerning dealer termination actions).

Because many of the actions under the ATV Action Plan, as well as the actions of Honda, will be implemented through each company's dealers, including prohibitions on the promotion and sale of larger ATVs for the use of underage riders at the dealer level, the CPSC staff will greatly enhance its efforts to assure dealer compliance with these actions. At least in the first year that the ATV Action Plan is in place, the staff expects to approximately double the number of undercover dealer inspections that it has conducted in recent years. These inspections will identify dealers that do not comply with the age requirements so that remedial action, including termination of the dealership agreement, where appropriate, can be taken. The staff will also add to its monitoring program a substantial number of general inspections of ATV dealers to determine, among other things, whether required warnings (labels, hang tags) are affixed to each ATV, whether warning information is communicated to each purchaser in safety videos and safety alerts, whether dealer advertisements comply with advertising guidelines specified in the ATV Action Plan, and whether dealers are promoting the taking of ATV training. Where deficiencies are found as a result of any of the above monitoring activities, the CPSC will take appropriate action to assure that the company in question takes appropriate remedial action.

The CPSC staff will monitor, as well as participate in, the process to update the Voluntary Standard. In this regard, the staff has communicated to the companies various issues that should be discussed in the context of a review and updating of the Voluntary Standard, including changes in vehicle equipment and configuration provisions to reflect current production, certain revisions of test requirements, changes to definitional terms, and revisions to reflect current labeling, hang tag, owner's manual and training practices. The updating of the Voluntary Standard will be coordinated by the American National Standards Institute. The procedures of that organization, including the opportunity to participate in the process of updating the Standard, will be followed.

Request for Comments

The Commission solicits public comments on the proposed Resolution published below. The Resolution would commend Yamaha, Kawasaki, Suzuki, Polaris and Arctic Cat for the ATV Action Plan. A Commission commendation of these companies would be consistent with the Commission's policy of encouraging companies to voluntarily take action that will help to reduce the risk of injury associated with consumer products. Although the ATV Action Plan does not create enforceable rights that can be exercised by the Commission, the companies have voluntarily made substantial commitments to continue certain actions that were part of the Consent Decrees and Arctic Cat Agreement and to implement additional actions to further promote safe and responsible use of ATVs that will, in the opinion of the Commission, enhance ATV rider safety. The Commission wishes whenever possible to acknowledge companies that voluntarily enhance consumer safety. The Commission believes that, in view of the risks associated with ATV use, the actions described in the ATV Action Plan will continue to be necessary for the foreseeable future. Furthermore, as any new companies enter this market, the Commission will seek the agreement of such companies to take actions that are comparable to the continuing actions of the companies under the ATV Action Plan.

The Commission is pleased that Honda will implement a unique and creative informational and educational campaign that will address specific areas of ATV safety that are of major concern to the Commission, including, most importantly, warnings against the use of adult size ATVs by underage riders. The Commission is also pleased that Honda has agreed to provide adequate funding for its campaign during each of the next three years. Although the Commission welcomes certain of the other actions that Honda will take, the Commission staff, as noted above, is dissatisfied with those parts of the company's program that relate to safety alerts, dealer monitoring, training incentives, and the refusal to notify the Commission at least 60 days in advance of any material changes in its program. For these reasons, the Commission staff cannot recommend to the Commission that its Resolution include a commendation of Honda's ATV program.

The Resolution also announces that the Commission will actively monitor actions taken under the Action Plan and will take appropriate action, where necessary, based on the results of this monitoring activity.

The Commission will consider all comments received in response to this notice before acting on the staff's recommendation that it adopt the proposed Resolution. In commenting, the public should be aware that the Commission does not have the authority to impose requirements on the use of ATVs (as opposed to requirements relating to the production and sale of ATVs). Many of the States have exercised their authority to impose requirements that relate to the use of ATVs; however, such requirements generally vary from State to State. The Commission believes that, in particular, there needs to be greater attention to the age issue at the State level. The Commission continues to be willing to work with the States in addressing safety issues related to the use of ATVs.

If the Commission adopts the Resolution, it will be available from the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207 after October 26, 1998.

Dated: September 2, 1998.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

(Proposed) Resolution of the United States Consumer Product Safety Commission

The United States Consumer Product Safety Commission (the ''Commission''), by vote on August 28, 1998, *Resolves that:*

Whereas, on April 28, 1988, the United States of America entered into Consent Decrees, filed in U.S. District Court, with American Honda Motor Co., Inc., Yamaha Motor Corp., U.S.A., Kawasaki Motors Corp., U.S.A., U.S. Suzuki Motor Corp. (nka American Suzuki Motor Corp.), and Polaris Industries, L.P. (nka Polaris Industries Inc.), which expired on April 28, 1998 (the ''Consent Decrees'');

Whereas, on September 27, 1996, the Commission entered into an Agreement and Action Plan with Arctic Cat Inc., which expired on April 28, 1998 (the ''Arctic Cat Agreement''); and

Whereas, the Consent Decrees and Arctic Cat Agreement required the signatory companies to implement various measures designed to enhance consumer safety with respect to all-terrain vehicles (''ATVs''); and

Whereas, on April 24, 1998, the Commission released the results and analysis of its 1997 ATV injury and exposure surveys, and those surveys indicate that, among other things, (i) risk of injury is 2.5 times higher when children younger than 16 drive ATVs than for drivers 16 to 34 years of age and 4.5 times higher for such children than for drivers 35 to 54 years of age; and (ii) risk declines with experience, for which

the Commission believes formal training is a partial surrogate; and

Whereas, the Commission remains concerned about the current level of deaths and injuries associated with ATVs, especially those involving children younger than 16, and believes enhanced safety efforts may achieve a further reduction in such deaths and injuries; and

Whereas, the staff of the Commission and Yamaha Motor Corp., U.S.A., Kawasaki Motors Corp., U.S.A., American Suzuki Motor Corp., Polaris Industries Inc., and Arctic Cat Inc. (collectively, the ''Participating Companies'') have actively consulted on actions that the companies will voluntarily undertake (the ''ATV Action Plan''); and

Whereas, the ATV Action Plan is set forth in separate documents that the Participating Companies have submitted to the Commission's staff; and

Whereas, a description of the ATV Action Plan, together with a draft copy of this Resolution and other materials, was published in the **Federal Register** on _____, 1998, and the public was invited to comment on this Resolution and the Commission has considered such comments in adopting this Resolution; and

Whereas, pursuant to the ATV Action Plan, the Participating Companies will (i) promote training, including through enhanced cash incentives to first-time ATV purchasers (or, in the case of Polaris, through requiring that previously untrained purchasers take training in order to receive a warranty on the vehicle), (ii) implement a multi-million dollar, multi-year information and education safety campaign emphasizing, among other things, the risks created when children younger than 16 operate or ride on adult-sized ATVs, (iii) not market, sell or offer to sell adult-size ATVs to or for use by children younger than 16, (iv) not market or sell three-wheel ATVs, (v) provide safety information on and with ATVs, including giving an ATV Safety Alert to each purchaser, (vi) retain the services of an independent organization to continue the undercover monitoring of the same number of randomly selected dealers as was done under previous monitoring programs (vii) continue or undertake various other safety measures, and (viii) notify the Commission at least 60 days in advance of any material changes to the ATV Action Plan (Arctic Cat Inc. has agreed to continue with its actions under the ATV Action Plan for five years); and

Whereas, notwithstanding implementation of the ATV Action Plan, the Commission reserves all its statutory enforcement, regulatory and oversight powers with respect to ATVs.

Now, therefore:

1. The Commission commends the Participating Companies for the ATV Action Plan, which the Commission believes will provide safety benefits to consumers.

2. The Commission will actively monitor the ATV Action Plan by, among other things, increasing the undercover inspections it conducts of dealerships to ensure compliance with age recommendations; increasing its inspections to ensure proper use of labels and hangtags; and collecting and assessing information regarding the effectiveness of the new training incentives.

Other activities are set forth in the **Federal Register** notice announcing this Resolution. The Commission will take appropriate action based on the results of this monitoring activity. The Commission also will continue to track the death and injury rate associated with ATVs and reserves its authority to take action based on this data.

[FR Doc. 98–24073 Filed 9–8–98; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Acting Deputy Chief Information Officer, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before November 9, 1998.

ADDRESSES: Written comments and requests for copies of the proposed information collection requests should be addressed to Patrick J. Sherrill, Department of Education, 600 Independence Avenue, SW, Room 5624, Regional Office Building 3, Washington, DC 20202–4651.

FOR FURTHER INFORMATION CONTACT: Patrick J. Sherrill (202) 708–8196. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Acting Deputy Chief Information Officer, Office of the Chief Information Officer, publishes this notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment at the address specified above. Copies of the requests are available from Patrick J. Sherrill at the address specified above.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner, (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected, and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: September 2, 1998.

Sally Budd,

Acting Deputy Chief Information Officer, Office of the Chief Information Officer.

Office of Postsecondary Education

Type of Review: Revision.

Title: Federal Family Education Loan (FFEL) Program and William D. Ford Federal Direct Loan Program, Loan Discharge Applications.

Frequency: One time.

Affected Public: Individuals or households.

Reporting and Recordkeeping Hour Burden:

Responses: 70,000.

Burden Hours: 30,500.

Abstract: These forms will serve as the means of collecting the information necessary to determine whether a FFEL or Direct Loan Borrower qualifies for a loan discharge based on total and

permanent disability, school closure, false certification of student eligibility, or unauthorized signature.

[FR Doc. 98–24114 Filed 9–8–98; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

ACTION: Submission for OMB review; comment request.

SUMMARY: The Acting Deputy Chief Information Officer, Office of the Chief Information Officer, invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before October 9, 1998.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Danny Werfel, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503. Requests for copies of the proposed information collection requests should be addressed to Patrick J. Sherrill, Department of Education, 600 Independence Avenue, SW, Room 5624, Regional Office Building 3, Washington, DC 20202–4651.

FOR FURTHER INFORMATION CONTACT: Patrick J. Sherrill (202) 708–8196. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Acting Deputy Chief Information Officer, Office of the Chief Information Officer, publishes this notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment at the address specified above. Copies of the requests are available from Patrick J. Sherrill at the address specified above.

Dated: September 2, 1998.

Sally Budd,

Acting Deputy Chief Information Officer, Office of the Chief Information Officer.

Office of the Under Secretary

Type of Review: New.

Title: National Study of Local Education Agency Activities Under the Safe and Drug-Free Schools and Communities Act.

Frequency: One time reportings.

Affected Public: Not-for-profit institutions; State, local or Tribal Gov't; SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 561.

Burden Hours: 1,543.

Abstract: The purpose of this study is to increase understanding of how local education agencies plan, fund, implement, and evaluate drug use and violence prevention efforts, especially efforts funded by the Safe and Drug-Free Schools and Communities Act program, as required by Section 4117 of Title IV of the Elementary and Secondary Education Act.

Office of Educational Research and Improvement

Type of Review: Revision.

Title: Common Core of Data (CCD) Surveys.

Frequency: Annually.

Affected Public: Federal Government (DODDS); State, local or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 57.

Burden Hours: 10,901.

Abstract: The CCD Surveys collect data annually from state education agencies about students and staff involved in the public elementary and secondary education system: membership, number of graduates and dropouts, and staff employed in instruction, administration, and support. The surveys also collect information about school and agency characteristics, and revenues and expenditures for public elementary and secondary education.

[FR Doc. 98–24113 Filed 9–8–98; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Pantex Plant, Amarillo, TX

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. No. 92–463, 86 Stat. 770) notice is hereby given of the following Advisory Committee meeting: Environmental Management Site-Specific Advisory Board (EM SSAB), Pantex Plant, Amarillo, TX.

DATE AND TIME: Tuesday, September 22, 1998: 1:00 p.m.–5:00 p.m.

ADDRESSES: Ramada Inn East, Amarillo, TX.

FOR FURTHER INFORMATION CONTACT: Jerry S. Johnson, Assistant Area Manager, Department of Energy, Amarillo Area Office, P.O. Box 30030, Amarillo, TX 79120 (806) 477–3125.

SUPPLEMENTARY INFORMATION:

Purpose of the Committee: The Board provides input to the Department of Energy on Environmental Management strategic decisions that impact future use, risk management, economic development, and budget prioritization activities.

Tentative Agenda

1:00 p.m. Welcome—Agenda Review—Approval of Minutes
1:15 p.m. Co-Chair Comments
1:30 p.m. Immobilization and Question and Answer
2:45 p.m. Break
3:00 p.m. Task Force/Subcommittee Minutes
3:45 p.m. Updates—Occurrence Reports—DOE
4:00 p.m. Ex-Officio Reports
4:45 p.m. Closing Remarks
5:00 p.m. Adjourn

Public Participation: The meeting is open to the public, and public comment will be invited throughout the meeting. Written statements may be filed with the Committee either before or after the meeting. Written comments will be accepted at the address above for 15 days after the date of the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Jerry Johnson's office at the address or telephone number listed

above. Requests must be received 5 days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Designated Federal Official is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Each individual wishing to make public comment will be provided a maximum of 5 minutes to present their comments at any time throughout the meeting. This notice is being published less than 15 days before the day of the meeting due to programmatic issues that needed to be resolved.

Minutes: The minutes of this meeting will be available for public review and copying at the Pantex Public Reading Rooms located at the Amarillo College Lynn Library and Learning Center, 2201 South Washington, Amarillo, TX phone (806) 371–5400. Hours of operation are from 7:45 am to 10:00 p.m., Monday through Thursday; 7:45 a.m. to 5:00 p.m. on Friday; 8:30 a.m. to 12:00 noon on Saturday; and 2:00 p.m. to 6:00 p.m. on Sunday, except for Federal holidays. Additionally, there is a Public Reading Room located at the Carson County Public Library, 401 Main Street, Panhandle, TX phone (806) 537–3742. Hours of operation are from 9:00 a.m. to 7:00 p.m. on Monday; 9:00 a.m. to 5:00 p.m., Tuesday through Friday; and closed Saturday and Sunday as well as Federal Holidays. Minutes will also be available by writing or calling Jerry S. Johnson at the address or telephone number listed above.

Issued at Washington, DC on September 2, 1998.

Althea T. Vanzego,

Acting Deputy Advisory Committee Management Officer.

[FR Doc. 98–24136 Filed 9–8–98; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Kirtland Area Office (Sandia)

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. No. 92–463, 86 Stat. 770) notice is hereby given of the following Advisory Committee meeting: Environmental Management Site-Specific Advisory Board, Kirtland Area Office (Sandia).

DATES: Wednesday, September 23, 1998: 6:00 p.m.—9:00 p.m. (MST).

ADDRESSES: Mesa Verde Community Center, 7900 Marquette NE, Albuquerque, New Mexico.

FOR FURTHER INFORMATION CONTACT: Mike Zamorski, Acting Manager, Department of Energy Kirtland Area Office, P.O. Box 5400, Albuquerque, NM 87185 (505) 845–4094.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE and its regulators in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda

6:00 p.m. Call to Order/Roll Call
6:05 p.m. Public Comments
6:15 p.m. Approval of Agenda
6:18 p.m. Approval of 08/26/98 Board Meeting Minutes
6:23 p.m. Chair's Report—Hubert W. Joy
6:33 p.m. Budget and Planning Task Group Report—W. Paul Robinson, Task Leader
6:48 p.m. Regulatory Framework Explanation—Diane Terry, Task Leader
6:53 p.m. Annual Board Officer, Members at Large & Oversight Committee Election Speeches
7:13 p.m. Vote on Officer, Members at Large & Oversight Committee
7:18 p.m. Break (Votes will be counted)
7:33 p.m. Announcement of Election Results
7:38 p.m. Geohydrologic Framework at the Albuquerque basin, at and around the Kirtland Airforce Base Complex Presentation—Sandia National Lab Staff
8:03 p.m. Questions on Presentation Above
8:08 p.m. Groundwater Quality & Background Surrounding Sandia National Lab/Kirtland Airforce Base Presentations—William Moats, New Mexico Environment Department
8:33 p.m. Question on Presentation Above
8:38 p.m. New/Other Business
8:48 p.m. Public Comments
8:58 p.m. Announcement of Next Meeting—Cesar Chavez Community Center
9:00 p.m. Adjourn

A final agenda will be available at the meeting Wednesday, September 23, 1998.

Public Participation: The meeting is open to the public. Written statements may be filed with the Committee either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Mike Zamorski's office at the address or telephone number listed above. Requests must be received 5 days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Each individual wishing to make public comment will be provided a maximum of 5 minutes to present their comments.

Minutes: The minutes of this meeting will be available for public review and copying at the Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585 between 9:00 a.m. and 4 p.m., Monday—Friday, except Federal holidays. Minutes will also be available by writing to Mike Zamorski, Department of Energy Kirtland Area Office, P.O. Box 5400, Albuquerque, NM 87185, or by calling (505) 845–4094.

Issued at Washington, DC on September 2, 1998.

Althea T. Vanzego,

Acting Deputy Advisory Committee Management Officer.

[FR Doc. 98–24137 Filed 9–8–98; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Monticello Site

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. No. 92–463, 86 Stat. 770) notice is hereby given of the following Advisory Board Committee Meeting: Environmental Management Site-Specific Advisory Board, Monticello Site.

DATE AND TIME: Wednesday, October 21, 1998, 7:00 p.m.–9:00 p.m.

ADDRESSES: San Juan County Courthouse, 2nd Floor Conference Room, 117 South Main, Monticello, UT 84535.

FOR FURTHER INFORMATION CONTACT: Audrey Berry, Public Affairs Specialist, Department of Energy Grand Junction Projects Office, P.O. Box 2567, Grand Junction, CO 81502 (970) 248–7727.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to advise DOE and its regulators in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda: Updates on future land use; Monticello surface and

groundwater; project status; reports from subcommittees on local training and hiring; and health and safety.

Public Participation: The meeting is open to the public. Written statements may be filed with the Committee either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Audrey Berry's office at the address or telephone number listed above. Requests must be received 5 days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Each individual wishing to make public comment will be provided a maximum of 5 minutes to present their comments at the end of the meeting.

Minutes: The minutes of this meeting will be available for public review and copying at the Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585 between 9:00 a.m. and 4 p.m., Monday–Friday, except Federal holidays. Minutes will also be available by writing to Audrey Berry, Department of Energy Grand Junction Projects Office, P.O. Box 2567, Grand Junction, CO 81502, or by calling her at (303) 248–7727.

Issued at Washington, DC on September 2, 1998.

Althea T. Vanzego,

Acting Deputy Advisory Committee Management Officer.

[FR Doc. 98–24138 Filed 9–8–98; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Public Law 92–463, 86 Stat. 770) notice is hereby given of the following Advisory Committee meeting: Environmental Management Site-Specific Advisory Board (EM SSAB) Chairperson and Federal Coordinator Meeting.

DATES: Tuesday, September 15, 1998, 8:00 a.m.–5:00 p.m.; Wednesday, September 16, 1998, 8:00 a.m.–11:00 a.m.

ADDRESSES: Regal Harvest House, 1345 28th Street, Boulder, Colorado 80302.

FOR FURTHER INFORMATION CONTACT: Karol Hazard, Department of Energy, EM–22, Room 1H–087, 1000 Independence Avenue, SW, Washington, DC 20585, phone: (202) 586-7926, fax: (202) 586–4622.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE and its regulators in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda: This is a special-called Board Chairperson meeting. It will include information sharing between the Board's site-group Chairpersons; discussions on the FY 1998 SSAB Qualitative Assessment and SSAB cross-site issues; and presentations on current EM risk-related issues, the DOE Center for Risk Excellence, the Consortium for Risk Evaluation with Stakeholder Participation, and DOE Field Managers' EM Integration ''Round-Robin'' Meetings.

Public Participation: The meeting is open to the public. Written statements may be filed with the Committee either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Karol Hazard at the address or telephone number listed above. Requests must be received 5 days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Designated Federal Official is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Each individual wishing to make public comment will be provided a maximum of 5 minutes to present their comments at the end of each meeting day. This notice is being published less than 15 days before the date of the meeting due to programmatic issues that needed to be resolved.

Minutes: The minutes of this meeting will be available for public review and copying at the Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585 between 9:00 a.m. and 4 p.m., Monday-Friday, except Federal holidays. Minutes will also be made available by writing or calling Karol Hazard at the Board's office address or telephone number listed above.

Issued at Washington, DC on September 3, 1998.

Rachel Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. 98–24139 Filed 9–8–98; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER98–4109–000]

El Dorado Energy, LLC; Notice of Amendment

September 2, 1998.

Take notice that on August 31, 1998, El Dorado Energy, LLC (El Dorado), tendered for filing an amendment to Page 17, of El Dorado's Application for Market-Based Rates filed on August 4, 1998, in the above referenced docket.

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 and protests should be filed on or before September 10, 1998. Protests will be considered by the Commission to determine the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–24118 Filed 9–8–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP98–750–000]

Texas Eastern Transmission Corporation; Notice of Request Under Blanket Authorization

September 2, 1998.

Take notice that on August 26, 1998, Texas Eastern Transmission Corporation, (Applicant), 5400 Westheimer Court, P. O. Box 1642, Houston, Texas, 77251–1642, filed in Docket No. CP98–750–000 a request pursuant to Sections 157.205 and 157.211 of the Commission's Regulations under the National Gas Act (18 CFR 157.205 and 157.211) for approval to construct a delivery point located in Franklin County, Pennsylvania, to accommodate natural gas deliveries to Columbia Gas of Pennsylvania, Inc., (Columbia Distribution) a local distribution

company, under Applicant's blanket certificate issued in Docket Nos. CP82–535–000, pursuant to Section 7(c) of the Natural Gas Act (NGA), all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Application proposes to construct and install a four-inch tap valve, a four-inch check valve, and a four-inch insulating flange on Applicant's existing thirty-six-inch Line No. Two in Franklin County, Pennsylvania. Applicant states that Columbia Distribution will install or cause to be installed approximately one-hundred feet of four-inch piping, dual two-inch turbine meter runs and electronic gas measurement equipment. Applicant further states that Columbia Distribution will reimburse Applicant for 100 percent of the costs Applicant will incur for installing the facilities, which are estimated to be $107,000, including an allowance for federal income taxes.

Applicant states that the transportation service will be rendered pursuant to Applicant's CDS Rate Schedule. Applicant asserts that the installation of the delivery point will have no effect on Applicant's peak day or annual deliveries and that the proposal will be accomplished without detriment or disadvantage to Applicant's other customers.

Any person or the Commission's Staff may, within 45 days of the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.214), a motion to intervene and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefor, the proposed activities shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–24098 Filed 9–8–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP98–749–000]

Williston Basin Interstate Pipeline Company; Notice of Request Under Blanket Authorization

September 2, 1998.

Take notice that on August 26, 1998, Williston Basin Interstate Pipeline Company (Williston Basin), 200 North Third Street, Suite 300, Bismarck, North Dakota 58501, filed in Docket No. CP98–749–000 a request pursuant to Sections 157.205, 157.211, and 157.216 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.211, and 157.216) for authorization to modify an existing meter at the M&M meter station in Pennington County, South Dakota. Williston Basin makes such request under its blanket certificate issued in Docket No. CP82–487–000, *et al.* pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

Williston Basin is requesting authorization to modify its existing M&M meter station by abandoning certain existing facilities and constructing and operating modified facilities. Specifically, Williston Basin is proposing to abandon an existing 4-inch positive diaphragm meter, and to install a 3-inch positive rotary meter. After the replacement, the maximum daily delivery capacity at the M&M station will be reduced from 1,190 Mcf per day to 595 Mcf per day, to more properly size the facility to the current demand.

It is averred that the meter to be installed is properly sized for the current demand at the M&M station. Williston Basin indicates that the historical peak day load at this point is below the daily capacity that will exist after the modification.

Williston Basin provides natural gas transportation deliveries through this meter station to Montana-Dakota under Williston Basin's currently effective Rate Schedules FT–1 and/or IT–1. It is stated that the decrease in maximum daily delivery capacity at the M&M station resulting from the modification proposed herein, will have no significant effect on Williston Basin's peak day or annual requirements and will not affect existing firm shippers.

Williston Basin estimates the cost of the modification proposed herein to be approximately $4,155.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–24097 Filed 9–8–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC98–53–000, et al.]

Northeast Empire Limited Partnership #1, et al.; Electric Rate and Corporate Regulation Filings

August 31, 1998.

Take notice that the following filings have been made with the Commission:

1. Northeast Empire Limited Partnership #1

[Docket No. EC98–53–000]

Take notice that on August 11, 1998, Northeast Empire Limited Partnership #1, c/o Thomas D. Emero, Twenty South Street, P.O. Box 407, Bangor, Maine 0440200407, filed with the Federal Energy Regulatory Commission an Application for Approval of Disposition of Jurisdictional Facilities pursuant to Part 33 of the Commission's Rules.

Comment date: September 23, 1998, in accordance with Standard Paragraph E at the end of this notice.

2. PacifiCorp

[Docket No. ER98–4351–000]

Take notice that on August 26, 1998, PacifiCorp, tendered for filing in accordance with 18 CFR 35 of the Commission's Rules and Regulations, an umbrella Service Agreement with NGE Generation, Inc., under PacifiCorp's FERC Electric Tariff, First Revised Volume No. 12.

Copies of this filing were supplied to the Public Utility Commission of Oregon and the Washington Utilities and Transportation Commission.

Comment date: September 15, 1998, in accordance with Standard Paragraph E at the end of this notice.

3. Carolina Power & Light Company

[Docket No. ER98–4352–000]

Take notice that on August 26, 1998, Carolina Power & Light Company tendered for filing executed Service Agreements for Short-Term Firm Point-to-Point Transmission Service with Philadelphia Electric Company, Sonat Power Marketing L.P., and SCANA Energy Marketing, Inc. Service to each Eligible Customer will be in accordance with the terms and conditions of Carolina Power & Light Company's Open Access Transmission Tariff.

CP&L requests an effective date of August 26, 1998, for each Service Agreement.

Copies of the filing were served upon the North Carolina Utilities Commission and the South Carolina Public Service Commission.

Comment date: September 15, 1998, in accordance with Standard Paragraph E at the end of this notice.

4. Carolina Power & Light Company

[Docket No. ER98–4353–000]

Take notice that on August 26, 1998, Carolina Power & Light Company (CP&L), tendered for filing an executed Service Agreement between CP&L and the following eligible buyer Cinergy Capital & Trading, Inc. Service to this eligible buyer will be in accordance with the terms and conditions of CP&L's Market-Based Rates Tariff, FERC Electric Tariff No. 4, for sales of capacity and energy at market-based rates.

CP&L requests an effective date of August 3, 1998, for this Service Agreement.

Copies of the filing were served upon the North Carolina Utilities Commission and the South Carolina Public Service Commission.

Comment date: September 15, 1998, in accordance with Standard Paragraph E at the end of this notice.

5. Carolina Power & Light Company

[Docket No. ER98–4354–000]

Take notice that on August 26, 1998, Carolina Power & Light Company (CP&L), tendered for filing an executed Service Agreement with Oglethorpe Power Corporation under the provisions of CP&L's Market-Based Rates Tariff, FERC Electric Tariff No. 4. This Service Agreement supersedes the un-executed Agreement originally filed in Docket No. ER98–3385–000.

CP&L requests an effective date of May 18, 1998, for this Service Agreement.

Copies of the filing were served upon the North Carolina Utilities Commission and the South Carolina Public Service Commission.

Comment date: September 15, 1998, in accordance with Standard Paragraph E at the end of this notice.

6. PacifiCorp

[Docket No. ER98–4355–000]

Take notice that on August 26, 1998, PacifiCorp tendered for filing in accordance with 18 CFR 35 of the Commission's Rules and Regulations, a Mutual Netting/Closeout Agreement between PacifiCorp and NGE Generation, Inc.

Copies of this filing were supplied the Washington Utilities and Transportation Commission and the Public Utility Commission of Oregon.

Comment date: September 15, 1998, in accordance with Standard Paragraph E at the end of this notice.

7. Allegheny Power Service Corp., on behalf of Monongahela Power Co., The Potomac Edison Company and West Penn Power Company (Allegheny Power)

[Docket No. ER98–4356–000]

Take notice that on August 26, 1998, Allegheny Power Service Corporation on behalf of Monongahela Power Company, The Potomac Edison Company and West Penn Power Company (Allegheny Power) filed Supplement No. 2 to add one (1) new Customer to the Market Rate Tariff under which Allegheny Power offers generation services.

Allegheny Power requests a waiver of notice requirements to make service available as of May 25, 1998, to American Electric Power Service Corporation.

Copies of the filing have been provided to the Public Utilities Commission of Ohio, the Pennsylvania Public Utility Commission, the Maryland Public Service Commission, the Virginia State Corporation Commission, the West Virginia Public Service Commission, and all parties of record.

Comment date: September 15, 1998, in accordance with Standard Paragraph E at the end of this notice.

8. Allegheny Power Service Corp., on behalf of Monongahela Power Co., The Potomac Edison Company, and West Penn Power Company (Allegheny Power)

[Docket No. ER98–4357–000]

Take notice that on August 26, 1998, Allegheny Power Service Corporation on behalf of Monongahela Power Company, The Potomac Edison Company and West Penn Power Company (Allegheny Power), filed Supplement No. 36, to add the Town of Williamsport, MD to Allegheny Power's Open Access Transmission Tariff which has been submitted for filing by the Federal Energy Regulatory Commission in Docket No. OA96–18–000.

Allegheny Power requests a waiver of notice requirements and asks the Commission to honor the proposed effective date of July 25, 1998, as specified in the agreement negotiated by the parties.

Copies of the filing have been provided to the Maryland Public Service Commission.

Comment date: September 15, 1998, in accordance with Standard Paragraph E at the end of this notice.

9. Minnesota Power, Inc.

[Docket No. ER98–4358–000]

Take notice that on August 26, 1998, Minnesota Power, Inc., (MP), tendered for filing a letter from the Executive Committee of the Western Systems Power Pool (WSSP), indicating that MP had completed all the steps for pool membership. MP requests that the Commission amend the WSPP Agreement to include it as a member.

MP requests an effective date of September 1, 1998, for the proposed amendment. Accordingly, MP requests waiver of the Commission's notice requirements for good cause shown.

Copies of the filing were served upon the WSSP Executive Committee.

Comment date: September 15, 1998, in accordance with Standard Paragraph E at the end of this notice.

10. Cook Inlet Energy Supply, L.P.

[Docket No. ER98–4359–000]

Take notice that Cook Inlet Energy Supply, L.P. (Cook Inlet), on August 26, 1998, tendered for filing an amendment to its FERC Electric Service Tariff Rate Schedule No. 1. The proposed changes allow Cook Inlet to sell electric energy and capacity at wholesale to, and purchase electric energy and capacity from, its affiliate, Portland General Electric Company (PGE).

Cook Inlet's current rate schedule does not allow purchases from and sales to PGE. However, in a recent order by the Federal Energy Regulatory Commission, PGE was granted authority to sell power at market-based rates, including sales to its power marketing affiliates, one of which is Cook Inlet.

Comment date: September 15, 1998, in accordance with Standard Paragraph E at the end of this notice.

11. PP&L, Inc.

[Docket No. ER98–4360–000]

Take notice that on August 26, 1998, PP&L, Inc. (PP&L), filed with the Federal Energy Regulatory Commission a Borderline Service Agreement between PP&L and Metropolitan Edison Company d/b/a/ GPU Energy, dated August 3, 1998. The Agreement supplements a borderline service umbrella tariff approved by the Commission in Docket No. ER93–847–000, by establishing the precise point of delivery, metering arrangements and transmission losses associated with a new point of delivery under the umbrella tariff.

PP&L requests an effective date of August 3, 1998, for the Borderline Service Agreement.

PP&L states that a copy of this filing has been provided to Metropolitan Edison Company and to the Pennsylvania Public Utility Commission.

Comment date: September 15, 1998, in accordance with Standard Paragraph E at the end of this notice.

12. Fitchburg Gas and Electric Light Company

[Docket No. ER98–4361–000]

Take notice that on August 26, 1998, Fitchburg Gas and Electric Light Company (Fitchburg), tendered for filing service agreements between Fitchburg and Enserch Energy Services, Inc. (Enserch Energy), Cambridge Electric Light Company (Cambridge Electric), and Commonwealth Electric Company (Commonwealth Electric) for service under Fitchburg's Market-Based Power Sales Tariff. This Tariff was accepted for filing by the Commission on September 25, 1997, in Docket No. ER97–2463–000.

Fitchburg requests an effective date of July 29, 1998, for the service agreements with Cambridge Electric and Commonwealth Electric and an effective date of July 30, 1998, for the service agreement with Enserch Energy.

Comment date: September 15, 1998, in accordance with Standard Paragraph E at the end of this notice.

13. Unitil Power Corp.

[Docket No. ER98–4362–000]

Take notice that on August 26, 1998, Unitil Power Corp. (UPC), tendered for filing service agreements between UPC and Enserch Energy Services, Inc. (Enserch Energy), Cambridge Electric Light Company (Cambridge Electric), and Commonwealth Electric Company (Commonwealth Electric) for service under UPC's Market-Based Power Sales Tariff. This Tariff was accepted for filing by the Commission on September 25, 1997, in Docket No. ER97–2460–000.

UPC requests an effective date of July 29, 1998, for the service agreements with Cambridge Electric and Commonwealth Electric and an effective date of July 30, 1998, for the service agreement with Enserch Energy.

Comment date: September 15, 1998, in accordance with Standard Paragraph E at the end of this notice.

14. Montana Power Trading & Marketing Company

[Docket No. ER98–4363–000]

Take notice that on August 26, 1998, Montana Power Trading & Marketing Company (MPT&M), tendered for filing Electric Energy Sale Agreements for sales of electricity under its Rate Schedule FERC No. 1, to Idaho Power Company, PacifiCorp, Portland General Electric Company, Public Utility District No. 1 of Snohomish County, Washington, Puget Sound Energy, Sierra Pacific Power Company, Southern California Water Company.

MPT&M has proposed to make each of the Electric Energy Sale Agreements effective on July 27, 1998.

Comment date: September 15, 1998, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

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 these filings are on file with the Commission and are available for public inspection.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–24099 Filed 9–8–98; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PL98–1–000]

Public Access to Information and Electronic Filing; Notice of Technical Conference

September 2, 1998.

Take notice that on Thursday, October 22, 1998, the Commission will hold a technical conference to discuss FERC's Electronic Filing Initiative (EFI). The conference will begin at 9:00 A.M. and is scheduled for the Commission Meeting Room, 888 First Street, N.E., Washington, D.C.

This conference is being held pursuant to the Commission's Request for Comments and Notice of Intent to Hold Technical Conference, which was issued in this docket on May 13, 1998, and published in the **Federal Register** on May 19, 1998 (63 FR 27,529). The conference is being convened to enlist the participation of the gas pipeline, oil pipeline, electric transmission, and hydropower industries, and interested parties, in developing an effective system for submitting certain filings to the Commission in an electronic format instead of paper.

At the conference, staff will make a presentation on its vision for EFI, the EFI objectives, a cost/benefit assessment, and staff's proposed approach based on its review of comments to the May 13, 1998 request. Staff will show some prototype systems; we also anticipate brief panel discussions or presentations by attendees. The afternoon session will include a discussion of issues and consideration of working groups to address alternatives and standards related to specific issues.

Staff will also address the best way to conduct subsequent conferences and exchange information so that interested parties can participate in the proceedings with less inconvenience and travel. We will publish a detailed agenda at least one week before the conference.

Persons who wish to attend the conference should notify Erica Ramos or Carrie Blocker on or before October 8, 1998, either by telephone, facsimile, or by E-Mail.

Erica Ramos, (202) 219–2969, FAX: (202) 273–0873, erica.ramos@ferc.fed.us

or

Carrie Blocker, (202) 208–1382, FAX: (202) 208–2425, carrie.blocker@ferc.fed.us

Please provide your name, title, affiliation, mailing address, the industry(ies) you work with (natural gas, oil, electric, and hydropower), voice and fax telephone numbers, and your Internet e-mail address if you have one. Companies or organizations with more than one representative may consolidate the notifications if they provide the information for each attendee.

Persons wishing to make comments or presentations at the conference should submit a request for time and the topic(s) they want to address to: Brooks Carter, (202) 501–8145, FAX: (202) 208–2425, brooks.carter@ferc.fed.us.

The Commission staff will determine the format and time limit for presentations based on the number of requests we receive. Companies are encouraged to coordinate with their respective industry associations to consolidate formal presentations as much as possible.

If there is sufficient interest from those outside the Washington, D.C. metropolitan area, the Capitol Connection may broadcast the conference LIVE via satellite for a fee. If there is interest in the Washington, D.C. area for this program or you need more information about the national broadcast, please call Shirley Al-Jarani or Julia Morelli at the Capitol Connection (703–993–3100) by October 15, 1998. In addition, National Narrowcast Network's Hearing-On-The-Line service covers all FERC meetings live by telephone so that interested persons can listen at their desks, from their homes, or from any phone, without special equipment. Billing is based on time on-line. Call 202–966–2211 for further details.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–24119 Filed 9–8–98; 8:45 am]

BILLING CODE 6717–01–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6158–4]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; Revisions to the Underground Injection Control Regulations for Class V Injection Wells—Options 1 and 2

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the following Information Collection Requests (ICRs) have been forwarded to the Office of Management and Budget (OMB) for review and approval: Revisions to the Underground Injection Control Regulations for Class V Injection Wells—Options 1 and 2. The ICRs describe the nature of the information collection requirements contained in the proposed rule titled Revisions to the Underground Injection Control Regulations for Class V Injection Wells published in the **Federal Register** on July 29, 1998 (63 FR 40586) and their expected burden and cost; where appropriate, includes the actual data collection instrument.

DATES: Comments must be submitted on or before November 9, 1998.

ADDRESSES: Send comments on the ICRs to the Director, OP Regulatory Information Division; U.S. Environmental Protection Agency (2137); 401 M St., S.W.; Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th St., NW, Washington, DC 20503, marked ''Attention: Desk Officer for EPA.'' Include the ICR numbers (1873.01 and 1874.01) in any correspondence.

FOR FURTHER INFORMATION CONTACT: Robyn Delehanty, Underground Injection Control Program, Office of Ground Water and Drinking Water (mailcode 4606), EPA, 401 M Street, SW, Washington DC, 20460. Phone: 202–260–1993. E-mail: delehanty.robyn@epamail.epa.gov.

COPIES OF THE ICRS MAY BE OBTAINED FROM: Sandy Farmer at EPA by phone at (202) 260–2740, by E-mail at farmer.sandy@epamail.epa.gov, or download off the Internet at http://www.epa.gov/icr and refer to EPA ICR No. 1873.01 and 1874.01.

SUPPLEMENTARY INFORMATION:

Title: Revisions to the Underground Injection Control Regulations for Class V Injection Wells—Options 1 and 2 (EPA ICR No. 1873.01 and 1874.01). This is a new collection.

Abstract: In the UIC Class V Rule published on July 29, 1998, EPA proposed to establish additional federal requirements for UIC Class V injection wells in Source Water Protection Areas (SWPAs) that pose a high risk to underground sources of drinking water. The proposed rule would require owners and operators of Class V industrial waste disposal wells in ground water-based SWPAs to either close their wells or meet primary drinking water standards at the point of injection. The proposal included the co-proposal of two options for Class V motor vehicle waste disposal wells: (1) Ban Class V motor vehicle waste disposal wells in delineated ground water-based source water protection areas; and, (2) Ban Class V motor vehicle waste disposal wells in these SWPAs but allow owners and operators to apply for a waiver if they can demonstrate that they meet primary drinking water standards at the point of injection. The proposal would also prohibit large-capacity cesspools in ground water-based source water protection areas. In the case of closing Class V wells, the proposed rule does not require Primacy States to collect pre-closure notification. EPA believes that states may already have or could develop, another or a better mechanism that they prefer. However, because some states may require pre-closure notifications, the burden to states for information collection have been included.

The proposed regulation was designed with minimal new reporting requirements. These requirements fall into two major scenarios depending on which option is selected for final rule promulgation: (1) Pre-closure notification for all three well types, or (2) pre-closure notification for owners/operators of industrial wells and cesspools as well as pre-closure notification and/or waiver applications for automotive facilities under co-proposal option 2.

EPA uses information on all classes of injection wells, including Class V wells, to track the performance of the UIC Program toward meeting its goal of protecting USDWs from potential threats due to injected wastes. Responses to the request for information will be mandatory in accordance with provisions in 40 CFR 144.83 (Underground Injection Control). The Agency uses the information supplied in permit applications to track the location and numbers of Class V wells. Monitoring data provide information on the types of wastes injected and will be used to determine whether or not injection should be allowed to continue and under what conditions. Pre-closure notifications allow DI Programs to track the success of the Program in closing those wells that pose the greatest threat to USDWs. EPA also will use information on Class V wells to respond to information requests and to perform analyses for EPA management, the General Accounting Office, the Office of Management and Budget, Congress, and the public. States implementing Source Water Assessment Programs or Wellhead Protection Programs may use information on permitted or closed Class V injection wells if they choose to

update their contaminant source inventories.

Any Class V injection well operator may request that information submitted be kept confidential, as provided in 40 CFR 144.5 (Confidentiality of Information). All confidential information is treated in accordance with the provisions of 40 CFR part 2 (Public Information). Respondents to the information collection requirements may claim confidentiality by stamping the words ''confidential business information'' on each page containing such information. However, the Agency will not consider the following information confidential:

- The name and address of any facility with a Class V waste disposal well.
- Information regarding the existence, absence, or level of contaminants in drinking water.

If no claim of confidentiality is made at the time of submission, EPA may make the information available to the public without further notice. However, the information is collected for the Agency's internal use, and EPA does not plan to routinely release or publish any of the data.

EPA has prepared two separate Information Collection Requests (ICRs) to accommodate the flexibility the proposed rule offers to the owners and operators of the existing motor vehicle waste disposal wells to either close their wells or submit permit applications. The ICRs have been submitted to OMB for review.

The first ICR addresses the proposal that bans motor vehicle waste disposal wells and large-capacity cesspools, and allows industrial waste disposal wells to operate under specific conditions. The only paperwork activity associated with this proposal is the submittal of a pre-closure notice by owners or operators of motor vehicle waste disposal wells, large-capacity cesspools, and industrial waste disposal wells.

Using the most conservative assumptions, EPA estimates that, over the three years covered by the information collection request, the number of owners and operators of Class V injection wells responding to the information collection request will be 7,746. The average annual hours per response is 0.83 at a cost of $11.72. The notification is a one time only requirement. There are no operation and maintenance costs associated with this option.

A total of 7,746 Class V injection wells (including all motor vehicle waste disposal wells and large-capacity cesspools, and some industrial waste disposal wells) may close. The total burden associated with submitting pre-closure notifications is estimated to be 22,225 hours (an average of 7,408 hours per year) and the total annual cost is estimated to be $473,543 (an average of $157,848 per year). Reporting burdens for this ICR is estimated to average 1.65 hours (an average of 0.55 hours per year) per response, or $35.17 (an average of $11.72 per year) per response.

The second ICR incorporates the proposal that allows some existing motor vehicle waste disposal wells to continue to operate under permits and industrial waste disposal wells to continue operating under specific conditions and bans all large-capacity cesspools. Paperwork activities associated with this proposal include permit applications and monitoring reports (from operators of Class V motor vehicle waste disposal wells wishing to continue injecting), and pre-closure notices (from owners or operators of motor vehicle waste disposal wells, large-capacity cesspools, and industrial waste disposal wells that are closing).

The second ICR estimates the hourly burden and cost to owners and operators of affected Class V wells for complying with the proposed requirements. Using the most conservative assumptions, EPA estimates that, over the three years covered by the information collection request, the number of owners and operators of Class V injection wells responding to the information collection request will be 7,746. The average annual hours per response for notification of well closure is 0.83 at a cost of $11.72. The notification is a one time only requirement. There are no operation and maintenance costs associated with well closure. For owners and operators of motor vehicle waste disposal wells who receive a waiver and apply for a permit, the average annual hours per permit application is 28 hours at a cost of $553.00. The operation and maintenance costs for quarterly injectate monitoring and annual sludge monitoring is $3,380 per facility per year.

Over the three years covered by this information collection, a total of 2,638 Class V wells (including motor vehicle waste disposal wells, large-capacity cesspools, and industrial waste disposal wells) may close. In addition, 5,108 operators of motor vehicle waste disposal wells will apply for permits and monitor their injectate and sludge.

The total burden associated with permitting motor vehicle waste disposal wells, banning large-capacity cesspools, and allowing industrial waste disposal wells to operate under specific conditions is estimated to be 916,678 hours (an average of 305,559 hours per year), and the cost will be $71,796,202 (an average of $23,932,067 per year). The burden per response is 3.22 hours; the cost per response is $252.02.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR Part 9 and 48 CFR Chapter 15.

Comments are requested on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques. Send comments on the ICR to the Director, OP Regulatory Information Division; U.S. Environmental Protection Agency (2137); 401 M St., SW; Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th St., NW, Washington, DC 20503, marked ''Attention: Desk Officer for EPA.'' Include the ICR numbers (1873.01 and 1874.01) in any correspondence. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after September 9, 1998, a comment to OMB is best assured of having its full effect if OMB receives it by October 9, 1998. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

Dated: August 31, 1998.

Elizabeth Fellows,

Acting Director, Office of Ground Water and Drinking Water.

[FR Doc. 98–24147 Filed 9–8–98; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–00552; FRL–6027–9]

EPA-USDA Tolerance Reassessment Advisory Committee; Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA-USDA Tolerance Reassessment Advisory Committee (TRAC) has been established as a subcommittee under the auspices of the EPA National Advisory Council for Environmental Policy and Technology (NACEPT). The TRAC is in response to Vice President Gore's request for EPA and the U.S. Department of Agriculture (USDA) to work together to ensure the smooth implementation of the Food Quality Protection Act (FQPA).

DATES: The final TRAC meeting will be held on Tuesday, September 15, 1998, from 9:30 a.m. to 5:30 p.m. and on Wednesday, September 16, 1998, from 8 a.m. to 1 p.m. EPA and USDA are considering options for extending this meeting, such as an evening session or an afternoon session on September 15th.

ADDRESSES: The TRAC meeting will be held at the Ramada Conference and Exhibition Center, 8500 Annapolis Rd., New Carrollton, MD [just off Interstate 495 at Exit 20B and 1/4 mile from the New Carrollton METRO station], telephone: (301) 459–6700.

The official record is available in the Docket for inspection during normal business hours, Monday through Friday, excluding legal holidays at the Environmental Protection Agency, Crystal Mall #2, Rm. 101, 1921 Jefferson Davis Hwy., Arlington, VA, telephone: (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: By mail: Margie Fehrenbach or Linda Murray, Office of Pesticide Programs (7501C), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: Crystal Mall #2, Rm. 1119, 1921 Jefferson Davis Hwy., Arlington, VA; telephone: (703) 305–7090; e-mail: fehrenbach.margie@epamail.epa.gov or murray.linda@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: FQPA, Pub. L.104–170, was passed in 1996, this new law strengthens the nation's system for regulating pesticides on food. The TRAC will be asked to provide policy guidance on sound science, ways to increase transparency in decisionmaking, strategies for a reasonable transition for agriculture, and ways to enhance consultations with stakeholders, as pesticide tolerances are reassessed, including those for organophosphates.

The TRAC is co-chaired by EPA Deputy Administrator Fred Hansen and USDA Deputy Secretary Richard Rominger. The TRAC is composed of experts that include farmers, environmentalists, public health officials, pediatric experts, pesticide companies, food processors and distributors, public interest groups, academicians, and tribal, State, and local governments.

The TRAC meetings are open to the public under section 10(a)(2) of the Federal Advisory Committee Act, Pub. L. 92–463. Outside statements by observers are welcome. Oral statements will be limited to 2–3 minutes by only one person per organization. Any person who wishes to file a written statement may do so before or after a TRAC meeting. These statements will become part of the official record and will be provided to the TRAC members. The official record will be available for public inspection at the address in ''Addresses'' at the beginning of this document.

Agendas and other background information specific to these meetings, as well as information from the previous meetings, can be obtained on the EPA TRAC World Wide Web site (http://www.epa.gov/pesticides/trac); or from the Docket (Rm 101, Crystal Mall #2, Arlington, VA; telephone (703) 305–5805; or by calling (703) 305–7090.

List of Subjects

Environmental protection, Agriculture, Chemicals, Foods, Pesticides and pests.

Dated: August 26, 1998.

Marcia E. Mulkey,

Director, Office of Pesticide Programs.

[FR Doc. 98–24149 Filed 9–8–98; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[OPP–34141; FRL–6030–2]

Increasing Transparency for the Tolerance Reassessment Process; Availability of Preliminary Risk Assessments for Seven Organophosphates

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This Notice announces the availability of documents which were developed as part of EPA's process for making reregistration eligibility decisions for the organophosphate pesticides and for tolerance reassessments consistent with the Federal Food, Drug, and Cosmetic Act as amended by the Food Quality Protection Act of 1996 (FQPA). These documents are the preliminary risk assessments and related documents for cadusafos, dimethoate, ethoprop, fenthion, sulfotepp, temephos, and tribuphos. This Notice also starts a 60–day public comment period for the preliminary risk assessments. Comments are to be limited to issues directly associated with the seven organophosphates that have risk assessments placed in the docket and should be limited to issues raised in those documents. By allowing access and opportunity for comment on the preliminary risk assessments, EPA is seeking to strengthen stakeholder involvement and help ensure the Agency's decisions under FQPA are transparent, and based on the best available information. The tolerance reassessment process will ensure that the U.S. continues to have the safest and most abundant food supply. The Agency cautions that these risk assessments are preliminary assessments only and that further refinements of the risk assessments will be appropriate for some, if not all, of these seven pesticides. These documents reflect only the work and analysis conducted as of the time they were produced and it is appropriate that, as new information becomes available and/or additional analyses are performed, the conclusions they contain may change.

DATES: Written comments on these assessments must be submitted by November 9, 1998.

ADDRESSES: By mail, submit written comments in triplicate to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, deliver comments to: Rm. 119, CM #2, 1921 Jefferson Davis Highway, Arlington, VA.

Comments and data may also be submitted electronically to: opp-docket@epamail.epa.gov. Follow the instructions under Unit II. of this document. No Confidential Business Information (CBI) should be submitted through e-mail.

Information submitted as a comment concerning this document may be claimed confidential by marking any part or all of that information as CBI.

Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential will be included in the public docket by EPA without prior notice. The public docket is available for public inspection in Rm. 119 at the Virginia address given above, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

Copies of the preliminary risk assessments for the seven organophosphate pesticides can be accessed from the internet at: http: www.epa.gov/oppsrrd1/op.

To request a copy of any of the above listed preliminary risk assessments and related documents, contact the OPP Pesticide Docket, Public Information and Records Integrity Branch, in Rm. 119 at the address given above or call (703) 305–5805. The Docket staff will inform callers as to which of the documents can be sent directly from the docket and which need to be requested from the Freedom of Information Act Office due to their bulk.

FOR FURTHER INFORMATION CONTACT:

Karen Angulo, Special Review and Reregistration Division (7508C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; telephone: (703) 308–8004; e-mail: angulo.karen@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

EPA is making available preliminary risk assessments which have been developed as part of EPA's process for making reregistration eligibility decisions for the organophosphate pesticides and for tolerance reassessments consistent with the Federal Food, Drug, and Cosmetic Act as amended by the Food Quality Protection Act of 1996 (FQPA). The Agency's preliminary health effects risk assessments for the following seven organophosphate pesticides are available in the individual pesticide dockets: cadusafos, dimethoate, ethoprop, fenthion, sulfotepp, temephos, and tribuphos. In addition, the preliminary ecological effects risk assessments for dimethoate, fenthion, and tribuphos have also been docketed.

Included in the individual pesticide dockets are the Agency's preliminary risk assessments and the registrants' comments to this point. As additional comments, reviews, and risk assessment modifications become available, these will also be docketed for the above seven organophosphate pesticides. The Agency cautions that these risk assessments are preliminary assessments only and that further refinements of the risk assessments will be appropriate for some, if not all, of these seven pesticides. These documents reflect only the work and analysis conducted as of the time they were produced and it is appropriate that, as new information becomes available and/or additional analyses are performed, the conclusions they contain may change.

As the preliminary risk assessments for the remaining organophosphate pesticides are completed and registrants are given a 30–day review period to identify possible computational or other clear errors in the risk assessment, these risk assessments and registrant responses will be placed in the individual pesticide dockets. A Notice of Availability for subsequent assessments will appear in the **Federal Register**.

To provide users with the most recent information on the seven organophosphates, EPA has also included in each docket the Agency's July 7, 1998 ''Hazard Assessment of the Organophosphates'' and the Agency's August 6, 1998 ''FQPA Safety Factor Recommendations for the Organophosphates.'' In general, these two documents were completed after the seven individual pesticide preliminary risk assessments discussed above. The Agency notes that where the preliminary risk assessments are inconsistent with the Hazard Assessment and FQPA Safety Factor Recommendation these latter assessments will supersede the relevant portions of the preliminary risk assessments and will be incorporated into the revised individual pesticide risk assessments. The Agency also notes that these documents reflect only the work and analysis conducted as of the time they were produced, and as new information becomes available and/or additional analyses are performed, the conclusions they contain may change.

The Agency is providing an opportunity, through this Notice, for interested parties to provide written comments and input to the Agency on the preliminary risk assessments for the chemicals specified in this Notice. Such comments and input could address, for example, the availability of additional data to further refine the risk assessments, such as percent crop treated information or submission of residue data from food processing studies, or could address the Agency's risk assessment methodologies and assumptions as applied to these specific chemicals. Comments should be limited to issues raised within the preliminary risk assessments and associated documents. EPA will provide other opportunities for public comment on other science issues associated with the organophosphate tolerance reassessment program. Failure to comment on any such issues as part of this opportunity will in no way prejudice or limit a commenter's opportunity to participate fully in later notice and comment processes. All comments should be submitted by November 9, 1998 to the address given above. Comments will become part of the Agency record for each individual pesticide to which they pertain.

II. Public Record and Electronic Submissions

The official record for this action, as well as the public version, has been established for this action under the following docket control numbers. When submitting written or electronic comments regarding the seven organophosphates, use the following docket control numbers:

cadusafos	OPP–34142
dimethoate	OPP–34143
ethoprop	OPP–34144
fenthion	OPP–34145
sulfotepp	OPP–34146
temephos	OPP–34147
tribuphos	OPP–34148

A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The official record is located at the Virginia address in ''ADDRESSES'' at the beginning of this document.

Electronic comments can be sent directly to EPA at:

opp-docket@epamail.epa.gov

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comment and data will also be accepted on disks in Wordperfect 5.1/6.1 or ASCII file format. All comments and data in electronic form must be identified by the appropriate docket control number. Electronic comments on this document may be filed online at many Federal Depository Libraries.

List of Subjects

Environmental protection.

Dated: September 3, 1998.

Jack E. Housenger,

Acting Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. 98–24177 Filed 9–8–98; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[OPP–66258; FRL 6024–8]

Notice of Receipt of Requests to Voluntarily Cancel Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with section 6(f)(1) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as amended, EPA is issuing a notice of receipt of requests by registrants to voluntarily cancel certain pesticide registrations.

DATES: Unless a request is withdrawn by March 8, 1999, orders will be issued cancelling all of these registrations.

FOR FURTHER INFORMATION CONTACT: By mail: James A. Hollins, Office of Pesticide Programs (7502C), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location for commercial courier, delivery, telephone number, and e-mail: Rm. 216, CM#2, 1921 Jefferson Davis Highway, Arlington, VA, (703) 305–5761; e-mail: hollins.james@epamail.epa.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

Section 6(f)(1) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as amended, provides that a pesticide registrant may, at any time, request that any of its pesticide registrations be cancelled. The Act further provides that EPA must publish a notice of receipt of any such request in the **Federal Register** before acting on the request.

II. Intent to Cancel

This Notice announces receipt by the Agency of requests to cancel some 47 pesticide products registered under section 3 or 24(c) of FIFRA. These registrations are listed in sequence by registration number (or company number and 24(c) number) in the following Table 1.

TABLE 1. — REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

Registration No.	Product Name	Chemical Name
000070–00191	Kill-Ko Rabon 50% Wettable Powder	2-Chloro-1-(2,4,5-trichlorophenyl)vinyl dimethyl phosphate
000070–00192	Kill-Ko Rabon Livestock Dust	2-Chloro-1-(2,4,5-trichlorophenyl)vinyl dimethyl phosphate
000070–00225	Rigo Dipel Garden Insect Spray	*Bacillus thuringiensis* subsp. kurstaki
000070–00226	Rigo Dipel Bait	*Bacillus thuringiensis* subsp. kurstaki
000070–00227	Rigo 110 Dust Contains Dipel	*Bacillus thuringiensis* subsp. kurstaki
000070–00234	Rigo Garden Dust Special	*Bacillus thuringiensis* subsp. kurstaki
		1-Naphthyl-*N*-methylcarbamate
000491–00194	Selig's Sniper Residual Spray	*o*-Isopropoxyphenyl methylcarbamate
000769–00658	X-Cel Citrus Spray	*O,O,O',O'*-Tetraethyl *S,S'*-methylene bis(phosphorodithioate)
000769–00720	SMCP Dursban* 15 Granular Insecticide	*O,O*-Diethyl *O*-(3,5,6-trichloro-2-pyridyl) phosphorothioate
000769–00845	Pratt Rose & Floral Bomb	Pyrethrins
		Derris resins other than rotenone
		Rotenone
000769–00846	Pratt House Plant Spray Bomb	Pyrethrins
		Rotenone
		Cube Resins other than rotenone
000769–00860	Pratt Thuricide (R)-HPC	*Bacillus thuringiensis* subsp. kurstaki
000769–00923	Science Thuricide, A Natural, Microbial Insect	*Bacillus thuringiensis* subsp. kurstaki
003125 CA–87–0010	Morestan 25% Wettable Powder Miticide, Fungicide, Insecticide	6-Methyl-2,3-quinoxalinedithiol cyclic *S,S*-dithiocarbonate
003125 OR–89–0012	Morestan 25% Wettable Powder Miticide, Fungicide, Insecticide	6-Methyl-2,3-quinoxalinedithiol cyclic *S,S*-dithiocarbonate
003125 OR–90–0010	Morestan 25% Wettable Powder Miticide, Fungicide, Insecticide	6-Methyl-2,3-quinoxalinedithiol cyclic *S,S*-dithiocarbonate
003125 WA–85–0009	Morestan 25% Wettable Powder Miticide, Fungicide	6-Methyl-2,3-quinoxalinedithiol cyclic *S,S*-dithiocarbonate
003125 WA–90–0002	Morestan 25% Wettable Powder Miticide, Fungicide, Insecticide	6-Methyl-2,3-quinoxalinedithiol cyclic *S,S*-dithiocarbonate
005481 WA–83–0007	Vapam Soil Fumigant Solution for All Crops	Sodium *N*-methyldithiocarbamate
005887–00096	Black Leaf Thuricide	*Bacillus thuringiensis* subsp. kurstaki
008845–00087	Hot Shot Flea & Tick Killer	2-Methyl-4-oxo-3-(2-propenyl)-2-cyclopenten-1-yl *d-trans*-2,2-dimethyl-
		N-Octyl bicycloheptene dicarboximide
		O,O-Diethyl *O*-(3,5,6-trichloro-2-pyridyl) phosphorothioate

TABLE 1. — REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION—Continued

Registration No.	Product Name	Chemical Name
		(Butylcarbityl)(6-propylpiperonyl) ether 80% and related compounds 20%
009404–00014	Sunniland Ethion & Oil Spray	*O,O,O',O'*-Tetraethyl *S,S'*-methylene bis(phosphorodithioate)
009444–00128	System 22 Insecticide with Cypermethrin	Cyclopropanecarboxylic acid, 3-(2,2-dichloroethenyl)-2,2-dimethyl-,
010182–00155	Eptam 5.G Selective Herbicide	*S*-Ethyl dipropylthiocarbamate
010182–00160	Eptam 10-G Selective Herbicide	*S*-Ethyl dipropylthiocarbamate
010182–00188	Eptam 6E Emulsifiable Liquid	*S*-Ethyl dipropylthiocarbamate
010182–00210	Eradicane 6-E Emulsifiable Liquid	*S*-Ethyl dipropylthiocarbamate
010182–00244	Eradicane Extra Selective Herbicide	*S*-Ethyl dipropylthiocarbamate
010182–00251	Eptam Plus 6-E	*S*-Ethyl dipropylthiocarbamate
010182–00259	Short-Stop 10-G	*S*-Ethyl dipropylthiocarbamate
010182–00284	Genep EPTC 7EC	*S*-Ethyl dipropylthiocarbamate
010182–00323	Eradicane 25G	*S*-Ethyl dipropylthiocarbamate
010182–00348	Eradacane 7.5-IG Herbicide	*S*-Ethyl dipropylthiocarbamate
010182–00409	BRC605 6.7E Selective Herbicide	*S*-Ethyl dipropylthiocarbamate
		S-Ethyl diisobutylthiocarbamate
010182 NV–93–0001	Diquat Herbicide	6,7-Dihydrodipyrido(1,2-*a*: 2',1'-*c*)pyrazinediium dibromide
010182 WA–93–0012	Diquat	*N,N*-Diethyl-2-(1-naphthalenyloxy)propanamide
010182 WA–95–0027	Karate Insecticide	(R+S)-alpha-Cyano-3-phenoxybenzyl (1*S*+1*R*)-cis-3-(*Z*-2-chloro-3,3,3-
011623–00010	Apollo Wasp and Hornet Killer	o-Isopropoxyphenyl methylcarbamate
		N-Octyl bicycloheptene dicarboximide
		(Butylcarbityl)(6-propylpiperonyl) ether 80% and related compounds 20%
		Pyrethrins
019713 WA–87–0015	Drexel Diuron 4L Herbicide	3-(3,4-Dichlorophenyl)-1,1-dimethylurea
028293–00013	Unicorn Stirofos Flea & Tick Powder	2-Chloro-1-(2,4,5-trichlorophenyl)vinyl dimethyl phosphate
028293–00027	Unicorn Horse Spray-N-Wipe	Dipropyl isocinchomeronate
		N-Octyl bicycloheptene dicarboximide
		(Butylcarbityl)(6-propylpiperonyl) ether 80% and related compounds 20%
		Pyrethrins
		2-Chloro-1-(2,4,5-trichlorophenyl)vinyl dimethyl phosphate
028293–00028	Unicorn Jel Insecticide Repellent	Butoxypolypropylene glycol
		N-Octyl bicycloheptene dicarboximide
		(Butylcarbityl)(6-propylpiperonyl) ether 80% and related compounds 20%
		Pyrethrins
		2-Chloro-1-(2,4,5-trichlorophenyl)vinyl dimethyl phosphate
028293–00076	Unicorn Stirofos Sponge-On for Pets	2-Chloro-1-(2,4,5-trichlorophenyl)vinyl dimethyl phosphate
034704–00682	Bt-25 Biological Insecticide	*Bacillus thuringiensis* subsp. kurstaki
055638–00010	Foil Bfc Oil Flowable Bioinsecticide	*Bacillus thuringiensis* subsp. kurstaki strain EG 2424
057908 WA–78–0030	RO-Neet 6E A Selective Herbicide Emulsifiable Liquid	*S*-Ethyl cyclohexylethylthiocarbamate
069361–00005	Compound PA-14 Avian Stressing Agent	alpha-C11–15-sec-alkyl-omega-hydroxypoly(oxy-1,2-ethanediyl)

Unless a request is withdrawn by the registrant within 180 days of publication of this notice, orders will be issued cancelling all of these registrations. Users of these pesticides or anyone else desiring the retention of a registration should contact the applicable registrant directly during this 180–day period. The following Table 2, includes the names and addresses of record for all registrants of the products in Table 1, in sequence by EPA Company Number.

TABLE 2. — REGISTRANTS REQUESTING VOLUNTARY CANCELLATION

EPA Company No.	Company Name and Address
000070	SureCo Inc., An Indirect Subsidiary of Ringer Corporation, 9555 James Ave. South, Suite 200, Bloomington, MN 55431.
000491	The Selig Chemical Industries, 840 Selig Dr SW, Atlanta, GA 30378.
000769	SureCo Inc., An Indirect Subsidiary of Ringer Corporation, 9555 James Ave. South, Suite 200, Bloomington, MN 55431.
003125	Bayer Corp., Agriculture Division, 8400 Hawthorn Rd., Box 4913, Kansas City, MO 64120.
005481	Amvac Chemical Corp., Attn: W. F. Millar, 2110 Davie Ave., Commerce, CA 90040.
005887	SureCo Inc., An Indirect Subsidiary of Ringer Corporation, 9555 James Ave.South, Suite 200, Bloomington, MN 55431.
008845	Spectrum Group, Div of United Industries Corp., Box 15842, St Louis, MO 63114.
009404	Sunniland Corp., Box 8001, Sanford, FL 32772.
009444	Waterbury Companies Inc., Box 640, Independence, LA 70443.
010182	Zeneca Ag Products, Box 15458, Wilmington, DE 19850.
011623	Apollo Industries Inc., 1850 South Cobb Industrial Blvd., Smyrna, GA 30082.
019713	Drexel Chemical Co, 1700 Channel Ave., Box 13327, Memphis, TN 38113.
028293	Unicorn Laboratories, 12385 Automobile Blvd., Clearwater, FL 33762.
034704	Cherie Garner, Agent For: Platte Chemical Co Inc., Box 667, Greeley, CO 80632.
055638	Ecogen Inc., 2005 Cabot Blvd W., Langhorne, PA 19047.
057908	Metam Sodium Task Force, c/o Stauffer Chemical Co., 1200 South 47th St, Richmond, CA 94804.
069361	Mandava Associates, Agent For: Repar Corp., 1625 K Street, NW, Suite 501, Washington, DC 20006.

III. Loss of Active Ingredients

Unless the request for cancellation is withdrawn, one pesticide active ingredient will no longer appear in any registered products. Those who are concerned about the potential loss of this active ingredient for pesticidal use are encouraged to work directly with the registrant to explore the possibility of withdrawing their request for cancellation. The active ingredient is listed in the following Table 3, with the EPA company and chemical name.

TABLE 3. — ACTIVE INGREDIENTS WHICH WOULD DISAPPEAR AS A RESULT OF REGISTRANTS' REQUESTS TO CANCEL

Chemical Name	EPA Company No.
Bacillus thuringiensis subsp. kurstaki strain EG2424	055638

IV. Procedures for Withdrawal of Request

Registrants who choose to withdraw a request for cancellation must submit such withdrawal in writing to James A. Hollins, at the address given above, postmarked before March 8, 1999. This written withdrawal of the request for cancellation will apply only to the applicable 6(f)(1) request listed in this notice. If the product(s) have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling. The withdrawal request must also include a commitment to pay any reregistration fees due, and to fulfill any applicable unsatisfied data requirements.

V. Provisions for Disposition of Existing Stocks

The effective date of cancellation will be the date of the cancellation order. The orders effecting these requested cancellations will generally permit a registrant to sell or distribute existing stocks for 1 year after the date the cancellation request was received. This policy is in accordance with the Agency's statement of policy as prescribed in **Federal Register** (56 FR 29362) June 26, 1991; [FRL 3846–4]. Exceptions to this general rule will be made if a product poses a risk concern, or is in noncompliance with reregistration requirements, or is subject to a data call-in. In all cases, product-specific disposition dates will be given in the cancellation orders.

Existing stocks are those stocks of registered pesticide products which are currently in the United States and which have been packaged, labeled, and released for shipment prior to the effective date of the cancellation action. Unless the provisions of an earlier order apply, existing stocks already in the hands of dealers or users can be distributed, sold or used legally until they are exhausted, provided that such further sale and use comply with the EPA-approved label and labeling of the affected product(s). Exceptions to these general rules will be made in specific cases when more stringent restrictions on sale, distribution, or use of the products or their ingredients have already been imposed, as in Special Review actions, or where the Agency has identified significant potential risk concerns associated with a particular chemical.

List of Subjects

Environmental protection, Pesticides and pests, Product registrations.

Dated: August 18, 1998.

Linda A. Travers,

Director, Information Resources and Services Division, Office of Pesticide Programs.

[FR Doc. 98–24187 Filed 9–8–98; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[OPP–00545; FRL–6025–4]

Waiver of Fees Associated With Tolerance Objections

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: EPA has issued an updated policy concerning waivers of fees associated with filing objections to tolerance actions under the Federal Food, Drug, and Cosmetic Act (FFDCA). The policy is available as a Pesticide Registration (PR) Notice entitled ''Waiver of Fees Associated with Tolerance Objections.'' Interested parties may request a copy of the Agency's policy as set forth in the ''ADDRESSES'' unit of this document.

ADDRESSES: The PR Notice is available from Jim Tompkins; by mail: Registration Division (7505C), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 239, CM #2, 1921 Jefferson Davis Highway, Arlington, VA, (703) 305–5697, e-mail: tompkins.jim@epa.gov.

FOR FURTHER INFORMATION CONTACT: By mail: Jim Tompkins, Environmental Protection Agency (7505C), 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 713B, CM #2, 1921 Jefferson Davis Highway, Arlington, VA, (703) 305–5697, fax: 703–305–6920, e-mail: tompkins.jim@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Electronic Availability

A. Internet

Electronic copies of this document and the draft PR Notice also are available from the EPA Home Page at the **Federal Register**-Environmental Documents entry for this document under ''Laws and Regulations'' (http://www.epa.gov/fedrgstr/).

B. Fax-on-Demand

For Fax-on-Demand, use a faxphone to call 202–401–0527 and select item 6117 for a copy of the PR Notice.

II. Summary of the PR Notice

This **Federal Register** document announces the availability of a Pesticide Registration (PR) Notice which updates EPA's policy concerning waivers of fees associated with filing objections to tolerance actions under the FFDCA. Specifically, EPA's tolerance fees regulations require that objections ''shall be accompanied by a fee of $3,275.'' The regulations, however, also provide a procedure to request that EPA ''waive or refund part or all of any fee imposed by this section'' [§ 180.33(m)]. EPA does not construe these provisions as requiring objectors who believe they are entitled to a waiver of fees to file the specified fee with the objections and thereafter seek a refund. Rather, such a person may file a written request for a waiver of the objection fee with the objection. A fee of $1,600 must accompany the waiver request unless the objector has no financial interest in the matter objected to. If EPA later determines that a fee waiver is inappropriate, that determination will not affect the timeliness of the filing of the objections; however, further action on the objections will not proceed until the fee has been paid. Failure to pay the fee following denial of a waiver would be grounds for denial of the objections.

III. Public Docket

This document is filed in the Office of Pesticide Programs's Docket Office under docket control number ''OPP–00545.'' The public record is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The public record is located in Rm. 119, CM #2, 1921 Jefferson Davis Highway, Arlington, VA. To contact the docket office by mail, telephone, or e-mail: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; (703) 305–5805; e-mail: opp-docket@epamail.epa.gov.

List of Subjects

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests.

Dated: August 25, 1998.

James Jones,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 98–24035 Filed 9–8–98; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6158–1]

Notice of Proposed Prospective Purchaser Agreement Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as Amended by the Superfund Amendments and Reauthorization Act, Clear Creek/Central City Superfund Site, Chase Gulch #1 Priority Location

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for public comment.

SUMMARY: Notification is hereby given of a Proposed Prospective Purchaser Agreement (PPA) associated with the Clear Creek/Central City Superfund Site, Chase Gulch #1 Priority Location located at Millsite 50, Bates Road 222, in the City of Black Hawk, Gilpin County, Colorado. This Agreement is subject to final approval after the comment period. The Prospective Purchaser Agreement would resolve certain potential EPA claims under sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 (CERCLA), against Roger D. Leclerc, the prospective purchaser (the purchaser).

The settlement would require the purchaser to cleanup the Property to the levels set forth in EPA's Record of Decision and to pay the U.S. Environmental Protection Agency $2,500. The purchaser intends to use the purchased property for housing and housing for others. The purchaser agreed to provide EPA with an irrevocable right of access to the Site, to conduct all activities in compliance with all applicable local, State, and federal laws and regulations, and to exercise due care at the Site. The purchaser will record a copy of the PPA with the local Recorder's Office, and thereafter, each deed, title, or other instrument conveying an interest in the Property shall contain a notice stating that the Property is subject to the Agreement.

For thirty (30) days following the date of publication of this document, the Agency will receive written comments relating to the proposed settlement. The Agency's response to any comments received will be available for public inspection at the Superfund Records Center at the U.S. Environmental

Protection Agency, Region VIII, 999 18th Street, Denver, Colorado, 80202.

DATES: Comments must be submitted on or before October 9, 1998.

ADDRESSES: The proposed settlement is available for public inspection at the U.S. Environmental Protection Agency, Region VIII, 999 18th Street, Denver, Colorado, 80202. A copy of the proposed Agreement may be obtained from Mia Wood, Enforcement Attorney, U.S. Environmental Protection Agency, Region VIII, 999 18th Street, Denver, Colorado, 80202. Comments should reference the ''Clear Creek/Central City Superfund Site, Chase Gulch #1 Priority Location Prospective Purchaser Agreement'' and should be forwarded to Paul Rogers, Enforcement Specialist, at the U.S. Environmental Protection Agency, Region VIII, 8ENF–T, 999 18th Street, Denver, Colorado, 80202.

FOR FURTHER INFORMATION CONTACT: Paul Rogers, Enforcement Specialist, U.S. Environmental Protection Agency, Region VIII, 8ENF–T, 999 18th Street, Denver, Colorado, 80202, (303) 312–6356.

Dated: August 28, 1998.

Martin Hestmark,

Acting Assistant Regional Administrator, Office of Enforcement, Compliance and Environmental Justice, Region VIII.

[FR Doc. 98–24144 Filed 9–8–98; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[DA 98–1705]

Dispatch Interactive Television Request

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: On August 25, 1998, the Public Safety and Private Wireless Division released a public notice seeking comments on a request made by Dispatch Interactive Television, Inc. (DITV), for a declaratory ruling and waiver of the Commission's IVDS service rules. The waiver was requested to permit DITV to provide one-way voice or data transmission services, including paging services, over an interactive video and data service (IVDS) system it proposes to build in Indianapolis, Indiana.

DATES: Comments are due September 15, 1998 and reply comments are due September 30, 1998.

ADDRESSES: Federal Communications Commission, Room 222, 1919 M St., N.W. Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: James Moskowitz, Wireless Telecommunications Bureau, Public Safety & Private Wireless Division, (202) 418–0680, or via E-mail to ''jmoskowi@fcc.gov''.

SUPPLEMENTARY INFORMATION:

1. On June 9, 1998, Dispatch Interactive Television, Inc. (DITV), filed a Request for Waiver and Declaratory Ruling of §§ 95.855 and 95.859(a) of the Commission's Rules (Waiver Request). DITV seeks to provide one-way voice or data transmission services, including paging services, over an interactive video and data service (IVDS) system it proposes to build in Indianapolis, Indiana. The Commission now invites comment on this request.

2. DITV holds the B Block IVDS license in the Indianapolis Metropolitan Statistical Area (MSA), call sign KIVD0037. DITV is a wholly owned subsidiary of the Dispatch Printing Company, which in turn holds the license for television Channel 13 in Indianapolis, call sign WTHR. The system outlined by DITV in its Wavier Request contains a single cell transmitter station (CTS) co-located upon the antenna used by WTHR. DITV seeks permission to operate this CTS at up to 250 watts effective radiated power (ERP). Section 95.855 of the Commission's Rules, 47 CFR 95.855, limits the ERP of CTSs to 20 Watts ERP and Section 95.859(a), 47 CFR 95.859(a), further limits the ERP of CTS units to below 20 Watts if their antenna height above average terrain (HAAT) exceeds 36.6 meters. DITV's IVDS transmitter will be placed 212.2 meters HAAT.

3. DITV argues that its Waiver Request should be granted because the rules at issue were intended to ensure that IVDS signals would not interfere with TV Channel 13. DITV maintains that the design of its system eliminates this concern because co-locating the IVDS transmitting antenna with the TV Channel 13 antenna will ensure that the transmitting power disparity between WTHR and the IVDS signal will be maintained throughout WTHR's service area at approximately 10,000 to 1. This, DITV states, will ensure that the IVDS transmissions from the CTS will not interfere with the TV Channel 13 signal.

4. DITV further argues that granting its Waiver Request will serve the public interest by facilitating its efforts to obtain the equipment necessary to build and operate its IVDS system. DITV states that it cannot proceed with the development, manufacture, and purchase of equipment until it determines that the proposed system will be allowed to operate.

5. Interested parties may file comments on DITV's Waiver Request no later than September 15, 1998. Parties interested in submitting reply comments must do so no later than September 30, 1998. All comments should reference DITV's Waiver Request, and File No., DA 98–1705, and should be filed with the Office of Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. A copy of each filing should be sent to International Transcription Service, Inc. (ITS), 1231 20th Street, N.W.,Washington, D.C. 20036, (202) 857–3800 and to James Moskowitz, Federal Communications Commission, Wireless Telecommunications Bureau, Public Safety and Private Wireless Division, 2025 M Street, N.W., Room 8010, Washington, D.C. 20554.

6. The full text of the petition, comments, and reply comments are available for inspection and duplication during regular business hours in the Public Safety and Private Wireless Division of the Wireless Telecommunications Bureau, Federal Communications Commission, 2025 M Street, N.W., Room 8010, Washington, D.C. 20554. Copies may also be obtained from International Transcription Service, Inc. (ITS), 1231 20th Street, N.W.,Washington, DC 20036, (202) 857–3800.

7. For further information, contact James Moskowitz of the Public Safety and Private Wireless Division at (202) 418–0680 or via E-Mail at jmoskowi@fcc.gov.

Federal Communications Commission.

D'wana R. Terry,

Division Chief, Public Safety & Private Wireless Division.

[FR Doc. 98–24083 Filed 9–8–98; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA–1230–DR]

Iowa; Amendment No. 11 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Iowa, (FEMA–1230–DR), dated July 2, 1998, and related determinations.

EFFECTIVE DATE: August 31, 1998.

FOR FURTHER INFORMATION CONTACT: Madge Dale, Response and Recovery Directorate, Federal Emergency

Management Agency, Washington, DC 20472, (202) 646–3260.

SUPPLEMENTARY INFORMATION: The notice of a major disaster for the State of Iowa, is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of July 2, 1998:

Decatur and Union Counties for Individual Assistance.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 83.537, Community Disaster Loans; 83.538, Cora Brown Fund Program; 83.539, Crisis Counseling; 83.540, Disaster Legal Services Program; 83.541, Disaster Unemployment Assistance (DUA); 83.542, Fire Suppression Assistance; 83.543, Individual and Family Grant (IFG) Program; 83.544, Public Assistance Grants; 83.545, Disaster Housing Program; 83.548, Hazard Mitigation Grant Program.)

Lacy E. Suiter,

Executive Associate Director, Response and Recovery Directorate.

[FR Doc. 98–24155 Filed 9–8–98; 8:45 am]

BILLING CODE 6718–02–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA–3126–EM]

Kansas; Amendment No. 1 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency for the State of Kansas, (FEMA–3126–EM), dated June 9, 1998, and related determinations.

EFFECTIVE DATE: August 31, 1998.

FOR FURTHER INFORMATION CONTACT: Madge Dale, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3260.

SUPPLEMENTARY INFORMATION: The notice of an emergency for the State of Kansas is hereby amended to include Category B (Emergency Protective Measures) under Public Assistance for the following areas among those areas determined to have been adversely affected by the catastrophe declared an emergency by the President in his declaration of June 9, 1998:

The counties of Sedgwick and Harvey for Category B under Public Assistance.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 83.537, Community Disaster Loans; 83.538, Cora Brown Fund Program; 83.539, Crisis Counseling; 83.540, Disaster Legal Services Program; 83.541, Disaster Unemployment Assistance (DUA); 83.542, Fire Suppression Assistance; 83.543, Individual and Family Grant (IFG) Program; 83.544, Public Assistance Grants; 83.545, Disaster Housing Program; 83.548, Hazard Mitigation Grant Program.)

Lacy E. Suiter,

Executive Associate Director, Response and Recovery Directorate.

[FR Doc. 98–24159 Filed 9–8–98; 8:45 am]

BILLING CODE 6718–02–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA–1240–DR]

North Carolina; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of North Carolina (FEMA–1240–DR), dated August 27, 1998, and related determinations.

EFFECTIVE DATE: August 27, 1998.

FOR FURTHER INFORMATION CONTACT: Madge Dale, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3260.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated August 27, 1998, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*), as follows:

I have determined that the damage in certain areas of the State of North Carolina, resulting from Hurricane Bonnie on August 25, 1998, and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, P.L. 93–288, as amended (''the Stafford Act''). I, therefore, declare that such a major disaster exists in the State of North Carolina.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes, such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance, Hazard Mitigation and Public Assistance. The Federal share of assistance for Categories A and B (debris removal and emergency protective measures) under the Public Assistance program will be at 100 percent Federal funding for the first 72 hours in the designated areas. I have also authorized direct Federal assistance for the first 72 hours at 100 percent Federal funding. The time period for this direct Federal assistance funding may be extended by FEMA, if warranted. Consistent with the requirement that Federal assistance be supplemental, after the first 72 hours, any Federal funds provided under the Stafford Act for Public Assistance or Hazard Mitigation will be limited to 75 percent of the total eligible costs.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

Notice is hereby given that pursuant to the authority vested in the Director of the Federal Emergency Management Agency under Executive Order 12148, I hereby appoint Glenn Woodard of the Federal Emergency Management Agency to act as the Federal Coordinating Officer for this declared disaster.

I do hereby determine the following areas of the State of North Carolina to have been affected adversely by this declared major disaster:

Beaufort, Brunswick, Carteret, Currituck, Dare, Hyde, New Hanover, Onslow, Pamlico and Pender Counties for Individual Assistance and Public Assistance. The federal share assistance for Categories A and B (debris removal and emergency protective measures) under the Public Assistance program will be at 100 percent Federal funding for the first 72 hours in the designated areas. Further, direct Federal assistance will be provided for the first 72 hours at 100 percent Federal funding. The time period for this direct Federal assistance may be extended, if warranted.

All counties within the State of North Carolina are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 83.537, Community Disaster Loans; 83.538, Cora Brown Fund Program; 83.539, Crisis Counseling; 83.540, Disaster Legal Services Program; 83.541, Disaster Unemployment Assistance (DUA); 83.542, Fire Suppression Assistance; 83.543, Individual and Family Grant (IFG) Program; 83.544, Public Assistance Grants; 83.545, Disaster Housing Program; 83.548, Hazard Mitigation Grant Program.)

James L. Witt,

Director.

[FR Doc. 98–24158 Filed 9–8–98; 8:45 am]

BILLING CODE 6718–02–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA–1239–DR]

Texas; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Texas, (FEMA–1239–DR), dated August 26, 1998, and related determinations.

EFFECTIVE DATE: August 30, 1998.

FOR FURTHER INFORMATION CONTACT: Madge Dale, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3260.

SUPPLEMENTARY INFORMATION: The notice of a major disaster for the State of Texas, is hereby amended to include Categories A and B (debris removal and emergency protective measures) under the Public Assistance program among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of August 26, 1998.

Maverick County for Individual Assistance.

Val Verde County for Categories A and B (debris removal and emergency protective measure) under the Public Assistance program (already designated for Individual Assistance).

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 83.537, Community Disaster Loans; 83.538, Cora Brown Fund Program; 83.539, Crisis Counseling; 83.540, Disaster Legal Services Program; 83.541, Disaster Unemployment Assistance (DUA); 83.542, Fire Suppression Assistance; 83.543, Individual and Family Grant (IFG) Program; 83.544, Public Assistance Grants; 83.545, Disaster Housing Program; 83.548, Hazard Mitigation Grant Program.)

Lacy E. Suiter,

Executive Associate Director, Response and Recovery Directorate.

[FR Doc. 98–24156 Filed 9–8–98; 8:45 am]

BILLING CODE 6718–02–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA–1239–DR]

Texas; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Texas (FEMA–1239–DR), dated August 26, 1998, and related determinations.

EFFECTIVE DATE: August 31, 1998.

FOR FURTHER INFORMATION CONTACT: Madge Dale, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3260.

SUPPLEMENTARY INFORMATION: The notice of a major disaster for the State of Texas, is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of August 26, 1998.

Kinney, Real, Uvalde and Webb Counties for Individual Assistance.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 83.537, Community Disaster Loans; 83.538, Cora Brown Fund Program; 83.539, Crisis Counseling; 83.540, Disaster Legal Services Program; 83.541, Disaster Unemployment Assistance (DUA); 83.542, Fire Suppression Assistance; 83.543, Individual and Family Grant (IFG) Program; 83.544, Public Assistance Grants; 83.545, Disaster Housing Program; 83.548, Hazard Mitigation Grant Program.)

Lacy E. Suiter,

Executive Associate Director, Response and Recovery Directorate.

[FR Doc. 98–24157 Filed 9–8–98; 8:45 am]

BILLING CODE 6718–02–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA–1239–DR]

Texas; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Texas, (FEMA–1239–DR), dated August 26, 1998, and related determinations.

EFFECTIVE DATE: August 27, 1998.

FOR FURTHER INFORMATION CONTACT: Madge Dale, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3260.

SUPPLEMENTARY INFORMATION: The notice of a major disaster for the State of Texas, is hereby amended to include direct Federal assistance at 75 percent Federal funding among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of August 26, 1998.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 83.537, Community Disaster Loans; 83.538, Cora Brown Fund Program; 83.539, Crisis Counseling; 83.540, Disaster Legal Services Program; 83.541, Disaster Unemployment Assistance (DUA); 83.542, Fire Suppression Assistance; 83.543, Individual and Family Grant (IFG) Program; 83.544, Public Assistance Grants; 83.545, Disaster Housing Program; 83.548, Hazard Mitigation Grant Program.)

Lacy E. Suiter,

Executive Associate Director, Response and Recovery Directorate.

[FR Doc. 98–24163 Filed 9–8–98; 8:45 am]

BILLING CODE 6718–02–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA–1228–DR]

Vermont; Amendment No. 4 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Vermont (FEMA–1228–DR), dated June 30, 1998 and related determinations.

EFFECTIVE DATE: August 19, 1998.

FOR FURTHER INFORMATION CONTACT: Madge Dale, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3260.

SUPPLEMENTARY INFORMATION: In a letter dated August 19, 1998, the President amended his initial declaration letter to reflect the incident period for this disaster as June 17, 1998, through and including August 17, 1998.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 83.537, Community Disaster Loans; 83.538, Cora Brown Fund Program; 83.539, Crisis Counseling; 83.540, Disaster Legal Services Program; 83.541, Disaster Unemployment Assistance (DUA); 83.542, Fire Suppression Assistance; 83.543, Individual and Family Grant (IFG) Program; 83.544, Public Assistance Grants; 83.545, Disaster Housing Program; 83.548, Hazard Mitigation Grant Program.)

Dennis H. Kwiatkowski,

Deputy Associate Director, Response and Recovery Directorate.

[FR Doc. 98–24161 Filed 9–8–98; 8:45 am]

BILLING CODE 6718–02–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA–1238–DR]

Wisconsin; Amendment No. 4 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Wisconsin, (FEMA–1238–DR), dated August 12, 1998, and related determinations.

EFFECTIVE DATE: August 25, 1998.

FOR FURTHER INFORMATION CONTACT: Madge Dale, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3260.

SUPPLEMENTARY INFORMATION: The notice of a major disaster for the State of Wisconsin, is hereby amended to include the following area among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of August 12, 1998.

Racine County for Individual Assistance.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 83.537, Community Disaster Loans; 83.538, Cora Brown Fund Program; 83.539, Crisis Counseling; 83.540, Disaster Legal Services Program; 83.541, Disaster Unemployment Assistance (DUA); 83.542, Fire Suppression Assistance; 83.543, Individual and Family Grant (IFG) Program; 83.544, Public Assistance Grants; 83.545, Disaster Housing Program; 83.548, Hazard Mitigation Grant Program.)

Lacy E. Suiter,

Executive Associate Director, Response and Recovery Directorate.

[FR Doc. 98–24162 Filed 9–8–98; 8:45 am]

BILLING CODE 6718–02–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

National Flood Insurance Program; Call for Issues

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice with request for comments.

SUMMARY: FEMA's Federal Insurance Administration (FIA) and Mitigation Directorate (MT) give notice inviting the public to recommend how the National Flood Insurance Program (NFIP) may be made more effective.

DATES: Comments should be submitted by November 9, 1998.

ADDRESSES: Please submit your comments in the requested format to: National Flood Insurance Program, Call for Issues Project, Federal Emergency Management Agency, 500 C Street SW., room 430, Washington, DC 20472.

FOR FURTHER INFORMATION CONTACT: H. Joseph Coughlin, Jr., Assistant to the Federal Insurance Administrator, the Federal Insurance Administration, 500 C Street SW., Washington, DC 20472, (202) 646–3449, or Michael Robinson, Program Specialist, Program Assessment and Outreach Division, the Mitigation Directorate, 500 C Street SW., Washington, DC 20472, (202) 646–2716.

SUPPLEMENTARY INFORMATION: FEMA is providing an opportunity to partners and customers of the NFIP to provide input on how to improve the effectiveness of the program through a ''call for issues.'' Comments may focus on but are not limited to: the NFIP's laws, its regulations, and its policies; the language of the Standard Flood Insurance Policy; the flood insurance manual; the NFIP's procedures or forms; flood hazard mapping guidelines, specifications, or procedures; the NFIP's floodplain management requirements, policies, and technical guidance; and marketing, training, and public information efforts. FEMA will also consider any recommendations on reinventing the NFIP through innovative approaches.

Anyone wishing FEMA to consider recommendations to improve the NFIP's effectiveness should use the following format:

Issue: Briefly state the nature of the issue, concern, or problem.

Description: Identify the specific program reference, that is, where the issue is found in statute, regulations, insurance manuals, insurance policy, form, procedure, etc. Cite any applicable references to section, sub-section, page, paragraph number, line, etc. Explain also why the issue is a problem for NFIP's customers and why it should be changed.

Suggestion: Offer a specific suggestion on how the issue may be addressed. Include specific language changes, where appropriate, and where such changes should be made. Explain also the benefits to the NFIP's customers.

FEMA will evaluate each submission on its costs and benefits, the overall impact on the NFIP, service to its policyholders, and ease of adoption. FEMA's decisions will be reflected in a report to be published in the third quarter of fiscal year 1999.

Dated: August 31, 1998.

Jo Ann Howard,

Administrator, Federal Insurance Administration.

Michael J. Armstrong,

Associate Director, Mitigation Directorate.

[FR Doc. 98–24160 Filed 9–8–98; 8:45 am]

BILLING CODE 6718–03–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

Publication of Radiological Emergency Preparedness (REP) Program Strategic Review Draft Final Recommendations

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice with request for comments.

SUMMARY: In June 1996, FEMA initiated a Strategic Review of the REP Program in order to improve, streamline, and enhance the efficiency and effectiveness of the Program. A Strategic Review Steering Committee (SRSC) guided the Review, developed four concept papers based on stakeholder suggestions, and held a series of stakeholder meetings across the country. The SRSC submitted one concept paper to the FEMA and NRC Offices of General Counsel for further review and consolidated the remaining three concept papers into this document.

DATES: We invite your comments on these proposed recommendations. Please submit any comments on or before October 26, 1998.

ADDRESSES: Please address your comments to the Rules Docket Clerk, Office of the General Counsel, Federal Emergency Management Agency, room 840, 500 C Street SW., Washington, DC 20472; (telefax) (202) 646–4536, or (email) *rules@fema.gov*.

FOR FURTHER INFORMATION CONTACT: Vanessa E. Quinn, Acting Chief, State and Local Regulatory Evaluation and Assessment Branch, Exercises Division, Preparedness, Training, and Exercises Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–3664, or (email) *vanessa.quinn@fema.gov*.

SUPPLEMENTARY INFORMATION:

Radiological Emergency Preparedness Program Strategic Review Steering Committee Draft Final Recommendations

The Director of the Federal Emergency Management Agency (FEMA) established the independent Strategic Review Steering Committee (SRSC) in June 1996. Steering

Committee members were drawn from both FEMA and the Nuclear Regulatory Commission (NRC). The purpose of the SRSC was to solicit comments from stakeholders of the Radiological Emergency Preparedness (REP) Program, to consider ways to streamline the program, and to develop recommendations.

The SRSC has developed the following preliminary recommendations and will continue to refine them in light of additional comments. In making the SRSC draft recommendations public, FEMA invites further comment. It should be noted that neither FEMA nor the NRC has formally reviewed, endorsed, or adopted any of the recommendations in their present form. The final recommendations will undergo the appropriate FEMA and NRC review processes. The draft final recommendations follow.

Executive Summary

REP Program: Establishment and Activities

The REP Program was established as a consequence of the March 1979 accident at the Three Mile Island nuclear power plant. In December 1979, the lead Federal role for offsite radiological emergency activities pertaining to U.S. commercial nuclear power plants was transferred from the NRC to FEMA. Subsequent actions initiated by Congress, the NRC, and FEMA established the legal and regulatory foundation for a joint NRC/FEMA REP Program.

Under its REP Program, FEMA:

- Reviews and approves State and local government plans for preparing for and responding to a commercial nuclear power plant incident.
- Evaluates State and local biennial exercises of these plans. A joint NRC/FEMA document, NUREG–0654/FEMA–REP–1, Revision 1, contains the 16 Planning Standards used by FEMA in reviewing plans and evaluating exercises.
- Provides findings to the NRC with respect to the adequacy of State and local plans, as measured against the 16 Planning Standards, that there is ''reasonable assurance'' that these plans can be implemented. Reasonable assurance is defined as assurance that the health and safety of the public living in the vicinity of a commercial nuclear power plant can be protected in the event of an incident at the nuclear power plant. Currently, FEMA's confirmation of the adequacy of emergency preparedness at each site is primarily based on the results of the evaluated biennial exercises.
- Conducts training courses pertaining to the evaluation of State and local government radiological emergency planning and preparedness.
- Reviews and approves State and local government systems for the alert and notification of the public in the event of a radiological emergency.
- Coordinates Federal agency assistance to State and local governments in planning and preparing for a radiological emergency; chairs a Federal interagency committee, the Federal Radiological Preparedness Coordinating Committee (FRPCC).

Background of the REP Program Strategic Review

In June 1996, considering the 17-year maturity of the REP Program and Stakeholder requests for a reconsideration of Program requirements and implementation, FEMA initiated a Strategic Review. The SRSC, with membership from FEMA Headquarters and Regions and the NRC, was chartered to undertake a formal review of REP activities. While undertaking this effort to improve, streamline, and enhance the efficiency and effectiveness of the REP Program, the SRSC was mindful of the provisions of the Government Performance and Results Act and the National Performance Review.

This Review was announced in the **Federal Register** on July 8, 1996, and suggestions for improvement were solicited from the REP community. On the basis of comments from Stakeholders, four draft concept papers were developed and presented to the REP community through a series of meetings held in various parts of the U.S. The concept papers addressed the following subjects: Exercise Streamlining, Partnership, Radiological Focus, and Delegated States. After considering comments received on the concept papers, one of the papers, Delegated States, was forwarded to FEMA and the NRC's Office of General Counsel for further review; the other three were consolidated into the subject document. Five major recommendations were made.

In addition to the major recommendations, which are summarized below, several potential short-term improvements to the REP Program were identified during the review process and implemented by FEMA. Specifically, FEMA has (1) established a Regional Assistance Committee (RAC) Chairpersons Advisory Council (RAC AC) that reports to the FRPCC; this Advisory Committee has already improved coordination, communication, and consistency among FEMA's Regions; (2) proposed legislation establishing a REP Program Fund, which will ensure continuity, the availability of funds until expended, and a measure of flexibility that will support the REP Program significantly better than the current budget system; (3) reorganized the REP Program, uniting FEMA Headquarters' REP Program functions in one location; and (4) established a REP Home Page.

Summary of Major Recommendations

Recommendation 1—Streamline the REP Program. The SRSC recommends that: the exercise evaluation process be streamlined by consolidating, combining, and/or eliminating objectives and evaluation criteria; flexibility in exercise scenarios be increased; the increased importance of the Annual Letter of Certification (ALC) be emphasized and ALC requirements be consistent among the FEMA Regions; additional approaches be provided, for use in conjunction with a streamlined program, to demonstrate and confirm reasonable assurance; and REP policy and guidance be revised to support a streamlined program.

Recommendation 2—Increase Federal Participation in REP Exercises. The SRSC recommends that: FEMA take a lead role in planning and coordinating federal participation in emergency preparedness exercises; FEMA complete the development and incorporation of the Radiological Incident Annex to the Federal Response Plan; an interagency task group be established to review the charters of the various response committees to determine if the committees' responsibilities can be streamlined to be more efficient; FRPCC agencies identify additional resources to enable them to participate in radiological preparedness and response activities; the role of the FRPCC in developing REP policy be reinforced; agencies' radiological preparedness and response training courses be reviewed and revised, as necessary, to reflect current concepts and experience; and a REP-funded position be established in FEMA's Response and Recovery Directorate.

Recommendation 3—Use State, Local, and Tribal Personnel as Federal Evaluators. The SRSC recommends that FEMA use State, local, and tribal personnel as Federal evaluators in the exercise process under certain conditions; FEMA develop a Memorandum of Understanding (MOU) that addresses the relationship between FEMA and the non-Federal evaluator; and the RAC AC develop qualification standards that will be applied to all evaluators, who would be subject to

performance reviews after the evaluation process has been completed.

Recommendation 4—Include Native American Tribal Nations in the REP Preparedness Process. The SRSC recommends that FEMA's American Indian and Alaska Native Policy be reviewed to identify areas for Federal and tribal REP relationships; all Federally recognized tribes within the emergency planning zones (EPZ) be identified and current relationships be determined; FEMA coordinate with other Federal agencies to identify current policies and practices; and FEMA work with tribal representatives and other Federal agencies to develop an approach to increase tribal involvement in REP activities.

Recommendation 5—Enhance the REP Training Program. The SRSC recommends that: FEMA establish qualification standards for REP exercise evaluators and establish an enhanced training curriculum for REP evaluators; opportunities for FEMA REP staff to teach evaluator training be increased; current radiological courses be revised as required by the outcomes of the REP review and REP training course development, revision, and delivery be included in the REP budget; and a REP Program Administration Course be developed for all REP staff.

Announcement of SRSC Results

An Emergency Education Network (EENET) broadcast was held on July 30, 1998, where SRSC members presented proposed recommendations and answered questions. In addition, the proposed recommendations were posted on FEMA's REP Home Page and will be shared at meetings and conferences during the next few months.

Implementation Strategy

The SRSC anticipates formally conveying the final recommendations to the FEMA Headquarters REP Program Office in, approximately, October. Having completed its chartered mission, the SRSC will then be dissolved. Headquarters, the RAC Chairs for the nine FEMA Regions that have REP Programs, and REP Program staff will then work with the REP community to implement the changes.

Considerations and Results

While conducting its Review and formulating recommendations, the SRSC established as a goal the improvement of relations with REP Stakeholders. The Committee feels that Federal, State, tribal, and local relationships have been strengthened as a result of the Review, and that these partners will continue to be actively involved in the implementation phase. FEMA plans to conduct REP Partnership Workshops with participation from the REP community. A Workshop for the FEMA REP staff is being planned for December of this year, in preparation for FEMA's Stakeholder Partnership Workshops.

Paramount in the Committee's deliberations was the requirement to preserve the REP Program's mission of providing reasonable assurance that the health and safety of the public living in the vicinity of commercial nuclear power plants can be protected. As a result of the Review, the amount of pertinent information available to FEMA's Regional Directors when considering a reasonable assurance finding has been expanded. The SRSC believes that implementation of its recommendations will maintain the well-regarded discipline of the REP Program of the past, while increasing the flexibility and efficiency of the REP Program of the future.

Introduction

In December 1979, President Carter assigned the lead Federal role for offsite radiological emergency activities pertaining to U.S. commercial nuclear power plants to FEMA as a result of the March 1979 accident at the Three Mile Island nuclear power plant. Subsequent actions initiated by Congress, the NRC, and FEMA established the legal and regulatory foundation for a joint NRC/FEMA REP Program.

Within the framework of its REP Program, FEMA:

- Reviews and approves State and local government plans.
- Evaluates State and local biennial exercises of these plans.
- Provides findings to the NRC with respect to the adequacy of State and local plan and makes a determination of reasonable assurance that public health and safety can be protected.
- Conducts training courses.
- Approves State and local Alert and Notification systems.
- Coordinates Federal agency assistance to State and local governments in planning and preparing for a radiological emergency.

Over its 19-year history, REP Program communities have developed some of the best-prepared emergency managers in the nation. REP Program stakeholders felt that this capability had not been recognized in the current implementation of the REP Program and its rules and regulations.

In response to comments received recommending program changes, FEMA decided to undertake a Strategic Review of the REP Program. FEMA announced the Strategic Review in the **Federal Register** in July 1996, and solicited suggestions for improvement of the REP Program from the REP community. In November 1996, FEMA formed the Strategic Review Steering Committee (SRSC). Original members were (1) representatives of FEMA and NRC Headquarters organizations; (2) the Preparedness, Training and Exercise Division Directors from FEMA Regions 1, 4, and 10; and (3) the RAC Chairs from FEMA Regions 3, 5, 6 and 7. The SRSC met for the first time in January 1997 to review all of the comments received from the REP community. On the basis of the Stakeholder comments, the SRSC developed four draft concept papers—''Partnership in the REP Program,'' ''Exercise Streamlining,'' ''Focus on Radiological Aspects of REP vis-a-vis All-Hazard Aspects of REP,'' and ''Delegated State''—and presented them to the REP community through a series of Stakeholder meetings held in the Fall of 1997.

After considering comments received on the concept papers, the ''Delegated State'' concept paper was forwarded to FEMA and the NRC's Office of General Counsel for further review. The remaining three papers were consolidated into five major recommendations addressing: REP Program streamlining; the use of State, tribal, and local government personnel as evaluators; Federal participation in REP exercises; the role of Native American tribal nations in REP preparedness; and REP training. These recommendations are discussed in detail in this report.

Recommendation 1: Streamline the REP Program

Issue

Most of the comments indicated that the Stakeholders are dissatisfied with the exercise evaluation process, the existing guidance, and the use of only the biennial exercise results to confirm reasonable assurance. Respondents also indicated that the FEMA Regions are not implementing the program in a uniform and consistent manner.

Background

The regulatory basis for REP is found in FEMA regulations (44 CFR Parts 350, 351, and 352), NRC regulations (10 CFR 50.33, 50.47, 50.54, and Appendix E to 10 CFR Part 50), and in the NRC/FEMA MOU. FEMA is responsible for assessing the adequacy of offsite emergency preparedness and provides its findings and determinations to the NRC. If FEMA and NRC staffs determine that the state of emergency preparedness does not

provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency (the ''reasonable assurance'' finding), the NRC will take appropriate enforcement action. The MOU indicates that FEMA's findings on preparedness are based on an assessment that: (1) Offsite plans are adequate as measured against the planning standards and evaluation criteria of NUREG–0654/FEMA-REP–1 and (2) there is reasonable assurance that plans can be implemented as demonstrated in exercises. Currently, FEMA's confirmation of the adequacy of emergency preparedness at each site is based primarily on an evaluation of the biennial full-participation exercise.

Introduction to Actions A–E

The SRSC, in its review of program implementation and guidance, has identified the need for changes to the REP Program in the following areas: a streamlined exercise evaluation process, revision of policy and guidance, increased flexibility in scenario development, a more flexible process to confirm reasonable assurance, and enhanced use of the Annual Letter of Certification (ALC). Combinations of these approaches will be used to confirm that reasonable assurance is maintained. These approaches are addressed in more detail in Actions A through E of this report.

Action A. Streamline the Exercise Evaluation Process by Consolidating, Combining and/or Eliminating Objectives and Evaluation Criteria

Introduction to Recommendation 1.1

Exercises are currently evaluated in an ''objective based'' format. FEMA–REP–14 and –15 identify 33 exercise objectives and include a sizeable number of Points of Review (POR) that must be satisfactorily demonstrated to successfully meet the requirements of each objective. This system is very structured and leaves little latitude for satisfying the objective by alternate means. Stakeholders have identified the obvious similarities between objectives. Experience in exercise evaluations indicates that several objectives can easily be combined, and others deleted, without weakening the evaluation process.

Comments have also been received from Stakeholders suggesting that the REP exercise program be streamlined to concentrate more on specific radiological aspects of REP and less on the ''all-hazards'' response. An exercise that only involves radiological activities is difficult to conduct when the ''glue'' for demonstrating an integrated response to a simulated emergency lies in the non-radiological functions. However, as proposed in other sections of this paper, some of the all-hazards Evaluation Areas could receive credit from other exercises, from response to real events, and through Staff Assistance Visits. This will provide flexibility to response organizations because those all-hazards valuation Areas granted credit may not be evaluated during exercises.

Recommendation 1.1: Establish Evaluation Areas for Consolidation of Objectives into Sub-elements

The SRSC recommends the consolidation of current objectives into the six Evaluation Areas identified below. These Evaluation Areas would be established to support a ''results-oriented'' evaluation process. Results-oriented exercise evaluation allows FEMA to focus on the outcome of actions taken by players in the implementation of their plans and procedures. This approach will give the exercise players more latitude to reach the desired results. Evaluators will then concentrate on the results of an exercise activity, not on the steps taken to arrive at a result.

Within each Evaluation Area, objectives would be combined and duplicative PORs would be eliminated. In addition, we recommend deleting Objectives 23, 31, 32, and 33.

The six Evaluation Areas and sub-elements are as follows:

1. Emergency operations management. This Evaluation Area contains elements involved in the overall management of the emergency response operations to include:

- Mobilization of Response Personnel.
- Facilities.
- Direction and Control.
- Communications.
- Equipment and Supplies Necessary to Support Operations.

2. Protective action decisionmaking. This Evaluation Area contains all aspects of the decisionmaking process to protect the health and safety of the public and emergency workers within the affected area to include:

- Radiological Exposure Control.
- Development of Dose Projections and Protective Action Recommendations and Decisions, Including Ingestion of Potassium Iodide (KI).
- Consideration for the Protection of Special Populations.
- Determination of Traffic and Access Control Points.
- Dose Projection and Decisionmaking for the Ingestion Exposure Pathway.
- Decisions Concerning Relocation, Re-entry, and Return.

3. Protective action implementation. This Evaluation Area contains the implementation of all protective action decisions to include:

- Emergency Worker Exposure Control.
- Implementation of KI Decision.
- Actions to Limit Exposure of Special Populations.
- Establishment of Traffic and Access Control.
- Implementation of Ingestion Pathway Decisions.
- Implementation of Relocation, Re-entry, and Return Decisions.

4. Field measurement and analysis. This Evaluation Area addresses the verification of predictive models used in accident assessment and the identification of contaminated areas to include:

- Ambient Radiation Monitoring.
- Airborne Radioiodine and Particulate Activity Monitoring.
- Collection and Analysis of Environmental Samples.

5. Emergency notification and public information. This Evaluation Area addresses the timely notification and dissemination of emergency instructions to the affected population and the provision of emergency information to the media to include:

- Activation of the Prompt Alert and Notification System.

Note: Current Objective 10, ''Alert and Notification,'' as it applies to the 15-minute criterion would be demonstrated as a separate and distinct drill conducted once every six years. The drill would be a ''no notice'' drill, would simulate a fast-breaking scenario, and would be initiated by a FEMA controller. Failure to correctly demonstrate this event would result in a Deficiency.

- Development of Emergency Instructions.
- Provision of Information to the Media.
- Establishment of a Public Inquiry System.

6. Support operations/facilities. This Evaluation Area addresses the support operations and facilities necessary to provide the reception, care and treatment, if needed, of individuals from the affected areas to include:

- Monitoring, Decontamination and Registration of Evacuees and Emergency. Workers.
- Monitoring and Decontamination of Vehicles and Equipment.
- Care of Evacuees.
- Transportation and Treatment of Contaminated, Injured and/or Exposed Individuals

Introduction to Recommendation 1.2

Several comments were received regarding the frequency of Medical Services drills (Objectives 20 and 21). As a result of demonstrated capability, hospital accreditation standards, and the establishment of universal health precautions, there is justification for evaluating Medical Services drills less frequently than once a year. Stakeholders also expressed a desire for more frequent demonstration of post-plume phase objectives (Objectives 23–29). Since post-plume phase objectives represent a significant portion of long-term recovery efforts and interaction with the Federal response, it seems advisable to increase their demonstration to something more frequent than every six years. Currently the requirement calls for evaluating the post-plume phase objectives at least once every six years; State, tribal, and local government officials may demonstrate these functions more often if they choose.

Recommendation 1.2: Reduce Frequency of Demonstration

The SRSC recommends that the frequency of Medical Services drills be reduced to once every two years. The SRSC recommends that post-plume phase activities be evaluated at least once in the six-year cycle. If more frequent demonstration of post-plume phase activities is desired, States may negotiate the evaluation of this activity as part of their six-year agreement (See Action D). FEMA will evaluate all other Evaluation Areas at least once per six-year exercise cycle at those organizations with responsibility as determined by the organization's plans and procedures. Each State, tribal, and/or local entity with multiple sites within its boundaries shall be evaluated at one site on a rotational basis according to the frequency indicated in Table 1. When not fully participating in an exercise at a site, the responsible organizations shall partially participate in exercises to support the full participation of appropriate governments. Table 1 indicates the recommended frequency for evaluation.

Introduction to Recommendations 1.3, 1.4, and 1.5

Stakeholders indicated a desire for more flexibility for out-of-sequence demonstrations and the opportunity for direct feedback to exercise participants. They also sought the opportunity to correct issues during the demonstration for a more positive learning experience for participants. It is possible to perform numerous exercise evaluations out of sequence from the biennial exercises. Out-of-sequence demonstrations may be scheduled during the non-exercise year, at other times during the exercise year, and/or on another day during the exercise week.

Recommendation 1.3: Negotiate Use of Out-of-Sequence Demonstrations

The SRSC recommends that FEMA and State, tribal, and local governments negotiate the use of out-of-sequence demonstrations of Evaluation Areas (within the specified evaluation frequency) as specified in Table 1.

Recommendation 1.4: Give Direct Feedback

The SRSC recommends that Federal evaluators give direct feedback to exercise participants immediately following the exercise. These out-briefings should not attempt to detail the seriousness of any inadequacies observed, but should allow the evaluators to give positive feedback and to make general recommendations for improvement.

Recommendation 1.5: Correct Issues Immediately

The SRSC recommends that immediate correction of issues identified be allowed during out-of-sequence activities, since most, if not all, would be conducted as drills or tabletop activities. For example, if inappropriate monitoring techniques were demonstrated, a State, tribal, or local trainer, in conjunction with the evaluator, could provide instruction on proper monitoring and then allow for immediate re-demonstration. The issue would be documented, if appropriate, as an Area Requiring Corrective Action (ARCA), with a statement documenting the completion of the corrective action. However, attempting immediate correction during an integrated exercise is not recommended as it may be disruptive and may possibly affect other Evaluation Areas.

Introduction to Recommendation 1.6

At the present time, FEMA–REP–14 and –15 indicate that demonstration of objectives 32 and 33, unannounced and off-hours exercises and drills, may be satisfied by a response to an actual emergency. Stakeholders requested that the granting of credit for other exercise objectives be considered.

Recommendation 1.6: Expand the Use of Credit

The SRSC recommends that FEMA Regional Directors be delegated the authority to approve the expanded use of credit for those Evaluation Area sub-elements identified in Table 1. Stakeholders will develop specific criteria for the approval of credit for actual events and/or other exercises during the implementation phase. Staff Assistance Visits may also be used to prepare documentation for granting of exercise credit by the Regional Director, as specified in Table 1.

TABLE 1.—FEDERAL EVALUATION PROCESS MATRIX

Evaluation area	Consolidate	Frequency	Out-of-sequence of exercise scenario
A. Emergency Operations Management	1, 2, 3, 4, 5, 14, 17, 30		
Mobilization of Response Personnel		Every Exercise	No.
Facilities		Once if new [i]	No.
Direction and Control		Every Exercise	No.
Communications Equipment		Once if new [i]	Yes.
Equipment and Supplies to Support Operations		Every Exercise	Yes.
B. Protective Action Decision Making	5, 7, 9, 14, 15, 16, 17, 26, 28		
Radiological Exposure Control		Every Exercise	Yes.
Development of Dose Projections and Protective Action Recommendations and Decisions.		Every Exercise	No.
Consideration for the Protection of Special Populations		Every Exercise	No.
Determination of Traffic and Access Control		Every Exercise	No.

TABLE 1.—FEDERAL EVALUATION PROCESS MATRIX—Continued

Evaluation area	Consolidate	Frequency	Out-of-sequence of exercise scenario
Dose Projection and Decision-making for the Ingestion Exposure Pathway.[ii]		Once in 6 yrs	No.
Decisions Concerning Relocation, Re-entry, and Return.[ii]		Once in 6 yrs	No.
C. Protective Action Implementation	5, 14, 15, 16, 17, 27, 29		
Emergency Worker Exposure Control		Every Exercise	Yes.
Implementation of KI Decision		Once in 6 yrs	Yes.
Actions to Limit Exposure of Special Populations		Once in 6 yrs.[iii]	Yes.
Establishment of Traffic and Access Control.[iv]		1 per Organization per exercise.	Yes.
Implementation of Ingestion Pathway Decisions		Once in 6 yrs	No.
Implementation of Relocation, Re-entry, and Return decisions		Once in 6 yrs	No.
D. Field Measurement and Analysis	6, 8, 24, 25		
Ambient Radiation Monitoring		Every Full Participation Exercise.	Yes.
Airborne Radioiodine and Particulate Activity Monitoring		Every Full Participation	Yes.
Collection and Analysis of Environmental Samples		Once in 6 yrs	Yes.
E. Emergency Notification and Public Information	10, 11, 12, 13		
Activation of the Prompt Alert and Notification System.[v]		Every exercise	No.
Activation of the Prompt Alert and Notification System (Fast Breaking).	10	Separate Drill once in 6 yrs	No.
Development of Emergency Instructions		Every exercise	No.
Provision of information to the media		Every exercise	No.
Establishment of a Public Inquiry System		Every exercise	No.
F. Support Operations/Facilities	18, 19, 20, 21, 22		
Monitoring, Decontamination and Registration of Evacuees and Emergency Workers.[iii]		Once in 6 yrs	Yes.
Monitoring and Decontamination of Vehicles and Equipment.[iii]		Once in 6 yrs	Yes.
Temporary Care of Evacuees [vi]		Once in 6 yrs	Yes.
Transportation and Treatment of Contaminated, Injured, and/or Exposed Individuals.		Every 2 years	Yes.

[i] Will be evaluated if new or changed substantially.
[ii] The plume phase and the post-plume phase (ingestion, relocation, re-entry and return) can be demonstrated separately.
[iii] All facilities must be evaluated once during the six-year exercise cycle.
[iv] Physical deployment of resources is not necessary.
[v] This sub-element does not address the ''fast-breaking'' scenario and the 15-minute requirement.
[vi] Facilities managed by the American Red Cross will be evaluated once when designated or when substantial changes occur, all other facilities must be evaluated once in the six-year exercise cycle.

Action B. Increase Flexibility in Exercise Scenarios

Introduction to Recommendation 1.7

Stakeholders expressed concern that exercise scenarios were not realistic and did not offer sufficient flexibility for making the exercise a useful training activity. Currently, the scenario for a simulated nuclear power plant accident is developed jointly by the State and the licensee and is submitted to the Regional offices of NRC and FEMA for review. The FEMA RAC Chairperson reviews the scenario to confirm that the source term and scenario events are adequate to drive the agreed-upon exercise objectives.

Recommendation 1.7: Implement New Options

The SRSC recommends that the following options be implemented in the development of exercise scenarios:

a. States may demonstrate their post-plume phase capabilities more frequently than once every six years. Demonstration criteria for this option would be developed during negotiations for the ''Six-Year Agreement'' (see Action D).

b. Mini-scenarios may be developed to support the increased participation of local responders.

c. Exercises may begin at any of the four emergency classification levels (ECL) and/or an ECL may be skipped to reflect a fast-breaking event.

d. The plume and post-plume phases of the exercise may be separated by days or months.

e. State, tribal, and local governments may provide a ''Trusted Agent'' to enhance development of the scenario and extent-of-play. A Trusted Agent is a staff member involved in exercise planning but not a member of the response team.

Action C. Annual Letter of Certification

Introduction to Recommendations 1.8, 1.9, and 1.10

The Annual Letter of Certification (ALC), submitted by the governor or the governor's designee, is a tool for State, tribal, and local governments to document periodic requirements that are used to confirm reasonable assurance. Currently, regional offices are not requiring the submittal of consistent information across the country. On the basis of guidance contained in Guidance Memorandum PR–1, the following documentation is requested:

- Public Education and Information.
- Emergency Facilities and Equipment.
- Exercises.
- Drills.
- Radiological Emergency Response Training.
- Updates of Plans and Letters of Agreement.
- Alert and Notification.

Under the SRSC's recommendations, the ALC would become a critical component of a three-part comprehensive assessment process to confirm reasonable assurance. The ALC, in combination with the results of Federally evaluated exercises and Staff

Assistance Visits, would be the basis for the reasonable assurance finding. Documentation would be submitted with the ALC or provided for review during a regularly scheduled Staff Assistance Visit.

Recommendation 1.8: Revise ALC-related Regulations

The SRSC recommends that the importance of the ALC be emphasized by addressing it in a revision to the regulations.

Recommendation 1.9: Revise ALC Submittal Requirements

The SRSC recommends the revision of ALC submittal requirements to support program changes. These requirements would be used for the review and approval of the ALC and would be consistently administered by all Regions.

Recommendation 1.10: Verify ALC Documentation

The SRSC recommends that ALC documentation on file be verified during Staff Assistance Visits.

Action D. Provide Additional Approaches That Can Be Used in Conjunction With a Streamlined Program To Demonstrate and Confirm Reasonable Assurance

Introduction to Recommendation 1.11

Stakeholders requested a flexible approach for determining reasonable assurance. Stakeholders perceive that FEMA's confirmation of reasonable assurance is currently based primarily on the biennial exercise evaluation. The SRSC proposes that FEMA revise the process by which the adequacy of offsite emergency preparedness is demonstrated and confirmed. FEMA would continue to provide reasonable assurance to the NRC on a biennial basis. The finding of reasonable assurance would be a three-part comprehensive assessment process consisting of the ALC in combination with the results of federally evaluated exercises and Staff Assistance Visits. The documentation submitted in the ALC may be verified during regularly scheduled site visits.

FEMA's process for review and approval of State, tribal, and local emergency plans and preparedness at commercial nuclear power plants should also be improved. FEMA regulation 44 CFR Part 350 establishes policy and procedures to be utilized in the review, evaluation, and approval of State, tribal, and local governments' emergency plans and procedures. Currently, those sites that do not have a formal ''350'' approval, have been granted interim approval. The formal 350 approval process should be accelerated on the basis of demonstrated capability by State, tribal, and local organizations. A formal 350 approval will be required to take full advantage of the recommended program enhancements. Those sites without a formal 350 approval will be required to participate in an exercise biennially.

Full implementation of this recommendation will require a change to both NRC and FEMA regulations. The regulations currently require that an exercise of the offsite plans at each site be conducted biennially. Recommendation 1.11 (the six-year cycle) gives a State the option of foregoing the third biennial exercise; therefore, a rule change will be needed to accomplish the recommendation.

Recommendation 1.11: Negotiate Six-Year Agreements

The SRSC recommends that FEMA negotiate with affected State, tribal, and local governments a six-year agreement for each site. These six-year agreements would identify all items to be completed by State, tribal, and local governments for the biennial confirmation of reasonable assurance. Agreements would be reviewed annually to reflect necessary changes. Successful completion of agreed-upon activities would result in the recommendation of a positive reasonable assurance finding. The FEMA Regional Director would issue the finding to the NRC Regional Administrator.

Government entities with formal 350 approval may choose to conduct and participate in an exercise three times during the six-year cycle or to participate in an exercise twice and, in lieu of a third exercise, negotiate the following alternatives with FEMA during development of the proposed six-year agreement:

a. Evaluated Integrated Radiological Focus Drills—Included are dose assessment, radiological field monitoring, evacuee and emergency worker monitoring and decontamination, radiological exposure control, and radiological laboratories.

b. Evaluated Drills—Involved are a combination of some of the Evaluation Areas of the offsite emergency response capabilities. The Evaluation Areas of emergency response include activities such as Emergency Operations Management, Protective Action Decision-making, Protective Action Implementation, Field Measurement and Analysis, Emergency Notification and Public Information, and Support Operations/Facilities. Not all offsite facilities would need to participate in these drills. State, tribal, and local responders would have the opportunity to consider emergency response strategies, to provide supervised instruction, and to focus on training objectives.

c. Evaluated Post-Plume Only Exercise—This exercise may be conducted as a tabletop activity.

d. State Assessment—This option would be permitted for those jurisdictions below the State level. State personnel would not evaluate response organizations for which they have direct program responsibility. Areas for which State Assessment may be performed are schools, congregate care, special populations, training, and non-radiological drills. Results of all State Assessments would be documented in the ALC and would be available during Staff Assistance Visits.

e. FEMA Verification and Program Reviews—This may be done through Staff Assistance Visits.

Post-plume phase response must be evaluated once within the six-year exercise cycle. Each government entity with multiple sites within its boundaries will rotate its full-participation exercises to ensure that all sites fully participate over a given period (the length of this period will depend on the number of sites in the government entity). When not fully participating in an exercise at a site, the government entity shall partially participate in exercises to support the full participation of appropriate local governments.

During the option year, governments will demonstrate correction of previously identified ARCAs in scheduled drills or through separate Staff Assistance Visits.

Recommendation 1.12: Conduct Staff Assistance Visits

The SRSC recommends that FEMA REP personnel conduct Staff Assistance Visits to:

- Review documentation of activities to verify capabilities for those exercise Evaluation Areas that can be determined by site visits as negotiated. This will include facility and equipment inspections. For example, several of the objectives require verification that appropriate equipment is available for emergency workers. The use of Potassium Iodide (Objective 14) requires the evaluator to confirm that sufficient doses exist to be given to all emergency workers and institutionalized individuals. In addition, monitoring equipment and dosimetry operation/maintenance verification is required on a regular basis (Objectives 5, 14, 16, 17, 18, 22, 24, and 25). Specific areas in

which site visits would apply are contained in Table 1.

Assist responders with the development and submission of applications for credit for response to emergencies and participation in non-REP exercises. All applications would be submitted to the FEMA Regional Director for approval.

- Attend exercise and drill training activities for informal comments and suggestions.
- Participate in State, tribal, and local emergency training.
- Review information and other documentation to verify ALC submissions.

Action E. Revise REP Policy and Guidance To Support a Streamlined Program

Introduction to Recommendations 1.13, 1.14, 1.15, and 1.16

Many commenters noted the need to update FEMA REP policy and guidance to include numerous changes that have occurred since the documents were published and to resolve inconsistencies with other guidance. Some commenters saw a need to revise guidance to recognize the evolution of emergency management since program inception.

Some examples of changes that are required are an update to reflect the Emergency Alert System (EAS) and the use of ''Special News Broadcasts'' and an update to ensure consistency with the current EPA–400 ''Manual of Protective Action Guides.''

The SRSC has compiled a list of existing FEMA policy and guidance in Appendix 1.

Recommendation 1.13: Develop a REP Program Handbook

The SRSC recommends that regulations, policy, and guidance governing administration of the REP Program be reviewed and that current operative guidance be identified. This operative guidance would be reviewed, revised, and updated. The revised material would form the basis for the development of a REP Program Handbook. Related technical manuals would be catalogued and referenced appropriately.

Recommendation 1.14: Revise NUREG–0654/FEMA–REP–1

The SRSC recommends that NUREG–0654/FEMA–REP–1, Rev.1, be revised to reflect current technical standards and practices in emergency management. The FEMA/NRC MOU would also be updated appropriately to reflect changes.

Recommendation 1.15: Review Guidance Annually

The SRSC recommends that FEMA Headquarters, in conjunction with the RAC AC and other Stakeholders, review all REP Program guidance, at least annually, and incorporate appropriate changes. Program guidance will no longer be issued through memoranda, but as changes to the REP Program Handbook.

Recommendation 1.16: Post Guidance on the REP Home Page

The SRSC recommends that all REP Program guidance be posted on the REP Home Page.

Recommendation 2: Increase Federal Participation in REP Exercises

Issue

Stakeholders have consistently recognized the significant role of the Federal Government in preparing for and responding to radiological emergencies and the importance of Federal participation to assure that all partners receive the needed experience of operating as a team. Comments submitted during the Strategic Review process indicated a concern that, because of a lack of resources or due to other priorities, Federal representatives are not adequately fulfilling their radiological emergency preparedness responsibilities.

Background

The existing infrastructure for emergency response to a nuclear power plant accident has matured since the inception of the REP Program. The regulations and guidance assured that a coordinated response capability evolved between the nuclear power plant operator and the State and local organizations. The emergency response capability of the Federal government developed separately. This is satisfactory for the early hours of an emergency response since State, tribal, and local governments serve in a first responder role without assistance from the Federal government. It is expected that Federal assistance would arrive later, when the State, tribal, and local organizations would be strained and additional resources needed. Because the level of sophistication for post-plume phase response has developed at a slower rate (since post-plume phase exercises are required less frequently—every six years), the need for a coordinated response with the Federal government was not recognized in the first years of the program. After the experience of three or four post-plume phase exercises, the States have realized there is a missing partner in many of these exercises—the Federal Government. The Federal response will significantly change and enhance the response of the State, tribal, local, and operator participants. The post-plume phase exercises that are now being conducted without Federal participation are creating an inaccurate understanding of the later phases of an emergency. Occasionally, States have requested Federal participation in exercises and the Federal agencies have accommodated some of these requests.

Introduction to Recommendations 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, and 2.7

To fully carry out their radiological responsibilities, Federal representatives need to be involved in both preparedness and response functions. In addition to evaluating exercises, they should be reviewing plans, conducting training, and developing and participating in various exercises. To do this more effectively, there should be a Federal entity that plays a stronger role in guaranteeing that Federal agencies fulfill their radiological responsibilities.

One of the problems identified was the confusion about the various response plans involved. The Federal Radiological Emergency Response Plan (FRERP) was drafted at the direction of Congress after the Three Mile Island accident and was finalized in 1985. In 1992, FEMA revised its emergency response policy and issued the Federal Response Plan (FRP) as an ''all hazards'' plan. With the publication of the new plan came questions regarding which plan FEMA intended to use to respond to radiological emergencies. FEMA indicated that the FRP was its standard method of response and FEMA committed to prepare an annex to the FRP that would explain how the two plans would be used simultaneously. A revision to the FRERP was published in 1996 that mentioned the relationship when both plans were being used at the same time, but the details were again left to be outlined in an annex to the FRP. To date, this annex has not been developed.

One of the reasons given by Federal agencies for not performing all of their radiological functions is the competing demands placed on them due to their membership in other Federal response committees. On the national level the primary groups are the National Response Team, the Catastrophic Disaster Response Group, the Emergency Support Function Leaders Group, and the FRPCC. On the Regional level the primary groups are the Regional Assistance Committees, the Regional Interagency Steering

Committees, and the Regional Response Teams. The resource commitment for some Federal agencies could be even greater for agencies that have fewer than 10 Federal Regions or for those without a regional structure.

Comments reflected frustration, the lack of responsiveness to specific requests, and the insufficient technical capability within FEMA. Stakeholders felt that this resulted in an overreliance on contractor support to develop guidance. Some of this guidance appeared to be arbitrary and inconsistently applied in the FEMA Regions. The 15 member agencies of the FRPCC have sufficient capability to address technical issues in the REP Program. FEMA can take advantage of that capability and depend on the support of the FRPCC for response to technical requests.

The biggest obstacle to increased Federal participation, including RAC support, is insufficient resources. The appropriate management level of each affected agency (FEMA, Department of Energy, NRC, Environmental Protection Agency, U.S. Department of Agriculture, Department of Health and Human Services, Department of the Interior, Department of Transportation, Department of Defense, etc.) must agree to make this a priority and must ensure that internal procedures are developed to support increased participation. To create a true partnership, Federal agencies should regularly participate in post plume phase exercises to develop an integrated response.

Recommendation 2.1: Have FEMA Take the Lead Role

The SRSC recommends that FEMA take the lead role in planning and coordinating Federal agency participation in federally evaluated post-plume phase exercises. FEMA should meet with State, tribal, and local governments to identify those opportunities in which substantial Federal involvement is requested. FEMA should share this information with the other Federal agencies and help facilitate their involvement.

Furthermore, FEMA should coordinate the development of a comprehensive exercise schedule for full participation of Federal resources.

Recommendation 2.2: Complete the Radiological Incident Annex

The SRSC recommends that FEMA complete the development and incorporation of the Radiological Incident Annex to the FRP, to be followed by training or briefing of the Federal agencies in Headquarters and the Regions.

Recommendation 2.3: Establish an Interagency Taskforce

The SRSC recommends that an interagency task force be established to review the charters of the various response committees to determine if they can be streamlined or combined for efficiency and effectiveness in accordance with the National Performance Review. This may enable agencies to participate more extensively in Federal response planning and preparedness activities. This could also eliminate duplicate projects being conducted by separate planning groups and would enhance the understanding of other response plans among Federal responders.

Recommendation 2.4: Identify Additional Resources

The SRSC recommends that the FRPCC agencies identify additional resources to participate in a comprehensive exercise process and provide the resources necessary to coordinate and implement Federal participation in radiological preparedness and response activities.

Recommendation 2.5: Reinforce the FRPCC's Role

The SRSC recommends the reinforcement of the FRPCC's role in developing REP policy. A protocol, developed by FEMA, to refer technical questions to the FRPCC and its Subcommittees for resolution would serve as the vehicle for policy coordination. Issues emerging from exercise evaluations and plan reviews would be included in the protocol hierarchy.

Recommendation 2.6: Revise Training Courses

The SRSC recommends the conduct of a review and revision of the training courses sponsored by the FRPCC agencies for radiological preparedness and response. The level of experience in the States; new concepts in radiological response; and the response partnership of the facility, State, tribal, local, and Federal organizations, must be reflected in revised course material.

Recommendation 2.7: Facilitate Communications

The SRSC recommends that a REP-funded position be established in FEMA's Response and Recovery Directorate in order to facilitate communications between REP preparedness and response entities and to coordinate Federal response play in REP exercises.

Recommendation 3: Use State, Tribal, and Local Personnel as Federal Evaluators

Issue

Stakeholders indicated a desire to use State, tribal, and local personnel to augment FEMA's REP exercise evaluation teams. They felt that these employees would provide an experienced cadre that would result in an improved evaluation process and a reduction in exercise costs.

Background

At least five years ago, the National Emergency Management Association (NEMA) discussed the use of State personnel to augment FEMA's REP exercise evaluation teams. A Focus Group explored this issue again during the Kansas City Stakeholders Meeting in September 1997. Most of the basic concepts were introduced by the State participants who attended.

The first legal opinion on the subject was offered in a July 26, 1993, memorandum, which stated that FEMA lacked the authority to accept the gift of services and cover the expenses of State personnel as evaluators. On the basis of Stafford Act Amendments, a second legal opinion, which allowed the limited use of and compensation for State evaluators, was offered on April 29, 1996.

Based on a preliminary review of the concept, FEMA's Office of General Counsel (OGC) saw no substantial legal problems with the use of State, tribal, and local personnel as evaluators. Further legal precedent is also found in both the Chemical Stockpile Emergency Preparedness Program (CSEPP) and the Urban Search and Rescue (USAR) Program.

Introduction to Recommendations 3.1, 3.2, and 3.3

The use of State, tribal, and local personnel as FEMA evaluators could result in an overall cost benefit to the program. Such use would also improve partnership between FEMA and the State, tribal, and local governments. The non-Federal evaluator receives a different perspective on how another jurisdiction in a similar situation operates and a better understanding of the evaluation process.

Recommendation 3.1: Establish Conditions

The SRSC recommends that FEMA adopt the use of State, tribal, and local government personnel as evaluators under the following conditions:

• State, tribal, and local personnel would serve as evaluators outside their own jurisdictions.

• FEMA is responsible for managing the evaluation team and paying invitational travel expenses. FEMA would make a written request for evaluators. FEMA's commitment would include all pre-determined transportation costs (air, private vehicle, rental car, parking, airport shuttle, etc.) and per diem expenses as stated in the individual invitational travel letter issued for each specific assignment.

• The State, tribal, and local governments agree to maintain the costs of the employee's compensation package to include liability coverage (paid staff only, i.e., no volunteers).

• State and tribal governments would maintain a ''Qualified and Available List'' of evaluators.

• FEMA Regions would budget for expenses involved in use of State, tribal, and local evaluators. FEMA Headquarters would approve and transfer these funds.

Recommendation 3.2: Develop an MOU

The SRSC recommends that an MOU be developed between FEMA and the State, tribal, and local governments that addresses the relationship between FEMA and non-Federal evaluators.

Recommendation 3.3: Develop Qualification Standards

The SRSC recommends that the RAC AC develop non-Federal evaluator Qualification Standards. Evaluators would be subject to performance reviews after completing each exercise.

Recommendation 4: Include Native American Tribal Nations in the REP Preparedness Process

Issue

Stakeholders expressed concern that Native American tribal nations were not appropriately recognized as separate and sovereign entities within the REP Program.

Background

On April 29, 1994, President Clinton issued a memorandum to the heads of executive departments outlining the principles that executive departments and agencies, including every component bureau and office, were to follow in their interactions with Native American tribal governments. The President pointed out that ''The United States Government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities must be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty.''

Introduction to Recommendations 4.1, 4.2, 4.3, and 4.4

On June 24, 1997, FEMA Director Witt presented the draft Agency policy on American Indian and Alaska Natives to tribal leaders on the Standing Rock Sioux Reservation. Following that historic meeting, letters were sent to leaders of all Federally recognized tribes, State governors, State emergency management directors, and national constituency and official organizations requesting their review and comments on the draft policy. On November 17, 1997, FEMA published the policy in the **Federal Register** for public comment. On February 17, 1998, FEMA published another **Federal Register** notice extending the comment period until March 15, 1998. Subsequently, an announcement of the Agency's consultation sessions on the draft policy was published in the **Federal Register** on March 6, 1998. Six officially announced sessions and three additional forums were organized by the Regional offices to consult with and gather input on the policy from more than 100 tribal leaders and representatives.

Recommendation 4.1: Identify Areas for REP Relationship

The SRSC recommends the conduct of a review of the FEMA American Indian and Alaska Native Policy to identify areas for Federal and tribal REP relationships in the REP Program.

Recommendation 4.2: Identify tribes in the EPZs

The SRSC recommends that RAC Chairpersons, in coordination with the regional tribal liaison, identify all Federally recognized tribes in the 10- and 50-mile EPZs of all nuclear power plant sites and determine how EPZ States and counties currently relate with the tribes.

Recommendation 4.3: Identify Current Policies and Practices

The SRSC recommends that FEMA coordinate with other Federal agencies, including the NRC and DOI, to identify current policies and practices in government-to-government relations.

Recommendation 4.4: Increase Tribal Involvement

The SRSC recommends that for those Regions with tribes in their EPZs, RAC Chairpersons and representatives from the NRC and the tribal governments develop an approach to increase tribal involvement in the REP Program.

Recommendation 5: Enhance the REP Training Program

Issue

Stakeholders recommended that an evaluator certification program be developed. The program was to have a very structured, formalized approach for the identification and recruitment of qualified evaluators.

Background

Current evaluator selection depends largely upon individual evaluator qualifications and on completion of the Emergency Management Institute (EMI) REP Exercise Evaluation course. Evaluators must be FEMA employees, FEMA Regional American Red Cross representatives, FEMA REP contractors, or employees of RAC departments or agencies. The Regions usually assign evaluators with existing qualifications in mind. The EMI REP Exercise Evaluation Course is the only formal training required for REP exercise evaluators.

Until 1998, instructional staff comprised the EMI course manager and two contract instructors. In 1998, EMI eliminated one contract instructor in favor of using two regional REP staff. The EMI implemented this change in order to have the students taught by FEMA staff involved in the program on a daily basis, to provide a growth opportunity to qualified regional REP staff, and to decrease costs.

The course is currently taught at EMI twice every fiscal year. The number of students in a class is limited to 36. Twenty-five slots are reserved for Federal evaluators in every class; the remainder of the class comprises State, local, or utility representatives. In the last two years no class has been completely filled. Enrollment has declined over the past several years because of market saturation; the course was conducted in the Regions and offsite a total of 12 times between 1992 and 1994. In addition, there is less job turnover.

FEMA staff and contractors represent the bulk of the audience in the REP Exercise Evaluation Course. The RAC agencies are less well represented. The National Emergency Training Center (NETC) Admissions Office maintains a database of participants who successfully complete the course.

Informally, some Regions require new evaluators to attend an exercise as observers or to work with another more experienced evaluator for one or two exercises.

Introduction to Objectives 5.1, 5.2, 5.3, and 5.4

The current 4.5-day EMI course covers the role of the evaluator and all 33 exercise objectives with several related activities. Course material is based on FEMA–REP–14 and –15.

The following statement by EMI summarizes the current course:

A central theme of the course is to evaluate performance based on the relevant plan and procedures. All deviations are to be documented and reported to the team leader for disposition. The evaluator is the eyes and ears of FEMA and should not ignore what might, at first glance, appear to be unimportant events. Evaluators should not interfere with participants, but may be required to ask questions at appropriate (slow) times of the exercise. There should be no prompting or leading by evaluators. Course participants are cautioned to be courteous, tactful, and polite during the course of the evaluation. Furthermore, they are instructed not to characterize issues at any particular level.

A video-based tabletop exercise is used in which the participants evaluate one or two objectives. The completed checklists and narrative summaries are examined with each student, and the instructors make suggestions for improvement. This activity takes 1.5 days to complete.

A refresher training or advanced training course is not available. It is generally assumed that ongoing experience evaluating exercises will keep the skills fresh and that the regional REP staff will apprise the evaluators of changes in the process. Other REP training includes the REP Planning Course and the two Accident Assessment Courses. Radiological training courses are also available from other Federal agencies and private sources.

A common training program for all REP evaluators can help ensure consistent application of program guidance and policy. The REP Program Office and Regions should consider developing a REP Program Administration course for all FEMA REP staff. This course would give an overview of the revised REP Program, discuss use of job aids/procedures for granting exercise credit, negotiating extent of play agreements, ALC review, and other aspects of the post-Strategic Review REP Program. The SRSC believes this would help ensure program consistency and provide a formal training setting, which has advantages over on-the-job training.

Recommendation 5.1: Establish Qualification Standards

The SRSC recommends that qualification standards be established for REP exercise evaluators, in conjunction with the standards outlined in Recommendation 3.3. Before establishing such standards, the required knowledge, skills, and abilities should be identified and an enhanced training curriculum for REP staff and evaluators should be developed. However, the establishment of a formal certification program for Federal evaluators is not recommended.

Recommendation 5.2: Increase Training Opportunities

The SRSC recommends that opportunities for FEMA REP staff to teach evaluator training be increased.

Recommendation 5.3: Revise Radiological Courses

The SRSC recommends that current radiological courses be revised as required by the outcomes of the REP Strategic Review, and that REP training course development, revision, and delivery be included in the REP budget.

Recommendation 5.4: Develop an Administration Course

The SRSC recommends the development of a REP Program Administration Course for all FEMA REP staff.

Appendix 1—Existing Federal Emergency Management Agency Radiological Emergency Preparedness (REP) Policy and Guidance

Some of the material in the documents cited is out of date. Where possible, this has been noted.

There also may be some redundancy in this list. One particular document may provide more detail than another, and, thus, is listed.

1. FEMA-REP-Series Documents

''Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants,'' U.S. Nuclear Regulatory Commission and Federal Emergency Management Agency, NUREG–0654/FEMA–REP–1, Rev. 1, Washington D.C., November 1980.

''Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants—Criteria for Utility Offsite Planning and Preparedness, Final Report,'' U.S. Nuclear Regulatory Commission and Federal Emergency Management Agency, NUREG–0654/FEMA–REP–1, Rev. 1, Supp. 1, Washington D.C., September 1988.

Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants, Criteria for Emergency Planning in an Early Site Permit Application,'' Draft Report for Comment, U.S. Nuclear Regulatory Commission and Federal Emergency Management Agency, NUREG–0654/FEMA–REP–1, Rev. 1, Supp. 2, Washington D.C., April 1996.

''Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants—Criteria for Protective Action Recommendations for Severe Accidents,'' Draft Report for Interim Use and Comment, U.S. Nuclear Regulatory Commission and Federal Emergency Management Agency, NUREG–0654/FEMA–REP–1, Rev. 1, Supp. 3, Washington D.C., July 1996.

''Guidance on Offsite Emergency Radiation Measurement Systems, Phase 1—Airborne Release,'' FEMA–REP–2, Rev. 2, June 1990.

''Guidance for Developing State, Tribal, and Local Radiological Emergency Response Planning and Preparedness for Transportation Accidents,'' FEMA–REP–5, Rev. 1, June 1992.

''Exercise Evaluation and Simulation Facility Evacuation Events Models: Part 1—PREDYN Users Guide,'' FEMA–REP–6, April 1984.

''Exercise Evaluation and Simulation Facility Evacuation Events Model: Part II—Users Manual,'' FEMA–REP–7, April 1984.

''Application of the I–DYNEV System (To Compute Estimates of Evacuation Travel Time at Nuclear Power Stations),'' FEMA–REP–8, December 1984.

''Guide for the Evaluation of Alert and Notification Systems for Nuclear Power Plants,'' FEMA–REP–10, November 1985.

''Guidance on Offsite Emergency Radiation Measurement Systems, Phase 2—The Milk Pathway,'' FEMA–REP–12, September 1987.

''Guidance on Offsite Emergency Radiation Measurement Systems, Phase 3—Water and Non-Dairy Food Pathway,'' FEMA–REP–13, May 1990.

''Radiological Emergency Preparedness Exercise Manual,'' FEMA–REP–14, September 1991.

''Radiological Emergency Preparedness Exercise Evaluation Methodology,'' FEMA–REP–15, September 1991.

''Emergency Response Resources Guide for Nuclear Power Plant Emergencies,'' NUREG–1442/FEMA–REP–17, Rev.1, July 1992.

''Statements of Consideration for FEMA–REP–14 and FEMA–REP–15,'' FEMA–REP–18, January 1992.

2. Guidance Memoranda

GM IT–1. ''A Guide to Documents Related to the REP Program,'' October 1, 1985.

GM 4. ''Radio Transmission Frequencies and Coverage,'' April 1, 1980.

GM 5. ''Agreements Among Governmental Agencies and Private Parties,'' Rev. 1, October 19, 1983.

GM 8. ''Regional Advisory Committee Coordination with Utilities,'' Rev. 1, October 19, 1983.

GM 16. ''Standard Regional Reviewing and Reporting Procedures for State and Local Radiological Emergency Response Plans,'' August 7, 1980.

GM 20. ''Foreign Language Translation of Public Education Brochures and Safety Messages,'' Joint FEMA/NRC Issuance, October 19, 1983.

GM 21. ''Acceptance Criteria for Evacuation Plans,'' February 27, 1984.

GM 22. ''Recordkeeping Requirements for Public Meetings,'' October 19, 1983.

GM 24. ''Radiological Emergency Preparedness for Handicapped Persons,'' April 5, 1984.

GM PI–1. ''FEMA Action to Pilot Test Guidance on Public Information Materials and Provide Technical Assistance On Its Use,'' October 2, 1985.

GM FR–1. ''Federal Response Center,'' December 3, 1985.

GM AN–1. ''FEMA Action to Qualify Alert and Notification Systems Against NUREG–0654/FEMA–REP–1 and FEMA–REP–10,'' April 21, 1987.

GM EV–2. ''Protective Actions for School Children,'' November 13, 1986. **Note:** Guidance in FEMA–REP–14 superseded pages 6–13 concerning the following: (1) Clarification of guidance related to the demonstration of protective action capabilities for schools in exercises, and (2) modifications to the set of questions as reflected in the Points of Review and Demonstration Criteria in Objective 16 of FEMA–REP–15.

GM IN–1. ''The Ingestion Exposure Pathway,'' February 26, 1988. **Note:** Guidance in FEMA–REP–14 and FEMA–REP–15 superseded pages 12–17.

GM PR–1. ''Policy on NUREG–0654/FEMA–REP–1 and 44 CFR Periodic Requirements,'' October 1, 1985. **Note:** Guidance in FEMA–REP–14 superseded two parts of the guidance contained in GM PR–1. These two changes were: (1) The provision set forth on page 3 (section 3) for partial participation in ingestion exercises for States with multiple sites located within their borders has been terminated. Per guidance provided in the Manual, such States would only need to partially participate in ingestion exercises when full participation exercises are conducted in bordering States, and (2) During the year in which the full-participation exercise is held at one of the sites, the responsible State and local governments should review their plans and procedures for the other sites within the State to verify their accuracy and completeness. This review should validate the identification of farms, food processors and distributors. This review and any resultant revisions should be made and reported in the Annual Letter of Certification, as described in GM PR–1, as part of their annual review and plan update.

GM MS–1. ''Medical Services,'' November 13, 1986. **Note:** Guidance contained in Sections D.20 and D.21 of the Manual superseded GM MS–1 with respect to the following: (1) Minimum staffing for medical facilities, (2) deferral of radiological monitoring by transportation providers to medical facility staff, and (3) the role of licensee personnel in supporting State and local government medical services functions.

GM RG–2. ''Guidance for FEMA Regional Implementation of the FEMA Rule,'' 44 CFR Part 352, February 8, 1993.

3. Additional Memoranda of Importance

Memorandum from Richard Krimm to Frank Finch dated 5/17/85, on ''Congregate Care Facilities.''

Memorandum from Richard Krimm to NTH Division Chiefs, FEMA Regional Offices dated 12/24/85, on ''Guidance on NUREG–0654/FEMA–REP–1 Evaluation Criterion J.12.''

Memorandum from Richard Krimm to Frank Begley dated 2/2/87 on ''24-hour Staffing Capability.''

Memorandum from Richard Krimm to Frank Begley dated 9/23/87 on ''Alternate Emergency Operations Center (EOC).''

Memorandum from Richard Krimm to Frank Begley dated 12/9/87, on ''Quad Cities Emergency Planning Zone (EPZ) Boundary Determination (split jurisdiction).''

Memorandum from Richard Krimm to Frank Begley dated 1/5/88, on ''Radiological Monitoring.''

Memorandum from Richard Krimm to NTH Division Chiefs dated 2/9/88, on ''Clarification of Selected Provisions of Guidance Memorandum (GM) MS–1, Medical Services.''

Memorandum from Richard Krimm to Frank Begley dated 2/26/88 on ''Annual Letter of Certification.''

Memorandum from Grant Peterson to Regional Directors dated 3/7/88, on ''Guidelines for Regions to Use In Implementing NUREG–0654/FEMA–REP–1, Rev. 1, Supplement 1, With Qualifying Exercises.''

Memorandum from Richard Krimm to Frank Begley dated 5/25/88 on ''Relocation Centers.''

Memorandum from Richard Krimm to Frank Begley dated 9/19/88, on ''Medical Services and Radiological Monitoring Guidance.''

Memorandum from Craig Wingo to William Fucik dated 9/20/88 on ''FEMA Policy Concerning Receiving Schools Around the Perry Island NPS.''

Memorandum from Richard Krimm to Frank Begley dated 9/22/88 on ''Interpretation of 'Shall' and 'Should' as Used in NUREG–0654/FEMA–REP–1 and Off-Hours Unannounced Drills/Exercises.''

Memorandum from Richard Krimm to Glenn Woodard dated 9/30/88 on ''Clarification of Annual Medical Emergency Drill Provisions for States with Separate Sets of Primary and Backup Medical Facilities.''

Memorandum from Richard Krimm to Frank Begley dated 12/7/88, on ''Landmark Descriptions.''

Memorandum from Grant Peterson to Paul Giordano dated 12/7/89, on ''Guidance on Ingestion Pathway Exercises.''

Memorandum from Grant Peterson to Regional Directors dated 1/12/90 on ''Distribution and Use of the Generic Ingestion Pathway Brochure, entitled ''Radiological Emergency Information.''

Memorandum from Frank Begley to Kenneth V. Miller (Missouri Department of Health) dated 3/23/90 on ''Exercise Demonstration of Two Radiological Monitoring Field Teams.''

Memorandum from Dennis Kwiatkowski to William Tidball dated 11/2/90 on ''Request from the State of New York for Waiver of Self-Reading Dosimetry Requirements for Emergency Workers.''

Memorandum from Dennis Kwiatkowski to Stephen Harrell dated 1/16/92, on ''Response to Request From Region VII for Resolution of Radiological Emergency Preparedness (REP) Program Issues, including Radiological Monitoring for 20 percent of the population; Ingestion Pathway Exercises; Dosimetry and Protective Clothing; Medical Care of Nursing Home and Medically Dependent Hospital Evacuees; Portal Monitors.''

Memorandum from Dennis Kwiatkowski to Walter Pierson dated 3/26/92 on ''Response to Region III's Request for Guidance on Ingestion Pathway Exercise Demonstration.''

Memorandum from Dennis Kwiatkowski to Walter Pierson dated 5/15/92, on ''Objective 13: Alert, Notification, and Emergency Information—Public Instructions.''

Memorandum from Dennis Kwiatkowski to Robert Adamcik dated 1/13/93, on ''Pennsylvania Emergency Management Agency Request for Clarification of FEMA–REP–14 Dosimetry Requirements Under Objective 5, Emergency Worker Exposure Control.''

Memorandum from Craig Wingo to Stephen Harrell dated 3/5/93, on ''Response to Policy Clarification on Radiological Emergency Planning for Day Care Centers.''

Memorandum from H. Joseph Flynn, (FEMA) Associate General Counsel for Program Law, to Richard W. Krimm, dated 4/30/93, on ''Legal Opinion on Letters of Agreement.''

Memorandum from Margaret Lawless to RAC Chairs dated 6/25/93 on ''Guidance on Planning Requirements Whenever Changes are Made to Existing 10-Mile EPZs.'' (contains memorandum from Craig Wingo to Stephen Harrell dated 6/24/93 on ''Request for Guidance on Areas Beyond the 10 mile EPZ Ring.'')

Memorandum from Richard Krimm to Regional Directors dated 9/14/93 on ''Technical Review of REP Exercise Scenarios.''

Memorandum from Richard Krimm to Regional Directors dated 10/13/93 on ''Adequate Demonstration of Objective 16 at Radiological Emergency Preparedness Exercises.''

Memorandum from Delbert Kohl to Charles Biggs dated 3/28/94 on ''Clarification of Communication Equipment Needed by Field Monitoring Teams for Radiological Emergency Preparedness.''

Memorandum from Joe Flynn to Dennis Kwiatkowski dated 4/6/94 on ''Impact of OSHA's HAZMAT Standard on REP Program.''

Memorandum from Delbert Kohl to Stuart Rifkind dated 5/27/94 on ''Ingestion Planning—Indiana.''

Memorandum from Dennis Kwiatkowski to Regional Directors, Regions I–X, dated 7/25/94, on ''Environmental Protection Agency's (EPA) Manual of Protective Action Guides (PAGs) and Protective Actions for Nuclear Incidents (EPA 400–R–92–001).''

Memorandum from Robert Fletcher to Stuart Rifkind dated 11/9/94 on ''Clarification on Alert and Notification System—the Order of Sirens and EBS Messages.''

Memorandum from Robert Fletcher to Rita Calvan dated 12/12/94 on ''FEMA Review and Approval Process for the Susquehanna Steam Electric Station Offsite Radiological Emergency Plans and Preparedness.''

Memorandum from Dennis Kwiatkowski to Robert Adamcik dated 12/13/94 on

''Pennsylvania Emergency Management Agency Request for Exemption from REP–14 and REP–15 EBS Provisions.''

Memorandum from Robert Fletcher to Charles Biggs dated 2/23/95 on ''Request for Exemption on Back-up Medical Facilities.''

Memorandum from Robert Fletcher to Charles Biggs dated 3/9/95 on ''EPA Manual of Protective Action Guides and Retrospective Determinations of Total Dose.''

Memorandum from Bill Wark to Larry Bailey dated 6/6/95 on ''Evaluation of Activities at Designated Radio/Television Stations That Broadcast Emergency Messages.''

Memorandum from William Wark to Joseph Dominguez, dated 2/21/96, on ''Annual Distribution of Emergency Information to the Public.''

Memorandum from William Wark to Joseph Dominguez, dated 4/12/96, on ''Precautionary Evacuation for the Emergency Planning Zone (EPZ) of the Diablo Canyon Site.''

Memorandum from Vern Wingert to Larry Robertson dated 8/21/96 on ''Dosimeter Guidance for Emergency Workers.''

Memorandum from Kay Goss to Regional Directors dated 12/23/96 on ''Forwarding of Draft Agency Guidance to Clarify REP Policy on Use of Dosimeters by Bus Drivers.''

Memorandum from Kay Goss to Regional Directors dated 1/10/97 on ''Purpose of Memo and Draft Guidance on the Use of Dosimetry by Bus Drivers.''

Letter from Woodie Curtis to Paul Schmidt (Wisconsin Department of Health and Social Services) dated 3/7/97 on ''Several Technical Issues.''

Memorandum from Ihor Husar to Eric Jenkins dated 3/5/98 on ''Review and Determination on the Nebraska Emergency Management Agency's Petition to Delete Nemaha County Hospital From the Nebraska Radiological Emergency Response Plans (Cooper Nuclear Station).''

Memorandum from Kay Goss to Regional Directors, dated 4/2/98 on ''Interim-Use Guidance for Providing Information and Instructions to the Public for Radiological Emergencies Using the New Emergency Alert System (EAS).''

4. FEMA Policy Statements

''Policy Statement on Respiratory Protection,'' Federal Emergency Management Agency, November 22, 1985.

''Policy Statement on the Use of NUREG–0654/FEMA–RP–1 and Guidance Memoranda,'' Federal Emergency Management Agency, September 21, 1988.

''Policy Statement on Disposal of Waste Water and Contaminated Products from Decontamination Activities,'' Federal Emergency Management Agency, January 1989.

5. Other Basic and Pertinent Guidance

''Potassium Iodide as a Thyroid-Blocking Agent in a Radiation Emergency: Final Recommendations on Use,'' Food and Drug Administration, U.S. Department of Health and Human Services, 47 FR 28,158, June 29, 1982.

''Accidental Radioactive Contamination of Human Food and Animal Feeds: Recommendations for State and Local Agencies,'' Food and Drug Administration, U.S. Department of Health and Human Services, 47 FR 47,073, October 22, 1982.

Note: Revised FDA Protective Action Guides are due to be published in late May 1998.

''Federal Policy on Distribution of Potassium Iodide Around Nuclear Power Sites for Use as a Thyroidal Blocking Agent,'' Federal Emergency Management Agency, 50 FR 30,258, July 24, 1985.

''Mass Care—Preparedness and Operations, Disaster Services Regulations and Procedures,'' ARC 3031, American Red Cross (ARC), Washington, DC, April 1987.

''Federal Response Plan (FRP),'' Federal Emergency Management Agency, FEMA 229, April 1992.

''Manual of Protective Action Guides and Protective Actions for Nuclear Incidents,'' U.S. Environmental Protection Agency (EPA), EPA 400–R–02–001, May 1992.

''Emergency Planning and Preparedness for Nuclear Power Reactors,'' NRC Regulatory Guide 1.101 Rev.3, August 1992.

''Memorandum of Understanding between Federal Emergency Management Agency and Nuclear Regulatory Commission,'' 58 FR 47,996, Sept. 14, 1993.

Note: This MOU, which was entered into June 17, 1993, supersedes all previous FEMA/NRC MOU's.

''Contamination Monitoring Standard for a Portal Monitor Used for Emergency Response,'' Federal Emergency Management Agency, March 1995.

''Federal Radiological Emergency Response Plan (FRERP),'' Federal Emergency Management Agency, May 1, 1996.

''Respiratory Protection,'' Occupational Safety and Health Administration, 29 CFR 1910.134.

''Respiratory Protection—A Manual and Guideline,'' 2nd edition, Publication #63PC91, American Industrial Hygiene Association (AIHA), Fairfax, VA.

6. Background Material

''Planning Basis for the Development of State and Local Government Radiological Emergency Response Plans in Support of Light Water Nuclear Power Plants,'' NUREG–0396, EPA 520/1–78–016, Nuclear Regulatory Commission and Environment Protection Agency, December 1978.

''Background for Protective Action Recommendations: Accidental Radioactive Contamination of Food and Animal Feeds,'' Food and Drug Administration, U.S. Department of Health and Human Services, August 1982. DHHS Publication FDA 82–8196.

''Personal Dosimetry Performance Criteria for Testing,'' American National Standards Institute, Standard N13.11–1983. ''Criteria for Protective Action Recommendations for General Emergencies,'' NRC Information Notice 83–28, May 1983.

''Preparedness and Response in Radiation Accidents,'' Food and Drug Administration, U.S. Department of Health and Human Services, August 1983. DHHS Publication FDA 83–82111.

Memorandum from Richard Krimm to Glenn Woodard dated 4/22/86 on ''Clarification of the 15-Minute Design Objective for Alert and Notification Systems.''

''Evacuation: An Assessment of Planning and Research,'' RR–9, Federal Emergency Management Agency, November 1987.

''Management of Persons Accidentally Contaminated with Radionuclides,'' National Council of Radiation Protection, Report No. 65, 1979.

''Check List for Review and Evaluation of Emergency Public Information Brochures for Ingestion Pathway Measures,'' Federal Emergency Management Agency, July 1990 (contains cover memorandum from Grant Peterson to Regional Directors dated 6/12/90).

''Response Technical Manual (RTM–91),'' NUREG/BR–0150, Vol. 1, Rev. 1, U.S. Nuclear Regulatory Commission, April 1991.

''State of the Art in Evacuation Time Studies for Nuclear Power Plants,'' NUREG/CR4831, NNL–776, March 1992.

''Resources Available for Nuclear Power Plant Emergencies Under the Price-Anderson Act and Robert T. Stafford Disaster Relief and Emergency Assistance Act,'' NUREG–1457, July 1992.

''Repair and Maintenance Manuals for Radiological Instruments,'' CPG 4–1, Vols. 1–10, Federal Emergency Management Agency, July 20, 1992.

''American National Standard for Respiratory Protection,'' ANSI 288.2–1992, American National Standards Institute, NY, NY.

''RG REP 05, Rev. 1, REP Evacuation Time Study Review Guide (Checklist),'' Federal Emergency Management Agency, April 1993.

''Emergency Alert System,'' CPG 1–40, Federal Emergency Management Agency, June 1996.

''Emergency Alert System: A Program Guide for State and Local Governments,'' CPG 1–41, Federal Emergency Management Agency, June 1996. Memorandum from Kay Goss to All Regional Directors dated 11/25/96 on ''Disposition of FEMA-Owned Radioactive Sources in the States.''

''RG REP 02, Rev. 8, REP Annual Letter of Certification Review Guide (Checklist),'' Federal Emergency Management Agency, October 1997. Memorandum from Kay Goss to All Regional Directors dated 6/23/97 on ''Monitoring of Radiation Exposure by States.''

Dated: August 31, 1998.

Kay C. Goss,

Associate Director for Preparedness, Training, and Exercises.

[FR Doc. 98–24153 Filed 9–8–98; 8:45 am]

BILLING CODE 6718–20–P

FEDERAL RESERVE SYSTEM

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: 11:00 a.m., Monday, September 14, 1998.

PLACE: Marriner S. Eccles Federal Reserve Board Building, 20th and C Streets, N.W., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Lynn S. Fox, Assistant to the Board; 202–452–3204.

SUPPLEMENTARY INFORMATION: You may call 202–452–3206 beginning at approximately 5 p.m. two business days before the meeting for a recorded announcement of bank and bank holding company applications scheduled for the meeting; or you may contact the Board's Web site at http://www.bog.frb.fed.us for an electronic announcement that not only lists applications, but also indicates procedural and other information about the meeting.

Dated: September 4, 1998.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 98–24349 Filed 9–4–98; 3:33 pm]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Clinical Trials Review Committee.

Date: October 25–26, 1998.

Time: 6:00 PM to 6:30 PM.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Joyce A. Hunter, PHD, NHLBI/DEA/Review Branch, Rockledge Building II, Room 7192, MSC 7924, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 435–0287.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: September 1, 1998.

Anna Snouffer,

Acting Committee Management Officer, NIH.

[FR Doc. 98–24103 Filed 9–8–98; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Heart, Lung, and Blood Advisory Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Advisory Council.

Date: October 22–23, 1998.

Open: October 22, 1998, 8:30 AM to 2:00 PM.

Agenda: For discussion of program policies and issues.

Place: National Institutes of Health, 9000 Rockville Pike, Conference Room 10, Building 31C, Bethesda, MD 20892.

Closed: October 22, 1998, 2:00 PM to adjournment.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, 9000 Rockville Pike, Conference Room 10, Building 31C, Bethesda, MD 20892.

Contact Person: Ronald G. Geller, PHD, Director, Division of Extramural Affairs, National Heart, Lung, and Blood Institute, National Institutes of Health, PHS, DHHS, Bethesda, MD 20892, (301) 435–0260.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: September 1, 1998.

Anna Snouffer,

Acting Committee Management Officer, NIH.

[FR Doc. 98–24104 Filed 9–8–98; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel RFA AI98–002—Mycology Research Units.

Date: October 27–28, 1998.

Time: October 27, 1998, 8:30 AM to adjournment.

Agenda: To review and evaluate grant applications.

Place: Bethesda Holiday Inn, Versailles III, 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Stanley C. Oaks, PHD, Scientific Review Administrator, Scientific Review Program, Division of Extramural Activities, NIAID, NIH, Solar Building, Room 4C06, 6003 Executive Boulevard MSC 7610, Bethesda, MD 20892–7610, 301–496–7042.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology,

and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: September 1, 1998.

Anna Snouffer,

Acting Committee Management Officer, NIH.

[FR Doc. 98–24100 Filed 9–8–98; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Microbiology and Infectious Diseases Research Committee.

Date: October 8–9, 1998.

Open: October 8, 1998, 8:00 AM to 9:00 AM.

Agenda: The meeting will be open for discussion of administrative details relating to committee business and program review, and for a report from the Director, Division of Extramural Activities, which will include a discussion of budgetary matters.

Place: Holiday Inn, Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Closed: October 8, 1998, 9:00 AM to adjournment.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn, Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Gary S. Madonna, PHD, Scientific Review Administrator, Room 4C12, Solar Bldg., 6003 Executive Blvd., Bethesda, MD 20892.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: September 1, 1998.

Anna Snouffer,

Acting Committee Management Officer, NIH.

[FR Doc. 98–24101 Filed 9–8–98; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of meetings of the National Deafness and Other Communication Disorders Advisory Council.

The meetings will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such a sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Deafness and Other Communication Disorders Advisory Council, Planning Subcommittee.

Date: October 6, 1998.

Open: 2:00 PM to 3:00 PM.

Agenda: Institute reports and policy discussion.

Place: National Institutes of Health, Building 31, Conference Room 8, 9000 Rockville Pike, Bethesda, MD 20892.

Closed: 3:00 PM to 4:00 PM.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, Building 31, Conference Room 8, 9000 Rockville Pike, Bethesda, MD 20892.

Contact Person: Craig A. Jordan, PHD, Acting Director, NIH/NIDCD/DEA, Executive Plaza South, Room 400C, Bethesda, MD 20892–7180, 301–496–8693.

Name of Committee: National Deafness and Other Communication Disorders Advisory Council.

Date: October 7, 1998.

Open: 8:30 AM to 12:00 PM.

Agenda: Institute reports and policy discussion.

Place: National Institutes of Health, 9000 Rockville Pike, Building 31, C Wing, Conf. Rm. 6, Bethesda, MD 20892.

Closed: 1:00 PM to 3:00 PM.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 9000 Rockville Pike, Building 31, C Wing, Conf. Rm. 6, Bethesda, MD 20892.

Contact Person: Craig A. Jordan, PHD, Acting Director, NIH/NIDCD/DEA Executive Plaza South, Room 400C, Bethesda, MD 20892–7180, 301–496–8693.

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: September 1, 1998.

Anna P. Snouffer,

Acting Committee Management Officer, NIH.

[FR Doc. 98–24102 Filed 9–8–98; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Chemistry and Related Sciences Special Emphasis Panel, ZRG3–BBCB–4.

Date: September 10, 1998.

Time: 2:00 PM to 3:30 PM.

Agenda: To review and evaluate grant applications.

Place: NIH, Rockledge 2, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Donald Schneider, PHD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4172, MSC 7806, Bethesda, MD 20892, (301) 435–1727

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.333, Clinical Research, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893; 93.306, Comparative Medicine, 93.306, National Institutes of Health, HHS)

Dated: September 1, 1998.

Anna Snouffer,

Committee Management Officer, NIH.

[FR Doc. 98–24105 Filed 9–8–98; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. ER–4375–N–02]

Notice of Proposed Information Collection: Comment Request

AGENCY: Office of the President of Government National Mortgage Association (Ginnie Mae), HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: Comments due: November 9, 1998.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Sonya Suarez, Office of Policy, Planning and Risk Management, Department of Housing & Urban Development, 451—7th Street, SW, Room 6226, Washington, DC 20410.

FOR FURTHER INFORMATION CONTACT: Sonya Suarez, Ginnie Mae, (202) 708–2772 (this is not a toll-free number) for copies of the proposed forms and other available documents.

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

The Notice is soliciting comment from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) 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 collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: (1) Letter of Transmittal, (2) Resolution of Board of Directors and Certificate of Authorized Signatures, and (3) Master Servicing Agreement.

OMB Control Number, if applicable: 2503–0016.

Description of the need for the information and proposed use: The purpose of the Letter of Transmittal is to provide issuers with a form to transmit documentation to Ginnie Mae when requesting Ginnie Mae's action on certain activities such as requests for commitment authority/pool number and Ginnie I or II approval. The Resolution of Board of Directors and Certificate of Authorized Signatures is used by the issuers to provide a list of the names and signatures of officers of the company authorizing the issuance of securities. The Master Servicing Agreement is used to provide assurance to Ginnie May that the servicing of the mortgages backing the securities approved for issuance will be performed in accordance with acceptable standards of mortgage servicing. It is also used to determine whether the issuer of the pool is the sole servicer or whether the issuer has established a sub-contract servicer arrangement with another institution to perform certain servicing functions on behalf of the issuer.

Agency form numbers, if applicable: HUD forms 11700, 11702, and 11707.

Members of affected public: For profit business (mortgage companies, thrifts, savings & loans, etc.).

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response:

	Respondents	Frequency of response	Total annual responses	Hours of response*
HUD form 11700	399	4	1,596	271
HUD form 11702	399	1	399	69
HUD form 11707	399	59	23,541	4,002
Total hours of response				4,340

*Total Annual Responses × .17 (10 minutes).

Status of the proposed information collection: Extension of a currently approved collection.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: August 26, 1998.

George S. Anderson,

Executive Vice President, Ginnie Mae.

[FR Doc. 98–24081 Filed 9–8–98; 8:45 am]

BILLING CODE 4210–01–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4352–N–08]

Notice of Proposed Information Collection: Comment Request

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: On August 11, 1998, the proposed information collection requirement described below was published in the **Federal Register**, Vol. 63, No. 154, page 42867, but the applicable form was not attached. The Department is republishing the notice with the applicable form attached. The proposed information collection will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: Comments due date: November 9, 1998.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Mildred M. Hamman, Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street, SW, Room 4238, Washington, D.C. 20410.

FOR FURTHER INFORMATION CONTACT: Mildred M. Hamman, (202) 708–3642, extension 4128, for copies of other available documents. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) 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 collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Calculation of Operating Percentage for a Requested Budget Year (RBY) PHA/IHA-Owned Rental Housing Performance Funding System (PFS).

OMB Control Number: 2577–0066.

Description of the need for the information and proposed use: This collection of information is necessary to ensure that Public Housing Agencies (PHAs) determine an appropriate and justifiable occupancy percentage for RBY in a uniform manner when calculating operating subsidy eligibility under the PFS.

Agency form numbers, if applicable: HUD–52728.

Members of affected public: All PHAs requesting operating subsidy under the provisions of the PFS.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: 3,100 PHAs (respondents), one Calculation of Occupancy Percentage for a Requested Budget Year (RBY) per PHA, two hours per response, 6,200 hours includes preparation of the response (3,100 hours) and recordkeeping burden (3,100 hours).

Status of the proposed information collection: Extension.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: September 1, 1998.

Deborah Vincent,

General Deputy, Assistant Secretary for Public and Indian Housing.

BILLING CODE 4210–33–M

HA Calculation of Occupancy Percentage for a Requested Budget Year (RBY)

PHA/IHA-Owned Rental Housing Performance Funding System (PFS)

U.S. Department of Housing and Urban Development
Office of Public and Indian Housing

OMB Approval No. 2577-0066 (Exp. 8/31/98)

1a. Name of PHA/IHA:	2a. Contact: (Person who can best answer questions about this submission)
1b. Street Address:	2.b Contact's Phone No: (include area code)
1c. City: 1d. State: 1e. Zip Code:	

3. RBY Beginning Date: (mo/day/yr)	4. Type of Submission: ☐ Original ☐ Revision No. ( )	5. PAS/LOCCS Project No:	6. Report Date: (mo/day/yr) (check one box) ☐ Actual Day ☐ Average for Actual Month	7. Data Source: ☐ form HUD-51234 ☐ Rent Roll Records

Part A. Actual Occupancy Data as of Report Date

8. Units Occupied	
9. Units Available	
10. Actual Occupancy Percentage (Divide line 8 by line 9; multiply by 100 and round to nearest whole)	%

Stop & Note 11. If the HA-wide occupancy percentage shown on line 10 is 97% or greater ***and*** the HA believes that an average occupancy rate of at least 97% is sustainable for the RBY, then check the box below. You have completed the form and do not need to proceed further.

☐ High Occupancy HA: Occupancy Percentage is 97% or higher and is sustainable for the RBY → Use 97% as the Projected Occupancy Percentage on line 17 of form HUD-52723

12. Units vacant as of Report Date (subtract line 8 from line 9 and enter result)	

Stop & Note 13. If the result on line 12 is five or fewer vacant units ***and*** the HA believes that during the RBY: 1) the inventory (line 9) will not change; and, 2) the number of vacant units on line 12 will be vacant for the full RBY, then check the box below. You have completed the form and do not need to proceed further.

☐ High Occupancy HA with five or fewer vacant units → Use line 10 for the Projected Occupancy Percentage on line 17 of form HUD-52723

Part B. Distribution of Actual Vacancies By Major Cause Given below are circumstances and actions recognized by HUD as possible causes of vacancies that are beyond the control of the HA to correct. If appropriate, please distribute the number of vacant units reported on line 12 among these causes. Attach sheet identified with HA name and address, the RBY beginning date, and ACC number. Use the sheet to describe, for each circumstance; when the circumstance occurred; the location of the units involved; why the circumstance is preventing the HA from occupying, selling, demolishing, rehabilitating, reconstructing, consolidating or modernizing the vacant units; and the likelihood that these circumstances will be mitigated or eliminated in the RBY.

14. Units vacant because of litigation (e.g., units that are being held vacant as part of court-ordered or HUD-approved desegregation plan)	
15. Units vacant because of Federal, Tribal, or State laws of general applicability. (Note: do not include units vacant only because they do not meet minimum construction or habitability standards.)	
16. Units vacant due to changing market conditions	
17. Units vacant because of natural disaster	
18. Units vacant because of insufficient funding for otherwise approvable CIAP application	
19. RMC-managed units vacant because of failure of HA to fund approvable request for Federal modernization funding ***(This line for use only by RMCs)***	
20. Units vacant because of casualty loss and need to settle insurance claims	
21. Total Units Vacant Due To Circumstances Beyond The HA's Control (Enter sum of lines 14 - 20)	
22. Units vacant after adjusting for circumstances beyond the HA's control (Subtract line 21 from line 12)	

Stop & Note 23. If the result on line 22 is five or fewer vacant units ***and*** the HA believes that during the RBY: 1) the inventory (line 9) will not change; and, 2) the number of vacant units on both lines 21 and 22 will be vacant for the full RBY, then check the box below. You have completed the form and do not need to proceed further.

☐ High Occupancy HA with five or fewer vacant units after adjustment for vacancies beyond its control → Use line 10 for the Projected Occupancy Percentage on line 17 of form HUD-52723

24. Vacancy Percentage after adjusting for beyond control circumstances (Divide line 22 by line 9, multiply by 100, and round to nearest whole)	%

Stop & Note 25. If the result on line 24 is 3% or less ***and*** the HA believes that during the RBY: 1) the inventory (line 9) will not change; and, 2) the number of vacant units on lines 21 and 22 will be vacant for the full RBY, then check the box below. You have completed the form and do not need to proceed further.

☐ High Occupancy HA: 3% or less vacancy rate afteradjustment for vacancies beyond control → Use line 10 for the Projected Occupancy Percentage on line 17 of form HUD-52723

This form replaces forms HUD-52728-A thru -C which have been canceled. Previous edition is obsolete.

form **HUD-52728** (6/96)
ref Handbook 7475.13

Part C. Status of Units Undergoing Modernization as of Report Date If changes occur after the Report Date but prior to submission of this form, the most current status will be shown.

26. Protected Units	Occupied Units	Vacant Units
a: Number of units that are under modernization construction (contract awarded or force account work started)		
b. Number of units not under construction contract but included in a HUD-approved modernization budget where the time period for placing the units under construction (two FFYs after FFY of approval) has not yet expired.		
27. Unprotected Units: Number of units included in a HUD-approved modernization budget where the time period for placing the units under construction (two FFYs after FFY of approval) has expired.		

Part D. Units Estimated to be Available for Occupancy During RBY	(a) No. of Units	(b) Avg. No. of Mos. in RBY	(c) No. of Unit Mos.(a x b)
28. Units Available as of Report Date (Enter line 9)		12	
29. Additional Units Available During RBY because of Development/Acquisition of PFS-Eligible projects	+		+
30. Units Unavailable During RBY because of Demolition/Disposition/Conversion Actions Approved By HUD	-		-
31. Total (Add lines 28 and 29; subtract line 30)			

Part E. Units Estimated to be Occupied During RBY			
32. Units Occupied as of Report Date (Enter line 8)		12	
33. Additional Units Occupied during RBY because of Development/Acquisition of PFS-Eligible Projects	+		+
34. Reoccupancy during RBY of Units Vacated for Circumstances Beyond the HA's Control	+		+
35. Reoccupancy during RBY of Vacant Units in a Funded Modernization Program	+		+
36. Occupied Units in Funded Modernization Program Being Vacated during RBY	-		-
37. Occupied Units Being Vacated during RBY because of Demolition/Disposition/Conversion Actions Approved by HUD. If there are occupied units that become vacant after the Report Date but before the start of the RBY because of circumstances and actions beyond the HA's control, place that number here ( ) and include in total shown on 37. Attach separate sheet with same information requested in Part C.			
38. Total (Add lines 32-35, subtract lines 36 and 37)			

Part F. Occupancy Percentage During RBY	
39. Total Unit Months of Occupancy (Enter line 38c)	
40. Total Unit Months Available for Occupancy (Enter line 31c)	
41. Occupancy Percentage for RBY (Divide line 39 by line 40; multiply by 100 and round to nearest whole)	%
42. Average Number of Vacant Units During RBY (Subtract line 39 from line 40; divide result by 12 and round to nearest whole)	

Stop & Note

43. If the result on line 41 is 97% or higher *or* if the result on line 42 is five or less, then check the appropriate box below. You have completed the form and do not need to proceed further.

- ☐ a. High Occupancy HA: Occupancy Percentage is 97% or higher for the RBY ➔ Use 97% as the Projected Occupancy Percentage on line 17 of form HUD-52723
- ☐ b. High Occupancy HA with five or fewer vacant units ➔ Use line 41 for the Projected Occupancy Percentage on line 17 of form HUD-52723

Part G. Vacancy Percentage for RBY Adjusted for Modernization		
44. Total Unit Months of Vacancy in RBY (Enter line 40 less line 39)		
45. Total Unit Months for Vacant Units In Funded Mod. and Under Construction or Funded for Construction (Sum the vacant units of lines 26a and b; multiply by 12)		
46. If any of the vacant units on lines 26a or b will be reoccupied during the RBY, enter that number times the average number of months during the RBY these units will be reoccupied.	-	
47. If any of the occupied units on lines 26a or b will be vacated during the RBY for mod. construction, enter that number times the average number of months during the RBY these units will be vacated.	+	
48. Total Unit Months for Vacant Units In Funded Mod. And Under Construction or Funded For Construction In RBY (Add line 45; less line 46; plus line 47)		
49. Total Unit Months of Vacancy in RBY Adjusted for Modernization (Enter line 44 less line 48)		
50. Vacancy Percentage for RBY Adjusted for Modernization (Divide line 49 by line 40; multiple by 100; and round to nearest whole.)		%
51. Average Number of Vacant Units in RBY Adjusted for Modernization (Divide line 49 by 12; round to nearest whole)		

Stop & Note

52. If the result on line 50 is 3% or lower *or* if the result on line 51 is five or less, then check the appropriate box below. You have completed the form and do not need to proceed further.

- ☐ a. High Occupancy HA: Vacancy Percentage is 3% or less for the RBY after Modernization Adjustment ➔ Use line 41 as the Projected Occupancy Percentage on line 17 of form HUD-52723
- ☐ b. High Occupancy HA: five or fewer vacant units after Modernization Adjustment ➔ Use line 41 for the Projected Occupancy Percentage on line 17 of form HUD-52723

This form replaces forms HUD-52728-A thru -C which have been canceled. Previous edition is obsolete.

form **HUD-52728** (6/96)
ref Handbook 7475.13

Part H. Vacancy Percentage for RBY Adjusted for Both Modernization *and* Beyond Control Circumstances	
53. Total Unit Months of Vacancy in RBY (Enter line 44)	
54. Total Unit Months of Vacancy in RBY Due to Modernization (Enter line 48)	
55. Total Unit Months of Vacancy in RBY Due to Beyond Control Vacancies (Enter line 21 times 12; less any entry made on line 34c)	
56. Total Unit Months of Vacancy After Above Adjustments (Enter line 53 less lines 54 and 55)	
57. Vacancy Percentage for RBY After Above Adjustments (Divide line 56 by line 40; multiple by 100; and round to nearest whole.)	%
58. Average Number of Vacant Units in RBY After Above Adjustments (Divide line 56 by 12; round to nearest whole)	

Stop & Note

59. If the result on line 57 is 3% or lower *or* if the result on line 58 is five or less, then check the appropriate box below. You have completed the form and do not need to proceed further.

- ☐ a. High Occupancy HA: Vacancy Percentage is 3% or less for the RBY after Modernization Adjustment → Use line 41 as the Projected Occupancy Percentage on line 17 of form HUD-52723
- ☐ b. High Occupancy HA: five or fewer vacant units after Modernization Adjustment → Use line 41 for the Projected Occupancy Percentage on line 17 of form HUD-52723

Part I. Adjustment for Long Term Vacancies If the HA estimates that it will have a vacancy percentage of more than 3% for its RBY and more than five vacant units after adjusting for vacant units undergoing modernization and vacancies beyond its control, the HA will exclude all of its long-term vacancies (if any) from its count of units available for occupancy and use this section to determine its projected occupancy percentage.

60. Total Long-term Vacancies (Subtract vacant units shown on lines 21, 26a, and b from line 12. Analyze remaining vacancies and identify those units that have been vacant for more than 12 months as of the Report Date.)	
61. Unit Months of Vacancy Associated With Long-Term Vacancies (Multiply line 60 by 12)	
62. Total Unit Months Available for Occupancy in RBY Adjusted for Long-Term Vacancies (Subtract line 61 from line 31(c)) Use this UMA number in all other PFS calculations.	
63. Occupancy Percentage for RBY Adjusted for Long-Term Vacancies (Divide line 38(c) by line 62; multiply by 100 and round to nearest whole)	%
64. Average Number of Vacant Units in RBY after All Adjustments (Subtract line 60 from line 58)	
65. Total Unit Months of Vacancy in RBY after All Adjustments (Subtract line 61 from line 56)	
66. Vacancy Percentage for RBY Adjusted for Long-Term Vacancies (Divide line 65 by line 62; multiply by 100 and round to nearest whole)	%

Stop & Note

67. If the result on line 63 is 97% or higher *or* if the result on line 64 is five or less *or* if the result on line 66 is 3% or less, then check the appropriate box below. You have completed the form and do not need to proceed further.

- ☐ a. High Occupancy HA: Occupancy Percentage is 97% or higher for the RBY after Long-Term Vacancies Adjustment → Use 97% as the Projected Occupancy Percentage on line 17 of form HUD-52723. ***Use the UMA result on line 62 in calculating PFS eligibility.***
- ☐ b. High Occupancy HA: Five or fewer vacant units after Adjustment for Long-TermVacancies → Use line 63 as the Projected Occupancy Percentage on line 17 of form HUD-52723. ***Use the UMA result on line 62 in calculating PFS eligibility.***
- ☐ c. High Occupancy HA: Vacancy Percentage is 3% or lower for the RBY after Long-Term Vacancies Adjustment → Use line 63 as the Projected Occupancy Percentage on line 17 of form HUD-52723. ***Use the UMA result on line 62 in calculating PFS eligibility.***

Part J. Projected Occupancy Percentages for Low Occupancy HAs If the HA cannot determine an acceptable Projected Occupancy Percentage for the RBY using the above approach, it will use this section. The HA will use the lower of either 97% or that percentage based on having five units vacant for the RBY. Either percentage can be adjusted for vacant units undergoing modernization construction and vacancies beyond its control. Small HAs of 140 units or less will generally want to use a percentage based on five vacant units.

68. Enter 97% if HA has more than 140 units. If 140 or fewer units, determine occupancy percentage based on 5 vacant units, for RBY. (Take 60 unit months and divide by line 62; multiply by 100 and round to nearest whole. Subtract result from 100%)	%
69. Percentage Adjustment for Modernization and Beyond Control Vacancies (Add lines 48 plus 55; divide that sum by line 62; multiply by 100 and round to nearest whole)	%
70. Projected Occupancy Percentage for Low Occupancy HA (Take the percentage on line 68 and subtract the percentage shown on line 69. Use the result as the Projected Occupancy Percentage on line 17 of form HUD-52723. ***Use the UMA result on line 62 in calculating PFS eligibility***)	%

Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. This agency may not collect this information, and you are not required to complete this form, unless it displays a currently valid OMB control number.

Instructions for Preparing Form HUD-52728, HA Calculation of Occupancy Percentage for a Requested Budget Year (RBY)

The purpose of this form is to provide a structured format for Public Housing Authorities (PHAs), Indian Housing Authorities (IHAs), and, if applicable, Resident Management Corporations (RMCs) to use in developing an appropriate and justifiable projection of occupancy for the RBY. The projected occupancy percentage that is developed will be used as one element in the calculation of operating subsidy under the Performance Funding System (PFS), 24 CFR Parts 950 and 990, as applicable. The term Housing Authority (HA) will be used to collectively describe both PHAs and IHAs. The form is ***not*** for use by HAs requesting operating subsidy solely to cover the cost of an Independent Audit (IA).

The instructions should be read carefully since it may not be necessary for a HA to complete all sections of the form in order to determine an acceptable projected occupancy percentage for the RBY. The form has been designed to go from the most simple situation to the relatively more complex cases. If, at any point, an HA is able to classify itself as a High Occupancy HA, it does not need to proceed further with the form.

Headings:

RBY Beginning. Enter the beginning month, day and year of the requested budget year for which this form is submitted.

Type of Submission. Indicate whether this form is (1) the original submission for the RBY or (2) a revision of the latest approval for the subject fiscal year. If a revision, enter the revision number.

ACC Number. Enter the number of the Annual Contributions Contract (ACC) covering the projects for which this form is submitted.

PAS/LOCCS Project No. Enter the PAS/LOCCS Project Number applicable to the corresponding Calculation of Performance Funding System Operating Subsidy, form HUD-52723.

Report Date. Enter the date of the occupancy data collected to determine the actual occupancy percentage. ***Unless otherwise approved by HUD***, that date will be the last day of the month ending six months before the start of the HA's RBY or the monthly average for the month ending six months before the start of its budget year. Check whether actual day data was used or an average was constructed using actual data for the month.

Data Source. Indicate the data source used to calculate the actual occupancy percentage.

Part A. Actual Occupancy Data as of Report Date

Using actual occupancy data as of the Report Date, an HA will determine its actual occupancy percentage and number of vacant units. For many HAs, this will be the only section that will need to be completed.

Part B. Distribution of Actual Vacancies By Major Cause

This part allows the HA to present data and supporting narrative on the number of units that are vacant for reasons that are beyond the control of the HA to correct. For a further description of allowable reasons, please refer to ¶ 990.102 and the definition of units vacant due to circumstances and actions beyond the HA's control.

Part C. Status of Units Undergoing Modernization

Data in this part will be used in determining the occupancy percentage for the RBY. If the RBY occupancy percentage is less than 97% and HA will have more than five vacant units, data from this part will be used in Part G to determine if the RBY occupancy percentage is justified. Report occupied units, as appropriate, on lines 26a., 26b., and 27, if they will be subsequently vacated in order for construction work to be performed and then reoccupied upon completion. If changes occur after the Report Date but prior to the submission of this form, the most current status will be shown.

Line 26. Enter data on the number of protected units, both vacant and occupied, as of the Report Date, which may fall into two categories: (a) the number of units that are under construction (contract awarded or force account work started); or (b) the number of units not under construction contract but included in a HUD-approved modernization budget where the time period for placing the units under construction (two Federal Fiscal Years (FFYs) after the FFY of approval) has not yet expired.

Line 27. Enter data on the number of unprotected units, both vacant and occupied, as of the Report Date, which are the number of units included in a HUD-approved modernization budget where the time period for placing the units under construction (two FFYS after FFY of approval) has expired and the units are not yet under construction. Note: When such units subsequently reach construction, they will become protected units. If a change in status occurs after the initial subsidy calculation has been approved, an HA may recalculate its subsidy eligibility as part of its year-end adjustments.

Part D. Units Estimated to be Available for Occupancy During RBY

Data which is entered on ***line 29*** or ***line 30*** must only reflect actions that have been approved by HUD, including approvals made after the Report Date but prior to the submission of this form. If there are pending applications for HUD approval of actions that would increase or decrease the number of units available for occupancy at the time of submission, that data will be excluded.

Part E. Units Estimated to be Occupied During RBY

Line 33. Use this line to show the number of units on line 29. (if any) that will be occupied during the RBY.

Line 34. Use this line to show the number of units on line 21. (if any) that will be occupied during the RBY.

Line 35. Use this line to show the number of vacant units on lines 26a and 26b. (if any) that will be reoccupied during the RBY.

Line 36. Use this line to show the number of occupied units on lines 26a, 26b, and 27. (if any) that will be vacated during the RBY.

Line 37. Use this line to show the number of units on line 30. (if any) that will be vacated during the RBY.

Part G. Vacancy Percentage for RBY Adjusted for Modernization

Note that this section deals with units that meet the definition of being vacant units undergoing modernization. The units must be under construction and on-schedule or funded for construction with the time period (two-year maximum after award) for fund obligation not expiring.

Part I. Adjustment for Long Term Vacancies

Note that if this section is used, the HA will be recalculating its Unit Months Available (UMAs) to exclude long-term vacancies and must use the recalculated result in its determination of PFS eligibility. If the UMAs for occupancy have been adjusted for long term vacancies, the unit months associated with those vacancies, line 61, shall be multiplied by 20% of the AEL (line 7 of the HUD-52723 prepared for RBY) and the result displayed on line 28e of the HUD-52723.

[FR Doc. 98–24082 Filed 9–8–98; 8:45 am]

BILLING CODE 4210–33–C

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ES–930–08–1430–00 Michigan]

Disclaimer of Interest; Michigan Correction

AGENCY: Bureau of Land Management, Interior.

ACTION: Correction to the July 30, 1998, Notice of Disclaimer of Interest as published in the **Federal Register** (63 FR 40729).

SUMMARY: The purpose of this notice is to correct the list of lands described in the July 30, 1998, Notice of Disclaimer of Interest as published in the **Federal Register** (63 FR 40729) for certain islands under the Michigan Public Lands Improvement Act of October 28, 1998.

The following parcels were inadvertently included in the **Federal Register** Notice of July 30, 1998, and are hereby deleted.

UNSURVEYED ISLANDS SUBJECT TO WHEELER

[All are Michigan Meridian]

County	CCN	TNP	RNG	SEC	Acres	Location
Alpena	001	31N	6E	3	0.80	Island in Thunder Bay River.
	002	31N	6E	3	1.50	Island in Thunder Bay River.
	003	31N	6E	11	0.30	Island in Thunder Bay River.
	004	31N	6E	3	020	Island in Thunder Bay River.
	005	31N	6E	36	0.20	Island in Thunder Bay River.
	006	31N	8E	7	1.50	Island in Thunder Bay River.
	007	31N	8E	7	0.20	Island in Thunder Bay River.
	008	31N	8E	7	0.30	Island in Thunder Bay River.
	009	31N	8E	7	0.40	Island in Thunder Bay River.
	010	31N	8E	18	0.30	Island in Thunder Bay River.
Berrien	005	6S	18W	1	0.80	Island in St. Joseph River.
Branch	002	7S	5W	5	1.50	Island in Marble Lake.
Iron	022	41N	32W	5	0.10	Island in Stager Lake.
	055	42N	33W	15	0.60	Island in Buck Lake.
Marquette	022	46N	28W	15	0.20	Island In Island Lake.
Roscommon	001	22N	1W	31	1.00	Island In West Twin Lake.
	003	21N	2W	12	0.20	Island In Clear Lake.
The following parcel is added to the list of all parcels described in the **Federal Register** Notice of July 30, 1998.						
Washtenaw	016	2S	6E	21	0.20	Island in Huron River.
Following is a complete and correct list as intended in the **Federal Register** Notice of July 30, 1998.						
Barry	004	1N	10W	7	1.30	Island in Pine Lake.
	005	1N	10W	15	2,80	Island in Crooked Lake.
Calhoun	011	3S	6W	15	1.50	Island in Cedar Lake.
Cass	005	7S	13W	19	0.80	Island in Shavehead Lake.
	012	7S	15W	30	1.50	Island in Pine Lake.
Clare	002	20N	4W	26	0.50	Island in Long Lake.
Genesee	006	9N	5E	21	8.00	Island in Flint River.
Kent	015	8N	11W	7	3.20	Island in Little Pine Island Lake.
Keweenaw	023	58N	31W	1	0.50	Island in Lake Superior.
Marquette	018	50N	26W	21	0.60	Island in Lake Superior.
	019	50N	26W	21	0.30	Island In Lake Superior
	020	50N	26W	27	4.00	Garlic Island in Lake Superior.
	021	47N	27W	13	0.80	Island In Lake Miller.
Montcalm	003	10N	5W	17	0.30	Island In Crystal Lake.
Oakland	001	2N	9E	4	0.30	Island In Cass Lake.
Ogemaw	004	23N	1E	2	0.20	Island In Clear Lake.
	005	23N	1E	2	0.90	Island In Clear Lake.
	006	23N	1E	11	1.20	Island In Clear Lake.
	010	23N	4E	8	1.80	Island In George Lake.
Presque	002	34N	4E	31	0.10	Island In Lake Nettie.
Isle	004	33N	7E	25	0.10	Island In Long Lake.
	005	33N	7E	25	0.20	Island in Long Lake.
Washtenaw	014	2S	6E	21	1.30	Island in Huron River.
	015	2S	6E	21	0.10	Island in Huron River.
	016	2S	6E	21	0.20	Island in Huron River.

SURVEYED ISLANDS SUBJECT TO WHEELER

[All are Michigan Merdian]

County	Serial No.	TWP	RNG	SEC	Subdiv	AC	Location/name
Chippewa	041337	47N	1E	11	Tr. 41	1.05	Black Point Sugar Island.
Chippewa	041338	46N	2E	14	Tr. 38	0.60	Rock Island.
					Tr. 37	1.68	Advance Island.
Chippewa	041339	42N	4E	16	Lot 2	1.24	Sweets Island.
Chippewa	041340	41N	5E	14	Tr. 39	0.28	Huron Bay.
				23	Tr. 38	1.27	Huron Bay.

SURVEYED ISLANDS SUBJECT TO WHEELER—Continued

[All are Michigan Merdian]

County	Serial No.	TWP	RNG	SEC	Subdiv	AC	Location/name
Chippewa	035667	43N	6E	30	Tr. 39	0.06	Potaganissing Bay.
				31	Tr. 37 & 38.	0.47	Potaganissing Bay.
				31	Tr. 40 & 41.	0.36	Potaganissing Bay.
Grand Traverse	041343	26N	10W	1	Tr. 37	0.10	Rennie Lake.
		26N	10W	9	Tr. 39	0.70	Island in Arbutus Lake.
Mackinac	041349	41N	1E	3	Tr. 37	1.10	Little Island.
Mackinac	041350	42N	1W	28	Tr. 39	0.19	Lake Huron.
					Tr. 40	0.02	Lake Huron.
Mackinac	035172	42N	1W	28	Tr. 37	0.45	Lake Huron.
Mackinac	036455	42N	1W	29	Tr. 41	0.45	Burnam Island.
Otsego	041360	30N	4W	32	Tr. 37	1.02	Buhl Lake.
Otsego	041361	30N	4W	32	Tr. 38	0.91	Buhl Lake.

FOR FURTHER INFORMATION CONTACT: Deputy State Director, Walter Rewinski, at (703) 440–1727, Eastern States, Division of Resources Planning, Use and Protection, 7450 Boston Boulevard, Springfield, VA 22153.

Dated: August 28, 1998.

Gwen W. Mason,

Associate State Director, Eastern States.

[FR Doc. 98–24110 Filed 9–8–98; 8:45 am]

BILLING CODE 4310–CJ–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR–022–08–1010–00: GP–0307]

Oregon: Use of Helicopters to Gather Wild Horses Meeting Notice

AGENCY: Bureau of Land Management (BLM), DOI.

ACTION: Burns District Office: Public meeting to discuss the use of helicopters to gather wild horses in Oregon.

SUMMARY: In accordance with Pub. L. 92–195, this notice sets forth the public meeting date to discuss the use of helicopters in gathering wild horses and the proposed gathering schedule in Oregon for FY99.

EFFECTIVE DATE: October 5, 1998—2 p.m. to 3 p.m.

ADDRESSES: The meeting will take place at the BLM Burns District Office, HC 74–12533 Highway 20 West, Hines, Oregon.

FOR FURTHER INFORMATION CONTACT: James G. Kenna, Acting District Manager, Burns District, Bureau of Land Management, HC 74–12533 Hwy 20 West, Hines, Oregon 97738, Telephone (503) 573–4400.

SUPPLEMENTARY INFORMATION: Public comments will be accepted concerning the use of helicopters to gather wild horses in eastern Oregon in FY99. The gathering schedule and approximate dates of gathering will be presented at the meeting. The total number of horses expected to be gathered will be approximately 550 depending on the availability of funds and the capability of the Bureau of Land Management to process and adopt out the horses gathered.

This meeting is open to the public. Persons interested in making an oral statement at this meeting are asked to notify the Acting District Manager, Burns District Office, HC 74–12533 Hwy 20 West, Hines, Oregon 97738 by September 25, 1998. Written statements must be received by October 2, 1998.

Summary minutes of the meeting will be available for public inspection and duplication within 30 days following the meeting.

Dated: September 1, 1998.

Miles R. Brown,

Andrews Resource Area Manager.

[FR Doc. 98–24174 Filed 9–8–98; 8:45 am]

BILLING CODE 4310–33–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ES–930–08–1310–00–241A; MSES 48204]

Proposed Reinstatement of Terminated Oil and Gas Lease; Mississippi

Under the provisions of Public Law 97–451, a petition for reinstatement of oil and gas lease MSES 48204, Greene County, Mississippi, was timely filed and accompanied by all required rentals and royalties accruing from December 1, 1997, the date of termination.

Not valid lease has been issued affecting the lands. The lessee has agreed to new lease terms for rentals and royalties at rates of $10 per acre and 16⅔ percent. Payment of $500 in administrative fees and a $125 publication fee has been made.

The Bureau of Land Management is proposing to reinstate the lease effective December 1, 1997, subject to the original terms and conditions of the lease and the increased rental and royalty rates cited above. This is in accordance with section 31 (d) and (e) of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 188 (d) and (e)).

For Further Information Contact: Gina Goodwin at (703) 440–1534.

Dated: August 28, 1998.

Gwen W. Mason,

Associate State Director.

[FR Doc. 98–24108 Filed 9–8–98; 8:45 am]

BILLING CODE 4310–GJ–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ES–930–08–1310–00–241A; MSES 48202]

(Mississippi) Proposed Reinstatement of Terminated Oil and Gas Lease

Under the provisions of Public Law 97–451, a petition for reinstatement of oil and gas lease MSES 48202, Greene County, Mississippi, was timely filed and accompanied by all required rentals and royalties accruing from December 1, 1997, the date of termination.

No valid lease has been issued affecting the lands. The lessee has agreed to new lease terms for rentals and royalties at rates of $10 per acre and 16⅔ percent. Payment of $500 in administrative fees and a $125 publication fee has been made.

The Bureau of Land Management is proposing to reinstate the lease effective December 1, 1997, subject to the original terms and conditions of the lease and the increased rental and royalty rates cited above. This is in accordance with section 31(d) and (e) of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 188(d) and (e)).

For Further Information, Contact: Gina Goodwin at (703) 440–1534.

Dated: August 28, 1998.

Gwen W. Mason,

Associate State Director.

[FR Doc. 98–24109 Filed 9–8–98; 8:45 am]

BILLING CODE 4310–GT–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–060–08–1430–01, M84505.1]

Realty Actions; Sales, Leases, etc: Montana

AGENCY: Bureau of Land Management, Lewistown Field Office.

ACTION: Cancellation of notice of realty action; Direct sale of public land in Petroleum County, Montana.

SUMMARY: The Notice of Realty Action published in the **Federal Register**, Volume 62, No. 229, on November 28, 1997 on page 63381, is hereby cancelled in its entirety. The sale is being cancelled as the public land (80 acres) is now included in the Two Crow Land Exchange proposal, MTM87193, Petroleum County, Montana.

ADDRESSES: Information related to this action is available for review at the Lewistown Field Office, Airport Road, P.O. Box 1160, Lewistown, MT 59457.

FOR FURTHER INFORMATION CONTACT: Loretta Park, 406–538–7461.

Authority: Sec. 203, Pub. L. 94–579, 90 Stat. 2750 (43 U.S.C. 1713) and Sec. 206, Pub. L. 94–579, 90 Stat. 2756 (43 U.S.C. 1716))

Dated: August 31, 1998.

B. Gene Miller,

Associate Field Manager.

[FR Doc. 98–24090 Filed 9–8–98; 8:45 am]

BILLING CODE 4310–DN–M

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before August 29, 1998. Pursuant to section 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, 1849 C St. NW, NC400, Washington, DC 20240. Written comments should be submitted by September 24, 1998.

Carol D. Shull,

Keeper of the National Register.

CALIFORNIA

Los Angeles County

Kress, George R., House, 2337 Benedict Canyon Dr., Los Angeles, 98001196

San Diego County

Teacher Training School Building—San Diego State Normal School, 4345 Campus Ave., San Diego, 98001193

San Francisco County

Hotel Californian, 403 Taylor St., San Francisco, 98001195

COLORADO

Denver County

Brueger Brothers Building and Annex, 1732–1740 Champa St., Denver, 98001198

FLORIDA

Hendry County

Dixie Crystal Theatre, 100 E. Sugarland Hwy., Clewiston, 98001202

Hernando County

South Brooksville Avenue Historic District, Roughly along S. Brooksville Ave., from Liberty St. to Early Ave., Brooksville, 98001203

Lake County

Lake County Courthouse, 315 W. Main St., Tavares, 98001199

Sarasota County

Payne, Christy, Mansion, 800 S. Palm Ave., Sarasota, 98001201

Suwannee County

Price, Dr., House, 702 Pine Ave., Live Oak, 98001200

IOWA

Floyd County

Wildwood Park Historic District, 1 Wildwood Rd., Charles City, 98001205

Guthrie County

Cretsinger, John, House, 1363 Burl Ln., Coon Rapids, 98001206

Winneshiek County

Decorah East Side Elementary and Middle School, 210 Vernon St., Decorah, 98001204

Woodbury County

Ashby, Atchison A., House, 1807 Summit St., Sioux City, 98001207

NEVADA

Carson City Independent City

Virginia and Truckee Railroad Depot—Carson City, 729 N. Carson St., Carson City, 98001208

NORTH CAROLINA

Cumberland County

Cross Creek Cemetery Number One, Jct. of N. Cool Spring and Grove St., Fayetteville, 98001209

Currituck County

Grandy School, (Former), Jct. of US 158 and Poplar Branch Rd., Grandy, 98001210

TENNESSEE

Giles County

Elk River Fortification (Tennessee Resources of the American Civil War MPS), Address Restricted, Prospect vicinity, 98001212

Greene County

Bulls Gap Fortification (Tennessee Resources of the American Civil War MPS), Address Restricted, Bulls Gap vicinity, 98001211

TEXAS

Wood County

Lott, Howard L. and Vivian W., House, 311 E. Kilpatrick St., Mineola, 98001185

UTAH

Utah County

Davis—Ercanbrack Farmstead (Orem, Utah MPS), 2044 S. Main St., Orem, 98001213

Weber County

Jefferson Avenue Historic District, Roughly along Jefferson Ave., bet. 25th and 27th Sts., Ogden, 98001214

WASHINGTON

Island County

Utsalady Ladies Aid Building, 79 Utsalady Rd., Camano Island, 98001186

[FR Doc. 98–24112 Filed 9–8–98; 8:45 am]

BILLING CODE 4310–70–M

AGENCY FOR INTERNATIONAL DEVELOPMENT

Bureau for Global Programs, Field Support and Research, Office of Environment and Urban Programs Certificate of the Director

I, David Painter, Director, Office of Environment and Urban Programs, Bureau for Global Programs, Field Support and Research, U.S. Agency for International Development, an agency of the United States of America, do hereby certify that from this date of publication and until further notice, for the purposes of the Housing Guaranty Standard Terms and conditions (22 CFR part 204) (1996) (''Standard Term''), the authorized representatives of USAID are:

David Painter
Earl Kessler
Ronald Carlson
Michael Enders

Any promissory note having the guaranty legend signed, either by

manual or facsimile signature, by one of such persons, and any such promissory notes previously signed by Viviann Gary, former Director, Office of Environment and Urban Programs, Center for Environment, U.S. Agency for International Development, shall constitute an ''Eligible Note'' (as defined in the Standard Terms) entitled to the benefit of the Standard Terms.

In witness whereof, I have hereunto set my hand this 31st day of August, 1998.

David Painter,

Director, Office of Environment and Urban Program, Bureau of Global Programs, Field Support and Research, Agency for International Development.

[FR Doc. 98–24176 Filed 9–8–98; 8:45 am]

BILLING CODE 6116–01–M

FOREIGN CLAIMS SETTLEMENT COMMISSION

[F.C.S.C. Meeting Notice No. 13–98]

Sunshine Act Meeting

The Foreign Claims Settlement Commission, pursuant to its regulations (45 CFR Part 504) and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of meetings and oral hearings for the transaction of Commission business and other matters specified, as follows:

DATE AND TIME: Friday, September 18, 1998, 10:00 a.m.

SUBJECT MATTER: A. Oral Hearings on Objections to Proposed Decisions on claims against Albania, as follows:

Claim No. ALB–117 James Elias

B. Hearings on the Record on Objections to Proposed Decisions on claims against Albania, as follows:

Claim Nos. ALB–137 & ALB–138 Klementina P. Sevo and Marianthi P. Fili

C. Proposed Decisions on claims against Albania.

STATUS: Open.

All meetings are held at the Foreign claims Settlement Commission, 600 E Street, N.W., Washington, DC. Requests for information, or advance notices of intention to observe an open meeting, may be directed to: Administrative Officer, Foreign Claims Settlement Commission, 600 E Street, NW., Room 6002, Washington, DC 20579. Telephone: (202) 616–6988.

Dated at Washington, DC, September 4, 1998.

Judith H. Lock,

Administrative Officer.

[FR Doc. 98–24283 Filed 9–4–98; 3:06 pm]

BILLING CODE 4410–BA–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Proposed Information Collection Request Submitted for Public Comment and Recommendations; Records of Tests and Examinations of Personnel Hoisting Equipment

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, the Mine Safety and Health Administration (MSHA) is soliciting comments concerning the proposed extension of the information collection related to the Records of Tests and Examinations of Personnel Hoisting Equipment. MSHA is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

A copy of the proposed information collection request can be obtained by contacting the employee listed below in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

DATES: Submit comments on or before November 9, 1998.

ADDRESSES: Send comments to Patricia W. Silvey, Director, Office of Standards, Regulations, and Variances, 4015 Wilson Boulevard, Room 627, Arlington, VA 22203–1984. Commenters are encouraged to send their comments on a computer disk, or via E-mail to psilvey@msha.gov, along with an original printed copy. Ms. Silvey can be reached at (703) 235–1910 (voice) or (703) 235–5551 (facsimile).

FOR FURTHER INFORMATION CONTACT: Theresa O'Malley, Program Analysis Office, Office of Program Evaluation and Information Resources, U.S. Department of Labor, Mine Safety and Health Administration, Room 715, 4015 Wilson Boulevard, Arlington, VA 22203–1984. Mrs. O'Malley can be reached at tomalley@msha.gov (Internet E-mail), (703) 235–1470 (voice), or (703) 235–1563 (facsimile).

SUPPLEMENTARY INFORMATION

I. Background

These requirements provide for a record of specific test and inspections of a mine's personnel hoisting systems, including the wire rope, to ensure that the system remains safe to operate. Review of the record indicates whether deficiencies are developing in the equipment, in particular the wire rope, so that corrective action may be taken before an accident occurs. A record is not required if unsafe conditions are not present. However, the mine operator must certify that the required inspections have been made.

The precise format in which the record is kept is left to the discretion of the mine operator. All records are made by the person conducting the required examinations or tests. Unless otherwise noted below, these records are to be retained for one year at the mine site.

II. Current Actions

The information is used by industry management and maintenance personnel to project the expected safe service performance of equipment; to indicate when maintenance and specific test need to be performed; and to ensure that wire rope is replaced in time to maintain the necessary safety for miners. Federal inspectors use the records to ensure that unsafe conditions are identified early and corrected. The consequence of hoist equipment malfunctions or wire rope failures can

result in serious injuries and fatalities. It is essential that MSHA inspectors be able to verify that mine operators are properly inspecting their hoist equipment for unsafe conditions.

Type of Review: Extension.

Agency: Mine Safety and Health Administration.

Title: Records of Tests and Examinations of Personnel Hoisting Equipment.

OMB Number: 1219–0034.

Agency Number: MSHA 720.

Recordkeeping: All records are required to be retained for one year, except for the wire rope test and that is required for the life of the wire rope.

Affected Public: Business or other for-profit.

Cite/reference	Total respondents	Frequency	Total responses	Average time per response	Burden hours
EXAMINATION 56/57.19023	86	Daily	22,360	20 minutes	7,379
(a) and (d), 56/57.19121	86	Weekly	4,472	10 minutes	745
56/57.19129, 56/57.19131, 56/57.19132, 56/57.19133, 56/57.19134.	86	Bi-weekly	2,236	45 min.	1,677
RECORDING 56/57.19023 (a) and (d)	86	Daily	22,360	5 min.	1,863
56/57.19121, 56/57.19129	86	Weekly	4,472	5 min.	373
56/57.19131, 56/57.19132, 56/57.19133, 56/57.19134	86	Bi-weekly	2,236	5 min.	186
EXAMINATION 56/57.19022, 56/57.19023(c), 56/57.19023(e)	86	2/year	172	1 hour	172
RECORDING	86	2/year	172	9 minutes	26
EXAMINATION 75.1400–4, 75.1433(d), 77.1404, 77.1433(d), 77.1906.	274	On occasion	18,084	1 hour	18,084
RECORDING	274	On occ.	18,084	5 minutes	1,506
EXAMINATION 75.1432, 75.1433(e), 77.1432, 77.1433(e)	274	Semi-annual	548	1 hour	548
RECORDING	274	Semi-annual	548	0.15 hr	82
EXAMINATION 75.1400–2	274	6/yr	1,644	9 minutes	247
RECORDING	274	6/year	1,644	1 hour	1,644
TOTALS			99,032	21 min.	34,532

Total Burden Cost (capital/startup): This cost is based upon the mine operator's decision as to whether or/not to install a personnel hoist or elevator.

Total Burden Cost (operating/maintaining): $1,304,201.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: September 2, 1998.

George M. Fesak,

Director, Program Evaluation and Information Resources.

[FR Doc. 98–24188 Filed 9–8–98; 8:45 am]

BILLING CODE 4510–43–M

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Proposed Information Collection Request Submitted for Public Comment and Recommendations; Refuse Piles and Impounding Structures, Recordkeeping and Reporting Requirements

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, the Mine Safety and Health Administration (MSHA) is soliciting comments concerning the proposed extension of the information collection related to the Refuse Piles and Impounding Structures, Recordkeeping and Reporting Requirements. MSHA is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

A copy of the proposed information collection request can be obtained by contacting the employee listed below in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

DATES: Submit comments on or before November 9, 1998.

ADDRESSES: Send comments to Patricia W. Silvey, Director, Office of Standards, Regulations, and Variances, 4015 Wilson Boulevard, Room 627, Arlington, VA 22203–1984. Commenters are encouraged to send their comments on a computer disk, or via E-mail to psilvey@msha.gov, along with an original printed copy. Ms. Silvey can be reached at (703) 235–1910 (voice) or (703) 235–5551 (facsimile).

FOR FURTHER INFORMATION CONTACT: Mrs. Theresa M. O'Malley, Program Analysis Officer, Office of Program Evaluation and Information Resources, U.S. Department of Labor, Mine Safety and Health Administration, Room 719, 4015 Wilson Boulevard, Arlington, VA 22203–1984. Mrs. O'Malley can be reached at TOMalley@msha.gov (Internet E-mail), (703) 235–1470 (voice), or (703) 235–1563 (facsimile).

SUPPLEMENTARY INFORMATION:

I. Background

The Coal Mine Health and Safety Act of 1969 was amended by the Federal Mine Safety and Health Act of 1977

after the Buffalo Creek dam failure in 1972 in West Virginia. The refuse pile and impoundment standards, Title 30 CFR Sections 77.215 and 77.216 had been enacted earlier in 1975 and were incorporated into the Act. Additional parts of these Sections were promulgated and enacted in 1992.

The standards require that the agency approve prudently engineered design plans for dams and their impoundments, as well as the plans for hazardous refuse piles that are routinely constructed by coal mine operators. Plan revisions are also required to be submitted for approval. In addition, the standards also require plans when one of these sites is to be abandoned. And plans are required when spontaneous fires erupt and need to be extinguished at the burning site. Records of weekly inspections and instrument monitoring are also required to ensure that the sites remain safe. Finally, the mine operators are also required to submit an annual status report and certification that guarantees that the site is being constructed in accordance with the approved plan, and the site has not been altered during the construction year.

II. Current Actions

There are approximately 750 coal mine impounding structures, of which at least 250 are high-hazard sites. In addition, there are hundreds of refuse piles, and of these, it is estimated that 25 are hazardous. All impoundments and hazardous refuse piles are required by the standards to be constructed and operated in an approved manner. In addition, coal mine operators frequently revise construction plans to accommodate mining conditions, cycles or markets. Since these revisions to the structures can adversely affect a great number of people, such changes are required to be planned in a prudent manner and approved by the agency.

Fire extinguishing plans are only required from an operator when a spontaneous combustion has occurred, and the operator is directed to extinguish the fire.

Inspections on a weekly basis, or inspections at a longer interval for long-established and stable impoundments (after the regulation changes in 1992), are required to ensure that precipitation, seismic activity, or perhaps an unknown construction flaw, has not adversely affected any part of the dam site. The annual status report and certification ensures that the company's engineers confirm that the site is in accordance with the approved engineering plan.

An abandonment plan approved by the agency, ensures that a hazardous site is not left in place after all mining activity has ceased.

Type of Review: Extension.

Agency: Mine Safety and Health Administration.

Title: Impounding Structures and Refuse Piles, Reporting Requirements, Certifications and Recordkeeping.

OMB Number: 1219–0015.

Agency Number: MSHA 211.

Recordkeeping: 3 years.

Affected Public: Business or other for-profit.

Cite/Reference/Form/etc: 30 CFR Sections 77.215 and 77.216.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintaining): $3,618,412.

Cite/Reference	Total respondents	Frequency	Total responses	Average time per response (hours)	Burden hours
77.215 New Refuse Piles	24	Annually	50	16	800
Fire Ext. Plans	24	Annually	1	4	4
Abandonment Plans	25	Annually	25	8	200
Certification	15	Annually	15	2	30
77.216 New Impoundments	731	Annually	50	1,300	65,000
Revisions	100	Annually	100	5	500
Annual Certification	100	Annually	100	2	200
Inspections w/monitoring Instruments	300	On Occasion	5,100	3	15,300
Without Monitoring Instruments	431	Annually	7,327	2	14,654
Totals	755		12,768		96,688

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: September 2, 1998.

George M. Fesak,

Director, Program Evaluation and Information Resources.

[FR Doc. 98–24189 Filed 9–8–98; 8:45 am]

BILLING CODE 4510–43–M

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. ICR–98–9]

Gear Certification (29 CFR part 1919); Announcement of OMB Approval of Information Collection Requirements

AGENCY: Occupational Safety and Health Administration.

ACTION: Notice; Announcement of the OMB approval of information collection requirements.

SUMMARY: The Occupational Safety and Health Administration is announcing that the collections of information found in the standard on Gear Certification (29 CFR part 1919) have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995). This document announces the OMB approval number and expiration date.

DATES: Effective September 9, 1998.

FOR FURTHER INFORMATION CONTACT: Theda Kenney, Directorate of Safety Standards Programs, Occupational Safety and Health Administration, U.S Department of Labor, Room N–3605, 200 Constitution Avenue, N.W., Washington, D.C. 20210, telephone (202) 219–8061, ext. 100.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of March 6, 1998 (63 FR 11311), the Agency announced its intent to request renewal of its current OMB approval for 29 CFR part 1919, Gear Certification. In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), OMB has renewed its approval for the information collection and assigned OMB control

number 1218–0003. The approval expires on July 31, 2001. Under 5 CFR 1320.5(b), an Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.

Signed at Washington, D.C. this 28th day of July 1998.

Charles N. Jeffress,

Assistant Secretary of Labor.

[FR Doc. 98–24190 Filed 9–8–98; 8:45 am]

BILLING CODE 4510–26–M

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. ICR 98–30]

Confined and Enclosed Spaces and Other Dangerous Atmospheres in Shipyard Employment (29 CFR part 1915); Information Collection Requirements

ACTION: Notice; Opportunity for Public Comment.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA–95) (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and impact of collection requirements on respondents can be properly assessed. Currently, the Occupational Safety and Health Administration (OSHA) is soliciting comments concerning the proposed extension of the information collection requirements contained in the standard on Confined and Enclosed Spaces and Other Dangerous Atmospheres in Shipyard Employment (29 CFR part 1915). The Agency is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;
- Evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

DATES: Written comments must be submitted on or before November 9, 1998.

ADDRESSES: Comments are to be submitted to the Docket Office, Docket No. ICR–98–30, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–2625, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Telephone: (202) 219–7894. Written comments limited to 10 pages or less in length may also be transmitted by facsimile to (202) 219–5046.

FOR FURTHER INFORMATION CONTACT: Theda Kenney, Directorate of Safety Standards Programs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3605, 200 Constitution Avenue, N.W., Washington, D.C. 20210, telephone: (202) 219–8061. A copy of the referenced information collection request is available for inspection and copying in the Docket Office and will be mailed to persons who request copies by telephoning Theda Kenney at (202) 219–8061, extension 100, or Barbara Bielaski at (202) 219–8076, extension 142. For electronic copies of the Information Collection Request on Confined and Enclosed Spaces and Other Dangerous Atmospheres in Shipyard Employment, contact OSHA's WebPage on the Internet at http://www.osha.gov and click on ''Regulations and Compliance.''

SUPPLEMENTARY INFORMATION:

I. Background

The Occupational Safety and Health Act of 1970 (the Act) authorizes the promulgation of such health and safety standards as are necessary or appropriate to provide safe or healthful employment and places of employment. The statute specifically authorizes information collection by employers as necessary or appropriate for the enforcement of the Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents.

The requirements contained in the standard on Confined and Enclosed Spaces and Other Dangerous Atmospheres in Shipyard Employment (29 CFR part 1915) are necessary for the protection of employees exposed to hazardous atmospheres in shipyard employment. Hazardous atmospheres, whether toxic, flammable or oxygen deficient/enriched, are found throughout shipyard employment, in shipbuilding, ship breaking, ship repair and land side activities. Before employees can work in spaces that may contain hazardous atmospheres, the spaces must be inspected and often tested to determine atmospheric contents. In some situations, the testing is done by a Marine Chemist, Coast Guard Authorized Person, or certified industrial hygienist and a hot work certificate is issued and posted. To make sure the atmosphere in a space remains safe for workers, retesting will be required. In the vast majority of situations, a Shipyard Competent Person (SCP) will test the space, record and maintain the results and post instructions for the workers to follow prior to or during work in the space. The SCP must also retest as necessary to maintain safe conditions.

Employees who must enter spaces that may contain hazardous atmospheres must be trained and a record kept of the training. Training is also required for the shipyards that maintain their own rescue teams.

Employers and employees are unable to recognize toxic, flammable or oxygen deficient/enriched atmospheres in spaces without first testing to determine that hazardous conditions exist. By requiring employers, under 29 CFR 1915.7, to ensure that employees have the ability and knowledge to recognize, test for, and remove these hazards and to specifically assign certain duties to these employees, OSHA is reducing the incidence of accidents caused by hazardous atmospheres within shipyard employment, including, but not limited to, vessels and vessel sections.

There is an increase of 135,869 burden hours associated with the information collection requirements contained in the standard (from 1,312 hours to 137,181 hours). This increase is due primarily to a mathematical error in OSHA's previous estimates. In the previous burden estimates, OSHA, in error, only counted the burden to perform tests and inspections once a year, rather than daily or 235 working days per year. In addition, OSHA's previous estimates did not account for all of the provisions in the standard currently considered ''collections of information'' under PRA–95.

II. Current Actions

This notice requests public comment on OSHA's burden hour estimates prior to OSHA seeking Office of Management and Budget (OMB) approval of the information collection requirements contained in the standard on Confined and Enclosed Spaces and Other Dangerous Atmospheres in Shipyard Employment (29 CFR part 1915).

Type of Review: Extension of a Currently Approved Collection.

Agency: U.S. Department of Labor, Occupational Safety and Health Administration.

Title: Confined and Enclosed Spaces and Other Dangerous Atmospheres in Shipyard Employment (29 CFR part 1915).

OMB Number: 1218–0011.

Agency Number: Docket Number ICR–98–30.

Affected Public: Business or other for-profit; Federal Government; State, Local or tribal Government.

Number of Respondents: 82,425.

Frequency: Varies (On Occasion, Daily).

Average Time per Response: Varies from 2 minutes (.03 hr.) 2 hours.

Estimated Total Burden Hours: 137,181.

Total Annualized Capital/Startup Costs: $0.

Comments submitted in response to this notice will be summarized and included in the request for Office of Management and Budget (OMB) approval of the information collection request. The comments will become a matter of public record.

Signed at Washington, D.C., this 28th day of August 1998.

Charles N. Jeffress,

Assistant Secretary of Labor.

[FR Doc. 98–24191 Filed 9–8–98; 8:45 am]

BILLING CODE 4510–26–M

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. H370A]

Occupational Exposure to Bloodborne Pathogens: Request for Information

AGENCY: Occupational Safety and Health Administration (OSHA), Department of Labor.

ACTION: Request for information.

SUMMARY: OSHA requests information and comment on engineering and work practice controls used to eliminate or minimize the risk of exposure to bloodborne pathogens due to percutaneous injuries from contaminated needles and other contaminated sharps in occupational environments. Percutaneous injuries continue to be a concern in work settings where employees are exposed to bloodborne pathogens. The Agency is considering possible actions that it can undertake to assist in addressing this issue. Consequently, OSHA is interested in strategies for reducing percutaneous injury rates that have been successfully implemented in the work environment, including work practices and, in particular, the use of devices designed to limit the risk of such injuries. The information received in response to this notice will be carefully reviewed and will assist OSHA in determining effective approaches to reducing percutaneous injury rates and what role the Agency may have in these approaches.

DATES: Comments should be postmarked on or before December 8, 1998.

ADDRESSES: Comments should be submitted in quadruplicate or one original (hardcopy) and one diskette (5¼ or 3½ inch) in WordPerfect 5.0, 5.1, 6.0, 6.1, 7.0, 8.0, or ASCII to the Docket Officer, Docket No. H370A, Room N–2625, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. Telephone: (202) 219–7894. Comments of 10 pages or fewer may be transmitted by fax to (202) 219–5046, provided the original and three copies are sent to the Docket Office thereafter.

Comments may also be submitted electronically through OSHA's Internet site at URL, http://www.osha-slc.gov/html/needle-form.html. Please be aware that information such as studies, journal articles, and so forth cannot be attached to the electronic response and must be submitted in quadruplicate to the above address. Such attachments must clearly identify the respondent's electronic submission by name, date and subject, so that they can be attached to the correct response.

FOR FURTHER INFORMATION CONTACT: Bonnie Friedman, Director, OSHA Office of Public Affairs, Room N–3647, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. Telephone: (202) 219-8148.

SUPPLEMENTARY INFORMATION:

I. Background

Needlesticks and other sharps injuries are a recognized means of transmitting infectious bloodborne diseases. Bloodborne pathogens shown to be transmitted through percutaneous injuries include hepatitis B virus (HBV), human immunodeficiency virus (HIV), and hepatitis C virus (HCV). In recognition of the threat to the health of workers posed by HBV, HIV, and other bloodborne pathogens, OSHA promulgated the Bloodborne Pathogens standard (29 CFR 1910.1030) on December 6, 1991. The Agency is interested in the progress in efforts to prevent needlesticks and other percutaneous injuries in the years following promulgation of the Bloodborne Pathogens standard and in assessing the status of approaches to percutaneous injury prevention. Such approaches include use of safer medical devices and safer work practices as well as integrated percutaneous injury prevention programs. In using the term ''safer medical device,'' the Agency is referring to the wide variety of implements designed to reduce the risk of needlesticks and other percutaneous injuries through such measures as substitution (as in the use of a blunt cannula with a prepierced septum for intravenous administration of medication), modification of the device to reduce the hazard (as with a blunt suture needle), or incorporation of safety features (as with a retractable-needle syringe). In addition, OSHA is interested in integrated percutaneous injury prevention programs that have been successfully implemented in the workplace. These programs may include use of safer medical devices, safer work practices, elimination of needles and other sharps in certain instances and procedures, focused intervention in high injury areas, specialized training, and other elements.

Hepatitis B infection in health care workers has been estimated to have declined following promulgation of the Bloodborne Pathogens standard, from 5,000 new cases in 1991 to 800 new cases in 1995 (Exhibit 1–5). The HBV infection incidence rate for health care workers is now lower than the incidence rate for the general U.S. population (Exhibit 1–4). However, needlesticks and other percutaneous injuries continue to be of occupational health concern due to the frequency of their occurrence and the severity of the health effects that can be associated with them. In the occupational environment, percutaneous injuries have been estimated to occur approximately 600,000 times annually (Exhibit 1–2).

HBV has long been recognized as a pathogen capable of causing serious illness and death. Approximately 60–70% of acute HBV infections are asymptomatic; the remaining cases result in symptoms and signs which may include jaundice, fatigue, abdominal pain, loss of appetite,

nausea, and vomiting. Severe acute infections may require hospitalization, and can result in death. Most HBV infections result in complete recovery and immunity from future infection; in 5–10% of adult cases, however, inability to clear the virus from liver cells results in chronic HBV infection. Chronic HBV infection has been linked to increased risk of cirrhosis and liver cancer; approximately 15%-25% of chronically infected persons are expected to die prematurely from these causes.

In 1981, the first cases were reported in the United States of what was to become known as Acquired Immunodeficiency Syndrome (AIDS); AIDS is caused by HIV. By killing or impairing cells of the immune system, HIV progressively destroys the body's ability to fight infections and certain cancers. Two to four weeks after exposure to the virus, up to 70 percent of HIV-infected persons suffer flu-like signs and symptoms, which may include fever, headache, malaise and enlarged lymph nodes. These signs and symptoms usually disappear within a week to a month. More persistent or severe signs and symptoms may not surface for a decade or more after HIV first enters the body. During the asymptomatic period, however, HIV is actively infecting and killing cells of the immune system, and the virus is transmissible to others through sexual contact with an infected person, percutaneous injury with infected blood or other infectious materials, injection of infected blood (transfusions, IV drug abuse), exposure to infected blood or other infectious materials through mucous membranes or non-intact skin, and perinatal exposure. As the immune system deteriorates, a variety of complications begin to surface. Enlarged lymph nodes, fatigue, and fever may again be evident; weight loss, persistent skin rashes, and short-term memory loss have also been associated with HIV infection. The term AIDS applies to the most advanced stages of HIV infection. Opportunistic infections common in people with AIDS can cause coughing, shortness of breath, seizures, dementia, severe and persistent diarrhea, vision loss, severe headaches, extreme fatigue, nausea, vomiting, lack of coordination, coma, abdominal cramps, and difficult or painful swallowing. People with AIDS are particularly prone to developing various cancers such as Kaposi's sarcoma or lymphomas.

Persons who become acutely infected with the Hepatitis C virus (HCV) may develop illness evidenced by jaundice, fatigue, abdominal pain, loss of appetite, nausea, and vomiting. Nearly all acute infections are persistent; chronic liver disease develops in about 67% of those who become infected, placing these individuals at increased risk of developing cirrhosis and liver cancer.

In the U.S., between one and 1.25 million persons are estimated to suffer from chronic HBV infection (Exhibits 1–6, 1–10, 1–11); 650,000 to 900,000 individuals are estimated to be infected with HIV (Exhibit 1–3), and nearly four million persons are estimated to be chronically infected with HCV (Exhibits 1–8, 1–12, 1–13). Percutaneous injury resulting in exposure to blood or certain other body fluids from any of these individuals places health care workers at risk of contracting disease. In addition to the risk of disease transmission, workers may suffer from the side effects of drugs used for post-exposure prophylaxis and from psychological stress due to the threat of infection after an exposure occurs.

By this notice, OSHA solicits public input on approaches to percutaneous injury prevention. In order to assist the Agency in evaluating the issue of prevention of percutaneous injuries and possible actions that could promote implementation of prevention strategies, OSHA encourages responses to include any pertinent data that could be helpful in performing this evaluation, including information on systems used for the collection and assessment of data on needlestick and other percutaneous injuries; intervention measures, including specific types of safer medical devices and safer work practices currently in use and the effect these devices and work practices have had on injury rates; and the costs and savings associated with particular approaches. The Agency's actions are independent of the current activities in California relative to this issue. Further information on California's deliberations can be obtained by contacting the OSHA-approved State Plan Agency: California Department of Industrial Relations, Division of Occupational Safety and Health, at (415) 972–8500.

Executive Order 12866 and the President's memorandum of June 1, 1998, require each agency to write in plain language. For the purpose of improving future requests for information, we invite your comments on how successful this notice is in meeting this goal. For example:

—Is the material organized to suit your needs?
—Is the Agency's intent and meaning of the questions understood?
—Would a different format (grouping and order of sections, use of headings, paragraphs) have made the notice easier to understand?
—Would more (but shorter) questions be better?
—Does the request for information contain technical language or jargon that isn't clear?
—Could something have been done to make the request for information easier to understand?

If you are submitting your comments via the electronic form, responses to the above questions can be placed in the box labeled ''Additional Comments or Questions.''

II. Key Issues on which Comment is Requested

OSHA includes these questions to provide a basis for response to this general request for information. However, commentors are encouraged to address any aspect of percutaneous injury prevention strategies that they feel is pertinent to the issue.

1. What is the type, size, and employment of your facility or work setting? OSHA solicits information on the type and size of your facility or work setting (e.g., 200-bed tertiary care hospital, 10-bed nursing home), the total number of employees, how many of these employees have the potential to sustain a needlestick or other percutaneous injury during performance of their job duties and, if possible, the job classification(s) of these employees.

2. Does your facility have a surveillance system to track needlesticks and other percutaneous injuries? If yes, please state if your system includes tracking of needlesticks and other percutaneous injuries other than those that must be recorded on the OSHA 200 log. OSHA solicits information on systems being used to track needlesticks and other percutaneous injuries, if and how the gathered information is used, and any factors affecting the successful implementation of such systems.

3. What is the *total* number of potentially contaminated needlesticks and other percutaneous injuries that have occurred in your facility in the past year and in previous years? OSHA solicits information on how many of these needlesticks and other percutaneous injuries were recordable on the OSHA 200 log and how many were non-recordable.

4. What is the rate of injuries from potentially contaminated needles and other sharps in your workplace in the past year and in previous years? If possible, please express your response in terms of Injuries per 100 Workers according to the following formula:

* Base for 100 equivalent full-time workers, working 40 hours per week, 50 weeks per year.

$$\text{Rate} = \frac{(\text{Number of Injuries from question \#3}) \times 200{,}000\,*}{\text{Hours Worked}\,**}$$

** Includes hours worked by all full time, part time, or temporary workers covered by your bloodborne pathogens exposure control plan.

OSHA seeks information and comment on needlestick and other percutaneous injury rates and/or patterns associated with particular employee groups, work locations, procedures, or devices.

5. What methods and criteria are used in your workplace to evaluate the effectiveness of existing exposure controls? If a system is used in your workplace for periodic review of the feasibility of instituting more effective engineering controls, please describe the system including the type of information obtained, how this information is applied, and how the appropriate individuals in your workplace become aware of the availability of new controls.

6. Has any type of integrated percutaneous injury prevention program, as discussed above, been established in your workplace to reduce the incidence of needlesticks and other percutaneous injuries? If yes, OSHA solicits information and comment on the structure and content of this program (e.g., safer work practices, safer medical devices, training), the results achieved, and any specific problems and/or successes that have been encountered in the implementation and operation of the program.

7. To what extent have devices designed to reduce the incidence of needlesticks and other percutaneous injuries been adopted in your workplace? Please provide any workplace- or industry-specific data you have available indicating the degree to which devices incorporating safety features have replaced standard devices, with specific information on the types (e.g., needleless IV connector, blunt suture needle) and brand or description of devices used; where such devices are used (i.e., specific locations, procedures, or employee groups); and any historical data indicating the rate at which your workplace has implemented safer medical devices over the years.

8. On what basis are decisions made in your workplace concerning selection of safer medical devices? OSHA solicits information and comment on design and/or performance criteria being used to select safer medical devices and the basis for using the particular criteria; if and how percutaneous injury data are used in making selection decisions; if and how the opinions of the primary users of needles and other sharps are considered in selection decisions; how costs are considered in the selection process; and any other factors that influence selection decisions.

9. Have new safer medical devices been readily accepted and correctly used when provided? OSHA seeks information and comment on factors influencing successful implementation of safer medical devices in the workplace.

10. What provisions are made to ensure adequate training and education in the use of safer medical devices and/or safer work practices in your workplace? OSHA solicits information and comment on the effectiveness of training and education in reducing needlesticks and other percutaneous injuries, both relative to and in conjunction with the implementation of safer medical devices and/or safer work practices. Specific information is desired regarding program elements, successful and/or unsuccessful measures undertaken, and the method(s) by which results were measured.

11. How effective are safer medical devices and/or safer work practices in reducing percutaneous injury rates? OSHA seeks information and comment on the efficacy of safer medical devices and/or safer work practices in reducing injuries from needles and other sharps, including any data available that will aid in quantifying these results in total and/or for specific employee groups, work locations, procedures, devices or work practices; and the method(s) by which these data were obtained. OSHA is particularly interested in data regarding the percutaneous injury rates prior to implementing the device(s) and/or work practice(s), steps used in selecting and implementing the device(s) and/or work practice(s) in the work setting, and the percutaneous injury rates after implementation.

12. Has use of safer medical devices and/or safer work practices in any way affected the delivery of patient care? If yes, please describe the effects and any data quantifying these effects.

13. Based on observations in your workplace and your knowledge from other sources, please describe any obstacles that may be encountered relative to the selection, purchase, and effective implementation of currently available and new safer medical devices in the workplace, along with any specific information and comment you can provide detailing successful and/or unsuccessful methods of overcoming these obstacles.

14. OSHA solicits information on the costs associated with the implementation of safer medical devices and any savings resulting from their use. Please provide specific information on the methods used to calculate these costs and savings.

15. Please describe any problems associated with sharps disposal containers in your workplace, as well as successful and/or unsuccessful measures that have been undertaken to correct these problems.

16. Based on experience in your workplace and your knowledge from other sources, what are the most effective means of preventing needlesticks and other percutaneous injuries? Please explain the basis for your opinion on this matter and provide any supporting evidence.

Authority and Signature

This document was prepared under the direction of Charles N. Jeffress, Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. It is issued pursuant to section 6(b) of the Occupational Safety and Health Act of 1970 (84 Stat. 1593: 29 U.S.C. 655).

Signed at Washington, DC, this 3rd day of September 1998.

Charles N. Jeffress,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 98–24124 Filed 9–8–98; 8:45 am]

BILLING CODE 4510–26–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sunshine Act Meeting

August 31, 1998.

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: Vol. 63, No. 164, at 45,267, August 25, 1998.

PREVIOUSLY ANNOUNCED TIME AND DATE: This meeting will commence immediately following the conclusion of the meeting starting at 10:00 a.m., Friday, August 28, 1998, to consider Secretary of Labor v. White Oak Mining & Constr. Co., Docket No. WEST 96–338.

PLACE: Room 6005, 6th Floor, 1730 K Street, N.W., Washington, D.C.

STATUS: Open.

CHANGES IN THE MEETING: The status of the Commission meeting to consider and act upon the following item was changed from open to closed:

1. Secretary of Labor v. Lone Mountain Processing, Inc., Docket No. KENT 98–254–D. (Issues include whether the Mine Act's temporary reinstatement remedy applies to an applicant for employment.)

Because agency business so required, it was determined by a majority vote of the Commission on August 28, 1998, to change the status of this meeting from open to closed [Pursuant to 5 U.S.C. § 552b(c)(10)]. Chairman Jordan and Commissioners Marks and Beatty voted to change the meeting status to closed and Commissioners Riley and Verheggen voted to keep the meeting status open. No earlier announcement of the change was possible.

CONTACT PERSON FOR MORE INFORMATION: Jean Ellen, (202) 653–5629/(202) 708–9300 for TDD Relay/1–800–877–8339 for toll free.

Jean H. Ellen,

Chief Docket Clerk.

[FR Doc. 98–24194 Filed 9–3–98; 4:42 pm]

BILLING CODE 6735–01–M

NATIONAL COUNCIL ON DISABILITY

Sunshine Act Meeting

TYPE: Quarterly Meeting and Public Hearing.

AGENCY: National Council on Disability.

SUMMARY: This notice sets forth the schedule and proposed agenda of the forthcoming quarterly meeting and public hearing of the National Council on Disability. Notice of this meeting is required under Section 552b(2)(1) of the Government in the Sunshine Act (P.L. 94–409).

QUARTERLY MEETING DATES: November 18–19, 1998, 8:30 a.m. to 5:00 p.m., November 20, 1998, 8:30 a.m. to 12:00 noon.

PUBLIC HEARING: November 20, 1998, 3:30 p.m. to 8:30 p.m.

LOCATION: Albany Marriott Hotel, 189 Wolf Road, Albany, New York; 518–458–8444.

FOR FURTHER INFORMATION, CONTACT: Mark S. Quigley, Public Affairs Specialist, National Council on Disability, 1331 F Street NW, Suite 1050, Washington, D.C. 20004–1107; 202–272–2004 (Voice), 202–272–2074 (TTY), 202–272–2022 (Fax).

Agency Mission

The National Council on Disability is an independent federal agency composed of 15 members appointed by the President of the United States and confirmed by the U.S. Senate. Its overall purpose is to promote policies, programs, practices, and procedures that guarantee equal opportunity for all people with disabilities, regardless of the nature of severity of the disability; and to empower people with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society.

Accommodations

Those needing interpreters or other accommodations should notify the National Council on Disability prior to this meeting.

Environmental Illness

People with environmental illness must reduce their exposure to volatile chemical substances in order to attend this meeting. In order to reduce such exposure, we ask that you not wear perfumes or scents at the meeting. We also ask that you smoke only in designated areas and the privacy of your room. Smoking is prohibited in the meeting room and surrounding area.

Open Meeting

This quarterly meeting and public hearing of the National Council on Disability will be open to the public.

Agenda

The proposed agenda includes:

Reports from the Chairperson and the Executive Director

Committee Meetings and Committee Reports

Executive Session

Unfinished Business

New Business

Announcements

Adjournment

Public Hearing on Federal Policy Issues Affecting People with Psychiatric Disabilities

Records will be kept of all National Council on Disabilities proceedings and will be available after the meeting for public inspection at the National Council on Disability.

Signed in Washington, DC, on September 3, 1998.

Ethel D. Briggs,

Executive Director.

[FR Doc. 98–24251 Filed 9–4–98; 11:06 am]

BILLING CODE 6820–MA–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–302]

In the Matter of Florida Power Corporation, et al.; Crystal River, Unit 3; Revocation of Exemption

I

The Florida Power Corporation, et. al. (FPC or the licensee) is the holder of Facility Operating License No. DPR–72, which authorizes operation of Crystal River Unit 3. The license provides that the licensee is subject to all rules, regulations, and orders of the Nuclear Regulatory Commission (the Commission) now or hereafter in effect.

The facility consists of a pressurized-water reactor at the licensee's site located in Citrus County, Florida.

II

With respect to certain generic issues for facilities operating prior to January 1, 1979, except to the extent set forth in 10 CFR 50.48(b), 10 CFR Part 50, Appendix R, sets forth fire protection features required to satisfy general design Criterion 3 of the Commission's regulations. Pursuant to 10 CFR Part 50, Appendix R, Section III. O, ''Oil collection system for reactor coolant pump,'' the reactor coolant pump (RCP) shall be equipped with an oil collection system which ''* * * shall be capable of collecting lube oil from all potential pressurized and unpressurized leakage sites in the RCP lube oil system.''

When replacing the RCP motors with new motors and re-designed RCP lube oil system, physical interference and other design difficulties prevented four specific sites in the RCP motor lube oil system from accommodating an oil collection system for collecting potential oil leakage. By letter dated June 7, 1993, as supplemented March 28, 1994, the licensee submitted an exemption request to exclude these four specific sites from leakage protection. On October 7, 1994, as appended on September 17, 1996, the NRC granted the requested exemption because it was determined that a collection system at the four specific sites was not necessary to achieve the underlying purpose of the regulation.

By letter dated November 13, 1997, the licensee informed the NRC that modifications had been made to the RCP Oil Collection System such that collection coverage for these four potential leakage sites was assured, and that the Crystal River Unit 3 RCP Oil Collection System now conforms to the requirements of 10 CFR Part 50, Appendix R, Section III. O. In the FPC

letter, it was stated that the exemption issued on October 7, 1994, was no longer needed.

III

The NRC has reviewed the information submitted by the licensee and concludes that the exemption granted for the four oil collection sites in the RCP motor lube oil system is no longer necessary. Specifically, the licensee has stated that modifications have been completed on the RCP Oil Collection System such that the system now conforms to the requirements of 10 CFR Part 50, Appendix R, Section III. O.

IV

Accordingly, the Commission hereby revokes the specific exemption from 10 CFR Part 50, Appendix R, Section III. O, granted on October 7, 1994, as appended September 17, 1996, relating to oil collection in the RCPs.

This Revocation of Exemption is effective upon issuance.

Dated at Rockville, Maryland, this 1st day of September 1998.

For the Nuclear Regulatory Commission.

Robert A. Capra,

Acting Director, Division of Reator Projects I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 98–24128 Filed 9–8–98; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–220 and 50–410]

Niagara Mohawk Power Corporation; Nine Mile Point Nuclear Station, Unit Nos. 1 and 2

Notice is hereby given that the U.S. Nuclear Regulatory Commission (the Commission) is considering the issuance of an Order approving, under 10 CFR 50.80, an application regarding an indirect transfer of the operating licenses for Nine Mile Point Nuclear Station, Unit Nos. 1 and 2 (NMP1 and NMP2, or collectively, the facility), to the extent held by Niagara Mohawk Power Corporation (NMPC). The transfer would be to a New York corporation, Niagara Mohawk Holdings, Inc., to be created as a holding company over NMPC in accordance with a Settlement Agreement reached with the New York Public Service Commission (PSC Case Nos. 94-E–0098 and 94-E–0099), dated October 10, 1997, and revised March 19, 1998. NMPC is licensed by the Commission to possess, maintain, and operate both NMP1 and NMP2. NMPC fully owns NMP1 and is a 41-percent co-owner of NMP2. The facility is located in Scriba, New York.

By application transmitted under cover of a letter dated July 21, 1998, NMPC informed the Commission of a proposed corporate restructuring under which NMPC would become a subsidiary of the newly formed holding company. Each share of NMPC's common stock would be exchanged for one share of common stock of the holding company. NMPC's outstanding preferred stock would not be exchanged. Under this restructuring, NMPC would divest all of its hydro and fossil generation assets by auction, but would retain its nuclear assets, and would continue to be an ''electric utility'' as defined in 10 CFR 50.2 engaged in the transmission, distribution and, through NMP1 and NMP2, the generation of electricity. NMPC would continue to be the owner of NMP1 and a co-owner of NMP2 and would continue to operate both NMP1 and NMP2. No direct transfer of the operating licenses or ownership interests in the facility would result from the proposed restructuring. The transaction would not involve any change in the responsibility for nuclear operations within NMPC. Officer responsibilities at the holding company level would be primarily administrative and financial in nature and would not involve operational matters related to NMP1 or NMP2. No NMPC nuclear management positions would be changed as a result of the corporate restructuring.

Pursuant to 10 CFR 50.80, the Commission may approve the transfer of control of a license after notice to interested persons. Such approval is contingent upon the Commission's determination that the holder of the license following the transfer is qualified to hold the license and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders of the Commission.

For further details with respect to this proposed action, see NMPC's application transmitted under a cover letter dated July 21, 1998. These documents 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 Penfield Library, State University of New York, Oswego, New York 13126.

Dated at Rockville, Maryland this 31st day of August, 1998.

For the Nuclear Regulatory Commission.

Darl S. Hood,

Senior Project Manager, Project Directorate I–1, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 98–24129 Filed 9–8–98; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–498 and 50–499]

STP Nuclear Operating Company; Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards; Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License Nos. NPF–76 and NPF–80, issued to STP Nuclear Operating Company, (STPNOC, the licensee), for operation of the South Texas Project, Units 1 and 2 (STP), located in Matagorda County, Texas.

The proposed amendment would modify Technical Specification (TS) 4.0.5 to state that the inservice testing requirement for exercise testing in the closed direction for specified Unit 1 containment isolation valves shall not be required until the next plant shutdown to Mode 5 of sufficient duration to allow the testing or until the next refueling outage scheduled in March 1999.

The licensee orally requested a Notice of Enforcement Discretion (NOED) on August 27, 1998 (this was followed up by letter dated August 28, 1998). The NRC orally issued the NOED at 5:00 p.m. EDT on August 27, 1998. Pursuant to NRC's policy regarding exercise of discretion for an operating facility, set out in Section VII.c, of the ''General Statement of Policy and Procedures for NRC Enforcement Actions'' (Enforcement Policy), NUREG–1600, the letter documenting the issuance of the NOED was dated August 31, 1998. The NOED was to be effective until the next refueling outage or cold shutdown period of sufficient duration or until such time as a proposed TS amendment is reviewed and approved by the NRC.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

Pursuant to 10 CFR 50.91(a)(6) for amendments to be granted under exigent circumstances, the NRC staff must determine that the amendment

request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the change involve a significant increase in the probability or consequences of an accident previously evaluated?

No.

The proposed change would relieve the requirement to apply Surveillance 4.0.5 to the subject check valves. Specifically, STPNOC would not have to perform the ASME Section XI exercise of the valves. Neither the valves nor the systems of which they are a part are accident initiators. The proposed change is essentially a deferral of surveillance test intervals, which has no potential effect on accident initiation. Therefore, there is no significant increase in the probability of occurrence of an accident previously evaluated in the Safety Analysis Report.

Previous testing of the valves has demonstrated that they are capable of performing their design function. Therefore, the systems of which they are a part would be expected to perform accident mitigation and safe shutdown functions as designed. There is no effect on safety analysis assumptions from the proposed discretion. Consequently, there is no significant increase in the consequences of an accident previously evaluated in the Safety Analysis Report.

There is no significant increase in the probability of malfunction of equipment important to safety previously evaluated in the Safety Analysis Report because past leak testing of the subject check valves has shown the valves to be able to close and seal as required. The extended surveillance test interval involves no challenge to the function of the valves.

2. Does the change create the possibility of a new or different kind of accident from any accident previously evaluated?

No.

The effect of the proposed change is to extend the surveillance test interval. This extension has no effect on the way the subject systems are operated, nor does it affect the configuration of the station. It does not introduce the potential for any new failure modes. Therefore, the change does not involve a possibility of an accident or malfunction of a different type than any evaluated previously in the Safety Analysis Report.

3. Does this change involve a significant reduction in a margin of safety?

No.

The proposed extension of the testing will not affect a margin of safety for any Technical Specification because there is no change in the design functions or performance of any of the subject systems. All design margins remain unchanged from the existing design basis. Therefore, the proposed extension of the testing does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 14 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 14-day notice period. However, should circumstances change during the notice period, such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 14-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish in the **Federal Register** a notice of issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D59, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the NRC Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

By October 8, 1998, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the Wharton County Junior College, J.M. Hodges Learning Center, 911 Boling Highway, Wharton, TX 77488. 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 15 days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than 15 days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of

the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If the amendment is issued before the expiration of the 30-day hearing period, the Commission will make a final determination on the issue of no significant hazards consideration. If a hearing is requested, the final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, by the above date. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and to Jack R. Newman, Esq., Morgan, Lewis & Bockius, 1800 M Street, NW, Washington, DC 20036–5869, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)–(v) and 2.714(d).

For further details with respect to this action, see the application for amendment dated August 28, 1998, which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room, located at the Wharton County Junior College, J.M. Hodges Learning Center, 911 Boling Highway, Wharton, TX 77488.

Dated at Rockville, Maryland, this 2nd day of September 1998.

For the Nuclear Regulatory Commission.

Thomas W. Alexion,

Project Manager, Project Directorate IV–1, Division of Reactor Projects III/IV, Office of Nuclear Reactor Regulation.

[FR Doc. 98–24127 Filed 9–8–98; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Nuclear Regulatory Commission.

DATE: Weeks of September 7, 14, 21, and 28, 1998.*

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of September 7

Thursday, September 10

3:30 p.m. Affirmative Session (Public Meeting) (if needed)

Week of September 14—Tentative

Tuesday, September 15

2:00 p.m. Briefing by Reactor Vendors Owners Groups (Public Meeting) (Contact: Bryan Sheron, 301–415–1274)

3:30 p.m. Affirmation Session (Public Meeting) (if needed)

Wednesday, September 16

10:00 a.m. Briefing on Investigative Matters (Closed—Ex. 5 and 7)

Week of September 21—Tentative

There are no meetings the week of September 21.

Week of September 28—Tentative

There are no meetings the week of September 28.

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*The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415–1292.

CONTACT PERSON FOR MORE INFORMATION: Bill Hill (301) 415–1661.

The NRC Commission Meeting Schedule can be found on the Internet at:

http://www.nrc.gov/SECY/smj/schedule.htm

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to it, please contact the Office of the Secretary, Attn: Operations Branch, Washington, DC 20555 (301–415–1661). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to wmh@nrc.gov or dkw@nrc.gov.

Dated: September 4, 1998.

William M. Hill, Jr.,

SECY Tracking Officer, Office of the Secretary.

[FR Doc. 98–24354 Filed 9–4–98; 3:48 am]

BILLING CODE 7590–01–M

NUCLEAR REGULATORY COMMISSION

Biweekly Notice Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

I. Background

Pursuant to Public Law 97–415, the U.S. Nuclear Regulatory Commission (the Commission or NRC staff) is publishing this regular biweekly notice. Public Law 97–415 revised section 189 of the Atomic Energy Act of 1954, as amended (the Act), to require the Commission to publish notice of any amendments issued, or proposed to be issued, under a new provision of section 189 of the Act. This provision grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the

Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from August 17, 1998, through August 28, 1998. The last biweekly notice was published on August 26, 1998 (63 FR 45521).

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received before action is taken. Should the Commission take this action, it will publish in the **Federal Register** a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules and Directives Branch, Division of Administration Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D22, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the NRC Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC. The filing of requests for a hearing and petitions for leave to intervene is discussed below.

By October 9, 1998, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC and at the local public document room for the particular facility involved. 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 a 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 15 days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than 15 days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a

significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington DC, by the above date. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and to the attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for a hearing will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of factors specified in 10 CFR 2.714(a)(1)(i)–(v) and 2.714(d).

For further details with respect to this action, see the application for amendment which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room for the particular facility involved.

Carolina Power & Light Company, et al., Docket Nos. 50–325 and 50–324, Brunswick Steam Electric Plant, Units 1 and 2, Brunswick County, North Carolina

Date of amendment request: August 17, 1998.

Description of amendment request: The Carolina Power & Light Company, licensee for the Brunswick Steam Electric Plant (BSEP), Unit Nos. 1 and 2, proposed amendments to the Technical Specifications (TS) to revise the requirement that the operations manager hold or has held a senior reactor operator (SRO) license. The proposed revision would require that either the operations manager or assistant operations manager hold an SRO license.

The licensee has concluded that the proposed license amendments do not involve a Significant Hazards Consideration. In support of this determination, an evaluation of each of the three standards set forth in 10 CFR 50.92 is provided below.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Would operation of the facility in accordance with the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposed license amendments do not involve a significant increase in the probability or consequences of an accident previously evaluated. The change to Technical Specification 5.2.2.f to require the operations manager or assistant operations manager to hold an SRO license is administrative in nature and does not directly affect plant operations. The change does not physically alter the facility in any manner and, as such, does not affect the means in which any safety-related system performs its intended safety function.

2. Would operation of the facility in accordance with the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

The proposed license amendments will not create the possibility of a new or different kind of accident from any accident previously evaluated. As stated above, the proposed change is administrative in nature. It does not involve physical alterations of the plant configuration or changes in setpoints or operating parameters. Therefore, there is no possibility of creating a new or different kind of accident.

3. Would operation of the facility in accordance with the proposed amendment involve a significant reduction in a margin of safety?

The proposed license amendments do not involve a significant reduction in a margin of safety. The proposed change to Technical Specification 5.2.2.f, requiring the operations manager or assistant operations manager to hold an SRO license is consistent with (1) 10 CFR 50.54(l), which requires individuals responsible for directing the licensed activities of licensed operators to hold an SRO license, (2) the previously approved wording of Revision 1 of NUREG–1433, ''Standard Technical Specifications General Electric Plants, BWR/4,'' and Technical Specification Traveler Form (TSTF) 65, Revision 1, and (3) the intent of ANSI–N18.1.–1971, ''Selection and Training of Nuclear Power Plant Personnel.'' Therefore, the proposed change does not represent a reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: University of North Carolina at Wilmington, William Madison Randall Library, 601 S. College Road, Wilmington, North Carolina 28403–3297.

Attorney for licensee: William D. Johnson, Vice President and Senior Counsel, Carolina Power & Light Company, Post Office Box 1551, Raleigh, North Carolina 27602.

NRC Project Director: Pao-Tsin Kuo (Acting).

Commonwealth Edison Company, Docket Nos. 50–237 and 50–249, Dresden Nuclear Power Station, Units 2 and 3, Grundy County, Illinois

Docket Nos. 50–254 and 50–265, Quad Cities Nuclear Power Station, Units 1 and 2, Rock Island County, Illinois

Docket Nos. 50–373 and 50–374, LaSalle County Station, Units 1 and 2, LaSalle County, Illinois

Date of application for amendment request: August 14, 1998.

Description of amendment request: The proposed amendments would change the Dresden, Quad Cities, and LaSalle Technical Specifications (TS) to reflect the use of Siemens Power Corporation (SPC) ATRIUM–9B fuel. Specifically the proposed amendments incorporate the following into the TS: (a) new methodologies that will enhance operational flexibility and reduce the likelihood of future plant derates, (b) administrative changes that eliminate the cycle specific implementation of ATRIUM–9B fuel and adopt Improved Standard Technical Specification language where appropriate, and (c) changes to the Minimum Critical Power Ratio (MCPR). This amendment request supersedes in its entirety a letter from J. Hosmer (ComEd) to U.S. NRC, ''Technical Specification Changes for Transition to Siemens Power Corporation ATRIUM–9B Fuel,'' dated August 29, 1997 (63 FR 2274).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated.

The probability of an evaluated accident is derived from the probabilities of the individual precursors to that accident. The consequences of an evaluated accident are determined by the operability of plant systems designed to mitigate those consequences. Limits have been established consistent with NRC approved methods to ensure that fuel performance during normal, transient, and accident conditions is acceptable. These changes do not affect the operability of plant systems, nor do they compromise any fuel performance limits.

a. Addition of SPC Revised Jet Pump Methodology (LaSalle Units 1 and 2)

The Reference 1 methodology to be added to the Technical Specifications is used as part of the LOCA analysis and does not introduce physical changes to the plant. The Reference 1 revised jet pump model changes the calculational behavior of the jet pump under reversed drive flow conditions. The revised jet pump model methodology makes the LOCA model behave more realistically and calculates small break LOCA PCTs that are comparable to the large break LOCA results. Therefore, this change only affects the methodology for analyzing the LOCA event and determining the protective APLHGR limits. The Technical Specification requirements for monitoring APLHGR are not affected by this change. The revised method will result in higher APLHGR limits, thus the SPC fuel will be allowed to operate at higher nodal powers. The approved methodology, however, still protects the fuel performance limits specified by 10 CFR 50.46. Therefore, the probability or consequences of an accident previously evaluated will not change.

b. Addition of SPC Generic Methodology for Application of ANFB Critical Power Correlation to Non-SPC Fuel (Quad Cities Units 1 and 2 and LaSalle Units 1 and 2)

The probability or consequences of a previously evaluated accident are not increased by adding Reference 3 to Section 6.9.A.6.b of the Quad Cities Technical Specifications and Bases Section 2.1.2 and Section 6.6.A.6.b of the LaSalle Technical Specifications. Reference 3 determines the additive constants and the associated uncertainty for application of the ANFB correlation to the coresident GE fuel. Therefore, it provides data that is used in the determination of the MCPR Safety Limit. This approved methodology for applying the ANFB critical power correlation to the GE fuel will protect the fuel from boiling transition. Operational MCPR limits will also be applied to ensure that the MCPR Safety Limit is protected during all modes of operation and anticipated operational occurrences. Because Reference 3 contains conservative methods and calculations and because the operability of plant systems designed to mitigate any consequences of accidents have not changed, the probability or consequences of an accident previously evaluated will not increase.

c. Addition of SPC Topical for Revised ANFB Correlation Uncertainty (Quad Cities Units 1 and 2, Dresden Units 2 and 3, and LaSalle Units 1 and 2)

The probability or consequences of a previously evaluated accident are not increased by adding Reference 7 to Section 6.9.A.6.b of the Quad Cities and Dresden Technical Specifications and Bases Section 2.1.2 and Section 6.6.A.6.b of the LaSalle Technical Specifications. Approval of Reference 7 (Reference 20) documents the additive constant uncertainty for the SPC ATRIUM–9B fuel design with an internal water channel. This methodology is used to determine an input to the MCPR Safety Limit calculations, which ensures that at least 99.9% of the fuel rods avoid transition boiling during normal operation as well as anticipated operational occurrences. This change does not require any physical plant modifications, physically affect any plant components, or entail changes in plant operation. This methodology for determining the ATRIUM–9B additive constant uncertainty for the MCPR Safety Limit calculation will continue to support protecting the fuel from boiling transition. Operational MCPR limits will be applied to ensure the MCPR Safety Limit is not violated during all modes of operation and anticipated operational occurrences. Therefore, no individual precursors of an accident are affected and the operability of plant systems designed to mitigate the probability or the consequences of an accident previously evaluated is not affected by these changes.

d. Change to Minimum Critical Power Ratio Safety Limit (Quad Cities Units 1 and 2, Dresden Unit 3, and LaSalle Units 1 and 2)

Changing the MCPR Safety Limit at Quad Cities Units 1 and 2, Dresden Unit 3, and LaSalle Units 1 and 2 will not increase the probability or the consequences of an accident previously evaluated. This change implements the MCPR Safety Limits resulting from the SPC ANFB critical power correlation methodology using the ATRIUM–9B additive constant uncertainty resulting from approval of Reference 7 (Reference 20). The MCPR Safety Limits for Quad Cities Units 1 and 2, Dresden Unit 3, and LaSalle Units 1 and 2 are anticipated to be conservative and acceptable for future cycles. Cycle specific MCPR Safety Limit calculations will be performed, consistent with SPC's approved methodology, to confirm the appropriateness of the MCPR Safety Limit. Additionally, operational MCPR limits will be applied that will ensure the MCPR Safety Limit is not violated during all modes of operation and anticipated operational occurrences. The MCPR Safety Limits are being set at the CPR value where less than 0.1% of the rods in the core are expected to experience boiling transition. These Safety Limits are expected to be applicable for future cycles of ATRIUM–9B. Therefore the probability or consequences of an accident will not increase.

e. Removal of Footnotes Limiting Operation with ATRIUM–9B Fuel Reloads (Quad Cities Unit 2 and Dresden Units 2 and 3)

The removal of footnotes from the Quad Cities and Dresden Technical Specifications does not involve any significant increase in the probability or consequences of an accident previously evaluated. The footnotes were added to clarify that cycle specific methods were used until the generic methodology was approved by the NRC. Since the NRC has approved SPC's generic methodology for application of the ANFB correlation to the coresident GE fuel (Reference 3) and SPC has addressed the concerns regarding the database used to calculate the ATRIUM–9B additive constant uncertainties (Reference 7), the footnotes are no longer necessary. The removal of the Unit 2 specific ''a'' pages, 2–1a and B2–3a, in the Quad Cities Technical Specifications is justified by the removal of the footnotes. Therefore, removing these footnotes and ''a'' pages does not require any physical plant modifications, nor does it physically affect any plant components or entail changes in plant operation. Therefore, the probability or consequences of an accident previously evaluated are not expected to increase.

f. Revision to Thermal Limit Descriptions (Quad Cities Units 1 and 2, Dresden Units 2 and 3, and LaSalle Units 1 and 2)

The revision to the Section 3 Technical Specification description of the APLHGR limits has no implications on accident analysis or plant operations. The purpose of the revision is to allow flexibility for the MAPLHGR limits and their exposure basis to be specified in the COLR and to establish consistency with approved methodologies currently utilized by Siemens Power Corporation, which calculate MAPLHGR limits based on bundle or planar average exposures. This revision also provides for consistency in the APLHGR limit Technical Specification wording between the ComEd BWRs. The revision to the 3.11.D SLHGR Technical Specification for Dresden also has no implications on accident analysis or plant operations. The purpose of this revision is to allow flexibility for the LHGR limits and their exposure basis to be specified in the COLR. This revision makes the Dresden LHGR definition consistent with NUREG 1433/1434, Revision 1 wording. The definition of the Average Planar Exposure is deleted, because the exposure basis of the APLHGR and LHGR is being removed. Therefore, no plant equipment or processes are affected by this change. Thus, there is no alteration in the probability or consequences of an accident previously evaluated.

2. Create the possibility of a new or different kind of accident from any accident previously evaluated:

Creation of the possibility of a new or different kind of accident would require the creation of one or more new precursors of that accident. New accident precursors may be created by modifications to the plant configuration, including changes in allowable modes of operation. This Technical Specification submittal does not involve any modifications to the plant configuration or allowable modes of operation. No new precursors of an accident are created and no new or different kinds of accidents are created. Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

a. Addition of SPC Revised Jet Pump Methodology (LaSalle Units 1 and 2)

The revised jet pump model methodology will be used to analyze the LOCA for LaSalle Units 1 and 2, and does not introduce any physical changes to the plant or the processes used to operate the plant. This change only affects the methods used to analyze the LOCA event and determine the MAPLHGR limits. Therefore, the possibility of a new or different kind of accident is not created.

b. Addition of SPC Generic Methodology for Application of ANFB Critical Power Correlation to Non-SPC Fuel (Quad Cities Units 1 and 2 and LaSalle Units 1 and 2)

Addition of the generic methodology for the application of the ANFB critical power correlation to GE fuel in Section 6.9.A.6.b of the Quad Cities Technical Specifications and Bases Section 2.1.2 and Section 6.6.A.6.b of the LaSalle Technical Specifications does not introduce any physical changes to the plant, the processes used to operate the plant, or allowable modes of operation. This change only involves adding an NRC approved methodology, which is used to determine the additive constants and additive constant uncertainty for GE fuel, to Section 6 of the Technical Specifications. Therefore, no new precursors of an accident are created and no new or different kinds of accidents are created.

c. Addition of SPC Topical for Revised ANFB Correlation Uncertainty (Quad Cities Units 1 and 2, Dresden Units 2 and 3, and LaSalle Units 1 and 2)

Addition of the Reference 7 methodology to Section 6.9.A.6.b of the Quad Cities and Dresden Technical Specifications and Bases Section 2.1.2 and Section 6.6.A.6.b of the LaSalle Technical Specifications will not create the possibility of a new or different kind of accident from any accident previously evaluated. This methodology describes the calculation of an input to the MCPR Safety Limit—the ATRIUM–9B additive constant uncertainty. This change does not introduce any physical changes to the plant, the processes used to operate the plant, or allowable modes of operation. Therefore, no new precursors of an accident are created and no new or different kinds of accidents are created.

d. Change to Minimum Critical Power Ratio Safety Limit (Quad Cities Units 1 and 2, Dresden Unit 3, and LaSalle Units 1 and 2)

Changing the MCPR Safety Limit will not create the possibility of a new accident from an accident previously evaluated. This change will not alter or add any new equipment or change modes of operation. The MCPR Safety Limit is established to ensure that 99.9% of the rods avoid boiling transition.

The MCPR Safety Limit is changing for Quad Cities, Dresden Unit 3 and LaSalle due to the revised ATRIUM–9B additive constants and the ATRIUM–9B additive constant uncertainty resulting from approval of Reference 7 (Reference 20). The new MCPR Safety Limit for Quad Cities Units 1 and 2, Dresden Unit 3, and LaSalle Units 1 and 2 are greater than the current values at Quad Cities Units 1 and 2, Dresden Unit 3, and LaSalle Units 1 and 2 and are being increased now in anticipation of bounding future reloads of ATRIUM–9B. This change does not introduce any physical changes to the plant, the processes used to operate the plant, or allowable modes of operation. Therefore, no new accidents are created that are different from any accident previously evaluated.

e. Removal of Footnotes Limiting Operation with ATRIUM–9B Fuel Reloads (Quad Cities Unit 2 and Dresden Units 2 and 3)

The removal of the footnotes from the Quad Cities and Dresden Technical Specifications does not create a new or different kind of accident from any accident previously evaluated. The removal of the footnotes does not affect plant systems or operation. The footnotes were temporarily established to implement a conservative cycle specific MCPR Safety Limit until the SPC generic methodology was approved. With the approval of References 3 and 7, these footnotes are no longer applicable. Removing these footnotes does not introduce any physical changes to the plant, the processes used to operate the plant, or allowable modes of operation. The removal of the Unit 2 specific ''a'' pages, 2–1a and B2–3a, in the Quad Cities Technical Specifications, which is justified by the removal of the footnotes, also does not create a new or different kind of accident from any accident previously evaluated.

f. Revision to Thermal Limit Descriptions (Quad Cities Units 1 and 2, Dresden Units 2 and 3, and LaSalle 1 and 2)

The revision of the APLHGR and LHGR limit descriptions will not create the possibility of a new or different kind of accident from any accident previously evaluated. This revision will not alter any plant systems, equipment, or physical conditions of the site. This revision allows the flexibility of the APLHGR and the LHGR limits to be specified in the COLR and to maintain consistency with the calculated results of methodologies currently used to determine the APLHGR. The definition of the Average Planar Exposure is deleted, because it is being removed from LHGR and APLHGR Technical Specifications. This change does not introduce any physical changes to the plant, the processes used to operate the plant, or allowable modes of operation. Therefore this change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Involve a significant reduction in the margin of safety for the following reasons:

a. Addition of SPC Revised Jet Pump Methodology (LaSalle Units 1 and 2)

The revised jet pump model methodology, and the MAPLHGRs, resulting from the revised jet pump methodology, will continue to ensure fuel design criteria and 10 CFR 50.46 compliance. The results of LOCA analyses performed with this methodology must continue to comply with the requirements of 10 CFR 50.46. Therefore, there is no significant reduction in the margin of safety.

b. Addition of SPC Generic Methodology for Application of ANFB Critical Power Correlation to Non-SPC Fuel (Quad Cities Units 1 and 2 and LaSalle Units 1 and 2)

The margin of safety is not decreased by adding Reference 3 to Section 6.9.A.6.b of the Quad Cities Technical Specifications and Bases Section 2.1.2 and Section 6.6.A.6.b of the LaSalle Technical Specifications. Siemens Power Corporation methodology for application of the ANFB Critical Power Correlation to coresident GE fuel is approved by the NRC and is the same methodology used in the cycle specific topicals for coresident fuel (Reference 4 and 5). The MCPR Safety Limit will continue to ensure that greater than 99.9% of the rods in the core avoid boiling transition. Additionally, operating limits will be established to ensure the MCPR Safety Limit is not violated during all modes of operation.

c. Addition of SPC Topical for Revised ANFB Correlation Uncertainty (Quad Cities Units 1 and 2, Dresden Units 2 and 3, and LaSalle Units 1 and 2)

The MCPR Safety Limit provides a margin of safety by ensuring that less than 0.1% of the rods are expected to be in boiling transition if the MCPR Safety Limit is not violated. This Technical Specification amendment request proposes to insert the topical report that describes SPC's calculation of the ATRIUM–9B additive constant uncertainty. The new ATRIUM–9B additive constant uncertainty calculation is conservative and is based on a larger database than previous calculations. Because the criteria of ensuring that 99.9% of the rods are expected to avoid boiling transition has not been changed and a conservative method is used to calculate the ATRIUM–9B additive constant uncertainty, a decrease in the margin to safety will not occur due to adding this methodology to the Technical Specifications. In addition, operational limits will be established to ensure the MCPR Safety Limit is protected for all modes of operation. This revised methodology will ensure that the appropriate level of fuel protection is being employed.

d. Change to Minimum Critical Power Ratio Safety Limit (Quad Cities Units 1 and 2, Dresden Unit 3, and LaSalle Units 1 and 2)

Changing the MCPR Safety Limit for Quad Cities Units 1 and 2, Dresden Unit 3, and LaSalle Units 1 and 2 will not involve any reduction in margin of safety. The MCPR Safety Limit provides a margin of safety by ensuring that less than 0.1% of the rods are calculated to be in boiling transition if the MCPR Safety Limit is not violated. The proposed Technical Specification amendment request reflects the MCPR Safety Limit results from conservative evaluations by SPC using the ANFB critical power correlation with the ATRIUM–9B additive constant uncertainty resulting from approval of Reference 7 (Reference 20).

Because a conservative method is used to apply the ATRIUM–9B additive constant uncertainty in the MCPR Safety Limit calculation, a decrease in the margin to safety will not occur due to changing the MCPR Safety Limit. The revised MCPR Safety Limit will ensure the appropriate level of fuel protection. Additionally, operational limits will be established based on the proposed MCPR Safety Limit to ensure that the MCPR Safety Limit is not violated during all modes of operation including anticipated operation occurrences. This will ensure that the fuel design safety criterion of more than 99.9% of the fuel rods avoiding transition boiling during normal operation as well as during an anticipated operational occurrence is met.

e. Removal of Footnotes Limiting Operation With ATRIUM–9B Fuel Reloads (Quad Cities Unit 2 and Dresden Units 2 and 3)

The removal of the cycle specific footnotes in Quad Cities and Dresden Technical Specifications does not impose a change in the margin of safety. These footnotes were added due to concerns regarding the calculation of the additive constant uncertainty for the ATRIUM–9B fuel and the cycle specific application of the ANFB critical power correlation to coresident GE fuel in Quad Cities Unit 2 Cycle 15. Because the generic ANFB application to coresident GE fuel MCPR methodology (Reference 3) has received NRC approval and the topical report describing the increased database used to calculate the additive constant uncertainties for ATRIUM–9B (Reference 7) has also received NRC approval (Reference 20) and both are proposed to be added to the Technical Specifications in this amendment request, there is no reason for the footnotes to remain. Removal of the Unit 2 specific ''a'' pages, 2–1a and B2–3a, in the Quad Cities Technical Specifications is justified by the removal of the footnotes. Therefore, the removal of the ''a'' pages, 2–1a and B2–3a, also does not impose a change in the margin of safety.

f. Revision to Thermal Limit Descriptions (Quad Cities Units 1 and 2, Dresden Units 2 and 3, and LaSalle Units 1 and 2)

The revision to the APLHGR and LHGR limit descriptions will not involve a reduction in the margin of safety. The methodology used to calculate the APLHGR must comply with the guidelines of Appendix K of 10 CFR Part 50, and the APLHGR and LHGR will still be required to be maintained within the limits specified in the COLR. The surveillance requirements for these two thermal limits remain unchanged. Thus, there will be no reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: For Dresden, Morris Area Public Library District, 604 Liberty Street, Morris, IL 60450; for Quad Cities, Dixon Public Library, 221 Hennepin Avenue, Dixon, IL 61021; and for LaSalle, the Jacobs Memorial Library, 815 North Orlando Smith Avenue, Illinois Valley Community College, Oglesby, IL 61348–9692.

Attorney for licensee: Michael I. Miller, Esquire; Sidley and Austin, One First National Plaza, Chicago, IL 60603.

NRC Project Director: Stuart A. Richards.

Entergy Operations Inc., Docket No. 50–382, Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana

Date of amendment request: July 17, 1996.

Description of amendment request: The proposed change extends the surveillance interval for the Reactor Trip Breakers (RTBs) from monthly to quarterly and increases the allowed outage time for operation with an inoperable RTB from one hour to two hours.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Will operation of the facility in accordance with this proposed change involve a significant increase in the probability or consequences of any accident previously evaluated?

Response: No.

The proposed change to increase RTB surveillance interval will have no significant effect on the probability or consequences of any accident previously evaluated. As previously stated, all of the transient and accident analyses that call for a reactor trip assume that the reactor trip breakers (RTBs) operate and interrupt power to the control element drive mechanism (CEDMs). Extensive testing results, indicate that the RTBs are available and capable of performing their safety-related function. Currently RTBs are verified operable every 4 weeks. Under the proposed change RTBs would be verified operable at least every 6 weeks. This reduced testing frequency is intended to increase component reliability. The increase in the testing interval cannot increase component failure rate or the potential for component failure.

The proposed change to increase the allowed outage time for RTBs from 1 hour to 2 hours will have no significant impact on probability or consequences of any accident previously evaluated. When an RTB is inoperable, Functional Testing and other breaker operations becomes more difficult. The current technical specification allows an inoperable breaker to be closed for 1 hour to perform testing of other RTBs. This provision is infrequently required, but when it is required, the allowed outage time is very short and rushing to complete a test may lead to an inadvertent reactor trip. Increasing this allowed outage time is an improvement item identified in NUREG 1366 and consistent with philosophy provided in Generic Letter 89–07.

Therefore, the proposed change will not involve a significant increase in the probability or consequences of any accident previously evaluated.

2. Will operation of the facility in accordance with this proposed change create the possibility of a new or different type of accident from any accident previously evaluated?

Response: No.

This proposed change does not involve any changes in equipment and will not alter the manner in which the plant will be operated.

Therefore, the proposed change will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Will operation of the facility in accordance with this proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed change will not adversely affect the performance of the safety function of the RTBs. In fact, it is expected that the performance of the RTBs will improve as a result of this change based on less wear and tear on the equipment. The proposed change will have no adverse impact on the protective boundaries, safety limits or margin of safety.

Therefore, the proposed change will not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room Location: University of New Orleans Library, Louisiana Collection, Lakefront, New Orleans, LA 70122.

Attorney for licensee: N.S. Reynolds, Esq., Winston & Strawn 1400 L Street N.W., Washington, D.C. 20005–3502.

NRC Project Director: John N. Hannon.

PECO Energy Company, Public Service Electric and Gas Company, Delmarva Power and Light Company, and Atlantic City Electric Company, Docket No. 50–277, Peach Bottom Atomic Power Station, Unit No. 2, York County, Pennsylvania

Date of application for amendment: July 10, 1998.

Description of amendment request: The proposed amendment would revise the Technical Specifications (TSs) to incorporate revised Safety Limit Minimum Critical Power Ratios (SLMCPRs) for the use of cycle-specific analysis performed for Peach Bottom Atomic Power Station (PBAPS), Unit 2, Cycle 13.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed TS changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

The derivation of the cycle-specific SLMCPRs for incorporation into the TS, and its use to determine cycle-specific thermal limits, have been performed using the methodology discussed in ''General Electric Standard Application for Reactor Fuel,'' NEDE–24011–P–A–13, and U.S. Supplement, NEDE–24011–P–A–13–US, August, 1996, and the ''Proposed Amendment 25 to GE Licensing Topical Report NEDE–24011–P–A (GESTAR II) on Cycle Specific Safety Limit MCPR.'' Amendment 25 was submitted by [General Electric Nuclear Energy] GENE to the U.S. Nuclear Regulatory Commission (USNRC) on December 13, 1996. This change in SLMCPRs cannot increase the probability or severity of an accident.

The basis of the SLMCPR calculation is to ensure that greater than 99.9% of all fuel rods in the core avoid transition boiling if the limit is not violated. The new SLMCPRs preserve the existing margin to transition boiling and fuel damage in the event of a postulated accident. The fuel licensing acceptance criteria for the SLMCPR calculation apply to PBAPS, Unit 2, Cycle 13 in the same manner as they have applied previously. The probability of fuel damage is not increased. Therefore, the proposed TS changes do not involve an increase in the probability or consequences of an accident previously evaluated.

In addition to the change to the SLMCPR, the footnote to TS 2.1.1.2 is being revised, and a footnote is being added to TS 5.6.5.b.1. The revision to the footnote associated with TS 2.1.1.2 will ensure that the SLMCPR value is reconfirmed for the cycle subsequent to PBAPS, Unit 2, Cycle 13, and the footnote to TS 5.6.5.b.1 is being added due to the use of the proposed Amendment 25 and the use of a proposed R-factor calculation methodology (''R-Factor Calculation Method for GE11, GE12, and GE13 Fuel,'' NEDC–32505P, Revision 1, June 1997), which has not yet been approved for generic use by the USNRC. The revision to the footnote associated with TS 2.1.1.2 and the addition of the footnote to TS 5.6.5.b.1 are administrative changes that do not involve an increase in the probability or consequences of an accident previously evaluated.

2. The proposed TS changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

The SLMCPR is a TS numerical value, designed to ensure that transition boiling does not occur in 99.9% of all fuel rods in the core during the limiting postulated accident. It cannot create the possibility of any new type of accident. The new SLMCPRs are calculated using methodology discussed in ''Generic Electric Standard Application for Reactor Fuel,'' NEDE–24011–P–A–13, and U.S. Supplement, NEDE–24011–P–A–13–US, August, 1996, and the ''Proposed Amendment 25 to GE Licensing Topical Report NEDE–24011–P–A (GESTAR II) on Cycle Specific Safety Limit MCPR.'' Amendment 25 was submitted by GENE to the USNRC on December 13, 1996. Therefore, the revision to the SLMCPR will not create the possibility of a new or different kind of accident from any accident previously evaluated.

Additionally, this proposed change will revise the footnote to TS 2.1.1.2, and add a footnote to TS 5.6.5.b.1. The revision to the footnote associated with TS 2.1.1.2, and the addition of the footnote to TS 5.6.5.b.1, are administrative changes that do not create the possibility of a new or different kind of accident from any previously evaluated.

3. The proposed TS changes do not involve a significant reduction in a margin of safety.

There is no significant reduction in the margin of safety previously approved by the USNRC as a result of the proposed change to the SLMCPR, and the proposed change that will revise the footnote to TS 2.1.1.2, and add a footnote to TS 5.6.5.b.1. The new SLMCPRs are calculated using methodology discussed in ''General Electric Standard Application for Reactor Fuel,'' NEDE–24011–P–A–13, and U.S. Supplement, NEDE–24011–P–A–13–US, August, 1996, and the ''Proposed Amendment 25 to GE Licensing Topical Report NEDE–24011–P–A (GESTAR II) on Cycle Specific Safety Limit MCPR.'' Amendment 25 was submitted by GENE to the USNRC on December 13, 1996. The fuel licensing acceptance criteria for the calculation of the SLMCPR apply to PBAPS, Unit 2 Cycle 13 in the same manner as they have applied previously. The SLMCPRs ensure that greater than 99.9% of all fuel rods in the core will avoid transition boiling if the limit is not violated, thereby preserving the fuel cladding integrity. Therefore, the proposed TS changes will not significantly reduce the margin of safety previously approved by the USNRC.

Additionally, the proposed change that will revise the footnote to TS 2.1.1.2, and add a footnote to TS 5.6.5.b.1 is an administrative change that will not significantly reduce the margin of safety previously approved by the USNRC.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Government Publications Section, State Library of Pennsylvania, (Regional Depository) Education Building, Walnut Street and Commonwealth Avenue, Box 1601, Harrisburg, PA 17105.

Attorney for Licensee: J. W. Durham, Sr., Esquire, Sr. V.P. and General Counsel, PECO Energy Company, 2301 Market Street, Philadelphia, PA 19101.

NRC Project Director: Robert A. Capra.

Pennsylvania Power and Light Company, Docket No. 50–388 Susquehanna Steam Electric Station, Unit 2, Luzerne County, Pennsylvania.

Date of amendment request: August 4, 1998

Description of amendment request: The amendment would modify the Susquehanna Steam Electric Station, Unit 2, Technical Specifications to replace figures 2.1.1.2–1 and 2.1.1.2–2, and associated footnotes, with single value minimum critical power ratio (MCPR) Safety Limits of Section 2.1.1.2; remove references from Section 5.6.5 which do not directly support the generation of Core Operating Limits; remove references from Section 5.6.5 which were previously included to address the application of the ANFB–10 correlation to ATRIUM–10 fuel; include Siemens Power Corporation ANFB–10 topical report in Section 5.6.5; and to change the Bases to reflect inclusion of the ANFB–10 critical power correlation.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The applicable sections of the FSAR [Final Safety Analysis Report] are Chapters 4.4 and 15. FSAR Chapter 4.4 describes the MCPR Safety Limit, and Chapter 15 describes the transient and accident analyses. The reference to be added to Section 5.6.5 of the Unit 2 Technical Specifications describes an NRC approved critical power correlation for ATRIUM™ – 10 fuel appropriate for use in conservative methodologies for generating MCPR Safety Limits and MCPR Operating Limits to assure safe operation of Unit 2 with ATRIUM™ – 10 fuel. A discussion of the impact of the proposed Technical Specification change is provided below.

The proposed change in critical power correlation does not physically affect the plant or its systems. Thus, it does not increase the probability of an accident previously evaluated.

A Unit 2 Cycle 10 MCPR Safety Limit analysis was performed for PP&L by SPC. This analysis used NRC approved methods described in ANF–524(P)(A), Revision 2 and Supplement 1 Revision 2. These methods will be used each cycle to calculate the Unit 2 Safety Limits. For Unit 2 Cycle 10, the critical power performance of the 9x9 – 2 and ATRIUM™ – 10 fuel was determined using the NRC approved ANFB and ANFB – 10 correlations, respectively. The SAFETY LIMIT MCPR calculations statistically combine uncertainties on feedwater flow, feedwater temperature, core flow, core pressure, core power distribution, and uncertainties in the Critical Power Correlations. The SPC analysis used cycle specific power distributions and calculated MCPR values such that at least 99.91% of the fuel rods are expected to avoid boiling transition during normal operation or anticipated operational occurrences. The resulting two-loop and single-loop MCPR Safety Limits are included in the proposed Technical Specification change. Thus, the cladding integrity and its ability to contain fission products are not adversely affected.

Analyses of the Single Loop Pump Seizure accident with the NRC approved ANFB – 10 correlation for the ATRIUM™ – 10 fuel (Reference 1) [Reference 1 refers to the reference listed in the application dated August 4, 1998] will be performed to demonstrate that the NRC acceptance criterion (i.e., small fraction of 10 CFR 100 dose limits) is met. Analyses will also be performed to validate the conclusion that single-loop transients are less severe than the those events analyzed for two-loop operation.

Changes to Section 2.1.1.2 reflect the change from a flow dependent MCPR Safety Limit to a single value MCPR Safety Limit for two-loop operation and single-loop operation.

Changes to Reference 5.6.5 delete the methodology used for critical power analyses for ATRIUM™ – 10 fuel and add the NRC approved ANFB – 10 methodology to the list of approved methodologies. Other changes in Reference 5.6.5 are administrative in nature because they delete references that are not directly related to the generation of Core Operating Limits. No new analysis approaches are used due to the removal of these references.

Changes to BASES Sections 2.1.1 and 3.2.2 reflect the inclusion of the ANFB–10 critical power correlation. The range of the applicability of the ANFB–10 is valid for pressures > 571 psia and bundle mass fluxes > 0.115×10^{6} lb/hr-ft^{2}. These values assure that a valid CPR calculation will result at or above 25% of rated core thermal power, that is, reactor steam dome pressure ≥785 psig and core flow ≥10 Mlbm/hr.

The consequences of transients and accidents will remain within the criteria approved by the NRC. The methodology used to perform the analyses have been previously approved by the NRC. Thus, analysis results using the new methodology will continue to provide assurance that the reactor will perform its design safety function during normal operation and design basis events. Therefore, the proposed action does not involve an increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed changes to the Unit 2 Technical Specifications (MCPR Safety Limits, removal of methodology references not directly supporting the generation of Core Operating Limits, removal of the two references describing previously approved methodology for applying ANFB to ATRIUM™–10 fuel, and inclusion of the ANFB–10 correlation reference) do not require any physical plant modifications, physically affect any plant components, or entail changes in plant operation. Removal of the Unit 2 Cycle 9 footnote allows Unit 2 Cycle 10 and future cycle operation with thermal limits generated using NRC approved methodology. Thus, the proposed change does not create the possibility of a previously unevaluated operator error or a new single failure. The consequences of transients and accidents will remain within the criteria approved by the NRC. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. The proposed change does not involve a significant reduction in a margin of safety.

The applicable Technical Specification Sections include 2.1.1.2 and 5.6.5.

The changes to the Unit 2 Technical Specifications discussed in item 1 above do not require any physical plant modifications, physically affect any plant components, or entail changes in plant operation. Therefore, the proposed change will not jeopardize or degrade the function or operation of any plant system or component governed by Technical Specifications. The consequences of transients and accidents will remain within the criteria approved by the NRC. The proposed MCPR Safety Limits and use of the NRC approved ANFB–10 critical power correlation described in the reference added to Section 5.6.5 do not involve a significant reduction in the margin of safety as currently defined in the BASES of the applicable Technical Specification sections.

Therefore, the proposed change does not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Osterhout Free Library, Reference Department, 71 South Franklin Street, Wilkes-Barre, PA 18701.

Attorney for licensee: Jay Silberg, Esquire, Shaw, Pittman, Potts and Trowbridge, 2300 N Street NW., Washington, DC 20037.

NRC Project Director: Robert A. Capra.

Pennsylvania Power and Light Company (PP&L), Docket No. 50–388, Susquehanna Steam Electric Station, Unit 2, Luzerne County, Pennsylvania

Date of amendment request: August 5, 1998.

Description of amendment request: The amendment would modify the Susquehanna Steam Electric Station, Unit 2, Technical Specifications Table 3.3.5.1–1 ''Emergency Core Cooling System Instrumentation.'' The change updates the allowable values for both the Core Spray (CS) and Low Pressure Coolant Injection System (LPCI) ''Reactor Steam Dome Pressure—Low'' functions for initiation and injection permissive. Specifically, the allowable values are changed from a specified minimum pressure to a specified allowable pressure band. This more restrictive allowable value range will prevent CS and LPCI system overpressurization while still permitting injection to prevent fuel clad temperature limits from being exceeded.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

This proposal does not involve an increase in the probability or consequences of an accident previously evaluated. The proposed amendment changes the ''Reactor Steam Dome Pressure—Low'' Allowable Values so to provide further assurance that the Core Spray and [Residual Heat Removal] RHR systems will perform their [loss-of-coolant accident] LOCA design basis function.

The functional design basis of the Core Spray and LPCI is to inject water into the reactor vessel to cool the core during a LOCA by opening the Core Spray and LPCI injection valves when reactor pressure drops below the reactor vessel low pressure permissive. The upper analytical limit for the permissive is the Core Spray and LPCI systems' maximum design pressure, and the lower analytical limit is the lowest pressure which allows injection to prevent exceeding the fuel cladding temperature limit. The new allowable values were selected to lie within the upper and lower limits to ensure there will be no change in the required logic or functions of the Core Spray and LPCI systems. These new values do not affect the LOCA nor its ''limiting fault'' frequency of occurrence and do not introduce any new accidents or malfunctions of equipment important to safety. Since they do not affect the LOCA, they do not change the probability of occurrence of the LOCA. The new allowable values do not change the logic or function of the reactor vessel low pressure permissive. These new values simply provide the basis for which the associated pressure instruments are to be set to ensure proper operation of Core Spray and LPCI within the design pressures as described above. Therefore, the change in allowable values does not increase the probability of occurrence or the consequences of an accident or malfunction of equipment important to safety.

Based upon the analysis presented above, PP&L concludes that the proposed action does not involve an increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

This proposal does not create the probability of a new or different type of accident from any accident previously evaluated. The new allowable values do not change any plant systems, structures, or components, nor do they change any existing or create any new Core Spray and LPCI logic or functions. The new allowable values were selected to ensure the required operation of the Core Spray and LPCI systems within the maximum design pressures.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed change does not involve a significant reduction in the margin of safety.

The change does not involve a reduction in the margin of safety. Technical Specification Bases Section B3.3.5.1 [9 sic] (ECCS Instrumentation) identifies that the low reactor steam dome pressure signals are used as permissives for operation of the low pressure ECCS subsystems. The new allowable values were selected so as to not impact the logic, redundancy, operability or surveillance requirements for these subsystems. The new allowable values maintain the margin requirements of the Core Spray and LPCI system pressures such that they do not exceed their system maximum design pressures and that system pressures are high enough to ensure that the ECCS injection prevents the fuel peak cladding temperature from exceeding the limits of 10 CFR50.46.

Therefore, the margin of safety is enhanced by the proposed changes.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Osterhout Free Library, Reference Department, 71 South Franklin Street, Wilkes-Barre, PA 18701.

Attorney for licensee: Jay Silberg, Esquire, Shaw, Pittman, Potts and Trowbridge, 2300 N Street NW., Washington, DC 20037.

NRC Project Director: Robert A. Capra.

Power Authority of the State of New York, Docket No. 50–333, James A. FitzPatrick Nuclear Power Plant, Oswego County, New York

Date of amendment request: August 3, 1998.

Description of amendment request: The proposed changes provide for applicability of the safety limit minimum critical power ratio (SLMCPR) to fuel cycle 14.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Operation of the FitzPatrick plant in accordance with the proposed amendment would not involve a significant hazards consideration as defined in 10 CFR 50.92, since it would not:

1. involve a significant increase in the probability or consequences of an accident previously evaluated.

A change to a note stating that the SLMCPR remains applicable through Cycle 14 does not affect the initiation of any accident. Operation in accordance with the current SLMCPR ensures the consequences of previously analyzed accidents are not changed. Therefore, this proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. create the possibility of a new or different kind of accident from any accident previously evaluated.

The SLMCPR establishes a performance limit for the fuel. This limit remains unchanged. Changing a note to reflect this is an administrative change and will not initiate any accident. Therefore, this proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. involve a significant reduction in a margin of safety.

GE [General Electric] has performed an evaluation of the SLMCPR for Cycle 14 and found that the cycle specific value, based on current reload plans, is bounded by the generic value calculated for GE 12 fuel. The existing SLMCPR remains unchanged for Cycle 14 and the margin of safety for the prevention of onset of transition boiling is unchanged. Therefore, this proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Reference and Documents Department, Penfield Library, State University of New York, Oswego, New York 13126.

Attorney for licensee: Mr. David E. Blabey, 1633 Broadway, New York, New York 10019.

NRC Project Director: S. Singh Bajwa, Director.

Public Service Electric & Gas Company, Docket Nos. 50–272 and 50–311, Salem Nuclear Generating Station, Unit Nos. 1 and 2, Salem County, New Jersey

Date of amendment request: July 30, 1998.

Description of amendment request: The proposed amendments would revise Technical Specification (TS) 3/4.7.6, ''Control Room Emergency Air Conditioning System.'' Specifically, the acceptance criteria for the control room envelope would be revised to maintain a ⅛-inch positive pressure with respect to all areas directly accessible from the control room and a positive pressure with respect to all other areas adjacent to the control room.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

CREACS [Control Room Emergency Air Conditioning System] ensures adequate protection after an accident and is not an accident initiator. The change to the acceptance criteria for CREACS does not affect the probability of an accident.

Revising the acceptance criteria for the CREACS from a '1/8-inch W.G. [water gauge] positive pressure in the control room with respect to the adjacent area' to 'a 1/8-inch W.G. positive pressure in the control room with respect to all areas directly accessible (Work Control Center and Control Room Equipment Rooms) from the control room and a positive pressure to all other areas adjacent to the control room' does not alter the assumptions in the radiological dose assessment provided to the NRC and approved under Amendments 190 (Unit 1) and 173 (Unit 2). Therefore the conclusions of the radiological dose assessment reviewed and approved by the NRC under the above Amendments remain unchanged. The radiological dose assessment provided under Amendments 190 and 173 demonstrates that operation of the CREAS in the pressurized mode at the initiation of an accident will ensure that the requirements of General Design Criterion (GDC) 19 will be met.

Therefore, the proposed TS change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

Since the CREACS is an accident mitigation system that does not communicate with the Reactor Coolant Pressure boundary or interface with Emergency Core Cooling Systems (ECCS), the proposed change to the acceptance criteria for CREACS pressurization cannot result in new accident scenarios. The function of the CREACS system is to maintain the habitability of the CRE [control room envelope] following an accident.

Therefore, the proposed TS change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed change does not involve a significant reduction in a margin of safety.

The CREACS ensures that (1) the ambient air temperature does not exceed the allowable temperature for continuous duty rating for equipment and instrumentation cooled by the CREACS and (2) the Control Room will remain habitable for operations personnel during and following all credible radiological accident conditions. Revising the

acceptance criteria to maintaining the control room at a ⅛-inch W.G. positive pressure in the control room with respect to all areas directly accessible (Work Control Center and Control Room Equipment Rooms) from the control room and a positive pressure to all other areas adjacent to the control room does not alter the assumptions used in the radiological dose assessment nor revise the conclusions of the dose assessment which was reviewed under Amendments 190 and 173. Since the assumptions and conclusions of the dose assessment remain unchanged, the CREACS continues to ensure that the requirements of GDC 19 continue to be met, and there is no reduction in the safety provided to the control room operators.

Therefore, the proposed change to the TS does not involve a reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Salem Free Public Library, 112 West Broadway, Salem, NJ 08079.

Attorney for licensee: Jeffrie J. Keenan, Esquire, Nuclear Business Unit—N21, P.O. Box 236, Hancocks Bridge, NJ 08038.

NRC Project Director: Robert A. Capra.

Public Service Electric & Gas Company, Docket Nos. 50–272 and 50–311, Salem Nuclear Generating Station, Unit Nos. 1 and 2, Salem County, New Jersey

Date of amendment request: August 12, 1998.

Description of amendment request: The proposed amendments would revise Technical Specification (TS) 3/4.6.1.3, ''Containment Air Locks,'' to change the action statements for an inoperable airlock. The proposed amendments would also correct an editorial error in TS Bases 3/4.6.1.2, ''Containment Leakage.''

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Will not involve a significant increase in the probability or consequences of an accident previously evaluated.

The reactor containment serves to mitigate the consequences of a Design Basis Accident (DBA). That is, the containment is designed to provide a barrier to ensure that in the event of a DBA, a release of radioactive material will not result in the radiation dose to the general public exceeding the limits of 10 CFR 100. Each unit's containment has been provided with two air locks. These air locks permit personnel to access components and systems within the containment boundary without compromising the containment's ability to carry out its design function. In this capacity, the air locks serve as part of the containment boundary and as such are not considered as a contributor to the probability of an accident.

To carry out their design function, the air locks are designed and tested to certify their ability to withstand a pressure in excess of the maximum expected following a DBA. Each door is individually tested to verify that leakage will remain below design values with the containment at design pressure. An interlock is provided to ensure that containment integrity is maintained during personnel passage by allowing only one air lock door to be open at a time. This interlock is also periodically tested to verify its functionality.

The proposed changes will allow continued operation with one air lock door inoperable or with the air lock door interlock mechanism disabled but will specify the actions necessary under those conditions to assure that containment integrity is not compromised. This will ensure that the consequences of an accident previously evaluated are not significantly increased. Additionally, the proposed changes specify that in the event that an air lock is inoperable for a reason other than an inoperable air lock door, or air lock interlock mechanism, the unit must be placed in a condition in which the analyzed accident could not occur.

Based upon the above, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Create the possibility of a new or different kind of accident.

The proposed changes to the Containment Air Lock Technical Specifications do not affect the ability of the containment to carry out its design function. The changes also do not introduce any new equipment; nor do they result in the operation of the plant in a manner contrary to the safety analysis. Therefore, the proposed changes will not increase the probability of a new or different kind of accident from any accident previously identified.

3. Will not involve a significant reduction in a margin of safety.

The proposed changes do not affect any design or functional requirements of the Containment or the Containment Air Locks. Additionally, the proposed changes do not affect any of the conditions or assumptions of the applicable safety analyses. Containment Air Lock leakage rates are determined based upon containment leakage at design pressure. The proposed changes will not affect containment design pressure nor will they affect the peak containment pressures expected for analyzed accidents.

Based upon the above, the proposed change will not involve a reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Salem Free Public Library, 112 West Broadway, Salem, NJ 08079.

Attorney for licensee: Jeffrie J. Keenan, Esquire, Nuclear Business Unit—N21, P.O. Box 236, Hancocks Bridge, NJ 08038.

NRC Project Director: Robert A. Capra.

Southern California Edison Company, et al., Docket Nos. 50–361 and 50–362, San Onofre Nuclear Generating Station, Unit Nos. 2 and 3, San Diego County, California

Date of amendment requests: May 11, 1998 (Supersedes the May 30, 1996, amendment request). This Notice supersedes the staff's proposed no significant hazards consideration determination for the requested changes that was published on September 11, 1996 (61 FR 47981).

Description of amendment requests: The proposed amendments would revise the Technical Specifications (TS) to allow use of performance-based criteria to establish containment leak rate test intervals and add a new ''Containment Leakage Rate Testing Program'' to the administrative section of TS to codify the program used to determine the testing program. The proposed program implements 10 CFR Part 50, Appendix J, Option B, by referring to Regulatory Guide 1.163, ''Performance-Based Containment Leak Test Program,'' dated September 1995.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Since the interval between containment leakage rate tests is not related in any way to conditions which cause accidents, and plant structures, systems, and components will not be operated in a different manner as a result of the proposed Technical Specification (TS) change, the proposed changes will not increase the probability of an accident previously evaluated.

Containment leakage may result from accidents which are evaluated in the Updated Final Safety Analysis Report. The proposed TS changes may result in an acceptably small increase in post-accident containment leakage. Using a statistical approach, NUREG–1493 determined that the increase in hypothetical dose to the public resulting from extending the testing interval is extremely small. NUREG–1493 concluded that such small hypothetical dose increases

to the public are justifiable due to the real reduction in occupational exposure resulting from interval extension. Therefore, the proposed change does not significantly increase the consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change only incorporates the performance based approach for containment leak rate testing authorized in the new Option B to Appendix J of 10 CFR Part 50. The interval extensions allowed, through this approach, do not have the potential for creating the possibility of new or different kinds of accidents from those previously evaluated because plant structures, systems, and components will not be operated in a different manner as a result of the TS change and, therefore, will not introduce any new or different failure modes or initiators. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed change does not involve a significant reduction in a margin of safety.

The proposed Technical Specification does not alter the allowable containment leakage rate. The proposed change replaces the current, prescriptive testing requirements with a new performance based approach for establishing the testing intervals. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment requests involve no significant hazards consideration.

Local Public Document Room location: Main Library, University of California, Irvine, California 92713.

Attorney for licensee: Douglas K. Porter, Esquire, Southern California Edison Company, P. O. Box 800, Rosemead, California 91770.

NRC Project Director: William H. Bateman.

Southern California Edison Company, et al., Docket Nos. 50–361 and 50–362, San Onofre Nuclear Generating Station, Unit Nos. 2 and 3, San Diego County, California

Date of amendment requests: June 19, 1998.

Description of amendment requests: The proposed amendments would revise Technical Specification (TS) 3.4.1, ''RCS DNB (Pressure, Temperature and Flow) Limits.'' Specifically, the proposed changes would include (1) a reduction in the minimum primary reactor coolant system (RCS) cold leg temperature (T_{cold}) from 554 F to 535 F between the 70 percent and 100 percent rated thermal power levels, (2) a conversion of the specified RCS minimum flow rate from a ''Mass'' (i.e., lb/hr) to a ''Volumetric'' (gpm) flow basis, and (3) elimination of the maximum RCS flow rate limit.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change to Technical Specification (TS) 3.4.1 does not adversely impact structure, system, or component design or operation in a manner which would result in a change in the frequency of occurrence of accident initiation. Nor are the affected parameters themselves accident initiators. As such, the proposed TS change will not significantly increase the probability of accidents previously evaluated. Likewise, the proposed TS change does not significantly increase the consequences of an accident previously evaluated. The safety analysis assessments confirm that the existing Analyses of Record (AORs) for San Onofre Units 2 and 3 remain valid or have been re-analyzed to demonstrate continued compliance with applicable Acceptance Criteria.

The change in Reactor Coolant System (RCS) ''Mass'' flow to ''Volumetric'' flow is a change in measuring units to be consistent with the measure used in the performance of the safety analysis. Therefore, there is no impact on any evaluated accidents.

The elimination of the upper RCS flow limit has no effect on Departure from Nucleate Boiling which is a concern at lower flows, and the maximum flow that is physically possible is less than the current upper limit.

Therefore, this amendment request does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

T_{cold} is an input parameter used in event analysis, it is not an event initiator. No new or different accidents have been identified which could result from operating at the proposed T_{cold}. The safety analysis assessments performed confirm that the existing safety system settings for San Onofre Units 2 and 3 remain valid, thereby assuring continued conformance to the Acceptance Criteria for all events.

A change in RCS flow measuring units can not initiate an accident, nor can the elimination of an upper RCS flow limit which can not be attained.

Therefore, this amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed change does not involve a significant reduction in a margin of safety.

Updated Final Safety Analysis Report (UFSAR) safety analyses have been assessed and remain valid or have been re-analyzed to demonstrate continued compliance with applicable Acceptance Criteria for operation at the reduced T_{cold}. All other safety limits and safety system settings remain unchanged.

A change in measuring units for RCS flow does not reduce the margin of safety.

Elimination of an RCS flow limit that can not physically be reached does not reduce the margin of safety. The shiftly surveillance requirement for maximum flow has no practical basis or safety benefit. Additionally, the margin to departure from nuclear boiling increases as the flow rate increases.

Therefore, this amendment does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment requests involve no significant hazards consideration.

Local Public Document Room location: Main Library, University of California, Irvine, California 92713.

Attorney for licensee: Douglas K. Porter, Esquire, Southern California Edison Company, P.O. Box 800, Rosemead, California 91770.

NRC Project Director: William H. Bateman.

STP Nuclear Operating Company, Docket Nos. 50–498 and 50–499, South Texas Project, Units 1 and 2, Matagorda County, Texas

Date of amendment request: July 6, 1998.

Description of amendment request: The proposed amendment would relocate the description of the reactor coolant system design features from Technical Specification 5.4 to the Updated Final Safety Analysis Report.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change relocates the description of the Reactor Coolant System design features to the Updated Final Safety Analysis Report (UFSAR), a licensee-controlled document. The description of the Reactor Coolant System design features, currently a part of the UFSAR, is maintained in accordance with 10 CFR 50.59 and 50.71. Existing South Texas Project procedures ensure that changes to the facility as described in the UFSAR, such as the replacement of the steam generators, are reviewed to determine if an unreviewed

safety question exists. The proposed amendment does not result in any hardware or operating procedure changes. The initiators of any accident previously evaluated are not affected by the relocation of the Reactor Coolant System design features. Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The change does not alter the plant configuration or make changes in the methods governing plant operation. The proposed change does not impose different requirements, and adequate control of information will be maintained in accordance with existing procedures. The change does not alter assumptions made in the safety analysis and licensing basis. Therefore, the proposed change does not create the possibility of a new or different kind of accident.

3. The proposed change does not involve a significant reduction in a margin of safety.

The relocation of a description of Reactor Coolant System design features has no impact on any safety analysis assumptions. There are no changes to the plant configuration or operating procedures. Future changes to the relocated information are governed by existing procedures in accordance with 10 CFR 50.59 and 50.71. Consequently, there is no significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the request for amendments involves no significant hazards consideration.

Local Public Document Room location: Wharton County Junior College, J.M. Hodges Learning Center, 911 Boling Highway, Wharton, TX 77488.

Attorney for licensee: Jack R. Newman, Esq., Morgan, Lewis & Bockius, 1800 M Street, N.W., Washington, DC 20036–5869.

NRC Project Director: John N. Hannon.

STP Nuclear Operating Company, Docket Nos. 50–498 and 50–499, South Texas Project, Units 1 and 2, Matagorda County, Texas

Date of amendment request: July 6, 1998.

Description of amendment request: Relocates the Technical Specification 3/4.3.3.3 requirements for the Seismic Instrumentation to the Technical Requirements Manual.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the change involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposed change relocates requirements and surveillances for the Seismic Monitoring System that do not meet the criteria for inclusion in Technical Specifications as identified in 10 CFR 50.36(c)(2)(ii). The affected systems and components are not assumed to be initiators of analyzed events and are not assumed to mitigate accident or transient events. The requirements and surveillances for these affected systems and components will be relocated from the Technical Specifications to the Technical Requirements Manual, which is incorporated in the STP UFSAR and will be maintained pursuant to 10 CFR 50.59. In addition, the Seismic Monitoring System components are addressed in existing surveillance procedures which are also controlled by 10 CFR 50.59 and subject to the change control provisions imposed by plant administrative procedures, which endorse applicable regulations and standards. The associated changes to the Index are administrative. Therefore, the change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the change create the possibility of a new or different kind of accident from any accident previously evaluated?

The proposed change relocates requirements and surveillances for the Seismic Monitoring System that do not meet the criteria for inclusion in Technical Specifications as identified in 10 CFR 50.36(c)(2)(ii). The change does not involve a physical alteration of the plant (no new or different type of equipment will be installed) or make changes in the methods governing normal plant operation. The change will not impose different requirements, and adequate control of information will be maintained. This change will not alter assumptions made in the safety analysis and licensing basis. The associated changes to the Index are administrative. Therefore, the change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does this change involve a significant reduction in a margin of safety?

The proposed change relocates requirements and surveillances for the Seismic Monitoring System, which does not meet the 10 CFR 50.36 criteria for inclusion in Technical Specifications. The change will not reduce a margin of safety because the change has no impact on any safety analysis assumptions. In addition, the relocated requirements and surveillances for the affected structures, systems, components, or variables remain the same as the existing Technical Specifications. Since any future changes to these requirements or the surveillance procedures will be evaluated per the requirements of 10 CFR 50.59, there will be no reduction in a margin of safety. The associated changes to the Index are administrative and have no potential effect on the margin of safety.

Therefore, the change does not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the request for amendments involves no significant hazards consideration.

Local Public Document Room location: Wharton County Junior College, J. M. Hodges Learning Center, 911 Boling Highway, Wharton, TX 77488.

Attorney for licensee: Jack R. Newman, Esq., Morgan, Lewis & Bockius, 1800 M Street, N.W., Washington, DC 20036–5869.

NRC Project Director: John N. Hannon.

STP Nuclear Operating Company, Docket Nos. 50–498 and 50–499, South Texas Project, Units 1 and 2, Matagorda County, Texas

Date of amendment request: July 6, 1998.

Description of amendment request: Relocates the Technical Specification 3/4.7.13 requirements for the Area Temperature Monitoring System to the Technical Requirements Manual.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the change involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposed change relocates requirements and surveillances for Technical Specification 3/4.7.13, which does not meet the criteria for inclusion in Technical Specifications as identified in 10 CFR 50.36(c)(2)(ii). The affected systems and components are not assumed to be initiators of analyzed events and are not assumed to mitigate accident or transient events. The requirements and surveillances for these affected systems and components will be relocated from the Technical Specifications to the Technical Requirements Manual, which is incorporated in the STP UFSAR and will be maintained pursuant to 10 CFR 50.59. In addition, the Area Temperature Monitoring System components are addressed in existing surveillance procedures which are also controlled by 10 CFR 50.59 and subject to the change control provisions imposed by plant administrative procedures, which endorse applicable regulations and standards. The associated changes to the Index are administrative. Therefore, the change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the change create the possibility of a new or different kind of accident from any accident previously evaluated?

The proposed change relocates requirements and surveillances for the Area Temperature Monitoring System, which does not meet the criteria for inclusion in Technical Specifications as identified in 10 CFR 50.36(c)(2)(ii). The change does not involve a physical alteration of the plant (no new or different type of equipment will be installed) or make changes in the methods governing normal plant operation. The change will not impose different requirements, and adequate control of information will be maintained. This change will not alter assumptions made in the safety analysis and licensing basis. The associated changes to the Index are administrative. Therefore, the change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does this change involve a significant reduction in a margin of safety?

The proposed change relocates requirements and surveillances for the Area Temperature Monitoring System, which does not meet the 10 CFR 50.36 criteria for inclusion in Technical Specifications. The change will not reduce a margin of safety since it has no impact on any safety analysis assumptions. In addition, the relocated requirements and surveillances for the affected structure, system, component, or variable remain the same as the existing Technical Specifications. Since any future changes to these requirements or the surveillance procedures will be evaluated per the requirements of 10 CFR 50.59, there will be no reduction in a margin of safety. The associated changes to the Index are administrative and have no potential effect on the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the request for amendments involves no significant hazards consideration.

Local Public Document Room location: Wharton County Junior College, J. M. Hodges Learning Center, 911 Boling Highway, Wharton, TX 77488.

Attorney for licensee: Jack R. Newman, Esq., Morgan, Lewis & Bockius, 1800 M Street, N.W., Washington, DC 20036–5869.

NRC Project Director: John N. Hannon.

STP Nuclear Operating Company, Docket Nos. 50–498 and 50–499, South Texas Project, Units 1 and 2, Matagorda County, Texas

Date of amendment request: July 22, 1998.

Description of amendment request: The proposed amendment would revise the Technical Specifications to reflect the steam generator water level low-low trip setpoint differences between the existing Model E and the replacement Model Delta-94 steam generators for the Reactor Trip System and the Engineered Safety Features Actuation System instrumentation.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

This proposed change includes changing the low-low steam generator water level trip setpoint. The setpoint is being changed to enhance the operational flexibility associated with the RSGs [replacement steam generators].

The minimum setpoint change proposed in this request establishes controls to ensure that an adequate heat sink is maintained by providing an adequate secondary liquid mass to remove primary system sensible heat and core decay heat shortly after reactor trip and initiating auxiliary feedwater flow for long-term cooling. The accidents analyzed for this requirement are the Loss of Non-Emergency AC Power to the Plant Auxiliaries, Loss of Normal Feedwater and Feedwater Line Break transients. These accidents were analyzed utilizing the Westinghouse RETRAN model. All acceptance criteria were shown to be met for both these events. Therefore, the proposed steam generator water level low-low trip setpoint change is demonstrated not to result in an increase in the consequences for these accidents.

The steam generator water level low-low trip setpoint is not considered a precursor to any of the analyzed accidents, and therefore, these proposed changes do not result in an increase in the probability or consequences of any accident previously analyzed.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed setpoint change does not create any new operating conditions or modes. The proposed change only revises the actuation setpoints for the Reactor Trip System and Engineered Safety Features Actuation System. The actions of these systems continue to be performed in accordance with existing requirements, which are sufficient to ensure plant safety is maintained.

3. The proposed change does not involve a significant reduction in a margin of safety.

The events potentially affected by the setpoint change in the steam generator water level low-low reactor trip (Table 2.2–1, Function 13) and ESFAS Auxiliary Feedwater System actuation (Table 3.3–4, Function 6.d) are the Loss of Normal Feedwater and Feedwater System Pipe Break. These events were analyzed and it was demonstrated that all acceptance criteria were met for both of these events.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the request for amendments involves no significant hazards consideration.

Local Public Document Room location: Wharton County Junior College, J. M. Hodges Learning Center, 911 Boling Highway, Wharton, TX 77488.

Attorney for licensee: Jack R. Newman, Esq., Morgan, Lewis & Bockius, 1800 M Street, N.W., Washington, DC 20036–5869.

NRC Project Director: John N. Hannon.

STP Nuclear Operating Company, Docket Nos. 50–498 and 50–499, South Texas Project, Units 1 and 2, Matagorda County, Texas

Date of amendment request: July 28, 1998.

Description of amendment request: The proposed amendment addresses the operator action to reduce the steam generator power-operated relief valve setpoint consistent with the revised small-break loss-of-coolant accident (SBLOCA) analysis for the replacement Delta-94 steam generators. The operator action and the associated revised SBLOCA analysis are reflected in a proposed revision to the South Texas Project Updated Final Safety Analysis Report.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed operator action associated with the re-analysis of the Delta-94 SGs [steam generators] will not result in a significant increase in the probability of an accident previously evaluated. The initiators of any design basis accident are not affected by this operator action. The operator action would facilitate the automatic mitigation capability of the SG PORVs [power-operated relief valves], and would not initiate the mitigating safety function. The operator action will be incorporated into the EOPs [Emergency Operating Procedures] and would not be performed until after the initiation of an accident. The automatic actuation of the SG PORVs is not a new design feature. The effects of inadvertent opening of a single steam dump, relief or safety valve are currently analyzed as described in Section 15.1.4 of the UFSAR [Updated Final Safety Analysis Report]. Consequently, there is no significant impact on any previously evaluated accident probabilities.

The proposed operator action associated with the re-analysis of the Delta-94 SGs does not result in a significant increase in the consequences of any accidents previously evaluated. The operator action will not adversely affect the integrated ability of the plant systems to perform their intended safety functions to mitigate the consequences of a small break LOCA [loss-of-coolant accident], or any other accident previously evaluated. In fact, the re-analysis has demonstrated that the use of the operator action reduces the consequences of a small break LOCA in that the Peak Cladding Temperature for the most limiting small break LOCA transient is reduced and continues to be substantially below the acceptance limit of 10 CFR 50.46.

The operator action does not affect the integrity of any fission product barrier such that their function in the control of radiological consequences is not affected. The radiological consequences for the small break LOCA presented in the UFSAR remain unchanged as a result of the proposed operator action.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed license amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated. The proposed amendment is not the result of any physical changes to the existing facility. The operator action does not represent a different initiator for any design basis accident and does not create new design basis scenarios. Small break LOCA mitigation, utilizing a combination of automatic and manual actions, is already part of the STP [South Texas Project, Units 1 and 2] licensing basis. Written procedures address those operator actions required for small break LOCA mitigation. The current STP EOPs have an operator action for a steam generator tube rupture (SGTR) similar to the operator action for the small break LOCA addressed by this proposed license amendment. The operator action for the SGTR is to raise the safety-grade SG PORV setpoints. The operator action credited in the small break LOCA analysis for the Delta-94 SGs is to lower the safety-grade SG PORV setpoints. The purpose of the action is to provide a more rapid cooldown of the primary side by depressurizing the secondary side during a small break LOCA using the steam dumps first, then the SG PORVs, if steam dumps are unavailable. The inadvertent operation of a single steam dump, relief or safety valve is currently addressed in UFSAR Section 15.1.4.

The proposed amendment does not alter any original design specification, such as seismic requirements, electrical separation requirements and environmental qualification, and is not the result of any physical changes to the facility. In addition, the proposed amendment does not result in exposure of additional equipment used in accident mitigation to an adverse environment beyond that currently identified in the UFSAR.

3. The proposed change does not involve a significant reduction in a margin of safety.

The proposed operator action does not involve a significant reduction in the margin of safety. The plant systems required for the mitigation of any design basis accidents will continue to be able to perform their safety function. In fact, the re-analysis has demonstrated that the use of the operator action reduces the consequences of a small break LOCA in that the Peak Cladding Temperature for the most limiting small break LOCA transient is reduced and continues to be substantially below the acceptance criteria of 10 CFR 50.46.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the request for amendments involves no significant hazards consideration.

Local Public Document Room location: Wharton County Junior College, J. M. Hodges Learning Center, 911 Boling Highway, Wharton, TX 77488.

Attorney for licensee: Jack R. Newman, Esq., Morgan, Lewis & Bockius, 1800 M Street, N.W., Washington, DC 20036–5869.

NRC Project Director: John N. Hannon.

Tennessee Valley Authority, Docket No. 50–259, 50–260 and 50–296, Browns Ferry Nuclear Plant Units 1, 2, 3, Limestone County, Alabama

Date of amendment request: June 12, and August 14, 1998.

Description of amendment request: The proposed amendment would revise the technical specifications (TS) for the Browns Ferry Nuclear Plant (BFN) Units 1, 2 and 3. The proposed changes would revise surveillance frequency of ''once-per-cycle'' surveillance requirements (SR) from 18 to 24 months to accommodate a 24-month fuel cycle. The licensee also proposed changes to the associated TS Bases (TS–390).

Basis for proposed no significant hazards consideration determination: Tennesee Valley Authority addressed the affected SRs into two groups: (1) non-instrument calibration related, and (b) those involving instrument calibrations. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Group 1: Non-instrument Calibration Related SRs

(1) The proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed amendment changes the surveillance frequency from 18 months to 24 months for SRs in the Units 2 and 3 TS that are normally a function of the refueling interval. In addition, the proposed amendment changes the surveillance frequency from 18 months to 24 months for those SRs in the Unit 1 TS that control the test interval for components and systems that are common to Units 1, 2, and 3. Under certain circumstances SR 3.0.2 would allow a maximum surveillance interval of 30 months for these SRs. The evaluations in Section III [Licensee's June 12, 1998 application, Section III, Safety Analysis] have shown that the reliability of protective instrumentation and equipment will be preserved for the maximum allowable surveillance interval. The proposed changes do not involve any change to the design or functional requirements of plant systems, and the surveillance test methods will be unchanged. The proposed changes will not give rise to any increase in operating power level, fuel operating limits, or effluents. In addition, the proposed changes will not significantly increase any radiation levels. Based on the foregoing considerations and the evaluations completed in accordance with the guidance of Generic Letter 91–04, it is concluded that the proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

(2) The proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed amendment requires no change to the plant design or the mode of operation, for any item of equipment. No new equipment is either added or substituted for any existing equipment. Based on the Section III [Licensee's June 12, 1998 application, Section III, Safety Analysis] evaluations, the extension of surveillance intervals is shown to have no significant impact on equipment performance. The proposed changes do not create the possibility of any new failure mechanisms. Therefore, the proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

(3) The proposed amendment does not involve a significant reduction in a margin of safety.

The proposed amendment seeks to change surveillance intervals from 18 to 24 months. Although the proposed TS changes will result in an increase in the interval between surveillance tests, the impact on system availability is small based on other, more frequent testing or redundant systems or equipment. There is no evidence of any failures that would impact the availability of the systems. This change does not alter the existing setpoints, TS allowable values or analytical limits. The assumptions in the current safety analyses are not impacted and the proposed amendment does not reduce a margin of safety.

Therefore, it is concluded that the proposed amendment does not involve a significant reduction in a margin of safety.

Group 2: SRs that Involve Instrument Calibrations

(1) The proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed amendment changes the surveillance Frequency from 18 months to 24 months for SRs in the Units 2 and 3 TS that are normally a function of the refueling interval. In addition, the proposed amendment changes the surveillance Frequency from 18 months to 24 months for those SRs in the Unit 1 TS that control the test interval for components and systems that are common to Units 1, 2, and 3. Under certain circumstances SR 3.0.2 would allow a maximum surveillance interval of 30 months for these SRs. The evaluations in Section III [Licensee's August 14, 1998 application, Section III, Safety Analysis] have shown that the reliability of protective instrumentation will be preserved for the maximum allowable surveillance interval. The proposed changes do not involve any change to the design or functional requirements of plant systems, and the surveillance test methods will be unchanged. The proposed changes will not give rise to any increase in operating power level, fuel operating limits, or effluents. In addition, the proposed changes will not significantly increase any radiation levels. Based on the foregoing considerations and the evaluations completed in accordance with the guidance of Generic Letter 91–04, it is concluded that the proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

(2) The proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed amendment requires no change to the plant design or the mode of operation, for any item of equipment. The proposed changes do not create the possibility of any new failure mechanisms. Therefore, the proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

(3) The proposed amendment does not involve a significant reduction in a margin of safety.

The proposed amendment seeks to change instrument calibration surveillance intervals from 18 to 24 months. The primary consideration relative to safety margin is that of exceeding analytical limits for the current safety analyses as a result of increased instrument drift over the extended surveillance interval. The drift studies discussed in Section III.A have shown that the existing setpoints and TS allowable values can be retained without challenging the current analytical limits; thereby preserving the assumptions in the current safety analyses and ensuring that safety limits will not be exceeded.

To confirm that the drift errors remain within projected values, instruments subjected to the longer interval between calibrations will continue to be monitored as required by current plant procedures. This practice will assure that no significant reduction in safety margin is incurred by adoption of the proposed amendment.

Therefore, it is concluded that the proposed amendment does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on its review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Athens Public Library, 405 E. South Street, Athens, Alabama 35611

Attorney for licensee: General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, ET l0H, Knoxville, Tennessee 37902.

NRC Project Director: Frederick J. Hebdon.

Tennessee Valley Authority, Docket Nos. 50–327 and 50–328, Sequoyah Nuclear Plant, Units 1 and 2, Hamilton County, Tennessee

Date of application for amendments: August 22,1996 (TS 97–04), as supplemented on August 27, 1998.

Brief description of amendments: The amendments would change the Sequoyah (SQN) Technical Specifications (TS) by extending the emergency diesel generator allowed outage time from 72 hours to 7 days. This amendment request was previously noticed on October 9, 1996 (61 FR 52969). The scope of the amendment request was changed by the August 27, 1998 submittal.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), Tennessee Valley Authority (TVA), the licensee, has provided its analysis of the issue of no significant hazards consideration, which is presented below:

TVA has concluded that operation of SQN Units 1 and 2, in accordance with the proposed change to the TSs [Technical Specifications] and operating licenses, does not involve a significant hazards consideration. TVA's conclusion is based on its evaluation, in accordance with 10 CFR 50.91(a)(1), of the three standards set forth in 10 CFR 50.92(c).

A. *The proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.*

The EDGs [emergency diesel generators] supply backup power to the essential safety systems in the event of a loss-of-offsite (normal) power. The EDGs are not postulated to be an initiator of a design basis accident. The requested change to provide a 7-day AOT [allowed outage time] for the EDGs and the deletion of the additional 72-hour extension for this AOT will not impact the plant design, components or operational practices. The increased out-of-service time does not invalidate assumptions used in evaluating the radiological consequences of an accident and does not provide a new or altered release path. In addition, the administrative changes to delete EDG reporting requirements and an obsolete License Condition will not impact plant equipment or operating practices. Therefore, this change does not involve an increase in the probability of any accident previously evaluated.

An increase in the AOT for the EDGs would not change the conditions, operating configuration, or minimum amount of operable equipment assumed in the plant Final Safety Analysis Report for accident mitigation. The longer AOT would provide a longer time window for maintenance, but would lesson the overall EDG unavailability, therefore, it would reduce plant risk. The CDF [core damage frequency] associated with a 7-day AOT increases from the base case in the SQN [Sequoyah Nuclear Plant] IPE [individual plant examination] but is not risk-significant. This CDF increase is based on sensitivity studies performed in accordance with the guidance in Draft Regulatory Guide DG–1065, dated June 1997. These studies assume additional unavailability of the EDGs for an increase in AOT even though plant practices are not expected to change. The EDG availability improvements and CDF reductions during 12- and 6-year maintenance activities compensates for this potential increase to provide an overall safety benefit.

The deletion of the footnote for extending the AOT for fuel tank cleaning removes inappropriate extensions of EDG out-of-service time. SQN's implementation of the Maintenance Rule, 10 CFR 50.65, also supports the proper scheduling and performance of maintenance activities to ensure EDG unavailability is adequately controlled. Based on no change in plant risk during routine maintenance, because work activity durations are unchanged, and the decrease in overall plant risk during the 12- and 6-year maintenance activities, as a result of the 7-day EDG action time, this change will not result in a significant increase in the consequences of an accident. In addition, the administrative deletions of reporting requirements that are not necessary based on Maintenance Rule implementation and obsolete License Condition deletion will not increase the consequences of an accident.

B. *The proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.*

The proposed change to extend the AOT for the EDGs and delete unnecessary TS and operating license provisions does not alter the physical design or configuration of the plant. The EDG operation remains unchanged, therefore, this change does not create the possibility of a new or different kind of accident from any previously analyzed.

C. *The proposed amendment does not involve a significant reduction in a margin of safety.*

The proposed extension of the EDG action time for inoperable units to 7 days will not alter plant equipment, setpoints or operating practices that provide the necessary margin of safety. The extension will reduce EDG unavailability and plant risk such that the

EDG's ability to react to accident situations is increased. Overall CDF, as a result of a 7-day AOT, indicates a slight increase but it is not significant. The AOT extension deletion for fuel tank cleaning is a conservative change to maintain appropriate EDG out-of-service times. The deletions of administrative requirements for reporting EDG reliability and obsolete License Conditions do not impact functions that maintain the margins of safety and have been or are continuing to be satisfied by other regulatory requirements. Therefore, the proposed change does not involve a significant reduction in the margin of safety.

The NRC has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Chattanooga-Hamilton County Library, 1001 Broad Street, Chattanooga, Tennessee 37402.

Attorney for licensee: General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, ET 10H, Knoxville, Tennessee 37902.

NRC Project Director: Frederick J. Hebdon.

Union Electric Company, Docket No. 50–483, Callaway Plant, Unit 1, Callaway County, Missouri

Date of application request: June 29, 1998.

Description of amendment request: The amendment would revise technical specification 3.7.1.7 to (1) address operability of all four atmospheric steam dump (ASD) lines, (2) retain an action statement for excessive ASD seat leakage, and (3) incorporate action statements for multiple inoperable ASD lines.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Revising the LCO to refer to the ASD lines rather than the ASD valves; requiring four ASD lines to be operable rather than three; limiting the LCO 3.0.4 exception to one ASD line inoperable; and adding a surveillance for the manual isolation valves constitutes a more restrictive change from the current Specification. The proposed changes impose more stringent requirements to ensure that ASD operability is maintained consistent with the safety analysis and licensing basis, and also to address all potential single failure scenarios.

Therefore these changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

When two ASD lines are inoperable due to causes other than excessive ASD seat leakage, the proposed change increases the allowed outage time for restoration of all but one required ASD line from 24 hours to 72 hours. The increase in time is not significant when balanced against the availability of the condenser steam dump system and/or the main steam safety valves, and the low probability of an event occurring during the restoration period that would require the ASD lines. Therefore the increase in allowed outage time for restoration of all but one ASD line does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change revising the required completion time from hot standby to hot shutdown from six hours to twelve hours is consistent with NUREG–1431, Rev. 1, where the required completion time to shut the plant down is revised to achieving hot standby in six hours and hot shutdown within the following twelve hours. The proposed change does not alter the plant configuration or operation or the function of any safety system. Consequently, the change does not increase the probability of an accident as defined in the accident analysis. The proposed change permits a longer time to cooldown to RHR entry conditions; however, this would not affect the consequences of any postulated accidents and is appropriate due to the need to avoid any transients while cooling down. Therefore the proposed change would not involve a significant increase in the probability or consequences of an accident.

Therefore, it is concluded that all of the above-proposed changes do not significantly increase the probability or consequences of any accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

Revising the LCO to refer to the ASD lines rather than the ASD valves; requiring four ASD lines to be operable rather than three; limiting the LCO 3.0.4 exception to one ASD line inoperable; and adding a surveillance for the manual isolation valves does not involve a physical alteration of the plant (no new or different type of equipment will be installed) or changes in controlling parameters. The proposed change does impose different requirements. However, these changes are consistent with assumptions made in the safety analysis and licensing basis. Thus, this change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

When two ASD lines are inoperable due to causes other than excessive ASD seat leakage, the proposed change increases the allowed outage time for restoration of all but one required ASD line from 24 hours to 72 hours. The increase in time is not significant when balanced against the availability of the condenser steam dump system and/or the main steam safety valves, and the low probability of an event occurring during the restoration period that would require the ASD lines. The increase in the allowed outage time does not result in a condition not previously considered or analyzed, and therefore does not create the possibility of a new or different kind of accident.

The proposed change revising the required completion time from hot standby to hot shutdown from six hours to twelve hours is consistent with NUREG–1431, Rev. 1, where the required completion time to shut the plant down is revised to achieving hot standby in six hours and hot shutdown within the following twelve hours. The proposed change does not require physical alteration to any plant system or change the method by which any safety-related system performs its function. The change does allow additional time to complete the transfer from the steam generator method for heat removal to the RHR system, but does not alter the basic methodology. Therefore, the proposed change would not create the possibility of a new or different kind of accident.

All of the proposed changes discussed above do not create the potential for a new or previously unanalyzed accident.

3. The proposed change does not involve a significant reduction in a margin of safety.

Revising the LCO to refer to the ASD lines rather than the ASD valves; requiring four ASD lines to be operable rather than three; limiting the LCO 3.0.4 exception to one ASD line inoperable; and adding a surveillance for the manual isolation valves imposes more stringent requirements. These requirements either have no impact on or increase the margin of safety by increasing the scope of the specification to include additional plant equipment; by adding additional requirements; and by imposing a new surveillance. The change is consistent with the safety analysis and licensing basis, and does not involve a reduction in a margin of safety.

When two ASD lines are inoperable due to causes other than excessive seat leakage, the proposed change increases the allowed outage time for restoration from 24 hours to 72 hours. The increase in time is not significant when balanced against the availability of the condenser steam dump system and/or the main steam safety valves, and the low probability of an event occurring during the restoration period that would require the ASD lines. The increase in the allowed outage time does not result in a condition not previously considered and does not involve a significant reduction in a margin of safety.

The proposed change revising the required completion time from hot standby to hot shutdown from six hours to twelve hours is consistent with NUREG–1431, Rev. 1, where the required completion time to shut the plant down is revised to achieving hot standby in six hours and hot shutdown within the following twelve hours. The change does not alter the basic regulatory requirements or change any accident analysis assumptions, initial conditions or results. Therefore, the proposed change would have no significant adverse effect on margins of safety.

None of the proposed changes have any significant adverse effect on margins of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: Elmer Ellis Library, University of Missouri, Columbia Missouri 65201.

Attorney for licensee: John O'Neill, Esq., Shaw, Pittman, Potts & Trowbridge, 2300 N Street, N.W., Washington, D.C. 20037.

NRC Project Director: William H. Bateman.

Virginia Electric and Power Company, Docket Nos. 50–338 and 50–339, North Anna Power Station, Units No. 1 and No. 2, Louisa County, Virginia

Date of amendment request: July 28, 1998.

Description of amendment request: The North Anna Power Station (NAPS), Unit 1 and 2, Technical Specifications (TS) Surveillance Requirement (SR) 4.6.2.2.1.b requires verification, during recirculation flow, that each outside recirculation spray (ORS) pump develops a discharge pressure of greater than or equal to 115 pounds per square inch (psig) and that each Casing Cooling pump develops a discharge pressure of greater than or equal to 58 psig for Unit 1 and 46 psig for Unit 2 when tested. The proposed changes will revise the testing acceptance criteria being verified from discharge pressure to the required developed head. The frequency of testing shall be in accordance with the Inservice Testing Program.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Virginia Electric and Power Company has reviewed the requirements of 10 CFR 50.92 as they relate to the proposed changes for the North Anna Units 1 and 2 and determined that the changes do not pose a significant hazards consideration * * * Specifically, operation of the North Anna Power Station in accordance with the proposed Technical Specification changes will not:

(a) Involve a significant increase in the probability or consequences of an accident as previously evaluated

The applicable UFSAR [Updated Final Safety Analysis Report] accidents previously evaluated are the LOCA [loss-of-coolant accident] and MSLB [main steamline break]. The proposed changes ensure that the Casing Cooling and ORS pumps will perform properly with no unacceptable degradation by using the correct pump test acceptance criteria as controlled by the PT program. This does not increase the probability of a LOCA or MSLB.

(b) Create the possibility of a new or different type from any accident previously evaluated

The proposed changes to the Technical Specifications will ensure that the Casing Cooling and ORS pumps are tested at the frequency established by the Inservice Testing Program to confirm their ability to provide design basis flow during a LOCA/MSLB. This will not result in any physical alteration to any plant system, nor would there be a change in the method by which any safety related system performs its function. The design and operation of the Casing Cooling and ORS systems are not being changed. Also, the proposed changes do not affect the design, operation or failure modes of the Casing Cooling and ORS pumps and other components within the Casing Cooling and ORS systems. Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

(c) Involve a significant reduction in a margin of safety

Implementation of the proposed changes ensures that the Casing Cooling and ORS pumps do not operate with unacceptable degraded flows during a LOCA/MSLB that are less than their containment analysis design basis flow. Therefore, the proposed changes would not reduce the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: The Alderman Library, Special Collections Department, University of Virginia, Charlottesville, Virginia 22903–2498.

Attorney for licensee: Michael W. Maupin, Esq., Hunton and Williams, Riverfront Plaza, East Tower, 951 E. Byrd Street, Richmond, Virginia 23219.

NRC Project Director: Pao-Tsin Kuo, Acting.

Virginia Electric and Power Company, Docket Nos. 50–338 and 50–339, North Anna Power Station, Units No. 1 and No. 2, Louisa County, Virginia

Date of amendment request: July 28, 1998.

Description of amendment request: The North Anna Power Station (NAPS), Unit 1 and 2, Technical Specifications (TS) Surveillance Requirements (SR) 4.8.1.1.2.a.4, 4.8.1.1.2.c, 4.8.1.1.2.d.2, 4.8.1.1.2.d.4.b, 4.8.1.1.2.d.5, 4.8.1.1.2.d.6.b, 4.8.1.1.2.d.11.b, and 4.8.1.1.2.e currently require each Emergency Diesel Generator (EDG) to be demonstrated OPERABLE by the performance of specific Surveillance Requirements. One significant part of demonstrating operability of the EDG requires verification that the frequency is within a specified range, which is currently 60 plus or minus 1.2 Hz. The proposed changes would change the frequency limit from 60 plus or minus 1.2 Hz to 60 plus or minus 0.5 Hz and separate the requirement of the EDG start from the steady state voltage and frequency limits.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Virginia Electric and Power Company has reviewed the proposed Technical Specification changes against the requirements of 10 CFR 50.92 and has determined that the proposed changes would not pose a significant hazards consideration. Specifically, operation of the North Anna Power Station in accordance with the proposed Technical Specifications changes will not:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change provides a more stringent requirement for the EDG frequency limit at steady state operation of 60 [plus or minus] 0.5 Hz from the current 60 [plus or minus] 1.2 Hz. The change additionally provides a separation of the start requirements from the steady state limits for voltage and frequency. The change to the EDG frequency limit does not result in operation that will increase the probability of initiating an analyzed event and does not alter assumptions relative to mitigation of an accident or transient event. The change to the frequency limit is acceptable because the safety analyses assumptions for emergency power limits the frequency variations to 60 [plus or minus] 0.5 Hz and assumes that the EDG supplies the emergency bus with electrical power within 10 seconds of receiving an emergency start signal. The EDG output breaker will close with no electrical power applied to the emergency bus when the EDG output reaches 95% of rated voltage. The minimum frequency requirement of 59.5 Hz is based on the steady state limit for the EDG. The EDG supplies the electrical power for the required equipment to mitigate the consequences of design basis events. The minimum voltage and frequency (3740 volts and 59.5 Hz) limits ensure that the ESF [engineered safety feature] equipment is maintained with the required electrical power to mitigate the consequences of an accident previously evaluated. Therefore, this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Create the possibility of a new or different type from any accident previously evaluated.

The proposed change provides a more stringent requirement for the EDG frequency at steady state operation of 60 [plus or minus] 0.5 Hz from the current 60 [plus or minus] 1.2 Hz. The change additionally provides a separation of the start requirements from the steady state limits for voltage and frequency. The change does not introduce a new mode of plant operation and does not involve physical modification to the plant. The proposed change does impose different requirements. However, these changes are consistent with the assumptions in the safety analyses. Thus, this change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Involve a significant reduction in a margin of safety.

The proposed change provides a more stringent requirement for the EDG frequency at steady state operation of 60 [plus or minus] 0.5 Hz from the current 60 [plus or minus] 1.2 Hz. The change additionally provides a separation of the start requirements from the steady state limits for voltage and frequency. The change to the frequency limit is acceptable because the safety analyses assumptions for emergency power limits the frequency variations to 60 [plus or minus] 0.5 Hz and assumes that the EDG supplies the emergency bus with electrical power within 10 seconds of receiving an emergency start signal. The EDG output breaker will close with no electrical power applied to the emergency bus when the EDG output reaches 95% of rated voltage. The minimum frequency requirement of 59.5 Hz is based on the steady state limit for the EDG.

The EDG supplies the electrical power for the required equipment to mitigate the consequences of design basis events. The minimum voltage and frequency (3740 volts and 59.5 Hz) limits ensure that the ESF equipment will be supplied with the required electrical power to mitigate previously evaluated accidents. The margin of safety is established through the design of the plant structures, systems and components, the parameters within which the plant is operated, and the establishment of the setpoints for the actuation of equipment relied upon to respond to an event. The change allowing the separation of the start requirements from the steady state voltage and frequency limits, due to the short time period allowed in this condition, does not significantly impact the performance of structures; systems or components relied upon for accident mitigation or any safety analysis assumptions. Therefore, the change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Local Public Document Room location: The Alderman Library, Special Collections Department, University of Virginia, Charlottesville, Virginia 22903–2498.

Attorney for licensee: Michael W. Maupin, Esq., Hunton and Williams, Riverfront Plaza, East Tower, 951 E. Byrd Street, Richmond, Virginia 23219.

NRC Project Director: Pao-Tsin Kuo, Acting.

Previously Published Notices of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The following notices were previously published as separate individual notices. The notice content was the same as above. They were published as individual notices either because time did not allow the Commission to wait for this biweekly notice or because the action involved exigent circumstances. They are repeated here because the biweekly notice lists all amendments issued or proposed to be issued involving no significant hazards consideration.

For details, see the individual notice in the **Federal Register** on the day and page cited. This notice does not extend the notice period of the original notice.

Duke Energy Corporation, Docket Nos. 50–413 and 50–414, Catawba Nuclear Station, Units 1 and 2, York County, South Carolina

Date of amendment request: August 6, 1998.

Description of amendment request: The proposed amendments would revise Technical Specification (TS) Surveillance Requirement 4.8.1.1.2.i.2. This requirement is in conflict with a relief granted by the NRC staff in February 1995. The deletion of TS Surveillance Requirement 4.8.1.1.2.i.2 would remove such a conflict.

Date of publication of individual notice in **Federal Register**: August 17, 1998 (63 FR 43962).

Expiration date of individual notice: September 16, 1998.

Local Public Document Room location: York County Library, 138 East Black Street, Rock Hill, South Carolina.

Niagara Mohawk Power Corporation, Docket No. 50–220, Nine Mile Point Nuclear Station Unit No. 1, Oswego County, New York

Date of application for amendment: July 16, 1998. This notice supersedes a previous notice (62 FR 40851, published July 30, 1997) that was based upon an amendment request dated July 2, 1997. The request dated July 2, 1997, was superseded in its entirety by the amendment request dated July 16, 1998.

Brief description of amendment: The amendment would change Technical Specification 3/4.2.3 regarding reactor coolant chemistry in accordance with a report by Electrical Power Research Institute, Inc. TR–103515–R1, ''BWR Water Chemistry Guidelines, 1996 Revision,'' also known as Boiling Water Reactor Vessel and Internals Project-29.

Date of publication of individual notice in **Federal Register**: August 13, 1998 (63 FR 43432).

Expiration date of individual notice: September 14, 1998.

Local Public Document Room location: Reference and Documents Department, Penfield Library, State University of New York, Oswego, New York 13126.

Northern States Power Company, Docket Nos. 50–282 and 50–306, Prairie Island Nuclear Generating Plant, Units 1 and 2, Goodhue County, Minnesota

Date of amendment requests: February 27, 1998, as supplemented July 14, 1998.

Brief description of amendment requests: The proposed amendments would allow a design modification to the existing Anticipated Transient Without Scram (ATWS) Mitigation System Actuation Circuitry (AMSAC). The design modification would install a Diverse Scram System (DSS) designed to meet the requirements of a DSS described by 10 CFR 50.62 (ATWS Rule) for non-Westinghouse designed plants and make major modifications to the existing AMSAC.

Date of publication of individual notice in **Federal Register**: August 17, 1998 (63 FR 4365).

Expiration date of individual notice: September 16, 1998.

Local Public Document Room location: Minneapolis Public Library, Technology and Science Department, 300 Nicollet Mall, Minneapolis, Minnesota 55401.

Power Authority of the State of New York, Docket No. 50–333, James A. FitzPatrick Nuclear Power Plant, Oswego County, New York

Date of application for amendment: October 14, 1997, as supplemented July 23, 1998.

Brief description of amendment: The proposed amendment would change the James A. FitzPatrick Technical Specifications to provide for installation of additional racks to increase spent fuel pool capacity, and to correct the maximum exposure dependent, infinite lattice multiplication factor for fuel bundles.

Date of initial notice in **Federal Register**: August 24, 1998 (63 FR 45096).

Expiration date of individual notice: September 23, 1998.

Local Public Document Room location: Reference and Documents Department, Penfield Library, State University of New York, Oswego, New York 13126.

Notice of Issuance of Amendments to Facility Operating Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for A Hearing in connection with these actions was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.12(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document rooms for the particular facilities involved.

Commonwealth Edison Company, Docket Nos. STN 50–456 and STN 50–457, Braidwood Station, Unit Nos. 1 and 2, Will County, Illinois

Date of application for amendments: January 14, 1998.

Brief description of amendments: The amendments revise the Technical Specifications to support replacement of the 125 volt direct current (Vdc) AT&T batteries with new Charter Power Systems, Inc. (C&D) batteries. In addition, the crosstie loading limitation is revised to reflect the larger capacity of the C&D batteries.

Date of issuance: August 18, 1998.

Effective date: Immediately, to be implemented within 30 days.

Amendment Nos.: 94 and 94.

Facility Operating License Nos. NPF–72 and NPF–77: The amendments revised the Technical Specifications.

Date of initial notice in **Federal Register**: May 20, 1998 (63 FR 27758). The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated August 18, 1998.

No significant hazards consideration comments received: No.

Local Public Document Room location: Wilmington Public Library, 201 S. Kankakee Street, Wilmington, Illinois 60481.

Detroit Edison Company, Docket No. 50–341, Fermi 2, Monroe County, Michigan

Date of application for amendment: April 2, 1998 (NRC–98–0057).

Brief description of amendment: The amendment revises Technical Specification 3.3.7.5 to permit entering Operational Conditions 1 and 2 prior to completion of Surveillance Requirements for the primary containment hydrogen and oxygen monitors in order to establish the conditions necessary (inerted containment) to properly perform the calibrations. The amendment also allows an increase in the frequency of the calibration for the oxygen monitors from once every 18 months to quarterly and corrects the nomenclature for the hydrogen and oxygen monitors in tables 3.3.7.5–1 and 4.3.7.5–1.

Date of issuance: August 20, 1998.

Effective date: August 20, 1998, with full implementation within 90 days.

Amendment No.: 125.

Facility Operating License No. NPF–43. Amendment revises the Technical Specifications.

Date of initial notice in **Federal Register**: April 22, 1998 (63 FR 19968).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated August 20, 1998.

No significant hazards consideration comments received: No.

Local Public Document Room location: Monroe County Library System, Ellis Reference and Information Center, 3700 South Custer Road, Monroe, Michigan 48161.

Detroit Edison Company, Docket No. 50–341, Fermi 2, Monroe County, Michigan

Date of application for amendment: March 27, 1998 (NRC–98–0034), as supplemented May 28 and July 31, 1998.

Brief description of amendment: The amendment revises footnotes associated with the emergency core cooling system (ECCS) in Technical Specifications 3.5.1, ''ECCS—Operating,'' and 3.5.2, ''ECCS—Shutdown,'' to indicate that a low pressure coolant injection system loop may be considered operable during alignment and operation for decay heat removal if it is capable of being manually realigned and is not otherwise inoperable. The associated Bases are also revised.

Date of issuance: August 25, 1998.

Effective date: August 25, 1998, with full implementation within 90 days.

Amendment No.: 126.

Facility Operating License No. NPF–43: Amendment revises the Technical Specifications.

Date of initial notice in **Federal Register**: April 22, 1998 (63 FR 19968). The May 28 and July 31, 1998, letters provided clarifying information that was within the scope of the original **Federal Register** notice and did not change the staff's initial proposed no significant hazards considerations determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated August 25, 1998.

No significant hazards consideration comments received: No.

Local Public Document Room location: Monroe County Library System, Ellis Reference and Information Center, 3700 South Custer Road, Monroe, Michigan 48161.

Detroit Edison Company, Docket No. 50–341, Fermi 2, Monroe County, Michigan

Date of application for amendment: September 25, 1996 (NRC–96–0085), as supplemented by letters dated November 26, 1997, and March 10 and June 17, 1998.

Brief description of amendment: The amendment revises Surveillance Requirement 4.8.4.3 to clarify the situational testing requirement for thermal overload devices to indicate that this portion of the requirement must be completed upon initial installation of a thermal overload device and following any maintenance that could affect its performance.

NRC has also granted the request of Detroit Edison Company to withdraw a portion of its September 25, 1996,

application. The proposed change would have deleted the requirement for periodically testing motor-operated valve thermal overload protective devices. However, by letter dated June 17, 1998, the licensee withdrew this portion of the amendment request. For further details with respect to these actions, see the application for amendment dated September 25, 1996, as supplemented above, and the licensee's letter dated June 17, 1998, which withdrew this portion of the application for license amendment, and the staff's safety evaluation enclosed with the amendment. The above documents 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 listed below.

Date of issuance: August 25, 1998.

Effective date: August 25, 1998, with full implementation within 90 days.

Amendment No.: 127.

Facility Operating License No. NPF–43: Amendment revises the Technical Specifications.

Date of initial notice in **Federal Register**: October 23, 1996 (61 FR 55030).

The November 26, 1997, and March 10 and June 17, 1998, submittals provided additional clarifying information within the scope of the original **Federal Register** notice and did not change the staff's initial proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated August 25, 1998.

No significant hazards consideration comments received: No.

Local Public Document Room location: Monroe County Library System, Ellis Reference and Information Center, 3700 South Custer Road, Monroe, Michigan 48161.

Duke Energy Corporation, et al., Docket Nos. 50–413 and 50–414, Catawba Nuclear Station, Units 1 and 2, York County, South Carolina

Date of application for amendments: April 8, 1998.

Brief description of amendments: The amendments revise Technical Specification Section 3/4.6.5.1, regarding the ice condenser, to reduce the total ice weight from 2,475,252 to 2,330,856 pounds, and to reduce individual ice basket ice weight from 1273 to 1199 pounds. The associated Bases section is also revised to reflect the changed requirements.

Date of issuance: August 25, 1998.

Effective date: As of the date of issuance to be implemented within 30 days from the date of issuance.

Amendment Nos.: Unit 1—168; Unit 2—160.

Facility Operating License Nos. NPF–35 and NPF–52: Amendments revised the Technical Specifications.

Date of initial notice in **Federal Register**: May 6, 1998 (63 FR 25107).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated August 25, 1998.

No significant hazards consideration comments received: No.

Local Public Document Room location: York County Library, 138 East Black Street, Rock Hill, South Carolina.

Duke Energy Corporation, et al., Docket Nos. 50–413 and 50–414, Catawba Nuclear Station, Units 1 and 2, York County, South Carolina

Date of application for amendments: December 11, 1997.

Brief description of amendments: The amendments revise Technical Specification Table 3.3–4, Engineered Safety Feature Actuation System Instrumentation Trip Setpoints, to require that suction of the Nuclear Service Water System be swapped from Lake Wylie to the Standby Nuclear Service Water Pond at a higher minimum water level of Lake Wylie. Specifically, the amendments change the swap setpoint from greater than or equal to 554.4 feet to greater than or equal to 557.5 feet, and the allowable value from greater than or equal to 552.9 feet to greater than or equal to 555.4 feet.

Date of issuance: August 25, 1998.

Effective date: As of the date of issuance to be implemented within 30 days from the date of issuance.

Amendment Nos.: Unit 1—169; Unit 2—161.

Facility Operating License Nos. NPF–35 and NPF–52: Amendments revised the Technical Specifications.

Date of initial notice in **Federal Register**: February 11, 1998 (63 FR 6983).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated August 25, 1998.

No significant hazards consideration comments received: No.

Local Public Document Room location: York County Library, 138 East Black Street, Rock Hill, South Carolina.

Duke Energy Corporation, et al., Docket Nos. 50–413 and 50–414, Catawba Nuclear Station, Units 1 and 2, York County, South Carolina

Date of application for amendments: September 15, 1997, as supplemented by letters dated March 5, April 27, June 15, July 22, and August 10, 1998.

Brief description of amendments: The amendments revise Technical Specification Figures 3.4–2 and 3.4–3 (pressure-temperature limits curves), Table 4.4–5 (reactor vessel surveillance capsule withdrawal schedule), and Sections 3/4.4.9.3 and 3.5.3 (requirements concerning overpressure protection). The associated Bases are also revised.

Date of issuance: August 28, 1998.

Effective date: As of the date of issuance to be implemented within 60 days.

Amendment Nos.: Unit 1—170; Unit 2—162.

Facility Operating License Nos. NPF–35 and NPF–52: Amendments revised the Technical Specifications.

Date of initial notice in **Federal Register**: October 8, 1997 (62 FR 52580); and July 29, 1998 (63 FR 40553).

The March 5, April 27, July 22, and August 10, 1998, letters provided additional information that did not change the scope of the September 15, 1997, application and the initial proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated August 28, 1998.

No significant hazards consideration commets received: No.

Local Public Document Room location: York County Library, 138 East Black Street, Rock Hill, South Carolina.

Duke Energy Corporation, Docket No. 50–287, Oconee Nuclear Station, Unit 3, Oconee County, South Carolina

Date of application of amendment: July 20, 1998.

Brief description of amendment: The amendment extends, on a one-time basis, Technical Specification Surveillance 4.18.3 for hydraulic and mechanical snubber testing. The tests are required to be performed at a frequency of 18 months, with a maximum allowed frequency of 22 months, 15 days. The amendment extends this to a maximum of 25 months.

Date of Issuance: August 26, 1998.

Effective date: As of the date of issuance to be implemented within 30 days from the date of issuance.

Amendment No.: 229.

Facility Operating License No. DPR–55: The amendment revises the Technical Specifications.

Date of initial notice in **Federal Register**: July 27, 1998 (63 FR 40137).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated August 26, 1998.

No significant hazards consideration comments received: No.

Local Public Document Room location: Oconee County Library, 501 West South Broad Street, Walhalla, South Carolina.

Duke Energy Corporation, Docket No. 50–287, Oconee Nuclear Station, Unit 3, Oconee County, South Carolina

Date of application of amendment: July 16, 1998.

Brief description of amendment: The amendment extends, on a one-time basis, during Operating Cycle 17, certain specified Technical Specification surveillances that are required to be performed at a frequency of 18 months from the maximum allowed frequency of 22 months, 15 days, to a maximum of 24 months.

Date of Issuance: August 28, 1998.

Effective date: As of the date of issuance to be implemented within 30 days from the date of issuance.

Amendment No.: 230.

Facility Operating License No. DPR–55: The amendment revises the Technical Specifications.

Date of initial notice in **Federal Register**: July 29, 1998 (63 FR 40555)

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated August 28, 1998.

No significant hazards consideration comments received: No.

Local Public Document Room location: Oconee County Library, 501 West South Broad Street, Walhalla, South Carolina.

Duquesne Light Company, et al., Docket Nos. 50–334 and 50–412, Beaver Valley Power Station, Unit Nos. 1 and 2 (BVPS–1 and BVPS–2), Shippingport, Pennsylvania

Date of application for amendments: December 19, 1997, as supplemented June 16, July 9, and July 15, 1998.

Brief description of amendments: These amendments revise the requirements for the source range neutron flux channels in Modes 2 (Below P–6), 3, 4, and 5 to incorporate the guidance provided in NUREG–1431, the NRC's improved Standard Technical Specifications with some modifications to address plant-specific design features. This change allows (1) the use of alternate detectors provided the required functions are provided, and (2) plant cooldown with inoperable detectors provided the shutdown margin accounts for the temperature change. This change also modifies the BVPS–2 Technical Specification (TS) Table 3.3–1 Channels To Trip and Minimum Channels Operable requirements to 0 and 1, respectively. This portion of the amendment makes these BVPS–2 requirements consistent with the current BVPS–1 requirements. For both BVPS–1 and BVPS–2, TS Table 4.3–1 is modified to include a notation exempting the alternate source range detectors from surveillance testing until they are required for operability.

Date of issuance: August 26, 1998.

Effective date: Both units, effective immediately, to be implemented within 60 days.

Amendment Nos.: 217 and 94.

Facility Operating License Nos. DPR–66 and NPF–73: Amendments revised the Technical Specifications.

Date of initial notice in **Federal Register**: March 11, 1998 (63 FR 11918).

The June 16, July 9, and July 15, 1998, letters provided clarifying information that did not change the initial no significant hazards consideration determination or expand the amendment request beyond the scope of the March 11, 1998, **Federal Register** notice.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated August 26, 1998.

No significant hazards consideration comments received: No.

Local Public Document Room location: B.F. Jones Memorial Library, 663 Franklin Avenue, Aliquippa, PA 15001.

Florida Power and Light Company, et al., Docket Nos. 50–335 and 50–389, St. Lucie Plant, Unit Nos. 1 and 2, St. Lucie County, Florida.

Date of application for amendments: June 3, 1998.

Brief description of amendments: Revise the surveillance requirements of TS Section 4.11.2.5.1, Explosive Gas Mixture, to add a reference the St. Lucie Units 1 and 2 Updated Final Safety Analysis Reports for clarification of an alternative monitoring method to be used in the event that continuous monitoring of explosive gas mixtures in the waste decay tanks becomes inoperable.

Date of Issuance: August 10, 1998.

Effective Date: August 10, 1998, and shall be implemented within 30 days of receipt.

Amendment Nos.: 156 and 94.

Facility Operating License Nos. DPR–67 and NPF–16: Amendments revised the Technical Specifications.

Date of initial notice in **Federal Register**: July 1, 1998 (63 FR 35990).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated August 10, 1998.

No significant hazards consideration comments received: No.

Local Public Document Room location: Indian River Junior College Library, 3209 Virginia Avenue, Fort Pierce, Florida 34954–9003.

Florida Power and Light Company, et al., Docket No. 50–389, St. Lucie Plant, Unit No. 2, St. Lucie County, Florida

Date of application for amendment: March 3, 1998.

Brief description of amendment: This amendment revises the TS in three areas. First, the amendment revises TS 3.4.7, Reactor Coolant System-Chemistry, to eliminate the need for sampling of reactor coolant system chemistry in the defueled condition. Second, the amendment revises TS 5.6.1.a.1, Design Features-Fuel Storage-Criticality, to reflect the total uncertainty associated with the unborated criticality analysis previously approved by NRC. And third, the amendment revises TS 6.5.2.9.d, Technical Review Responsibilities, to be consistent with the quality assurance process previously approved by NRC.

Date of Issuance: August 18, 1998.

Effective Date: As of date of issuance, and shall be implemented within 30 days of receipt.

Amendment No.: 95.

Facility Operating License No. NPF–16: Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register**: April 8, 1998 (63 FR 17224).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated August 18, 1998.

No significant hazards consideration comments received: No.

Local Public Document Room location: Indian River Community College Library, 3209 Virginia Avenue, Fort Pierce, Florida 34981–5596.

Northeast Nuclear Energy Company, et al., Docket No. 50–336, Millstone Nuclear Power Station, Unit No. 2, New London County, Connecticut

Date of application for amendment: April 6, 1998.

Brief description of amendment: The amendment changes the Technical Specifications (TSs) by (1) adding a surveillance requirement to verify

pressurizer heater capacity to TS 3.4.4, ''Reactor Coolant System—Pressurizer,'' (2) moving the identification of the location of the containment air temperature detectors from the surveillance requirements portion of TS 3.6.1.5, ''Containment Systems—Air Temperature,'' to the TS Bases for Containment Systems, Section 3/4.4.6.1.5, ''Air Temperature,'' and (3) modifying the action statements and surveillance requirements of TS 3.7.1.5, ''Plant Systems—Main Steam Isolation Valves.'' The TS Bases are updated to include the location of containment air temperature detectors and reflect the changes.

Date of issuance: August 21, 1998.

Effective date: As of the date of issuance to be implemented within 60 days.

Amendment No.: 219.

Facility Operating License No. DPR–65: Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register**: May 6, 1998 (63 FR 25113).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated August 21, 1998.

No significant hazards consideration comments received: No.

Local Public Document Room location: Learning Resources Center, Three Rivers Community-Technical College, 574 New London Turnpike, Norwich, Connecticut, and the Waterford Library, ATTN: Vince Juliano, 49 Rope Ferry Road, Waterford, Connecticut.

Northern States Power Company, Docket No. 50–263, Monticello Nuclear Generating Plant, Wright County, Minnesota

Date of application for amendment: June 19, 1998, as supplemented on July 1, 1998. The June 19, 1998, submittal superseded in its entirety Northern States Power (NSP) Company's previous letters dated July 26, 1996, and April 11, 1997. NSP letter dated May 5, 1997, was also considered in the staff's review of the amendment request.

Brief description of amendment: The amendment revises Section 3.6.C, Coolant Chemistry, and 3/4.17.B, Control Room Emergency Filtration System, of the Technical Specifications (TS) to establish TS requirements that are consistent with modified analysis inputs used for the evaluation of the radiological consequences of a postulated main steam line break accident, and of a postulated line break in the reactor water cleanup system.

This amendment request was originally noticed in the **Federal Register** on May 6, 1998 (63 FR 25115).

Date of issuance: August 28, 1998.

Effective date: August 28, 1998. Implementation of the license conditions shall be as specified in Appendix C to DPR–22.

Amendment No.: 101.

Facility Operating License No. DPR–22: Amendment revised the License and the Technical Specifications.

Date of publication of individual notice in **Federal Register**: July 28, 1998 (63 FR 40321).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated August 28, 1998.

No significant hazards consideration comments received: No.

Local Public Document Room location: Minneapolis Public Library, Technology and Science Department, 300 Nicollet Mall, Minneapolis, Minnesota 55401.

PECO Energy Company, Public Service Electric and Gas Company, Delmarva Power and Light Company, and Atlantic City Electric Company, Docket No. 50–277, Peach Bottom Atomic Power Station, Unit No. 2, York County, Pennsylvania

Date of application for amendment: January 17, 1995, as supplemented by letters dated March 30, 1995; July 2, 1996; February 28 and September 22, 1997; and January 23, July 9 and July 29, 1998.

Brief description of amendment: These amendments revise the technical specifications to support the replacement of the Source Range and Intermediate Range Monitors with the Wide Range Neutron Monitoring System.

Date of issuance: August 24, 1998.

Effective date: As of the date of issuance and is to be implemented upon completion of Modification P00271.

Amendment No.: 222.

Operating License No. DPR–44: Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register**: June 6, 1995 (60 FR 29885)

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated August 24, 1998.

No significant hazards consideration comments received: No.

Local Public Document Room location: Government Publications Section, State Library of Pennsylvania, (Regional Depository) Education Building, Walnut Street and Commonwealth Avenue, Box 1601, Harrisburg, PA 17105

Southern Nuclear Operating Company, Inc., Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, City of Dalton, Georgia, Docket Nos. 50–321 and 50–366, Edwin I. Hatch Nuclear Plant, Units 1 and 2, Appling County, Georgia

Date of application for amendments: December 18, 1997, as supplemented July 14, 1998.

Brief description of amendments: The amendments revise the Unit 1 and Unit 2 Facility Operating Licenses by modifying or deleting obsolete conditions.

Date of issuance: August 18, 1998.

Effective date: As of the date of issuance to be implemented within 30 days.

Amendment Nos.: Unit 1–212; Unit 2–153.

Facility Operating License Nos. DPR–57 and NPF–5: Amendments revised the Facility Operating Licenses.

Date of initial notice in **Federal Register**: January 28, 1998 (63 FR 4324).

The July 14, 1998, letter provided clarifying information that did not change the scope of the December 18, 1997, application and the initial proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated August 18, 1998.

No significant hazards consideration comments received: No.

Local Public Document Room location: Appling County Public Library, 301 City Hall Drive, Baxley, Georgia.

Southern Nuclear Operating Company, Inc., Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, City of Dalton, Georgia, Docket Nos. 50–321 and 50–366, Edwin I. Hatch Nuclear Plant, Units 1 and 2, Appling County, Georgia

Date of application for amendments: October 29, 1996, as supplemented February 19, June 20, and October 21, 1997.

Brief description of amendments: The amendments revise the Technical Specifications (TSs) associated with the oscillation power range monitor portion of the digital Power Range Neutron Monitoring system. The TSs associated with the average power range monitor portion of the system were issued on March 21, 1997.

Date of issuance: August 20, 1998.

Effective date: As of the date of issuance to be implemented on each

unit prior to the next refueling outage of that unit.

Amendment Nos.: Unit 1–213; Unit 2–154.

Facility Operating License Nos. DPR–57 and NPF–5: Amendments revised the Technical Specifications.

Date of initial notice in **Federal Register**: January 2, 1997 (62 FR 130).

The letters dated February 19, June 20, and October 21, 1997, provided clarifying information that did not change the scope of the October 29, 1996, application and the initial proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated August 20, 1998.

No significant hazards consideration comments received: No.

Local Public Document Room location: Appling County Public Library, 301 City Hall Drive, Baxley, Georgia.

Southern California Edison Company, et al., Docket Nos. 50–361 and 50–362, San Onofre Nuclear Generating Station, Unit Nos. 2 and 3, San Diego County, California

Date of application for amendments: September 16, 1997, as supplemented by letter dated February 23, 1998.

Brief description of amendments: The amendments would allow sleeving of steam generator tubes with sleeves designed by the vendor, ASEA Brown Boveri/Combustion Engineering (ABB/CE). Additionally, the proposed TS amendment would require that sleeves be removed from service upon detection of service-induced degradation, require post weld heat treatment (PWHT) of sleeve welds, and reduce the allowable primary-to-secondary leakage through any one steam generator to 150 gallons per day (gpd).

Date of issuance: August 26, 1998.

Effective date: August 26, 1998, to be implemented 30 days from the date of issuance.

Amendment Nos.: Unit 2–140; Unit 3–132

Facility Operating License Nos. NPF–10 and NPF–15: The amendments revised the Technical Specifications.

Date of initial notice in **Federal Register**: January 28, 1998 (63 FR 4323).

The February 23, 1998, supplemental letter provided additional clarifying information and did not change the original no significant hazards consideration determination. The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated August 26, 1998.

No significant hazards consideration comments received: No.

Local Public Document Room location: Main Library, University of California, P. O. Box 19557, Irvine, California 92713.

Union Electric Company, Docket No. 50–483, Callaway Plant, Unit 1, Callaway County, Missouri

Date of application for amendment: March 9, 1998, as supplemented by letter dated July 8, 1998.

Brief description of amendment: The amendment revises Technical Specification 4.5.2b.1 and its associated Bases to eliminate the requirement to vent the centrifugal charging pump casings.

Date of issuance: August 17, 1998.

Effective date: August 17, 1998, to be implemented within 30 days from the date of issuance.

Amendment No.: 127.

Facility Operating License No. NPF–30: The amendment revised the Technical Specifications.

Date of initial notice in **Federal Register**: May 6, 1998 (63 FR 25118)

The July 8, 1998, supplemental letter provided additional clarifying information and did not change the staff's original no significant hazards consideration determination. The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated August 17, 1998.

No significant hazards consideration comments received: No.

Local Public Document Room location: University of Missouri-Columbia, Elmer Ellis Library, Columbia, Missouri 65201–5149.

Virginia Electric and Power Company, et al., Docket Nos. 50–338 and 50–339, North Anna Power Station, Units No. 1 and No. 2, Louisa County, Virginia

Date of application for amendments: September 1, 1995, as supplemented April 8, 1996; April 22, 1996; April 23, 1996; November 18, 1997; February 9, 1998; March 25, 1998; May 5, 1998; June 25, 1998; and June 29, 1998.

Brief description of amendments: The proposed action would revise the Technical Specifications (TS) changing the Emergency Diesel Generator (EDG) outage time from 72 hours to 14 days.

Date of issuance: August 26, 1998.

Effective date: August 26, 1998.

Amendment Nos.: 214 and 195.

Facility Operating License Nos. NPF–4 and NPF–7: Amendments revised the Licenses and the Technical Specifications.

Date of initial notice in **Federal Register**: June 17, 1998 (63 FR 33110), which superseded the notice of September 27, 1995 (60 FR 49949).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated August 26, 1998.

No significant hazards consideration comments received: No.

Local Public Document Room location: The Alderman Library, Special Collections Department, University of Virginia, Charlottesville, Virginia 22903–2498.

Virginia Electric and Power Company, et al., Docket Nos. 50–280 and 50–281, Surry Power Station, Units 1 and 2, Surry County, Virginia

Date of application for amendments: June 19, 1998, as supplemented July 14, 1998.

Brief Description of amendments: These amendments revise the Licenses and Technical Specifications (TS) to allow the use of a temporary jumper line for providing service water to component cooling water heat exchangers while maintenance is performed on existing service water supply piping. In addition, editorial changes have been made to TS Table 3.7–2, item 3, and to TS Bases Section 3.14.

Date of issuance: August 26, 1998.

Effective date: August 26, 1998.

Amendment Nos.: 216 and 216.

Facility Operating License Nos. DPR–32 and DPR–37: Amendments change the License and Technical Specifications.

Date of initial notice in **Federal Register**: July 14, 1998 (63 FR 38206). The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated August 26, 1998.

No significant hazards consideration comments received: No.

Local Public Document Room location: Swem Library, College of William and Mary, Williamsburg, Virginia 23185.

Dated at Rockville, Maryland, this 2nd day of September 1998.

For the Nuclear Regulatory Commission.

Elinor G. Adensam,

Acting Director, Division of Reactor Projects—III/IV, Office of Nuclear Reactor Regulation.

[FR Doc. 98–24130 Filed 9–8–98; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Existing Collection; Comment Request

Upon written request, copies available from: Securities and Exchange Commission, Office of Filings and Information Services, 450 5th Street, NW, Washington, DC 20549.

Extension:

Rule 3a–4, SEC File No. 270–401, OMB Control No. 3235–0459
Form N–8B–2, SEC File No. 270–186, OMB Control No. 3235–0186

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget request[s] for extension of the previously approved collection[s] of information discussed below.

Rule 3a–4 under the Investment Company Act of 1940 [15 U.S.C. 80a] (''Investment Company Act'' or ''Act'') provides a nonexclusive safe harbor from the definition of investment company under the Act for certain investment advisory programs. These programs, which include ''wrap fee'' and ''mutual fund wrap'' programs, generally are designed to provide professional portfolio management services to clients who are investing less than the minimum usually required by portfolio managers but more than the minimum account size of most mutual funds. Under wrap fee and similar programs, a client's account is typically managed on a discretionary basis according to pre-selected investment objectives. Clients with similar investment objectives often receive the same investment advice and may hold the same or substantially the same securities in their accounts. Some of these investment advisory programs may meet the definition of investment company under the Act because of the similarity of account management.

In 1997, the Commission adopted rule 3a-4, which clarifies that programs organized and operated in a manner consistent with the conditions of rule 3a–4 are not required to register under the Investment Company Act or comply with the Act's requirements.[1] These programs differ from investment companies because, among other things, they provide individualized investment advice to the client. The rule's provisions have the effect of ensuring that clients in a program relying on the rule receive advice tailored to the client's needs.

Rule 3a–4 provides that each client's account must be managed on the basis of the client's financial situation and investment objectives and consistent with any reasonable restrictions the client imposes on managing the account. When an account is opened, the sponsor[2] (or its designee) must obtain information from each client regarding the client's financial situation and investment objectives, and must allow the client an opportunity to impose reasonable restrictions on managing the account.[3] In addition, the sponsor (or its designee) annually must contact the client to determine whether the client's financial situation or investment objectives have changed and whether the client wishes to impose any reasonable restrictions on the management of the account or reasonably modify existing restrictions. The sponsor (or its designee) also must notify the client quarterly, in writing, to contact the sponsor (or the designee) regarding changes to the client's financial situation, investment objectives, or restrictions on the account's management.[4]

The program must provide each client with a quarterly statement describing all activity in the client's account during the previous quarter. The sponsor and personnel of the client's account manager who know about the client's account and its management must be reasonably available to consult with the client. Each client also must retain certain indicia of ownership of all securities and funds in the account.

Rule 3a–4 is intended primarily to provide guidance regarding the status of investment advisory programs under the Investment Company Act. The rule is not intended to create a presumption about a program that is not operated according to the rule's guidelines.

The requirement that the sponsor (or its designee) obtain information about the client's financial situation and investment objectives when the account is opened is designed to ensure that the investment adviser has sufficient information regarding the client's unique needs and goals to enable the portfolio manager to provide individualized investment advice. The sponsor is required to contact clients annually and provide them with quarterly notices to ensure that the sponsor has current information about the client's financial status, investment objectives, and restrictions on management of the account. Maintaining current information enables the program manager to evaluate the client's portfolio in light of the client's changing needs and circumstances. The requirement that clients be provided with quarterly statements of account activity is designed to ensure the client receives an individualized report, which the Commission believes is a key element of individualized advisory services.

The Commission staff estimates that approximately 49 wrap fee and mutual fund wrap programs administered by 44 program sponsors use the procedures under rule 3a–4.[5] Although it is impossible to determine the exact number of clients that participate in investment advisory programs, an estimate can be made by dividing total assets by the minimum account requirement ($139.4 billion[6] divided by $100,000), for a total of 1,394,000 clients. In addition, an average number of new accounts opened each year can be estimated by dividing the average annual increase in account assets in 1994 through 1997, by the minimum account requirement ($7.5 billion divided by $100,000), for an average annual number of new accounts of 75,333.[7]

The Commission staff estimates that each program sponsor spends approximately one hour annually in preparing, conducting and/or reviewing interviews for each new client; 30 minutes annually preparing, conducting and/or reviewing annual interviews for each continuing client; and one hour preparing and mailing quarterly account activity statements, including the notice to update information to each client. Based on the foregoing, the Commission staff therefore estimates the total annual burden of the rule's paperwork requirements for all program sponsors to be 2,128,666.5 hours. This represents an increase of 1,112,666.5 hours from the prior estimate of 1,016,000 hours. The increase results primarily from an increase in the amount of assets managed under investment advisory programs and the resulting increase in the estimated number of clients in those

[1] Status of Investment Advisory Programs Under the Investment Company Act of 1940, Investment Company Act Release No. 22579 (Mar. 24, 1997) [62 FR 15098 (Mar. 31, 1997)] (''Adopting Release''). In addition, there are no registration requirements under section 5 of the Securities Act of 1933 for these programs. See 17 CFR 270.3a–4, introductory note.

[2] For purposes of rule 3a–4, the term ''sponsor'' refers to any person who receives compensation for sponsoring, organizing or administering the program, or for selecting, or providing advice to clients regarding the selection of, persons responsible for managing the client's account in the program.

[3] Clients specifically must be allowed to designate securities that should not be purchased for the account or that should be sold if held in the account. The rule does not require that a client be able to require particular securities be purchased for the account.

[4] The sponsor also must provide a means by which clients can contact the sponsor (or its designee).

[5] See **The Cerulli Report, Asset-Based Strategies: Developments In The Financial Advisor And Wrap Markets** 66 (1997) (statistical information on wrap fee and mutual fund wrap programs).

[6] See *id.* at 63 (estimating amount of assets in wrap fee and mutual fund wrap programs).

[7] The requirement for initial client contact and evaluation is not a recurring obligation, but only occurs when the account is opened. The estimated annual hourly burden is based on the average number of new accounts opened each year.

programs. The increase also results from a more accurate calculation of certain collection of information burdens. Compliance with the collection of information requirements of the rule is necessary to obtain the benefit of relying on the rule's safe harbor. Nevertheless, rule 3a–4 is a nonexclusive safe harbor, and a program that does not comply with the rule's collection of information requirements does not necessarily meet the Investment Company Act's definition of investment company.

Form N–8B–2 is the form used by unit investment trusts (''UITs'') which are currently issuing securities, including UITs which are issuers of periodic payment plan certificates and UITs of which a management investment company is the sponsor or depositor, to comply with the filing and disclosure requirements imposed by section 8(b) of the Act. Form N–8B–2 requires disclosure about the organization of a UIT, its securities, the trustee, the personnel and affiliated persons of the depositor, the distribution and redemption of securities, and financial statements. The Commission uses the information provided in the collection of information to determine compliance with section 8(b) of the Act.

Based on the Commission's industry statistics, the Commission estimates that there will be approximately 34 initial filings on Form N–8B–2 and 11 post-effective amendment filings to the Form. The Commission estimates that each registrant filing an initial Form N–8B–2 would spend 1,150 hours in preparing and filing the Form and that the total hour burden for all initial Form N–8B–2 filings is 39,100 hours. Also, the Commission estimates that each UIT filing a post-effective amendment to Form N–8B–2 would spend 150 hours in preparing and filing the amendment and that the total hour burden for all post-effective amendments to the Form is 1,650 hours. By combining the total hour burdens estimated for initial Form N–8B–2 filings and post-effective amendment filings to the Form, the Commission estimates that the total annual burden hours for all registrants on Form N–8B–2 is 40,750 hours.

The collection of information on Form N–8B–2 is mandatory. The information provided on Form N–8B–2 is not kept confidential.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act. The estimate is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms.

The Commission may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Written comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10202, New Executive Office Building, Washington, D.C. 20503; and (ii) Michael E. Bartell, Associate Executive Director, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Comments must be submitted to OMB within 30 days of this notice.

Dated: September 1, 1998.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–24093 Filed 9–8–98; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40391; File No. SR–Amex–98–29]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by American Stock Exchange, Inc. Relating to the Listing Under Rules 1000A et seq. of Sector SPDRs℠ and Technology 100 Index Fund Shares

September 1, 1998.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934,[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 17, 1998,[3] the American Stock Exchange, Inc. (''Amex'') or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons. 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 Amex proposes to list and trade under Amex Rules 1000A *et seq.* (''Index Fund Shares'') the following securities (1) nine series of Sector SPDRs℠, and (2) one series of the Technology 100 Index Fund. The text of the proposed rule change is available at the Office of the Secretary, the Amex 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, the Amex 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 Amex 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 the Statutory Basis for, the Proposed Rule Change

(1) Purpose

Amex Rules 1000A *et seq.* provide for the listing and trading of Index Fund Shares, which are shares issued by an open-end management investment company that seek to provide investment results that correspond generally to the price and yield performance of a specified foreign or domestic index.[4] The Exchange currently lists under Rules 1000A *et seq.* seventeen series of World Equity Benchmark Shares™ (''WEBS™'') based on Morgan Stanley Capital International foreign stock indices.[5]

The Exchange proposes to list and trade under Rules 1000A *et seq.* the following securities issued by an open-end management investment company: (1) nine series of Sector SPDRs℠, as described herein,[6] and (2) one series of the Technology 100 Index Fund.[7]

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The American Stock Exchange, Inc. filed an amendment to the proposed rule change on August 21, 1998, the substance of which is incorporated into this notice. *See* Letter from Michael Cavalier, Associate General Counsel, Legal & Regulatory Policy, Amex, to Sharon M. Lawson, Senior Special Counsel, Division of Market Regulation (''Division'') Commission, dated August 21, 1998 (''Amendment No. 1'').

[4] *See* Securities Exchange Act Release No. 36947 (March 8, 1996), 63 FR 2348 (March 14, 1998).

[5] ''World Equity Benchmark Shares'' and ''WEBS'' are service marks of Morgan Stanley Group, Inc.

[6] ''S&P''®, ''Standard & Poor's 500''®, ''Standard & Poor's Depository Receipts''® and ''SPDRs''® are trademarks of The McGraw-Hill Companies, Inc., and ''Sector SPDR'' is a service mark of The McGraw-Hill Companies, Inc.

[7] The Sector SPDR Trust (with respect to Sector SPDRs) and The Index Exchange Listed Securities Trust (with respect to the series of the Technology 100 Index Fund) have filed with the Commission an Application for Orders under Sections 6(c) and

(a) Sector SPDRs. The Exchange proposes to list and trade nine investment series of Sector SPDRs to be offered by the Sector SPDR Trust, an open-ended investment company and a Massachusetts business trust. The Sector SPDRs offered by the Trust are: The Basic Industries Sector SPDR; The Consumer Services Sector SPDR; The Consumer Staples Sector SPDR; The Cyclical/Transportation Sector SPDR; The Energy Sector SPDR; The Financial Sector SPDR; The Industrial Sector SPDR; The Technology Sector SPDR, and The Utilities Sector SPDR.[8]

Each Sector SPDR offers and issues Sector SPDR shares at their net asset values only in aggregations of a specified number of shares (''Creation Unit''), generally in exchange for a basket of common stocks consisting of some or all of the component securities (''Fund Securities'') of a specified market sector index (''Sector Index''), together with the deposit of a specified small cash payment known as the ''cash component'' and reflecting, for example, net accrued dividends. It is anticipated that the deposit of Fund Securities sand the specified cash payment in exchange for Sector SPDRs will be made primarily by institutional investors, arbitrageurs and the Exchange specialist. Creation Units are separable upon issue into identical shares which are listed and traded on the Amex. Similarly, shares are also redeemable only in Creation Unit size aggregations and usually in exchange for Fund Securities and a specified cash payment. It is anticipated that a Creation Unit will consist of 50,000 shares of the relevant series of Sector SPDRs. The Sector SPDR Trust reserves the right to offer a ''cash'' option for creations and redemptions of Sector SPDRs, although it has no current intention of doing so. For each Sector SPDR, the Administrator (State Street Bank and Trust Company) makes available through the National Securities Clearing Corporation (''NSCC''), immediately prior to the opening of business on the Amex, the list of names and the required number of shares of stocks of each relevant Sector Index to be included in the securities deposit required in connection with creation of Sector SPDRs in Creation Unites size aggregations.[9]

Each of the nine Sector Indices, which is the benchmark for a Sector SPDR, is intended to give investors an efficient way to track the movement of baskets of the equity securities of public companies that are components of the Standard & Poor's 500 Composite Stock Index (''S&P 500'') and are involved in specific sectors.

Each stock included in a Sector Index (the ''Component Stocks'') will be selected from companies represented in the S&P 500.[10] The nine Sector Indices together will include all of the companies represented in the S&P 500 and all of the stocks in the S&P will be allocated to one and only one of the Sector Indices. Each Sector Index will be calculated by the Amex's Index Services Group using the ''market capitalization'' methodology (the same method used in calculating the S&P 500). This design ensures the each of the component stocks within a Sector Index is represented in a proportion consistent with its percentage with respect to the total market capitalization of the Sector Index. Under certain conditions, the number of shares of a component stock may be adjusted to conform to requirements of Subchapter M under the Internal Revenue Code.[11]

The stocks included in a Sector Index have been assigned to a Sector Index by Merrill Lynch (''the Index Compilation Agent''). The Index Compilation Agent assigns stocks to a particular Sector Index on the basis of such company's sales and earnings composition and the sensitivity of the company's stock price and business results to the common factors that affect other companies in each Sector Index. Standard & Poor's has sole control over the removal of stocks from the S&P 500 and the selection of replacement stocks to be added to the S&P 500. However, Standard & Poor's plays no direct role in the Sector Index assignment of the S&P 500 stocks in a Sector Index.[12] Each Sector Index is weighted based on the market capitalization of each of the stocks in such index, subject to specified asset diversification requirements. Each Sector SPDR will normally invest at least 95% of its total assets in stocks that comprise the relevant Sector Index or stock equivalent positions which the Adviser deems appropriate as an alternative to such stocks.[13]

(b) Technology 100 Index Fund Shares. The Exchange also proposes to list and trade Technology 100 Index Fund (''Fund'') shares issued by the Index Exchange Listed Security Trust, an open-ended investment company and a Massachusetts business trust. Such trust is an ''index fund'' presently consisting of a single investment portfolio, the Technology 100 Index Fund (''Fund'').

The Fund's investment objective is to provide investment results that correspond generally to the price and yield performance of publicly traded equity securities of technology companies as represented by an index (''Index'') compiled by Merrill Lynch. The Index, which is constructed in accordance with specified selection criteria, is intended to give investors an efficient, equal-dollar weighted way to track movements of certain technology stocks and American Depositary Receipts traded within the United States. The Index is calculated by the Amex using an equal dollar weighting methodology designed to ensure that each component security within the Index is represented in an

17(b) of the Investment Company Act of 1940 (''1940 Act'') as amended, for the purpose of exempting Sector SPDRs and the series of the Technology 100 Index Fund from Sections 2(a)(32), 5(a)(1), 22(d), 17(a)(1) and (a)(2), and Rule 22c–1 under the 1940 Act. *See* File No. 812–10662.

[8] Information on the component stocks of the Sector Indices and the Technology 100 Index is available in the public file.

[9] The procedures for the creation and redemption of Sector SPDRs and Technology 100 Index Fund shares are similar to those applicable for SPDRs, and utilize processes of the National Securities Clearing Corporation in connection with the transmittal of trade instructions, the transfer of component securities and the cash component, and the transfer of Sector SPDRs or Technology 100 Index Fund shares and component securities on creation or redemption. This contrasts with procedures for the creation and redemption of other Index Fund Shares currently listed on the Amex (i.e., WEBS™), which, while similar in certain respects to SPDR procedures, do not utilize such National Securities Clearing Corporation processes. Unlike the WEBS series, which do not hold all of the applicable index stocks but instead utilize a representative ''portfolio sampling'' technique, Sector SPDRs and the Technology 100 Index Fund, generally will hold all of the securities in the applicable index, subject to certain conditions disclosed in the applicable prospectus.

[10] The Sector Indices underlying the Sector SPDRs are not the same as S&P indices based on specific industry sectors, although there may be some degree of overlap in stocks included in Sector Indices and comparable S&P sector indices.

[11] Each Sector SPDR Fund, (as well as the Technology 100 Index Fund), intends to qualify for and to elect treatment as a separate regulated investment company under Subchapter M. To qualify for such treatment, a company must annually distribute at least 90% of its net investment company taxable income (which includes dividends, interest and net short-term capital gains) and meet several other requirements, including certain diversification tests.

[12] If Standard & Poor's removes a stock from the S&P 500, Merrill Lynch will remove the same stock from whichever Sector Index it is in. When Standard & Poor's assigns a replacement stock to the S&P 500, Merrill Lynch will assign the same stock to whichever Sector Index it deems appropriate. Telephone conversation between Michael Cavalier, Associate General Counsel, Legal & Regulatory Policy, Amex, and Heather Seidel, Attorney, Division, Commission, on August 28, 1998.

[13] As noted above, *supra* note 9, Sector SPDRs generally will hold all of the securities in the applicable index, subject to certain conditions disclosed in the applicable prospectus.

approximately equal dollar amount. Fund shares may be created and redeemed in a manner similar to that described above for Sector SPDRs. The Fund Administrator (State Street Bank and Trust Company) makes available through NSCC, immediately prior to the opening of business on the Amex, the list of names and the required number of shares of stocks to be included in the securities deposit required in connection with creation of Fund shares in Creation Unit size aggregations. It is anticipated that one Creation Unit will consist of 50,000 Fund shares.

The Fund reserves the right to offer a ''cash'' option for creations and redemptions of Funds shares, although it has no current intention of doing so. The Fund will normally invest at least 95% of its total assets in stocks that comprise the benchmark index or stock equivalent positions which the Adviser deems appropriate as an alternative to such stocks.

(c) Dissemination of index and indicative per share portfolio value. The value of the Sector Indices and the Technology 100 Index will be calculated continuously by Amex and disseminated every 15 seconds on Network B of the Consolidated Tape Association (''CTA''). The major electronic financial data vendors, including Bloomberg, Quotron, Reuters, and Bridge Information Systems, are expected to publish information on each index for their subscribers. In order to provide up to date pricing information for each Sector SPDR and for Technology 100 Index Fund shares, the Exchange will calculate and disseminate through CTA facilities an Indicative Per Share Portfolio Value for each Sector SPDR and for Technology 100 Index Fund shares. This value will be disseminated every 15 seconds during Amex regular trading hours.

For each of the nine Sector SPDRs and Technology 100 Index Fund, the Indicative Per Share Portfolio Value has an equity securities value component and a net other assets value component, each of which are summed and divided by the total estimated shares expected to be issued and outstanding by that Sector SPDR or the Fund on that day,to arrive at the value. The equity securities value component of the Indicative Per Share Portfolio Value represents the estimated current value of the portfolio securities held by the given Sector SPDR Fund or the Technology 100 Index Fund on a given day, but does not necessarily reflect the precise composition or market value of the current portfolio of securities held by the Trust for a particular Sector SPDR Fund or by the Technology 100 Index Fund at a particular point in time. Therefore, the Indicative Per Share Portfolio Value per share disseminated during Amex trading hours should be reviewed on only as an estimate of a Sector SPDR Fund's net asset value per share, which is calculated only at the close of the regular trading session on the New York Stock Exchange (ordinarily 4:00 p.m. Eastern time).

(d) Other characteristics of Sector SPDRs and Technology 100 Index Fund. For each of the nine series of Sector SPDRs and the Technology 100 Index Fund, it is anticipated that a minimum of three Creation Units will be outstanding at the commencement of trading on the Exchange.[14]

Sector SPDRs and the Technology 100 Index Fund will pass along dividends and interest, net of expenses, to fund shareholders as ''income dividend distributions.'' Net capital gains will be distributed to shareholders as ''capital gain distributions.''

The net asset value for Sector SPDRs and the Technology 100 Index Fund (collectively, the ''Funds'') is calculated by the Administrator, State Street Bank and Trust Company, which is also the Adviser and Custodian for the Funds. Merrill Lynch serves as lending agent for the portfolio securities of the Funds. ALPS Mutual Funds Services, Inc. serves as the principal underwriter and distributor for the Funds.

Sector SPDRs and Technology 100 Index Fund shares are registered in book-entry form through the Depository Trust Company. Trading in Sector SPDRs and Technology 100 Index Fund shares on the Exchange is effected until 4:00 p.m. each business day. The minimum trading increment under Rule 127 for Sector SPDRs and Technology 100 Index Fund shares will be 1/64 of $1.00.

(e) Original and annual listing fees. The Amex original listing fee applicable to the listing of Sector SPDRs is $5,000 per series (*i.e.,* $45,000 for the nine series listed above). In addition, the annual listing fee applicable to Sector SPDRs under Section 141 of the Amex Company Guide will be based upon the year-end aggregate number of outstanding Sector SPDRs in all nine series.

The original listing fee applicable to the single series of the Technology 100 Index Fund will be $5,000, and the annual listing fee applicable to such series will be based upon the year-end aggregate number of outstanding shares of the Technology 100 Index Fund.

(f) Stop and stop limit orders. Amex Rule 154, Commentary .04(c) provides that stop and stop limit orders to buy or sell a security (other than an option, which is covered by Rule 950(f) and Commentary thereto) the price of which is derivatively priced based upon another security or index of securities, may with the prior approval of a Floor Official, be elected by a quotation, as set forth in Commentary .04(c) (i–v). The Exchange has designated Index Fund Shares, including Sector SPDRs and shares of the Technology 100 Index Fund, as eligible for this treatment.[15]

(g) Trading halts. In addition to other factors that may be relevant, the Exchange may consider factors such as those set forth in Rule 918C(b) in exercising its discretion to halt or suspend trading in Index Fund Shares, including Sector SPDRs and Technology 100 Index Fund shares. These factors would include (1) the current calculation of the numerical index value derived from the current market prices of the underlying stocks in such stock index group is not available; (2) trading in one or more of the underlying stocks comprising such stock index group has been halted in the primary market(s) under circumstances which indicate that such stock or stocks will likely re-open at a price or prices significantly different than the price or prices at which such stock or stocks last traded prior to the halt; (3) the extent to which trading is not occurring in stocks underlying the index; (4) other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.[16]

(h) Disclosure. Member firms will be informed by an information circular, prior to the commencement of trading, that investors purchasing Sector SPDRs or Technology 100 Index Fund shares will be required to receive a fund prospectus prior to, or concurrently with, the confirmation of a transaction within.

(2) Statutory Basis

The Exchange believes that the proposed rule change is consistent with

[14] The value of one creation unit will be between $1 million and $1.5 million. Telephone conversation between Michael Cavalier, Associate General Counsel, Legal & Regulatory Policy, Amex, and Heather Seidel, Attorney, Division, Commission, on August 28, 1998.

[15] *See* Securities Exchange Act Release No. 29063, n. 9 (April 10, 1991), 56 FR 15652 (April 17, 1991) (order approving File No. SR–Amex–90–31 regarding Exchange designation of equity derivative securities as eligible for such treatment under Rule 154, Commentary .04(c)).

[16] Amex circuit breaker rules will apply to the trading of Sector SPDRs and Technology 100 Index Fund shares. Telephone conversation between Michael Cavalier, Associate General Counsel, Legal & Regulatory Policy, Amex, and Heather Seidel, Attorney, Division, Commission, on August 28, 1998.

Section 6(b) of the Act,[17] in general, and furthers the objectives of Section 6(b)(5),[18] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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

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, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to the File No. SR–Amex–98–29 and should be submitted by September 30, 1998.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[19]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–24091 Filed 9–8–98; 8:45 am]

BILLING CODE 8010–01–M

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(5).

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40381; File No. SR–BSE–98–05]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the Boston Stock Exchange, Inc. Relating to the Display of Limit Orders

August 27, 1998.

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 June 16, 1998, the Boston Stock Exchange, Inc. (''BSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change. The proposed rule change, as amended, is described in Items I and II below, which Items have been prepared by the Exchange. The Exchange submitted to the Commission Amendment No. 1 to its proposed rule change on July 16, 1998,[3] Amendment No. 2 to its proposal on August 6, 1998,[4] and Amendment No. 3 on August 17, 1998.[5] The Commission is publishing this notice and order to solicit comments on the proposed rule change from interested persons and to grant accelerated approval of the proposed rule change.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange seeks to incorporate the provisions of SEC Rule 11Ac1–4,[6] Display of Customer Limit Orders, and interpretations thereto, into the Exchange rules to assist members and staff in ensuring compliance with its provisions. Proposed new language is italicized.

Chapter II

Dealings on the Exchange

* * * * *

Limit Order Display Rule

Sec. 40. *All customer Limit Orders shall be immediately (defined as no later than 30 seconds) displayed upon receipt, unless specifically exempted under SEC Rule 11Ac1–4 of the Securities Exchange Act of 1934.*

(a) More specifically, SEC Rule 11Ac1–4 provides that a specialist must, under normal market conditions, ''immediately'' (i.e., no later than 30 seconds) display such order in the bid or offer that reflects:

(i) the price and the full size of each customer limit order held by the specialist that is at a price that would improve the bid or offer price displayed by such specialist in such security; and

(ii) the full size of each customer limit order held by the specialist that:

(A) is priced equal to the bid or offer of such specialist for such security;

(B) is priced equal to the national best bid or offer; and

(C) represents more than a de minimus change in relation to the size associated with the specialist's bid or offer (more than 10% of the current quote size—must aggregate de minimus orders in calculating 10%).

(b) Exceptions. The requirements in paragraphs (i) and (ii) above shall not apply to any customer limit order:

(i) that is executed upon receipt of the order;

(ii) that is placed by a customer who expressly requests, either at the time that the order is placed or prior thereto, pursuant to an individually negotiated agreement with respect to such customer's orders, that the order not be displayed;

(iii) that is an odd-lot order;

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In Amendment No. 1, the Exchange generally made technical changes to the Exchange's proposed rule and interpretive guidance. *See* Revised Rule Filing, received July 16, 1998 (''Amendment No. 1'').

[4] In Amendment No. 2, the Exchange generally made technical changes to the Exchange's proposed rule and interpretive guidance. *See* Letter from George W. Mann, Jr., Senior Vice President and General Counsel, Exchange, to Terri Evans, Attorney, Division of Market Regulation (''Division''), SEC, dated August 3, 1998 (''Amendment No. 2'').

[5] In Amendment No. 3, the Exchange generally made technical changes to the Exchange's interpretive guidance. *See* Letter from George W. Mann, Jr., Senior Vice President and General Counsel, Exchange, to Terri Evans, Attorney, Division, SEC, dated August 13, 1998 (''Amendment No. 3'').

[6] 17 CFR 240.11Ac1–4.

(iv) that is a block size order (10,000 shares or more or a market value of $200,000 or more), unless a customer placing such order requests that the order be displayed (block size limit order—may accumulate partial executions and go below 10,000 shares without required display based on original block size exception);

(v) that is delivered immediately upon receipt to an exchange or association-sponsored system, or an electronic communications network that complies with the requirements of SEC Rule 11Ac1–1(c)(5)(ii) with respect to that order;

(vi) that is delivered immediately upon receipt to another exchange member that complies with the requirements of this section with respect to that order; or

(vii) that is an ''all or none'' order.

Interpretations:

(i) A customer short sale limit, if such display would cause an execution on a minus or zero-minus tick, should not be displayed.

(ii) BSE sole-listed issues are exempted.

(iii) ''Marker'' orders are permissible for those limit orders that qualify for an exception to SEC Rule 11Ac1–4.

(iv) A specialist may send a partial ''marker'' only with explicit customer authorization.

(v) The limit order display does not require a specialist to immediately display an order that would lock or cross the market. However, the specialist, if after using reasonable and efficient means, attempted but was unable to trade with the displayed market, the limit order must be displayed even if it locks or crosses the market.

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 Exchange 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 III below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to incorporate the provisions of the SEC Limit Order Display Rule into the Exchange rules for members' ease of reference, clarification and interpretation. The Rule is almost a verbatim copy of the relevant portions of SEC Rule 11Ac1–4.[7]

Additional interpretive sections (taken from SEC letters giving guidance on the order handling rules)[8] discuss further relief from the display requirements in certain situations, such as where the display of a customer short sale limit order would result in an execution on a minus or zero-minus tick; in all Exchange sole listed securities; where an attempt has been made to reach another market through a ''marker'' order and the quote is inaccessible, where a customer authorized partial marker order has been sent; and where the display of a limit order would result in a locked or crossed market.

2. Statutory Basis

The statutory basis for the proposed rule change in Section 6(b)(5) of the Act,[9] in that the proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest by ensuring that all limit orders are reflected in a timely and accurate manner.

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

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room in Washington, DC. 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–BSE–98–05 and should be submitted by September 30, 1998.

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

The Commission believes that the Exchange's proposal to adopt a limit order display rule is consistent with the policies behind the Commission's own Limit Order Display Rule.[10] The Commission recognizes that the Exchange's proposal is substantially similar to the Commission's own Limit Order Display Rule. The Commission also recognizes that the Exchange's proposal summarizes and incorporates interpretations of the Limit Order Display Rule issued by the Commission staff.[11] The Commission notes, however, that the Exchange's interpretations are merely summaries of guidance issued by the Commission staff and that reference should be made to the Commission's release adopting the Limit Order Display Rule[12] and the Interpretation Letters for full interpretive guidance on the Commission's Limit Order Display Rule. For instance, to understand fully the exceptions to the Limit Order Display Rule regarding ''marker'' orders, which are discussed in the Exchange's Interpretations (iii) and (iv), you must reference the Interpretation Letter to the NYSE.[13]

With respect to the foregoing, the staff has opined that an exchange specialist

[7] 17 CFR 240.11Ac1–4.

[8] *See* letters from Richard R. Lindsey, Director, Division, SEC to Richard Grasso, Chairman and Chief Executive Officer, New York Stock Exchange, Inc. (''NYSE''), dated November 22, 1996, and to Richard G. Ketchum, Chief Operating Officer, National Association of Securities Dealers, Inc., dated January 3, 1997 (collectively ''Interpretation Letters'').

[9] 15 U.S.C. 78f(b)(5).

[10] *See* Securities Exchange Act Release No. 37619A (September 6, 1996), 61 FR 48290 (September 12, 1996).

[11] *See* Interpretation Letters, *supra* note 8.

[12] *See* Release No. 37619A, *supra* note 10.

[13] *See* Letter to Richard Grasso, *supra* note 8.

may route its own order, rather than a customer order, to another market if the specialist's own order fully reflects the terms of the customer limit order, the order is displayed (or executed) by the other market, consistent with the Limit Order Display Rule, and any execution, in whole or in part, is passed on to the customer limit order. An exchange specialist order for less than the full size of the customer limit order would not be deemed to reflect the terms of the customer limit order. As a result, sending such an order to another market or market maker for display would not satisfy the Limit Order Display Rule. Using a market order not for the full size of the customer limit order would be permissible, however, if the customer had authorized the exchange specialist to use discretion in determining whether to display the order, or had requested that only the number of shares represented by the market order be displayed, consistent with the exception contained in the Limit Order Display Rule for customer consent.[14]

In addition to summarizing and incorporating interpretive guidance issued by the Commission staff, the Exchange also has interpreted the Commission Limit Order Display Rule as exempting Exchange solely listed issues.[15] While the Commission has never explicitly recognized this exemption from the Limited Order Display Rule, the Commission believes that, under the current circumstances, this interpretation is reasonable. The Commission notes that any interpretative guidance issued by the Commission staff is subject to modification at any time if the Commission or its staff determines that such action is necessary or appropriate. The Commission emphasizes that the Exchange specialists must comply with the Commission's rules and interpretations, notwithstanding the incorporation of prior Commission staff guidance in the Exchange's rule.

The Commission believes that the Exchange's proposal is consistent with Section 6 of the Act.[16] Specifically, the Commission believes the proposal is consistent with Section 6(b)(5) of the Act,[17] which requires an exchange to have rules designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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. In particular, the Commission believes that by incorporating the Commission's Limit Order Display Rule and the Commission staff's interpretive guidance regarding that rule into the Exchange's own rule the proposal should facilitate compliance with the Limit Order Display Rule by Exchange members by raising member awareness of the Commission rule and how the rule applies to Exchange members.

The Exchange has requested that the Commission approve the proposal prior to the thirtieth day after the date of publication of notice of the proposal in the **Federal Register**. Because the Commission believes the proposal clarifies and restates Commission requirements that already apply to all Exchange members and may facilitate compliance by making the rules and guidance more accessible to Exchange members, the Commission finds good cause for approving the proposed rule change (SR–BSE–98–05) prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[18] that the proposed rule change be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[19]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–24095 Filed 9–8–98; 8:45 am]

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[14] *See* Letter to Richard Grasso, *supra* note 8 and rule 11Ac1–4(c)(2) under the Act.

[15] The Exchange reasoned that because the BSE solely listed issues are not reported pursuant to an effective transaction reporting plan, they are not reported securities as defined in Rule 11Ac1–1(a)(20) under the Act.

[16] In reviewing this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78f.

[17] 15 U.S.C. 78f(b)(5).

[18] 15 U.S.C. 78s(b)(2).

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40383; File No. SR–CBOE–98–36]

Self-Regulatory Organization; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Chicago Board Options Exchange, Inc. Relating to Exchange Fees

August 31, 1998.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4[2] thereunder, notice is hereby given that on August 19, 1998, the Chicago Board Options Exchange, Inc. (''CBOE'' 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 CBOE. 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 make changes to its fee schedule relating to the Manual Book Entry fee and satellite television fees.

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 CBOE 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 CBOE 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 (i) to rescind, as of July 1, 1998, the Manual Book Entry fee, and (ii) to impose a monthly maintenance fee and installation fee for satellite television. These fee changes are being implemented by the Exchange pursuant to CBOE Rule 2.22.

The Exchange proposes to rescind, as of July 1, 1998, the Manual Book Entry fee, which initially was proposed in SR–CBOE–98–31, effective July 1, 1998. The Exchange now proposes to rescind the fee because there would have to be substantial systems enhancements in order to implement the fee, which would take much longer than expected, and the costs to Exchange and member firm staff would be significant compared to the expected revenue from the fee. As a result of this rescission, no members will be charged this fee, including any fee that would otherwise have been billed at the end of July for July activities.

The Exchange proposes to add two new fees relating to satellite television. The Exchange recently has approved the installation of satellite television in

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

booths for members who desire this service. The Exchange proposes to impose a one time satellite television installation fee of $500, and a monthly maintenance fee of $35.

The proposed rule change is consistent with Section 6(b) of the Act [3] in general, and further the objectives of Section 6(b)(4) of the Act [4] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other changes among CBOE members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The CBOE 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.

The CBOE has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [5] and subparagraph (e)(2) of Rule 19b–4 thereunder.[6] 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.[7]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. All submissions should refer to File No. SR–CBOE–98–36 and should be submitted by September 30, 1998.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

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[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78f(b)(4).

[5] 15 U.S.C. 78s(b)(3)(A)(ii).

[6] 17 CFR 240.19b–4(e)(2).

[7] In reviewing this proposal, the Commission considered its impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40384; File No. SR–CHX–98–12]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 to the Proposed Rule Change by the Chicago Stock Exchange, Inc. Relating to Joint Back Office Arrangements

August 31, 1998.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on May 28, 1998, the Chicago Stock Exchange, Inc. (''CHX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the CHX.[2] 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 CHX proposes to amend Interpretation .01 to CHX Article VI, Rule 3, ''Training and Examination Requirements,'' and CHX Article X, Rule 3, ''Initial Margin Rule.'' The CHX also proposes to adopt new CHX Rule 3A, ''Joint Back Office Participants,'' to CHX Article XI, ''Financial Responsibility and Reporting Requirements.'' This proposal establishes examination, margin, and net capital requirements for joint back office (''JBO'') participants and clearing firms.

The text of the proposed rule change is attached as Exhibit A.

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 CHX included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposal. The text of these statements may be examined at the places specified in Item IV below. The CHX has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Interpretation .01 to CHX Article VI, Rule 3 and CHX Article X, Rule 3, and to adopt new CHX Rule 3A to CHX Article XI to establish examination, margin and net capital requirements for JBO participants and clearing firms. JBO arrangements permit a participating broker-dealer to be deemed to be self-clearing for margin purposes and entitled to good faith credit.

In recent amendments to Regulation T,[3] the FRB placed its reliance on the authority of self-regulatory organizations (''SROs'') to ensure the reasonableness of JBO arrangements.[4] When the provision permitting JBO arrangements was first adopted, the FRB assumed there would be a reasonable relationship between the good faith credit extended to a JBO participant and its ownership interest in the clearing firm. Consequently, the FRB did not establish any explicit requirement for the amount of ownership each participant should have in the JBO. Because Regulation T does not provide an ownership standard,[5] however, good

[1] 15 U.S.C. 78s(b)(1).

[2] On July 16, 1998, the CHX amended its proposal to replace incorrect references to Section 220.11 of Regulation T, ''Credit by Brokers and Dealers,'' of the Board of Governors of the Federal Reserve System (''FRB'') with reference to Section 220.7 of Regulation T. *See* Letter from David T. Rusoff, Foley & Lardner, to Yvonne Fraticelli, Attorney, Division of Market Regulation (''Division''), SEC, dated July 16, 1998 (''Amendment No. 1'').

[3] 12 CFR 220. Regulation T is administered by the FRB pursuant to Section 7 of the Act.

[4] *See* FRB Docket No. R–0722 (April 26, 1996), 61 FR 20386 (May 6, 1996).

[5] According to the CHX, Section 220.7(c) of Regulation T only requires that a JBO clearing firm

faith credit has been extended to ''owners'' holding merely a nominal interest in a clearing firm.

In conjunction with other SROs, which received input from representatives of the securities industry, the Exchange has established standards for JBO participants and clearing firms.[6] These standards will permit the extension of good faith credit to clearing firm ''owners'' only when the owners maintain meaningful assets on deposit with the JBO clearing firm, and the clearing firm maintains sufficient net capital and risk control procedures to carry such accounts. The Exchange's proposal will establish the following requirements:

Notification. The proposed rule change will require a member or member organization for which the Exchange is the Designated Examining Authority (''DEA'') that wishes either to carry a JBO account or to be a JBO participant[7] to notify the Exchange in writing of its intention.

Net capital requirements. Proposed new Rule 3A to CHX Article XI will require each JBO participant to be a registered broker-dealer subject to the net capital requirements prescribed by SEC Rule 15c3–1.[8] JBO participants may not claim the net capital exemption available to option market makers under SEC Rule 15c3–1(b)(1)(i).[9] JBO participants will be required to deposit and maintain minimum account equity of $1,000,000, with each broker-dealer where an account of the JBO participant is carried. JBO participants also will be subject to Financial and Operational Combined Uniform Single Report (''FOCUS'') filings and certified audits. In addition, each JBO participant must meet and maintain the ownership standards established by the JBO clearing member.

To ensure that adequate procedures exist for complying with these requirements, JBO participants will be required to designate one registered person associated with the member or member organization as a financial and operations principal. That person must successfully complete the Series 27 Financial and Operations Principal Examination (''Series 27 Examination'') administered by the National Association of Securities Dealers. JBO participants must file a Form U–4 (Uniform Application for Securities Industry Registration or Transfer) for the financial and operations principal and list such person as a ''control person'' on Schedule A of its Form BD (Uniform Application for Broker-Dealer Registration).

The financial and operations principal will have to register to take the Series 27 Examination within 30 days of the Exchange's publication of the order approving this requirement in a Notice to Members and promptly notify the Exchange that they have so registered. They will have six months from the date of the Notice of Members in which to pass the Series 27 Examination. A financial and operationss principal who (i) does not file such registration within the time frame specified above, (ii) does not notify the Exchange of such registration, or (iii) fails to successfully complete the Series 27 Examination within the time frame specified above will not be allowed to serve as a financial or operations principal for JBO participant until he or she successfully completed the Series 27 Examination. Further, a JBO participant that has designated a financial and operation principal that has not met the requirement listed above concerning the Series 27 Examination will not be allowed to participate in JBO arrangements until is has a financial and operations principal that has successfully completed the Series 27 Examination.

In addition, the proposed rule change will require a member or member organization for which the Exchange is the DEA that wishes to carry the accounts of JBO participants to comply with additional net capital requirements prescribed by the Exchange. Such a member must maintain either: (i) Tentative net capital of $25 million;[10] or (ii) net capital of $10 million, if the member's primary business is the clearance of option market maker accounts.[11] A member carrying the accounts of JBO participants will be deemed to conduct a primary options market maker business if at least 60% of the gross haircuts calculated for all options market maker and accounts of JBO participants in aggregate is attributable to options market maker transactions. A member carrying the accounts of JBO participants and conducting a primary options market maker business must include the gross deductions calculated for all accounts of JBO participants in its ratio of gross options market maker deductions to adjusted net capital.

Future, each member carrying the accounts of JBO participants shall adjust its net worth daily by deducting any deficiency between a JBO participant's account equity and the proprietary haircut calculated pursuant to SEC Rule 15c3–1 for the positions maintained in the JBO account. As previously referenced, each member carrying the accounts of JBO participants must require and maintain equity of $1,000,000 for each JBO participant. The member carrying the accounts of JBO participants must issue a margin call if the JBO participant's account equity falls below the $1,000,000 threshold. Finally, each member carrying the accounts of JBO participants must establish and maintain written ownership standards for JBO accounts. The member carrying the accounts of JBO participants also must develop risk analysis standards for assessing the amount of credit extended to JBO participants, which shall be made available to the Exchange upon request.

Margin requirements. The Exchange proposes to revise CHX Article X, Rule 3 to permit a member organization to carry the accounts of JBO participants on a good faith margin basis. The JBO accounts must comply with the requirements established in Regulation T Section 220.7 and CHX Article XI, Rule 3A. JBO participants must maintain equity of not less than $1,000,000 in their accounts. If the equity falls below $1,000,0000, then the carrying member must make a call for additional funds or securities and the JBO participant must make a deposit in an amount sufficient to eliminate the deficiency within five business days.

Phase-In of $1,000,000 equity requirement. To ease the burden on existing JBO participants,[12] the

be ''a clearing and servicing broker or dealer owned jointly or individually by other [broker-dealers].''

[6] The CHX's proposal is substantially similar to proposals filed with the Commission by other SROs. *See* Securities Exchange Act Release Nos. 39418 (December 10, 1997), 62 FR 66154 (December 17, 1997) (notice of filing of File No. SR–CBOE–97–58); 39419 (December 10, 1997), 62 FR 66169 (December 17, 1997) (notice of filing of File No. SR–PHLX–97–56); 39497 (December 29, 1997), 63 FR 899 (January 7, 1998) (notice of filing of File No. SR–NYSE–97–28); and 39680 (February 18, 1998), 63 FR 9622 (February 25, 1998) (notice of filing of File No. SR–PCX–97–49).

[7] The proposal defines a JBO participant as a member or member organization for which the CHX is the DEA that maintains a JBO arrangement with a carrying broker-dealer.

[8] 17 CFR 240.15c3–1.

[9] 17 CFR 240.15c3–1(b)(i).

[10] ''Tentative net capital'' refers to a member's net capital before the application of haircuts and undue concentration deductions.

[11] Currently, the CHX does not act as the DEA for any member whose primary business is the clearance of option market maker accounts. However, the Exchange proposes to adopt this provision so that the CHX will have a rule in place if, in the future, the CHX becomes the DEA for a member whose primary business is the clearance of option market maker accounts. Telephone conversation between David T. Rusoff, Foley and Lardner, and Yvonne Fraticelli, Attorney, Division, Commission, on July 21, 1998.

[12] For purposes of the proposal, existing JBO participants are CHX members or member

Continued

Exchange proposes to give existing JBO participants six months from the date of the Exchange's publication in a Notice to members of information contained in the order approving the requirement in which to comply with the $1,000,000 requirement. Existing JBO participants who fail to comply with the equity requirement within the time frame specified above will not be allowed to continue the JBO arrangement until they have complied with this requirement.

2. Statutory Basis

The CHX believes that the proposed rule change is consistent with Section 6 of the Act, in general, and furthers the objectives of Section 6(b)(5) of the Act, in particular, in that it is designed to perfect the mechanism of a free and open market and a national market system and to protect investors and the public interest. In addition, the CHX believes that the proposed rule change is designed to ensure the reasonableness of JBO arrangements in accordance with the FRB's directive in its recent amendments to Regulation T.

B. Self-Regulatory Organization's Statement on Burden on Competition

The CHX believes that no burden will be placed on competition as a result of the proposed rule change.

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.

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 by order approve such proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested person are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the CHX. All submissions should refer to File No. SR–CHX–98–12 and should be submitted by September 30, 1998.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Margaret H. McFarland,

Deputy Secretary.

Exhibit A

Additions are italicized.

Article VI

Restrictions and Requirements

Training and Examination Requirements

Rule 3. No change in text.

Interpretations and Policies:

.01 (a)–(b). No change in text.

(3) Joint Back Office Participants

All registered persons associated with Joint Back Office (''JBO'') Participants (as defined in Article XI, Rule 3A, section (a)) designated as financial and operations principals must successfully complete the Financial and Operations Principal Examination, Series 27.

Article X

Margins

Initial Margin Rule

Rule 3.(a)–(b) No change in text.

Exceptions to Rule

(c)(1)–(6) No change in text.

(7) Joint Back Office Participant Accounts—A member or member organization may carry the accounts of joint back office (''JBO'') participants upon a margin basis which is satisfactory to both parties, provided the requirements of Regulation T Section 220.7 (or any successor thereto) and Article XI, Rule 3A are adhered to.

- *Interpretations and Policies:*

.01 Under the provisions of Regulation T Section 220.7 a clearing broker may extend good faith financing to an owner of the clearing broker under certain conditions. Such financing is typically provided under what is termed a joint back office arrangement.

(d) No change in text.

Article XI

Financial Responsibility and Reporting Requirements

Joint Back Office Participants

RULE 3A. An arrangement may be established between two or more registered broker-dealers pursuant to Regulation T Section 220.7 to form a joint back office (''JBO'') arrangement for carrying and clearing or carrying accounts of participating broker-dealers. Members and member organizations for which the Exchange is the Designated Examining Authority (''DEA'') shall provide written notification to the Exchange prior to becoming a JBO Participant (as defined below) and prior to carrying a JBO account.

(a) Requirements for Joint Back Office Participants. In addition to complying with the requirements of Rule 3 of this Article XI, a member or member organization for which the Exchange is the DEA that maintains a joint back office (''JBO'') arrangement (a ''JBO Participant'') with a carrying broker-dealer subject to the requirements of Regulation T Section 220.7 (or any successor thereto) of the Federal Reserve System shall:

1. Be registered as a broker-dealer pursuant to Section 15 of the Securities Exchange Act of 1934;

2. Be subject to the capital requirements prescribed by Rule 15c3–1 therein, and shall not be eligible to operate under the provisions of SEC Rule 15c3–1(b)(i)[sic];

3. Meet and maintain a minimum account equity requirement of $1,000,000 with each broker-dealer where an account of the JBO Participant is carried. If equity decreases below $1,000,000 the JBO Participant shall deposit an amount sufficient to eliminate this deficiency within five business days;

4. Meet and maintain the ownership standards established by the carrying broker-dealer; and

5. Designate one registered person associated with such member as a financial and operations principal, whose responsibilities shall include:

organizations that are part of a JBO arrangement approved by the CHX as of the date of the filing of the current proposal with the SEC. According to the CHX, there were 15 existing JBO arrangements as of the date of the filing of the CHX's proposal. Conversation between David T. Rusoff, Foley & Lardner, and Yvonne Fratecelli, Attorney, Division, Commission, on July 20, 1998.

[13] 17 CFR 200.30–3(a)(12).

(A) final approval and responsibility for the accuracy of financial reports submitted to any duly established securities industry regulatory body;

(B) final preparation of such reports;

(C) Supervision of individuals who assist in the preparation of such reports;

(D) supervision of and responsibility for individuals who are involved in the actual maintenance of the member's books and records from which such reports are derived;

(E) supervision and/or performance of the member's responsibilities under all Exchange or SEC financial responsibility rules; and

(F) overall supervision of and responsibility for the individuals who are involved in the administration and maintenance of the member's back office operations.

Such person shall successfully complete the Series 27 Financial and Operations Principal Examination.

(b) Requirements for Members or Member Organizations Carrying the Accounts of JBO Participants. A member or member organization that carries the accounts of JBO Participants shall:

1. *Maintain (i) tentative net capital of not less than $25 million as computed pursuant to SEC Rule 15c3–1 or (ii) net capital of not less than $10 million as computed pursuant to SEC Rule 15c3–1, provided that such member or member organization has as its primary business the clearance of options market maker accounts and provided that at least 60% of the sum of gross haircuts calculated for all options market maker accounts and accounts of JBO Participants, without regard to related account equity or clearing firm net capital charges, is attributable to options market maker transactions. Any member or member organization operating pursuant to subsection (ii) of this paragraph must include the gross deductions calculated for all accounts of JBO Participants in such member's or member organization's ratio of gross options market maker deductions to adjust net capital in accordance with the provisions of SEC Rule 15c3–1;*

2. *Require and maintain equity of $1,000,000 for each JBO Participant. If equity decreases below $1,000,000 the member or member organization carrying the JBO Participant's account shall issue a call for additional funds or securities which shall be obtained within five business days;*

3. *Adjust its net worth daily by deducting any deficiency between a JBO Participant's account equity and the proprietary haircut calculated pursuant to SEC Rule 15c3–1 for the positions maintained in such account;*

4. *Establish and maintain written ownership standards for accounts of JBO Participants; and*

5. *Develop risk analysis standards for assessing the amount of credit extended to JBO Participants which shall be made available to the Exchange upon request.*

• *Interpretations and Policies:*

.01 JBO Participants shall not be considered self-clearing for any purpose other than the extension of credit under Article X, Rule 3 or under the comparable rules of another self regulatory organization.

[FR Doc. 98–24092 Filed 9–8–98; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40385; File No. SR–NYSE–98–20]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Granting Approval to Proposed Rule Change Relating to an Interpretation of Article IV, Section 14 of the Exchange Constitution

August 31, 1998.

I. Introduction

On July 10, 1998, the New York Stock Exchange, Inc. (''NYSE'' 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 interpret Article IV, Section 14 of the Exchange Constitution to provide that decisions of the Director of Arbitration regarding jurisdiction and hearing situs are not subject to review by the Exchange's Board of Directors (''Board'').

Notice of the proposed rule change, together with the substance of the proposal, was published for comment in Securities Exchange Act Release No. 40229 (July 17, 1998), 63 FR 40150 (July 27, 1998). No comments were received on the proposal. This order approves the proposed rule change.

Description

The Exchange proposes to interpret Article IV, Section 14 of the Exchange Constitution so that decisions of the Director of Arbitration on issues of jurisdiction and hearings situs are not subject to review by the Exchange's Board at the request of a member, member organization, allied member or approved person. Article IV, Section 14 of the Exchange Constitution provides that where the Board has delegated its powers to an officer or employee, ''a member, member organization, allied member or approved person affected by a decision of any officer or employee .*.*. may require a review by the Board of such decision.''[3] No explicit exception is made for actions taken by the Director of Arbitration. Article IV, Section 13 also provides the Board with authority to interpret the Constitution.

Article XI, Section 1 of the Exchange Constitution and Exchange Rule 600 establish the jurisdiction of the Exchange's arbitration forum.[4] The Director of Arbitration is ''charged with the duty of performing all ministerial duties in connection with matters submitted for arbitration.''[5] These duties include making the initial decisions regarding jurisdiction and hearing situs.[6] When a claim is submitted for arbitration at the Exchange, the Director of Arbitration determines whether the claim submitted falls within the parameters of the Exchange's jurisdiction. Exchange Rule 613 deals with the situs of a hearing and provides that ''[t]he time and place for the initial hearing shall be determined by the Director of Arbitration and each hearing thereafter by the arbitrators.''

The Exchange believes that Exchange Rule 621 and applicable law provide for the review of the Director's decisions by arbitrators or the courts. Under Exchange Rule 621, arbitrators are empowered to interpret and determine the applicability of all provisions of the Arbitration Rules; thereby the Exchange believes arbitrators can overturn decisions of the Director of Arbitration regarding situs of the first hearing. In

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The NYSE notes that in the past, members have requested, and the Board has granted, review of the Director of Arbitration's decisions on jurisdiction and hearing situs.

[4] ''Any controversy between parties who are members, allied members or member organizations and any controversy between a member, allied member or member organization and any other person arising out of the business of such member, allied member or member organization, or the dissolution of a member organization, shall at the instance of any such party, be submitted for arbitration in accordance with the provisions of this Constitution and such rules as the Board may from time to time adopt.'' (Article XI, Sec. 1).

''All dispute, claim or controversy between a customer or non-member and a member, allied member, member organization and/or associated person arising in connection with the business of such member, allied member, member organization and/or associated person in connection with his activities as an associated person shall be arbitrated under the Constitution and Rules of the New York Stock Exchange, Inc. as provided by any duly executed and enforceable written agreement or upon the demand of the customer or non-member.'' Exchange Rule 600.

[5] Exchange Rule 635.

[6] Exchange Rules 600 and 613.

addition, the NYSE states that decisions of the Director of Arbitration regarding jurisdiction are subject to review by the courts.[7] The Exchange also notes that interlocutory procedural decisions are rarely appealable in judicial and arbitral processes, but instead are reserved for consideration as part of any overall review of the lowest court's or arbitrator's decision.[8] The Exchange notes that any review by the Board of staff action is in the nature of an interlocutory appeal, which the arbitrators and the courts may subsequently review. All this may result in an unnecessary delay in the final resolution of an arbitration claim.

III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b).[9] Specifically, the Commission believes the proposal is consistent with the Section 6(b)(5) of the Act [10] in that it promotes just and equitable principles of trade by providing members, member organizations and the public with a fair and impartial forum for the resolution of their disputes.[11]

The Commission believes that the proposed rule change provides for adequate review by arbitrators or by the courts of the Director's decision as to whether a claim submitted to arbitration falls within the Exchange's jurisdiction, or as to the hearing situs of the arbitration; therefore, review by the Board is not necessary. The Commission believes it is reasonable for arbitrators to review the Director's decision as to the hearing situs, under their authority to interpret and determine the applicability of the arbitration rules.[12] In addition, the Commission notes that decisions as to jurisdiction are subject to review by the courts. The Commission also notes that the proposed rule change allows for a more efficient arbitration process.[13]

[7] *See Spear, Leeds & Kellogg* v. *Central Life Assurance Co.*, 85 F.3d 21 (2d Cir. 1996).

[8] This reservation occurs in part because interlocutory appeals are frequently employed by parties simply to gain tactical advantage in the dispute. In addition, a substantive resolution of the conflict will often moot the procedural issues.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] In approving this rule, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[12] *See* Exchange Rule 621.

[13] The Commission also notes that the Board has the authority to interpret the Constitution.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[14] that the proposed rule change (SR–NYSE–98–20) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–24094 Filed 9–8–98; 8:45 am]

BILLING CODE 8010–01–M

[14] 15 U.S.C. 78s(b)(2).

[15] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

Advisory Committee on Religious Freedom Abroad; Public Meeting Notice 2892

The Department of State announces a meeting of the Secretary of State's Advisory Committee on Religious Freedom Abroad (AC) on Tuesday, September 15, 1998 from 12:00 to 5:00 p.m. in Room 1105 at the U.S. Department of State, 2201 C Street, NW., Washington, DC. We regret the short time frame on this notice. This was unavoidable and due to last minute scheduling difficulties. The agenda for the AC meeting will include:

12:00—Update on activities by Advisory Committee members to advocate religious freedom and the work of the AC Teams over the past few months.

12:45—Introduction of and Discussion with Robert Seiple, the new Special Representative of the Secretary of State for International Religious Freedom.

1:30—Panel Presentation and Discussion: The Theological Principles for Tolerance, Forgiveness, Reconciliation, and Respect for Human Rights.

3:30—Presentations and Comments from Members of the Public.

4:30—Closing Remarks.

5:00—Adjournment.

The meeting is open to the public up to the seating capacity of the rooms. Admittance to the State Department building is only by means of a pre-arranged clearance list, in accordance with routine security purposes. In order to be placed on the pre-clearance list, please provide your name, title, office or organization, social security number, date of birth, and citizenship to Ms. Kim Mallory by fax at (202) 647–9519 or by telephone at (202) 647–1422. All attendees must use the ''C'' Street entrance. One of the following valid ID's will be required for admittance: U.S. driver's license with photo, a passport, or a U.S. Government agency ID.

FOR FURTHER INFORMATION CONTACT: Ms. Alexandra Arriaga, Executive Secretary of the Advisory Committee by fax at (202) 647–9519 or by telephone at (202) 647–1422.

Dated: September 4, 1998.

Alexandra Arriaga,

Executive Secretary, Advisory Committee on Religious Freedom Abroad.

[FR Doc. 98–24282 Filed 9–8–98; 8:45 am]

BILLING CODE 4710–18–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

RTCA; Joint RTCA Special Committee 180 and EUROCAE Working Group 46 Meeting; Design Assurance Guidance for Airborne Electronic Hardware

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a joint RTCA Special Committee 180 and EUROCAE Working Group 46 meeting to be held September 22–25, 1998, starting at 8:30 a.m. on September 22. The meeting will be held at EUROCAE Headquarters, 17 rue Hamelin, Paris, France.

The agenda will be as follows: (1) Chairman's Introductory Remarks; (2) Review and Approval of Meeting Agenda; (3) Review and Approval of Minutes of Previous Joint Meeting; (4) Leadership Team Meeting Report; (5) Review Action Items; (6) Review Issue Logs; (7) Issue Team Status; (8) Plenary Disposition of Document Comments; (9) New Items for Consensus; (10) Special Committee 190 Committee Activity Report; (11) Other Business; (12) Establish Agenda for Next Meeting; (13) Date and Place of Next Meeting.

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the RTCA Secretariat, 1140 Connecticut Avenue, N.W., Suite 1020, Washington, DC 20036; (202) 833–9339 (phone); (202) 833–9434 (fax); or http://www.rtca.org (web site). Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on September 1, 1998.

Janice L. Peters,

Designated Official.

[FR Doc. 98–24133 Filed 9–8–98; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Certification Task Force

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given that the next meeting of the RTCA, Inc., Certification Task Force will be held September 10 and 11, 1998, starting at 9:00 a.m., at RTCA, Inc., Suite 1020, 1140 Connecticut Avenue, NW., Washington, DC 20036. This Task Force is reviewing the ''end-to-end'' certification of advanced avionics systems and, keeping safety as a first priority, developing recommendations for improving the timeliness and reducing the cost of certification.

The meeting agenda will include: (1) Welcome and Opening Remarks; (2) A Presentation by Task Force Co-Chairs Mr. Tony Broderick (former FAA Associate Administrator and now consultant to Airbus) and Mr. Ed Seymour (General Aviation Manufacturers Association); (3) Presentations by the leaders of the four Task Force Working Groups. The presentations will focus on tasking, progress to date and current issues/challenges. Time will be allocated to questions, answers and general discussion.

Concurrent working group sessions will take place at RTCA, Inc., 1140 Connecticut Avenue, NW., Suite 1020, Washington, DC 20036, on the afternoon of September 10 and the morning of September 11. A summary plenary session will commence at 11:30 a.m., September 11.

Attendance is open to the interested public but limited to space availability. With approval of the co-chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact RTCA at (202) 833–9339 (phone), (202) 833–9434 (fax), or email *dclarke@rtca.org* (e-mail). Members of the public may present a written statement at any time. Exceptional circumstances, due to an unanticipated delay in the development and administrative processing of the agenda exist in this instance to permit public notice of this meeting in less than 15 days.

Janice L. Peters,

Designated Official.

[FR Doc. 98–24134 Filed 9–8–98; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

RTCA Program Management Committee (PMC)

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463) 5 U.S.C., Appendix 2), notice is hereby given for the RTCA Program Management Committee (PMC) meeting to be held September 28, 1998, starting at 1:00 p.m. The meeting will be held at RTCA, Inc., 1140 Connecticut Avenue, NW., Conference Rooms A and B, Washington DC 20036.

The agenda will include: (1) Welcome and Introductions; (2) Review and approval of Summary of Previous Meeting; (3) Consider/Approve: a. Final Draft, Minimum Aviation System Performance Standards for Local Area Augmentation System, RTCA Paper No. 146–98/PMC–018, prepared by SC–159; b. Final Draft, Local Area Augmentation System Interface Control Document, RTCA Paper No. 147–98/PMC–019, prepared by SC–159; c. Final Draft, DO–200A, Standards for Processing Aeronautical Data, RTCA Paper No. 145–98/PMC–017, prepared by SC–181; d. Final Draft, Change 1, DO–215A, Guidance on Aeronautical Mobile Satellite Service (AMSS) End-to-End System Performance, RTCA Paper No. 096–98/PMC–011, prepared by SC–165; e. Final Draft Change 1, DO–186A, Minimum Operational Performance Standard for Airborne Radio Communications Equipment Operating in the Frequency Range 117.975–137,000 MHz, RTCA Paper No. 136–98/PMC–015, prepared by SC–172. (4) Action Item Review: a. Action Item 98–09 for SC–187, Mode S Airborne Beacon and Data Link Systems; b. Action Item 98–13 for SC–189, Air Traffic Services and Interoperability Requirements; c. Action Item 98–15 for PMC members; (5) Discussion: a. New Terms of Reference for SC–192, National Airspace Review; b. Discussion of possible new RTCA activity to address weather requirements-turbulence; (6) Other Business; (7) Date and Place of Next Meeting.

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the RTCA Secretariat, 1140 Connecticut Avenue, NW., Suite 1020, Washington, DC, 20036; (202) 833–9339 (phone); (202) 833–9434 (fax); or *http://www.rtca.org* (web site). Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on September 4, 1998.

Janice L. Peters,

Designated Official.

[FR Doc. 98–24135 Filed 9–8–98; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Amtrak Reform Council; Notice of Meeting

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of Amtrak Reform Council meeting.

SUMMARY: As provided in Section 203 of the Amtrak Reform and Accountability Act of 1997, the Federal Railroad Administration (FRA) gives notice of a meeting of the Amtrak Reform Council (''ARC''). The purpose of the meeting is to receive a briefing from the Department of Transportation's Inspector General regarding the independent assessment of Amtrak's financial needs and to take up such other matters as the Council or its members deem appropriate.

DATES: The ARC meeting is scheduled for 1:00 p.m. to 4:00 p.m. EST on Thursday, September 17, 1998.

ADDRESSES: The meeting will be held in Rooms 6332–6336 in the NASSIF Building, 400 Seventh Street, SW, Washington, DC. The meeting is open to the public on a first-come, first-served basis and is accessible to individuals with disabilities. Portions of the meeting may be closed to the public at the discretion of the Council if proprietary information is to be discussed. Persons in need of special arrangements should contact the person whose name is listed below.

FOR FURTHER INFORMATION CONTACT: Alexander Chavrid, Passengers Programs Division, Office of Railroad Development, FRA, RDV–13, Mail Stop 20, 400 Seventh Street, SW, Washington, DC 20590 (mailing address only) or by telephone at (202) 493–6380.

SUPPLEMENTARY INFORMATION: The ARC was created by the Amtrak Reform and

Accountability Act of 1997 (ARAA) as an independent commission to evaluate Amtrak's performance and make recommendations to Amtrak for achieving further cost containment and productivity improvements, and financial reforms. In addition, the ARAA requires: that the ARC monitor cost savings resulting from work rules established under new agreements between Amtrak and its labor unions; that the ARC provide an annual report to Congress that includes an assessment of Amtrak's progress on the resolution of productivity issues; and that after two years the ARC begin to make findings on whether Amtrak can meet certain financial goals and, if not, to notify the President and the Congress.

The ARAA provides that the ARC consist of eleven members, including the Secretary of Transportation and ten others nominated by the President or Congressional leaders. Each member is to serve a 5 year term.

Issued in Washington, DC on September 3, 1998.

Mark E. Yachmetz,

Chief, Passenger Programs Division.

[FR Doc. 98–24165 Filed 9–8–98; 8:45 am]

BILLING CODE 4910–06–P

UNITED STATES INFORMATION AGENCY

Culturally Significant Objects Imported for Exhibition Determination: ''Sepphoris Mosaic''

AGENCY: United States Information Agency.

ACTION: Notice.

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985, 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978 (43 FR 13359, March 29, 1978), and Delegation Order No. 85–5 of June 27, 1985 (50 FR 27393, July 2, 1985), I hereby determine that the object ''Synagogue Mosaic from Sepphoris,'' to be included in the exhibit, ''Sepphoris Mosaic,'' imported from abroad for the temporary exhibition without profit within the United States, is of cultural significance. This object is imported pursuant to a loan agreement with the foreign lender. I also determine that the exhibition or display of the object at the Carneigie Musuem of Art, Pittsburgh, PA, from on or abourt September 9, 1998, to on or about December 6, 1998, is in the national interest. Public Notice of these determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Neila Sheahan, Assistant General Counsel, Office of the General Counsel, 202/619–5030, and the address is Room 700, U.S. Information Agency, 301 4th Street, SW, Washington, DC 20547–0001.

Dated: September 2, 1998.

Les Jin,

General Counsel.

[FR Doc. 98–24106 Filed 9–8–98; 8:45 am]

BILLING CODE 8230–01–M

federal register

Wednesday
September 9, 1998

Part II

Department of Transportation

Federal Railroad Administration

49 CFR Parts 229, 231, and 232

Notice of Proposed Rulemaking; Brake System Safety Standards for Freight and Other Non-Passenger Trains and Equipment

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Parts 229, 231, and 232

[FRA Docket No. PB–9; Notice No. 13]

RIN 2130—AB16

Brake System Safety Standards for Freight and Other Non-Passenger Trains and Equipment

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FRA proposes revisions to the regulations governing the power braking systems and equipment used in freight and other non-passenger railroad train operations. The proposed revisions are designed to achieve safety by better adapting the regulations to the needs of contemporary railroad operations and facilitating the use of advanced technologies. These proposed revisions are being issued in order to comply with Federal legislation, to respond to petitions for rulemaking, and to address areas of concern derived from experience in the application of existing standards governing these operations.

DATES: (1) Written Comments: Written comments must be received by January 15, 1999. Comments received after that date will be considered to the extent possible without incurring additional expenses or delay.

(2) Public Hearings: FRA is planning to conduct at least two public hearings with the first public hearing being held in Washington D.C. and one technical conference with interested parties in order to provide all interested parties the opportunity to comment on the proposed revisions contained in the NPRM. FRA will issue a separate document in the **Federal Register** in the very near future to inform all interested parties as to the exact dates and locations where the public hearings and technical conference will be held.

ADDRESSES: (1) *Written Comments:* Address comments to the Docket Clerk, Office of Chief Counsel, RCC–10, Federal Railroad Administration, 400 Seventh Street, S.W., Stop 10, Washington, D.C. 20590. Comments should identify the docket and notice number, and five copies should be submitted. Persons wishing to receive confirmation of receipt of their comments should include a self-addressed, stamped postcard. The Docket Clerk will indicate on the postcard the date on which the comments were received and will return the card to the addressee. The dockets are housed in the Seventh Floor of 1120 Vermont Avenue, N.W., Washington D.C. Public dockets may be reviewed between the hours of 8:30 a.m. and 5:00 p.m., Monday through Friday, except holidays.

(2) *Public Hearings:* FRA is planning to conduct at least two public hearings with the first public hearing being held in Washington D.C. and one technical conference with interested parties in order to provide all interested parties the opportunity to comment on the proposed revisions contained in the NPRM. FRA will issue a separate document in the **Federal Register** in the very near future to inform all interested parties as to the exact dates and locations where the public hearings and technical conference will be held.

FOR FURTHER INFORMATION CONTACT: Leon Smith, Deputy Regional Administrator—Region 3, FRA Office of Safety, RRS–14, 400 Seventh Street, S.W., Stop 25, Washington, D.C. 20950 (telephone 404–562–3800), or Thomas Herrmann, Trial Attorney, Office of the Chief Counsel, RCC–10, 400 Seventh Street, S.W., Stop 10, Washington, D.C. 20950 (telephone 202–493–6053).

SUPPLEMENTARY INFORMATION:

Background

In 1992, Congress amended the Federal rail safety laws by adding certain statutory mandates related to power brake safety. *See* 49 U.S.C. 20141. These amendments specifically address the revision of the power brake regulations by adding a new subsection which states:

> (r) POWER BRAKE SAFETY.—(1) The Secretary shall conduct a review of the Department of Transportation's rules with respect to railroad power brakes, and not later than December 31, 1993, shall revise such rules based on such safety data as may be presented during that review.
>
> (2) In carrying out paragraph (1), the Secretary shall, where applicable, prescribe standards regarding dynamic brake equipment. * * *

Pub. L. No. 102–365, § 7; codified at 49 U.S.C. 20141, superseding 45 U.S.C. 431(r).

In response to the statutory mandate, the various recommendations and petitions for rulemaking, and due to its own determination that the power brake regulations were in need of revision, FRA published an Advance Notice of Proposed Rulemaking (ANPRM) on December 31, 1992 (57 FR 62546), and conducted a series of public workshops in early 1993. The ANPRM provided background information and presented questions on various subjects including: the use and design of end-of-train (EOT) telemetry devices; the air flow method of train brake testing; the additional testing of train air brakes during extremely cold weather; the training of employees to perform train brake tests and inspections; computer-assisted braking systems; the operation of dynamic brakes on locomotives; and other miscellaneous subjects relating to conventional brake systems as well as information regarding high speed passenger train brakes. The questions presented in the ANPRM on the various topics were intended as fact-finding tools and were intended to elicit the views of those persons outside FRA charged with ensuring compliance with the power brake regulations on a day-to-day basis.

Based on the comments and information received, FRA published a Notice of Proposed Rulemaking (1994 NPRM) regarding revisions to the power brake regulation. *See* 59 FR 47676 (September 16, 1994). In the 1994 NPRM, FRA proposed a comprehensive revision of the power brake regulations which attempted to preserve the useful elements of the current regulatory system in the framework of an entirely new document. FRA attempted to delineate the requirements for conventional freight braking systems from the more diverse systems for various categories of passenger service. In developing the NPRM, FRA engaged in a systems approach to the power brake regulations. FRA considered all aspects of a railroad operation and the effects that the entire operation had on the train and locomotive power braking systems. Therefore, the proposed requirements not only addressed specific brake equipment and inspection requirements, but also attempted to encompass other aspects of a railroad's operation which directly affect the quality and performance of the braking system, such as: personnel qualifications; maintenance requirements; written procedures governing operation, maintenance, and inspection; record keeping requirements; and the development and integration of new technologies.

Following publication of the 1994 NPRM in the **Federal Register**, FRA held a series of public hearings in 1994 to allow interested parties the opportunity to comment on specific issues addressed in the NPRM. Public hearings were held in Chicago, Illinois on November 1–2; in Newark, New Jersey on November 4; in Sacramento, California on November 9; and in Washington, D.C. on December 13–14, 1994. These hearings were attended by numerous railroads, organizations representing railroads, labor

organizations, rail shippers, and State governmental agencies. Due to the strong objections raised by a large number of commenters at these public hearings, FRA announced by notice published on January 17, 1995 that it would defer action on the NPRM and permit the submission of additional comments prior to making a determination as to how it would proceed in this matter. *See* 60 FR 3375. Although the comment period officially closed April 1, 1995, FRA continued to receive comments on the NPRM as well as other suggested alternatives well into October 1995.

Furthermore, beginning in mid-1995, FRA internally committed to the process of establishing the Rail Safety Advisory Committee (RSAC). The determination to develop the RSAC was based on FRA's belief that the continued use of *ad hoc* collaborative procedures for appropriate rulemakings was not the most effective means of accomplishing its goal of a more consensual regulatory program. FRA believed that the establishment of an advisory committee to address railroad safety issues would provide the best opportunity for creating a consensual regulatory program to benefit the Administrator in the conduct of her statutory responsibilities. FRA envisioned that the RSAC would allow representatives from management, labor, FRA and other interested parties to cooperatively address safety problems by identifying the best solutions based on agreed-upon facts, and, where regulation appears necessary, identify regulatory options to implement these solutions. The process of establishing the RSAC was not complete until March 1, 1996, and on March 11, 1996, FRA published a notice in the **Federal Register** that the Committee had been established. *See* 61 FR 9740.

In the interim, based on these considerations and after review of all the comments submitted, FRA published a notice in the **Federal Register** on February 21, 1996, stating that in order to limit the number of issues to be examined and developed in any one proceeding FRA would proceed with the revision of the power brake regulations via three separate processes. *See* 61 FR 6611. In light of the testimony and comments received on the 1994 NPRM, emphasizing the differences between passenger and freight operations and the brake equipment utilized by the two, FRA decided to separate passenger equipment power brake standards from freight equipment power brake standards. As passenger equipment power brake standards are a logical subset of passenger equipment safety standards, it was determined that the passenger equipment safety standards working group would assist FRA in developing a second NPRM covering passenger equipment power brake standards. *See* 49 U.S.C. 20133(c). In addition, in the interest of public safety and due to statutory as well as internal commitments, FRA determined that it would separate the issues related to two-way EOTs from both the passenger and freight issues, address them in a public regulatory conference, and issue a final rule on the subject as soon as practicable. A final rule on two-way EOTs was issued on December 27, 1996. *See* 62 FR 278 (January 2, 1997). Furthermore, it was announced that a second NPRM covering freight equipment power brake standards would be developed with the assistance of RSAC. At the Committee's inaugural meeting on April 1–2, 1996, the RSAC officially accepted the task of assisting FRA in development of revisions to the regulations governing power brake systems for freight equipment. *See* 61 FR 29164.

Members of RSAC nominated individuals to be members of the Freight Power Brake Working Group (Working Group) tasked with making recommendations regarding revision of the power regulations applicable to freight operations. The Working Group was comprised of thirty-one voting members as well as a number of alternates and technical support personnel. The following organizations were represented by a voting member and/or an alternate on the Working Group:

Association of American Railroads (AAR)
American Short Line Railroad Association (ASLRA)
Brotherhood of Locomotive Engineers (BLE)
Burlington Northern Santa Fe Railroad (BNSF)
Canadian National Railroads (CN)
Canadian Pacific Rail Systems (CP)
Consolidated Rail Corporation (CR)
CSX Transportation (CSX)
Illinois Central Railroad (IC)
International Association of Machinists & Aerospace Workers (IAMAW)
National Transportation Safety Board (NTSB)(Advisor)
National Association of Regulatory Commissioners (NARUC)/California Public Utilities Commission (CAPUC)
Norfolk Southern Corporation (NS)
Railway Progress Institute (RPI)
Sheet Metal Workers International Association (SMWIA)
Southern Pacific Lines (SP)
Transportation Communications International Union/Brotherhood of Railway Carmen (TCU/BRC)
Transport Workers Union of America (TWU)
Union Pacific Railroad (UP)
United Transportation Union (UTU)

The Working Group held seven multi-day sessions in which all members of the working group were invited. These sessions were held on the following dates:

May 15–17, 1996 in Washington D.C.;
June 11–13, 1996 in Chicago, Illinois;
July 31, 1996 in Chicago, Illinois;
August 21–23, 1996 in Annapolis, Maryland;
September 26–27, 1996 in Washington D.C.;
October 29–30, 1996 in Washington D.C.; and
December 4, 1996 in St. Louis, Missouri.

General minutes of each of these meetings are contained in FRA Docket PB–9 and are available for public inspection during the times and at the location noted previously. In addition to these meetings, there were numerous meetings conducted by smaller task force groups designated by the Working Group to further develop various issues. All of these smaller task forces were made up of various members of the Working Group or their representatives, with each task force being represented by management, labor, FRA and other interested parties. The Working Group designated smaller task forces to address the following issues: dry air; dynamic brakes; periodic maintenance and testing; electronically controlled locomotive brakes; and inspection and testing requirements. These task forces were assigned the job of developing the issues related to the broad topics, presenting reports to the larger Working Group, and if possible making recommendations to the Working Group for addressing the issues (recommendations and reports of these task groups will be addressed in detail in the Discussion of Issues portion of the preamble to follow).

Although the Working Group discussed, debated, and attempted to reach consensus on various issues related to freight power brakes, consensus could not be reached. However, the working group in conjunction with the various task forces developed a wealth of information on various issues and further clarified the parties' positions regarding how the issues could or should be addressed in any regulation. The major cluster of issues, upon which resolution of many of the other issues rested, were the requirements related to the inspection and testing of brake equipment. The inspection and testing task force met on numerous occasions, gathered and

reviewed data, and the labor and rail management representatives to the task force drafted various proposals and options related to the inspection and testing of freight brake equipment (these proposals are addressed in detail in the Discussion of Issues portion of the preamble to follow). Members of the inspection and testing task force presented their proposals to the larger Working Group as well as the underlying bases for the proposals. The Working Group discussed the proposals and investigated many of the costs and benefits related to the various proposals as well as the safety implications; however, the Working Group could not reach any type of consensus position. Consequently, FRA declared that an impasse had been reached and announced, at the December 4, 1996 meeting of the Working Group, that FRA would proceed unilaterally with the drafting of the NPRM.

Subsequent to December 4, 1996, several members of the Working Group, including representatives from both rail management and labor, continued informal discussions of some of the issues related to the inspection and testing of freight equipment. These representatives informed FRA that a consensus proposal might be possible provided that the Working Group were permitted to continue deliberations. Consequently, FRA agreed to reconvene the Working Group and in April 1997 three additional meetings were conducted on the following dates:

April 2–3, 1997 in Kansas City, Missouri;

April 10–11, 1997 in Phoenix, Arizona; and

April 23 in Jacksonville, Florida.

Representatives of both rail management and rail labor presented the Working Group with inspection and testing proposals for consideration and review both before and during this period. Although the proposals were discussed and deliberated, the Working Group was once again unsuccessful in reaching consensus on any of the freight power brake inspection and testing issues. Consequently, by letter dated May 29, 1997, FRA informed the members of the Working Group that FRA would be withdrawing the freight power brake task from the Working Group at the next full RSAC meeting on June 24, 1997. FRA provided this notice to avoid any misunderstanding regarding the process by which the proposed rule would be drafted. FRA also informed the members of the Working Group that it would not invest further time in attempting to reach consensus unless all other members of the Working Group jointly indicated that they have reached consensus on a proposal and wanted to discuss it with FRA. FRA noted that if that were to occur prior to June 24, 1997, it would reconsider withdrawing the task from RSAC. As no consensus proposal was presented to FRA prior to June 24, 1997, FRA withdrew the task from the Working Group and informed the members of RSAC that FRA would proceed unilaterally in the drafting of a freight power brake NPRM.

Although FRA proceeded on its own in drafting this document, FRA believes that all members of the Freight Power Brake Working Group should be commended for their hard work and dedication in attempting to resolve and address some of the most difficult and complex issues with which FRA deals. FRA believes that the information and knowledge provided by these individuals has helped FRA draft a proposal that not only ensures the continued safety of railroad employees and the public, but also recognizes the needs of contemporary railroad operations.

FRA has carefully considered the information, data, and proposals developed by the Freight Power Brake Working Group as well as all the oral and written comments offered by various parties regarding the 1994 NPRM on power brakes. The resulting NPRM is based on this information as well as FRA's experience with enforcing the current power brake regulations.

Prologue

FRA's institutional experience in locomotive and train braking safety extends backwards in time to the creation of the Department of Transportation in 1967 (at which time the Bureau of Railroad Safety and its functions were transferred from the Interstate Commerce Commission), to the passage of the Power or Train Brakes Safety Appliance Act of 1958, and ultimately to the passage of the original Safety Appliance Act over 100 years ago. Current FRA personnel have, during prior years, served in a variety of capacities on every major railroad. These railroad safety inspectors, supervisors, and managers contribute daily to the rulemaking judgments ultimately expressed by the Federal Railroad Administrator, and the agency has made a special effort in this proceeding to tap the knowledge that these individuals possess to ascertain the means by which public and employee safety may be secured.

As evidenced by the preceding discussion, FRA has spent years attempting to develop new power brake regulations to ensure the safety of our nation's railroads while recognizing the wide variety of railroad operations and technologies that currently exist in the industry. In the 1994 NPRM, FRA proposed a comprehensive and innovative revision to the power brake regulations. At that time, FRA was attempting to develop a set of regulations that addressed freight, passenger, and tourist operations, and thus, required FRA to provide certain latitudes and restrictions that were not completely compatible with every type of operation covered by the proposal. Consequently, many segments of the industry adamantly objected to the proposal. FRA believes that many of these objections were due, at least in part, to the complexity of the proposal as well as to a misunderstanding of exactly what was being proposed.

Since that time, as noted above, FRA has instituted rulemakings to address passenger and commuter operations and equipment, two-way end-of-train devices, and has developed a channel of communication to address tourist and excursion operational concerns. The current proposal is focused solely on freight and other non-passenger operations. Furthermore, FRA is limiting this proposal to the operation, inspection, and maintenance of freight power brake systems. Thus, unlike the previous proposal, FRA will not, for the most part, attempt to include provisions related to the inspection and maintenance of locomotive braking systems or to the performance of other mechanical inspections that are currently addressed by other parts of the regulations. Although FRA believes these requirements are interrelated to the inspection, testing, and maintenance of freight power brakes, FRA believes that they are adequately addressed in other regulations and would only add to the complexity of this proposal causing confusion and misunderstanding by members of the regulated community. Furthermore, representatives of both rail labor and rail management have indicated that if a consensus proposal could not be developed within the RSAC process then FRA should proceed unilaterally with developing a proposal which tracks the current requirements, and that FRA should strictly enforce those requirements. Although FRA believes that the current regulatory scheme tends to create incentives to ''overlook'' or fail to conduct vigorous inspections, FRA also believes that the current regulatory scheme is an effective and proven method of ensuring safety and that many of the ''negative incentives'' can be greatly reduced by

strict and aggressive enforcement and with moderate, although comprehensive, revision of the requirements. Consequently, the content of this proposal is far less complex than the previous proposal and more closely tracks the current requirements related to the inspection, testing, and maintenance of the braking systems used in freight operations.

This proposal is intended to be a moderate revision of the current requirements related to the inspection, testing, and maintenance of the brake equipment used freight operations. These proposed changes are intended to balance the concerns of rail labor and management and would increase the effectiveness of the regulation. Since the passage of the Power or Train Brakes Safety Appliance Act of 1958, which required adoption of the AAR recommended practices as regulatory text, FRA has realized that improvements in clarity are badly needed. FRA believes that the current regulations need to be reorganized and updated, and that potential loopholes created by the current language need to be eliminated. Furthermore, FRA believes that completely new requirements are needed to address the qualifications of those individuals conducting brake inspections and tests. FRA also proposes to codify the statutory requirements related to the movement of freight equipment with defective or inoperative brakes. In addition, this proposal codifies and solidifies the maintenance requirements related to the brake system and its components and prevents unilateral changes to these provisions by the very party to which they apply.

This proposal also contains various incentives to the railroads to encourage the performance of quality brake inspections, particularly at locations where trains originate. These include incentives to use qualified mechanical forces to conduct brake system tests at major terminals where long-distance trains originate in order to move these trains greater distances between brake inspections than currently permitted. Consequently, this proposal retains the basic inspection intervals and requirements contained in the current regulations and preserves the useful elements of the current system; however, FRA believes that the proposed additions, clarifications, and modifications increase the safety, effectiveness, and enforceability of the regulations.

Discussion of Issues and General FRA Conclusions

The following discussions are grouped by major themes and primary issues addressed not only in the Freight Power Brake Working Group but also in the 1994 NPRM issued on power brakes and the oral and written comments submitted in relation to that document. In each of the major issue areas FRA has attempted to discuss previous proposals, the comments to those proposals, the information developed by the Working Group, and any proposals or recommendations made by members of the Working Group.

I. Accident/Incident History and Defective Equipment

FRA considers many factors in attempting to determine the relative condition of the industry as it relates to the safety of train power brake systems. Two factors which figure prominently in this determination are the number of recent brake-related incidents and the amount of defective brake equipment recently discovered operating over the railroad system, both of which provide some indication as to the potential or likelihood of future brake-related incidents. For purposes of this discussion, a brake-related incident is one that was reported to FRA as being caused by one of the following: brake rigging down or dragging; air hose uncoupled or burst; broken brake pipe or connections; other brake components damaged, worn, broken or disconnected; brake valve malfunction (undesired emergency); brake valve malfunction (stuck brake); hand brake broken or defective; hand brake linkage and/or connections broken or defective. FRA did not consider brake pipe obstruction-related incidents because they were fully considered at the time that FRA promulgated the final rule relating to the use of two-way end-of-train devices.

Table 1 below contains a compilation of the relevant brake-related incidents that have been reported to FRA over the past 5 years. The totals for 1997 reflect incidents through October 1997 and the incident rate reflects train miles for 1996 (latest available). Both the number of incidents and the number of train miles for 1997 will in all probability be higher when they are finalized. As the table clearly indicates, there were increases in both brake-related incidents and the incident rate between 1994 and 1996. The incident rate remains fairly low relative to other causes of derailments and collisions. However, it should be noted that the figures presented in Table 1 most likely do not accurately reflect the total number of incidents that are potentially linked, in some part, to brake-related causes and do not provide a complete picture of the costs associated with the identified incidents. FRA obtains information on most incidents directly from the railroads which generally identify the direct cause of an incident but may not sufficiently identify all of the contributory causes in a manner to permit FRA to conclude that the brake system played a part in the incident. Thus, FRA believes that there may be numerous incidents that occur in the industry which are at least partially due to brake-related problems, but which are ultimately more closely linked to human error or other mechanical problems and thus, are reported to FRA under those cause codes. Furthermore, the damage costs noted in Table 1 for the identified incidents are based on the damage to railroad property or equipment together with the costs of the injuries or fatalities involved. Thus, the damages presented fail to consider the costs associated with such things as: loss of lading; wreck clearance; track delay; environmental clean-up; removal of damaged equipment; evacuations; or the impact on local traffic patterns. Consequently, the railroad property damages have been multiplied by a factor of 1.5625 in an effort to capture these non-reported damages.[1]

TABLE 1.—BRAKE-RELATED INCIDENTS

Year	Number of accidents	Rate per million train miles	Injured	Killed	Damages [2]
93	15	0.024	0	0	$1,298,109
94	33	0.050	17	1	$2,440,347
95	43	0.064	2	0	$6,710,280
96	52	0.077	12	1	$10,534,903
97 [3]	29	0.043	1	0	$10,032,013

[1] AAR surveyed its members and reported that, on average, these other costs constitute an additional 56.25 percent of the reported damages.

TABLE 1.—BRAKE-RELATED INCIDENTS—Continued

Year	Number of accidents	Rate per million train miles	Injured	Killed	Damages [2]
Total	172		32	2	$31,015,653

A second factor that is considered by FRA, to some extent, in determining the relative condition of the industry in regard to the safety of power brake equipment is the percentage of equipment found with defective brakes during FRA inspections and special projects. The percentage of equipment with defective brakes was a contentious subject within the RSAC Power Brake Working Group. The problem of brake defect data and how it is collected and entered into the FRA database was debated at length. The issue is important for cost and benefit estimation of proposals put forth by labor and management and it is useful to examine the problem in detail. Data on brake defects is collected by FRA inspectors as they do rail equipment inspections. Defect data is also collected for special projects under the Safety Assurance and Compliance Program (SACP). In neither instance is the data collection procedure designed to be suitable for use in statistical analysis of brake defects.

In order to perform a statistically valid analysis, either all cars and locomotives must be inspected (prohibitively expensive), or a statistically valid sample must be collected. For the sample to be valid for the purpose of statistical analysis, the sample must be randomly selected so that it will represent the same characteristics as the universe of data. Random samples have several unique characteristics. They are unbiased, meaning that each unit has the same chance of being selected. Random samples are independent, or the selection of one unit has no influence on the selection of other units. Most statistical methods depend on independence and lack of bias. Without a randomized sample design there can be no dependable statistical analysis, and no way to measure sampling error, no matter how the data is modified. Random sampling ''statistically guarantees'' the accuracy of the results.

The sampling method used for regular FRA inspections is not random. It is more of a combination between a judgement sample and an opportunity sample. The opportunity sample basically just takes the first sample population that comes along, while the judgement sample is based on ''expert'' opinion. The sampling method used for SACP inspections is also a judgement sample, where FRA is focusing its inspections on a specific safety concern. This method is extremely prone to bias, as FRA is typically investigating known problem areas. Furthermore, some SACP inspections are joint inspections with labor. Consequently, it is unknown whether the final reports reflect only FRA defects, as many of the joint inspections had both AAR and FRA defects recorded.

Neither the regular FRA inspections nor the SACP inspections were designed for random data collection. Although both are very useful to FRA, they were not designed for this purpose and the data should be used carefully. FRA believes that data collected during routine inspections is the most likely data to accurately reflect the condition of the fleet. However, both FRA inspection data and SACP data lack any measuring device, a defect is a defect and no distinction is made between a critical defect versus a minor defect. Furthermore, there is no correspondence between defects and accidents (no estimated correlation coefficients were statistically significant). This does not mean that defects cannot lead to collisions or derailments as the lack of correlation could easily be a result of non-random sampling. Consequently, the data collected both during routine FRA inspections and under SACP cannot be used as a proxy for data collected by means of a random sample for the purpose of statistical analysis. The sample is not random, so no dependable statistical analysis may be performed.

The defect ratios for brake and brake-related defects from the FRA inspection database are shown in Table 2 below. The five-year average brake defect ratio is 3.84 percent. SACP data (which focuses on known problem areas) indicates that brake defect ratios as high as 35 percent have been found during the course of some investigations. FRA believes that the reality lies between the two, and that it is more likely to resemble the data collected during routine FRA inspections as FRA examines almost a ½ million freight cars and locomotives annually. However, brake defects may be more common than FRA inspection data indicates and the SACP data in all likelihood indicates that there are localized areas of concern or that some railroads have particular yards with persistent problems. *For purposes of the cost/benefit analysis of this proposal only,* the brake defect ratio is assumed to be the five-year average brake defect ratio and rounding up to 4 percent. The data indicates that a slight increase in the percentage of cars with brake defects has been reported by FRA during routine inspections over the last five years. Due to the limitations of the available data, as discussed in detail above, FRA is unable to determine whether the defect ratio increase is the result of increased non-compliance with existing regulations or the result of sampling bias.

TABLE 2.—BRAKE DEFECT RATIO

Year	Ratio (defective equipment/equipment inspected)
1993	0.0336
1994	0.0347
1995	0.0369
1996	0.0419
1997	0.045
Average	0.0384

II. Inspection and Testing Requirements

As noted in the preceding discussions, the issues related to the inspection and testing of the brake equipment on freight trains are some of the most complex and sensitive issues with which FRA deals on a daily basis. A majority of the comments received with regard to the 1994 NPRM on power brakes issued in 1994 addressed the intervals and methods for performing the various proposed brake inspections and tests. Furthermore, the primary points of contention in the RSAC Working Group discussions centered on the performance of brake inspections and tests. Consequently, any proposed requirements related to the inspection and testing of freight power brakes must be viewed as the foundation on which

[2] Increased by 56.25% to reflect unreported damages.

[3] Based on train miles for 1996 and accidents through October, 1997.

the rest of the proposed requirements are based.

A. Brake Inspections—General

The current regulations are primarily designed around four different types of brake system inspections, these include: initial terminal; 1,000-mile; intermediate terminal; and a brake pipe continuity check. *See* 49 CFR 232.12 and 232.13. These brake system inspections differ in complexity and detail based on the location of the train or on some event that affects the composition of the train. Each of the inspections detail specific actions that are to be performed and identify the items that are to be observed by the person performing the inspection.

The initial terminal inspection described in § 232.12(c)–(j) is intended to be a comprehensive inspection of the brake equipment primarily required to be performed at the location where a train is originally assembled. This inspection requires the performance of a leakage test and an in-depth inspection of the brake equipment to ensure that it is properly secure and does not bind or foul. Piston travel must be checked during these inspections and must be adjusted to a specified length if found not to be within a certain range of movement. The brakes must also be inspected to ensure that they apply and release in response to a specified brake pipe reduction and increase. FRA recently issued enforcement guidance to its field inspectors clarifying that both sides of a car must be observed sometime during the inspection process in order to verify the condition of the brake equipment as required when performing an initial terminal inspection.

The current regulations require intermediate brake inspections at points not more than 1,000 miles apart. These inspections are far more limited than the currently required initial terminal inspections in that the railroad is required only to determine that brake pipe leakage is not excessive, the brakes apply on each car, and the brake rigging is secure and does not bind or foul. *See* 49 CFR 232.12(b). In the 1982 revisions to the power brake rules, FRA extended the distance between these inspections from 500 miles to 1,000 miles.

The current regulations also mandate the performance of an intermediate terminal brake inspection on all cars added to a train en route unless they have been previously given an initial terminal inspection. This inspection requires the performance of a leakage test and verification that the brakes on each car added to the train and the rear car of the train apply and release. *See* 49 CFR 232.13(d). Railroads are permitted to use a gauge or device at the rear of the train to verify changes in brake pipe pressure in lieu of performing the rear car application and release. The current regulations also require that cars that are added to a train with only an intermediate terminal brake inspection that have not previously been provided an initial terminal inspection must be so inspected at the next location where facilities are available for performing such an inspection.

The current regulations also require the performance of a brake pipe continuity test whenever minor changes to a train consist occur. This inspection requires that a brake pipe reduction be made and verification that the brakes on the rear car apply and release. Railroads are permitted to use a gauge or device at the rear of the train to verify changes in brake pipe pressure in lieu of visually verifying the rear car application and release. This inspection is to be performed when locomotive or caboose is changed, when a one or more consecutive cars are removed from the train, and when previously tested cars are added to a train.

In the 1994 power brake NPRM issued in 1994, FRA proposed a power brake inspection scheme in which various stated factors determined the distance that a freight train would be allowed to travel without additional inspection. *See* 59 FR 47732–47736. These factors included: the qualifications of the employee performing the initial terminal brake inspection; the extent of performance of supervisory spot checks of maintenance and inspection activity; the presence or absence of a single car test program on the railroad; the power brake defect ratio on outbound trains for the railroad; and the type of equipment used and installed on the train. Based on the conditions that were satisfied by the railroad, a train would be allowed to travel anywhere between 500 and 3,500 miles from the point of initial terminal without additional power brake tests or inspections. Thus, FRA proposed the elimination of the 1,000-mile inspection and replaced it with a sliding-scale performance-based inspection system. The inspection scheme proposed in the 1994 NPRM was an attempt to balance the competing views of rail management, which contended that trains can travel up to 5,000 miles between inspections, and rail labor, which contended that a 500 mile limit should be mandated as railroads are not living up to a commitment made in 1982 to perform quality initial terminal inspections. *See* 59 FR 47692–47693.

As noted above, railroad representatives and shippers of goods by rail vehemently opposed the 1994 NPRM. Many of these commenters objected to the possibility that most trains would be reduced to 500 miles between brake inspections and that the incentives for moving extended distances were unobtainable. They claimed that the brake inspection scheme contained in the 1994 NPRM would increase not only operational and delivery costs but would also substantially increase delivery times. These commenters believed that the 1994 NPRM failed to recognize the industry's improving safety record. Many railroad representatives also objected to the use of power brake defect ratios as a benchmark for determining the distances trains may travel between brake inspections. These commenters believed that defect ratios were an inappropriate performance standard in that it was too subjective and included items that were not related to the safe operation of a train. Several railroads also commented that the potential for being reduced to 500 miles between brake inspections based on defect ratios each quarter would require railroads to maintain facilities every 500 miles in order to be prepared for a reduction in distance.

Rail labor representatives also objected to the brake inspection scheme proposed in the 1994 NPRM. The primary objections these commenters raised involved the ability of railroads to continue to use train crews to conduct initial terminal brake inspections and the ability to move trains in excess of 1,000 miles between brake inspections. Most of these commenters believed that train crew personnel are not sufficiently trained to adequately perform initial terminal brake inspections. Several labor representatives also objected to the movement of a freight train beyond 1,000 miles without an additional inspection of the brake equipment. This objection was primarily based on their view that railroads have failed to abide by the commitment made in 1982, when the distance between such inspections was increased from 500 miles to 1,000 miles, that complete and perfect initial terminal inspections would be performed. These commenters also contended that the incentives proposed for permitting trains to travel extended distances were unenforceable and would result in extended movements of trains with no appreciable increase in the safety of those trains.

In light of these objections, FRA held the 1994 NPRM in abeyance and requested that alternative approaches be

submitted by interested parties. The AAR and its member railroads submitted an alternative performance standard approach based on mechanically-caused accidents per million train miles (APMTM). AAR's approach required various types of brake inspections to be performed based on the mileage the train will travel, and based on the railroad's performance versus the established foundation APMTM, the railroad could potentially move trains up to 3,600 miles with fewer inspection requirements. AAR's proposal also addressed certain maintenance requirements and permitted maintenance levels to be determined based on the accident level of the industry as a whole. In addition, the proposal permitted trains to depart initial terminals with 95 percent operative brakes and in some instances less than 95 percent operative brakes. The proposal also set limits on the enforcement actions that FRA could initiate based on a railroad's poor performance.

Several labor representatives strongly objected to AAR's alternative proposal claiming that the proposal was merely self-regulation disguised as a performance standard. These commenters contended that AAR's proposal provided railroads the ability to continue to manipulate data and statistics in order to reduce their safety and regulatory responsibilities. The BRC submitted substantial comments to FRA's 1994 NPRM as an alternative approach. The BRC's submission suggested that many of the proposed provisions were insufficient to ensure adequate compliance by the railroads. Consequently, the BRC made numerous recommendations for strengthening certain provisions contained in the NPRM and included: more stringent requirements regarding the inspection of trains; additional limitations on trains permitted to travel greater than 1,000 miles between brake inspections; enhanced documentation of all inspections performed by the railroad; and further limitations on the inspection abilities of train crew members.

At the time that alternative proposals were being submitted and reviewed, FRA was in the process of establishing RSAC. FRA believed that RSAC might be a good forum for addressing the issues and developing recommendations for revising the regulations governing power brake systems for freight equipment. Therefore, on April 1–2, 1996, the RSAC officially accepted the task of assisting FRA in development of revisions to the regulations governing power brake systems for freight equipment. *See* 61 FR 29164. As noted above, the RSAC Working Group met on numerous occasions to discuss various issues and proposals related to the inspection, testing and maintenance of freight power brake systems. As the meetings progressed it became clear that most of the issues being discussed by the Working Group were contingent on the outcome of the requirements related to the inspection and testing of the braking systems. Consequently, the Working Group created several smaller task forces composed of representatives of both rail labor and rail management to attempt to resolve these core issues.

On several occasions it appeared as though these smaller task forces might reach resolution of at least a large portion of the inspection and testing issues; however, after the individuals involved in these meetings presented proposals based on the discussions of the smaller group it appeared that either there was no agreement within the task force, the parties did not understand what was agreed to, or the parties disagreed as to whether an agreement was actually reached. Representatives of both rail management and rail labor submitted numerous proposals related to the inspection and testing of brake equipment. Many of the proposals were revisions or amendments to previous proposals based on the discussions of the Working Group at that time. Rather than attempt to reiterate the various proposals submitted by management and labor representatives, this document will attempt to outline the major provisions and discuss the similarities and differences of the various proposals in order to delineate the general positions of the parties involved. In order to facilitate this discussion, the proposals will generally be grouped as either a management proposal or a labor proposal. It should be noted that the items outlined below were developed over the period of a year, were developed as part of a series of intense negotiation sessions, were generally presented as part of a package by various parties with all of the requirements of the package necessary for agreement, or were presented in order to facilitate additional discussion of the group.

The proposals of both management and labor representatives addressed the need to have brake and other mechanical inspections performed by qualified inspectors. The proposals mandated that if certain inspections were performed in a specified manner by highly qualified inspectors then those trains could be moved either extended distances between brake inspections or with a certain minimum percentage of the brakes inoperative or both. However, the parties differed on what constitutes a qualified inspector. This issue became the key issue to resolving any of the other issues being debated within the Working Group. Rail management proposed the use of the term ''mechanically qualified personnel'' (MQP) to describe those individuals they would consider highly qualified inspectors. It was unclear from the railroads' proposals exactly who could be designated as MQP and the extent of the knowledge or training that would be required to designate a person as MQP. It appeared that even train crew personnel could qualify as MQPs under certain circumstances. Labor representatives refused to accept any definition of MQP that would permit train crew members to meet the designation. These representatives were adamant that only carmen or individuals similarly trained and experienced were qualified to perform the quality brake and mechanical inspections contained in the proposals except in limited circumstances. At a minimum, labor representatives sought to have the railroads commit to using carmen or individuals similarly trained and experienced to perform the majority of the proposed inspections and tests. The railroads refused to agree to such a commitment. Railroad representatives objected to the designation of the carman craft in the rule text based on their belief that the discussion of such designation would violate existing collective bargaining agreements. Labor representatives disagreed that such discussion was a violation of any collective bargaining agreements. Due to the nature of these objections, several members of the Working Group believed they were unable to continue deliberations which led to an adjournment of the Working Group. Consequently, the Working Group was unable to resolve the issue of what qualifications a person must possess in order to adequately perform brake system inspections and tests.

Both labor and management representatives proposed to limit the movement of trains inspected by train crews to at least 500 miles. The railroads proposed that trains inspected by train crews would be required to be inspected by an MQP within 500 miles of the train's departure. It should be noted that the railroads' proposal of this requirement was part of a package that permitted certain trains inspected by MQPs to travel to destination without additional inspection and that permitted all trains to be operated out of initial terminals and elsewhere with only 95

percent operative brakes. The railroads contended that the only way to economically justify a return to a 500-mile inspection would be to permit trains to move extended distances and to relax the requirements pertaining to the movement of defective equipment.

Rail labor proposed that trains inspected by train crews be permitted to move only to the next yard, repair point, or crew change point not to exceed 500 miles where it would be inspected by carmen. This proposal permitted train crews to perform a ''cursory'' brake and mechanical inspection at the initial terminal. Labor representatives contended that train crews are not properly trained and do not possess the experience to adequately perform the initial terminal brake test and mechanical inspections required by the current regulations. These parties also contend that when the regulations were revised in 1982 to permit trains to travel 1,000 miles between brake inspections the carriers committed to perform quality initial terminal brake inspections, which they contend has not occurred and will not occur if train crews are permitted to perform initial terminal brake inspections. Consequently, the labor representatives contended that their proposal was an attempt to hold the railroads to their 1982 commitment while permitting properly qualified train crews to perform the inspections they are capable of performing.

The proposals of both rail labor and rail management also contained provisions regarding the performance of a 1,000-mile brake and mechanical inspection. The railroads proposed that all trains would receive a brake and mechanical inspection at 1,000 mile intervals performed by MQPs. However, the railroads' proposal also permitted certain trains that are inspected by MQPs at the initial terminal and which depart those locations with 100 percent operative brakes to travel to destination without additional inspection if labor jointly agreed to such operations. Labor's proposal required the performance of brake and mechanical inspections on every train at intervals of every 1,000 miles regardless of the quality of the previous inspections. Labor's proposal permitted the movement of a train beyond 1,000 miles without inspection only through the filing of a joint labor/management waiver petition pursuant to a proposed waiver process.

The proposals of both rail management and rail labor attempted to provide benefits to a railroad that conducted inbound brake and mechanical inspections. The railroads' proposals contained requirements for the performance of inbound brake and mechanical inspections by MQPs. The carriers proposed the requirements as an alternative to the complete inspection of the train when it is assembled and outbound. All cars found during the inbound inspection with cut-out or defective brakes were to be removed from the train and given a repair track air brake test. In addition, all cars found with mechanical or safety appliance defects were to be repaired or switched out of the train. The railroads' proposals permitted trains to depart these locations with only 95 percent operative brakes. The railroads' proposals did not require the performance of inbound inspections but were intended to alleviate some of the inspection requirements on outbound trains since they were performed inbound.

Rail labor's proposals also included provisions for the performance of inbound brake and mechanical inspections. Labor proposed that these inspections must be performed by carmen. The basic requirements regarding the treatment of defective equipment were similar to those proposed by the railroads. Labor's proposal also contained provisions requiring dynamic brakes, event recorders, and two-way EOTs. Labor representatives attempted to provide an incentive to railroads that perform inbound brake and mechanical inspections by permitting railroads to depart with only 95 percent operative brakes from locations where these inbound inspections are performed. If a railroad performed all of the inspections on the outbound trains, however, then labor's proposal required 100 percent operative brakes from those locations.

Both the labor and management proposals also addressed the method by which the various proposed inspections were to be performed. Railroad representatives proposed that mechanical inspections be conducted on both sides of each car where physically possible. These proposals also indicated that brake inspections could be conducted on one side of the cars during the set and one side during the release with a roll-by option if the design of the car permits the observation of the application and release from one side of the car. However, the proposals do not require a mechanical inspection at 1,000-mile brake inspections and fail to specify exactly how the brakes are to be observed during this inspection. Thus, the railroads' position regarding the precise method of performing a brake inspection when not combined with a mechanical inspection is somewhat unclear. The railroads also proposed that piston travel be observed on each car during every brake inspection except a continuity check, thereby mandating that inspectors cross over the cars if necessary to view the piston travel.

Rail labor representatives proposed detailed requirements relating to the methods for performing a proper brake inspection. These individuals proposed that both sides of a train must be walked during both the application and release of the brakes. These representatives believed that the only way to view all of the equipment necessary to conduct a proper brake inspection is by walking the train. Labor's proposal did permit trains that receive a mechanical inspection pursuant to Part 215 by a carman to have its brakes inspected by a walking inspection of one side of the train with the option to use a vehicle on the other side during the application of the brakes. Such trains also had the option to use a vehicle or perform a roll-by inspection on both sides of the train to observe the release of the brakes. Labor's proposals also permitted carriers to conduct an inspection of the application of the brakes and its component parts from one side of the train and the release of the brakes from the other side of the train if the carrier could effectively demonstrate that the design of the cars is such to permit the brake application, brake release, and component parts to be observed from one side of the train.

The proposals of both rail management and rail labor also addressed the inspection of cycle trains (i.e., trains that operate in a continuous cycle between two points, that remain intact, and that generally consist of cars of the same mechanical type). Both proposals required that cycle trains receive a mechanical and initial terminal brake inspection based on the distance the train has traveled. The railroads' proposal would require these inspections at 1,000 mile intervals. Whereas, the labor proposal required the inspections once every cycle for trains traveling between 500 and 1,000 miles between origination and destination, and once every other cycle for trains traveling less than 500 between origination and destination.

FRA Conclusions. Based on consideration of the information and proposals outlined above as well as its experience in the enforcement of the current power brake regulations, FRA believes that the alternative proposals submitted in response to the 1994 NPRM, as well as the proposals developed as part of the RSAC process, are not viable models upon which a revision of the freight power brake

requirements can be based. The alternative approach submitted by AAR in response to the 1994 NPRM contains a performance standard based upon the number of mechanically-caused incidents per million train miles. FRA does not believe this is an appropriate standard on which to base the frequency of brake inspection and maintenance requirements. Such a standard is based on the occurrence of incidents rather than on a factor which could measure a railroad's performance prior to an accident occurring and thus, prevent incidents before they happen. In addition, the applicability of the standard to the entire industry would be difficult to calculate on a railroad-by-railroad basis, especially due to the large number of short line railroads currently operating in the country. The proposed performance standard is also very subjective as many incidents are due to a variety of causes only part of which may be a mechanical or brake related cause. Thus, identifying what actually constitutes a mechanically-caused incident would be very difficult, if not impossible in some circumstances. Furthermore, as the calculation of the performance standard would be based on incident information submitted to FRA by the railroad's themselves, the potential for data manipulation would exist which could cast doubt on the validity and accuracy of the performance standard.

The AAR's alternative proposal also seriously limited FRA's ability to take necessary enforcement actions until a railroad's non-compliance resulted in a substantial increase in mechanically-caused incidents. In addition, the restrictions imposed on a railroad with poor performance would have permitted the railroad to operate under more lenient inspection requirements than the current power brake regulations. The proposal also permitted the operation of trains out of initial terminals with only 95 percent operative brakes and thus, would potentially permit cars with inoperative brakes to be moved past locations where the necessary repairs could be performed which would be contrary to the statutory provisions related to the movement of cars with defective brakes contained at 49 U.S.C. 20303. Consequently, FRA believes that the alternative approach submitted by the AAR in response to the 1994 NPRM is based on a very subjective performance standard, would be extremely difficult to enforce, is contrary to certain statutory requirements, and most likely would not achieve the same level of safety as the current regulations.

Although the proposals submitted by both rail labor and rail management during the discussions of the RSAC Working Group meetings contain elements which FRA believes would increase the safety of railroad operations, both proposals also contain elements that cannot be sustained on either a safety, economic, or legal basis. As noted in the discussion above, the proposals submitted by both labor and management were presented as packages. The parties made clear that the various elements contained in the proposals could not be isolated and be acceptable, they had to be considered in conjunction with all of the elements contained in the proposals. Therefore, FRA is reluctant to use any of the proposals submitted during the RSAC process as a basis for any revision of the power brake regulations. Furthermore, representatives of both labor and management indicated that if they could not reach agreement on the revision of the power brake regulations, then any revision contemplated by FRA should track the current inspection requirements and intervals.

Both proposals contained requirements restricting the movement of trains inspected by train crews to no more than 500 miles before the train would be reinspected by more highly qualified inspectors. However, railroad representatives stressed that their acceptance of a return to a 500 mile brake inspection was conditioned on and could only be economically justified if the railroads were provided the ability to move some trains to destination (i.e. 2,000 miles or more) as well as flexibility in the movement of defective equipment, both of which were included in their proposal. Whereas, labor representatives stated that the acceptance of permitting train crews to perform any inspections was conditioned on a commitment by the railroads to ensure that all other inspections would be performed by carmen or similarly trained personnel and that the current 1,000 mile interval between inspections be retained unless labor and management jointly agreed to an extension. Labor's proposal also would have permitted a ''cursory'' inspection to be performed by train crews at initial terminals in order to reduce the burden on railroads if a 500 mile inspection were adopted. Consequently, although both proposals contained a 500-mile restriction on trains inspected by train crews, both proposals also contained various other restrictions or conditions that were part of the 500-mile restriction that were very different and in FRA's view are irreconcilable.

Although FRA believes that a 500-mile inspection interval would most likely increase the safety on today's railroads, FRA does not believe that the return to a 500-mile interval is the most efficient or most cost-effective method of achieving the desired result, as discussed below in more detail. In FRA's view, many of the items proposed by the parties in order to make a 500-mile inspection interval a viable approach would have the potential for increasing the safety risks that already exist. For example, FRA is not currently willing to permit trains to travel extended distances without strict operational conditions being imposed and without a means to obtain information on the condition of such trains at the time they arrive at destination. Furthermore, FRA is concerned that any safety gains acquired from a 500-mile inspection interval would be negated by other provisions contained in the various proposals such as allowing the extended movement of defective equipment or the performance of ''cursory'' inspections by train crews at initial terminals.

As noted above, both proposals also contained provisions extending some flexibility in the movement of defective brake equipment. The railroads' proposal permitted the movement of any train with only 95 percent operative brakes and permitted the defective cars to be hauled as far as destination. Although the labor proposal limited the locations and trains where defective equipment could be hauled, the proposal did permit defective equipment to be hauled out of initial terminals and to destination if certain stringent inspection practices were implement by the railroad. Currently, 49 U.S.C. 20303 permits equipment with defective brakes to be moved only if the movement is necessary for conducting repairs and limits such movement to the nearest location where the necessary repairs can be effectuated. Therefore, both of the proposals were based, in part, on provisions designed to provide incentives to perform heightened inspections that are contrary to the statutory requirements regarding the movement of equipment with defective safety appliances. At the time these proposals were discussed by the members of the Working Group it was agreed that if a consensus could be achieved, then representatives of all parties involved would petition Congress in an attempt to change the current statutory requirements. As no consensus was reached, FRA is bound by the statutory requirements regarding

the movement of defective equipment and will not propose any requirements that are not in accordance with those provisions. (See discussion below titled ''Movement of Defective Equipment.'')

In 1982, when FRA extended the 500-mile inspection interval to 1,000 miles, FRA intended that quality initial terminal brake inspections would be performed by the railroads. FRA feels that railroads have not conducted the excellent initial terminal inspections that were contemplated in 1982. Furthermore, contrary to the railroads' contention, FRA feels that many initial terminal brake inspections are being performed by individuals who are not sufficiently qualified or trained. FRA recognizes that since 1982 new technology and improved equipment have been developed that allow trains to operate for longer distances with fewer defects. However, the key to achieving this improved capability is to ensure the proper operation and condition of the equipment at the location where the train is initially assembled.

Although FRA agrees that many of the initial terminal inspections conducted by train crews are not of the quality anticipated in 1982 when the inspection interval was increased from 500 miles to 1,000 miles, FRA believes that properly trained and qualified train crew personnel could perform certain brake inspections and some have been performing such inspections for several years. FRA believes that a reversion to a 500 mile restriction on trains inspected by train crews does not adequately address the concerns regarding the safety of these trains and would impose an economic burden on the railroads that cannot be justified. Two of the major factors in ensuring the quality of brake inspections is the proper training of the persons performing the inspections and adequate enforcement of the requirements. Therefore, FRA believes that the current 1,000 mile inspection interval should be retained but intends to propose general training requirements for persons conducting brake inspections. These proposed training requirements will include general provisions requiring both classroom and ''hands-on'' training, general testing requirements, and annual refresher training provisions. FRA is also proposing to require that various training records be maintained by the railroads in order for FRA to determine the basis for a railroad's determination that a particular person is considered qualified to perform a brake inspection, test, or repair. FRA believes these general training and recordkeeping requirements will provide some assurances that qualified people are conducting the required brake system inspections and tests.

FRA also intends to enhance and increase its enforcement activities with regard to the performance of the brake inspections and tests proposed in this NPRM, particularly those performed by train crews. FRA intends to make a concerted effort to focus on the qualifications of train crew members and will strictly scrutinize the method and length of time spent by these individuals in the performance of the required inspections. This may involve the review of event recorder tapes to ensure that a sufficient amount of time was afforded for conducting a proper inspection of the brake system. FRA will also focus its inspection activities to ensure that train crews are provided the proper equipment necessary to perform many of the required inspection.

In addition to focusing its enforcement and to aid in that initiative, FRA proposes to clarify, update, and modify the current inspection requirements in order to close what are perceived to be existing loopholes and to incorporate what FRA believes to be the best practices currently existing in the industry while updating the requirements to recognize existing technology. FRA believes, and many representatives of rail labor and management agree, that the current inspection requirements are very good for the most part and are sufficient to ensure a high level of safety, but that they need to be strictly enforced, clarified, and updated to recognize existing and new technology. Therefore, FRA does not propose an extensive revision of the basic brake inspection intervals or requirements. Rather, FRA proposes a moderate revision of the requirements, with the intent of tightening, expanding, or clarifying those inspection or testing requirements which have created enforcement problems or inconsistencies in the past. FRA intends to recognize some of the technological improvements made in the industry such as the use of two-way EOTs during the brake tests and use of the air flow method of qualifying train air brake systems. FRA also recognizes that some trains are capable of moving extended distances between inspections provided that comprehensive inspections are performed at the locations where the trains are originated. (See discussion below titled ''Extended Haul Trains.'')

In order to clarify the requirements regarding where and when various brake inspections and tests must be performed, FRA proposes to modify the terminology related to the power brake inspection and testing requirements contained in the current regulations, which is generally based on the locations where the inspections and tests are performed (*i.e.*, initial terminal, intermediate locations). Instead, FRA proposes to identify various classes of inspections based on the duties and type of inspection required, such as: Class I; Class IA; and Class II. This is similar to the approach taken by FRA in the 1994 NPRM and in the proposed rulemaking on passenger equipment safety standards. *See* 59 FR 47736–40. FRA believes that this type of classification system will avoid some of the confusion that currently arises regarding when and where a certain brake inspection must be performed.

Currently, the brake system inspection and testing requirements are interspersed within § 232.12 and § 232.13 and are not clearly delineated. Therefore, FRA believes that reorganizing the major types of brake inspections currently contained in the regulations into separate and distinct sections will provide the regulated community with a better understanding as to when and where each inspection or test is required. Although FRA proposes a change in the terminology used to describe the various power brake inspections and tests, the requirements of these inspections and tests will mirror the current requirements and are not intended to change or modify any of the voluminous case law that has been developed over the years regarding the inspections. Consequently, FRA proposes four major types of brake inspections to be performed by freight railroads some time during the operation of the equipment. FRA proposes the terms ''Class I,'' ''Class IA,'' ''Class II,'' and ''Class III'' to identify the four major types of brake inspections required by this proposal.

The proposed Class I brake test generally contains the requirements currently contained in § 232.12 (a) and (c)–(h). These requirements have been reorganized to clearly delineate when and how the inspection is to be performed based on current interpretations and comments received since the 1994 NPRM. The requirements have also been modified to require written notification that the test was performed and that this notification be retained in the train until it reaches destination. The proposed revisions also acknowledge the use of the air flow method for qualifying train brake systems and permits the use of end-of-train devices in the performance of the test. The proposal also provides some latitude to trains received in interchange

that have a pre-tested car or solid block of cars added at the interchange point or that are moved less than 20 miles after being received in interchange based on the relative safety of permitting these types of trains to continue without the performance of a comprehensive Class I brake test.

The proposed Class IA brake test clarifies the requirements for performing 1,000-mile brake inspections currently contained in § 232.12(b). The proposal makes clear that the most restrictive car or block of cars in the train determines when this inspection must occur on the entire train. FRA also proposes to require that railroads designate the locations where these inspections will be conducted and does not permit a change in those designations without 30-day notice or the occurrence of an emergency situation. The proposed Class II and Class III brake tests essentially clarify the intermediate terminal inspection requirements currently contained in § 232.13(c) and (d) regarding the performance of brake system inspections when cars are added en route or when the train consist is slightly altered en route.

In addition to the modifications and clarifications proposed with regard to the four major types of brake system inspections, FRA also proposes to retain, with clarification and elaboration, the basic inspection requirements related to transfer trains currently contained at § 232.13(e) as well as the requirements for performing brake system inspections using yard air sources currently contained at § 232.12(i). FRA also proposes to retain the requirements related to the inspection and testing of locomotives when used in double heading and helper service currently contained at § 232.15. FRA proposes some additional inspection requirements of locomotives when used in helper service or when used in distributed power operations to ensure the proper functioning of the brakes on these locomotives as these types of inspections are not adequately addressed in the current regulation. Furthermore, FRA does recognize in this proposal that trains, if properly inspected, can safely travel greater than 1,000 miles between brake inspections. (See discussion below titled ''Extended Haul Trains.'')

B. Extended Haul Trains

In the 1994 NPRM, FRA recognized that since 1982 new technology and improved equipment have been developed that allow trains to operate for longer distances with fewer defects. However, FRA further acknowledged that the key to achieving this improved capability is to ensure the proper operation and condition of the equipment, and that the best way of ensuring the proper operation and condition of equipment is to perform quality initial terminal brake inspections and to conduct proper equipment maintenance. Therefore, in 1994 FRA proposed a sliding-scale approach that based the allowable distance a train may travel between brake inspections on a variety of factors and based on the conditions that were satisfied by the railroad. Consequently, a train would be allowed to travel anywhere between 500 and 3,500 miles from the point of initial terminal without additional power brake tests or inspections. *See* 59 FR 47735.

As noted in the previous discussion, the AAR submitted an alternative proposal which would have permitted some trains to travel as far as 3,600 miles between brake inspections. Whereas, the BRC and other labor representatives objected to any movement beyond 1,000 miles based on the railroads' commitment to perform quality initial terminal inspections in 1982, which they claim has not happened. However, the proposals submitted by both rail labor and rail management during the RSAC Working Group deliberations provided provisions for the potential movement of trains greater than 1,000 miles between brake and mechanical inspections. (A detailed synopsis of these proposals is contained in the preceding discussion and will not be reiterated). Admittedly, the proposals differed greatly regarding exactly which trains would be permitted the extended movements and the process by which such movements would be sanctified by FRA. However, all of the proposals stressed the necessity that any train permitted to travel longer distances between brake inspections would be required to be thoroughly inspected by highly qualified inspectors at its point of origin or early in the life of the train. Consequently, it is clear from the submitted proposals and the presentations made at the time they were presented that virtually every member of the industry acknowledges that the key to permitting trains to move extended distances lies in the quality of the inspection the train receives at or near the beginning of its journey.

FRA Conclusions. FRA continues to believe that if a train is properly and thoroughly inspected, with as many defective conditions being eliminated as possible, that the train is capable of traveling well over 1,000 miles between brake inspections. By this, FRA contends that not only must the brake system be in quality condition but that the mechanical components of the equipment must be in equally prime condition. As the distance a train is allowed to travel increases, the mechanical condition of the equipment is a key factor in ensuring the proper and safe operation of the train brake system throughout the entire trip. FRA also continues to believe that the best place to ensure the proper conduct of these inspections and to ensure that the train's brake system and mechanical components are in the best condition possible is at a train's point of origin (initial terminal).

In 1994, FRA proposed a set of requirements that must be met by a railroad in order to move a train up to 1,500 miles without performing additional brake inspections. The requirements included such things as low defect ratios, maintenance programs, and the performance of quality brake and mechanical inspections at a train's point of origin. FRA agrees with several commenters that some of the proposed requirements were overly burdensome and were partially predicated on potentially subjective standards. However, FRA continues to believe that many of the inspection requirements and movement restrictions proposed in 1994 are valid conditions that must be met in order to permit the extended movement of trains. These include: the performance of a quality in-depth brake inspection by a highly qualified inspector; the performance of a quality mechanical inspection by a person qualified under 49 CFR 215.11; and a restriction on the number of set-outs and pick-ups occurring en route. FRA also believes these trains must be closely monitored to ensure that both the brake system and mechanical components remain safely intact throughout the train's journey.

FRA proposes to permit certain designated trains to move up to 1,500 miles between brake and mechanical inspections provided the railroad meets various inspection and monitoring requirements, which FRA believes will ensure the safe and proper operation of these trains. As no trains are currently permitted to travel in excess of 1,000 miles between inspections, FRA is not willing to propose more than 1,500 miles between such inspections until appropriate data is developed which establishes that equipment moved under the proposed criteria remains in proper condition throughout the train's trip. FRA believes that the proposed provision requiring the performance of an inbound inspection at destination or at 1,500 miles and the requirement that carriers maintain records of all defective

conditions discovered on these trains create the bases for developing such data. In order to ensure the accuracy of the data as well as ensure the proper and safe operation of these trains, FRA also proposes that these trains have 100 percent operative brakes and contain no cars with mechanical defects at their points of origin and at the time of departure from the 1,500 point, if moving an additional 1,500 miles from that location between brake inspections. FRA further proposes that these trains not conduct any pick-ups or set-outs en route, except for the removal of defective equipment, in order to minimize the disruptions made to the integrity of the train's brake system and reduce mechanical damage that may occur during switching operations. In addition, there is currently no reliable tracking system available to FRA to ensure that cars added to the train en route have been inspected in accordance with the proposed requirements.

As noted earlier in the discussion, FRA believes that in order for a train to be permitted to travel 1,500 miles between inspections, the train must receive inspections that ensure the optimum condition of both the brake system and the mechanical components at the location where the train originates. In order to ensure that these quality inspections are being performed, FRA proposes to require that they be performed by highly qualified and experienced inspectors. As FRA intends the Class I brake test that is required to be performed on these trains at their point of origin to be as in-depth and comprehensive as possible, FRA believes that these inspections must be performed by individuals possessing the knowledge to not only identify and detect a defective condition in all of the brake equipment required to be inspected, but also possess the knowledge to recognize the interrelational workings of the equipment and the ability to trouble-shoot and repair the equipment. Therefore, FRA proposes the term ''qualified mechanical inspector'' to identify and describe those individuals it believes possess the necessary knowledge and experience to perform the proposed Class I brake tests on these trains.

A ''qualified mechanical inspector'' is a person with training or instruction in the troubleshooting, inspection, testing, maintenance, or repair of the specific train brake systems the person is assigned responsibility and who's primary responsibilities include work generally consistent with those functions. (See § 232.5 of the section-by-section for a more detailed discussion of ''qualified mechanical inspector.'') FRA further believes these same highly qualified inspectors must be the individuals performing the proposed inbound inspection on these extended haul trains in order to ensure that all defective conditions are identified at the train's destination or 1,500 mile location. Similarly, FRA proposes that all of the mechanical inspections required to be performed on these trains be conducted by inspectors designated pursuant to 49 CFR 215.11, rather than train crew members, in order to ensure that all mechanical components are in proper condition prior to the train's departure.

C. Air Flow Method

The air flow method (AFM) of train air brake testing monitors the rate of air flow through the automatic brake valve to the brake pipe by the means of a brake pipe flow indicator. The AFM of brake testing is a more comprehensive test than the present leakage test. The leakage method only measures the amount of leakage from the brake and branch pipes, whereas the AFM tests the entire brake system including the reservoirs and control valves. In addition, the leakage method does not test the capability of the pressure-maintaining feature of the 26L brake equipment. The AFM, on the other hand, tests the brake system just as it is operated, with the pressure-maintaining feature cut in.

The AFM of qualifying train air brake systems has been allowed in Canada as an alternative to the leakage test since 1984. In addition, several railroads in the United States have been using the AFM since 1989 when the AAR's petition for a waiver of compliance was granted allowing the AFM as an alternative to the leakage test. In order to determine if the AFM of train air brake testing should be included as an alternative to the leakage test, FRA requested comments from interested parties in the ANPRM regarding the operating history of the AFM. *See* 57 FR 62552.

The AAR and several railroads commented on the operating experience of using the AFM. These commenters reported that the AFM is an effective and reliable method of qualifying train brakes and that the greatest benefit of the method is the information it provides to the train crew. CP Rail reported that testing on the AFM started in Canada in 1975 and became an alternate method of qualifying train brakes in 1984. CP Rail as well as several other railroads stated that they have experienced no problems with the method. Conrail commented that, although it initially experienced problems with sticking pointers, defective check valves, and protruding screws on the air flow meters, these problems have been eliminated. Conrail also stated that use of the AFM has indicated a slight reduction in undesired emergencies. Several railroads commented that the AFM provides information to the train crew regarding the brake pipe that is not provided by the leakage test. Two railroads responded that in all the years they have used the AFM they have experienced no instance where a train had to stop because the air flow could not be maintained. The AAR maintained that the failure rate of the air flow indicators is less than 1 percent. In fact, Conrail stated that it performed 9,000 air flow indicator calibrations in 1992 and found only 90 defective indicators. Several railroads commented that they currently calibrate the air flow meters on a 60-day to 92-day basis and have no problem with current calibration procedures. Two railroads noted that they initially had problems calibrating the devices due to orifice sizes but have since cured this problem. One railroad mentioned that it had problems calibrating the devices in extremely cold weather until it applied condition eight of FRA's waiver to the calibration of the gauge on the locomotive as well as the test orifices. (''The air flow indicator calibration test orifice shall be calibrated at temperatures of not less than 20 degrees Fahrenheit.'')

Railroad representatives unanimously opposed any requirement that would make using the AFM mandatory or the sole method of qualifying brake systems. All railroad commenters supported the adoption of the AFM as an alternative to the leakage test for qualifying braking systems. Most of these commenters suggested that the use of either method is an economical or operational decision that should be made by each individual railroad. One railroad recommended that trains qualified under the AFM should be requalified with the leakage test if the air flow indicator fails en route. The cost figures presented by the AAR and several railroads for equipping locomotives with air flow meters range from $350 to $1,450 per unit.

Both the Railway Labor Executives' Association (RLEA) and the BRC as well as several individual carmen opposed the adoption of the AFM as an alternative method of qualifying brake systems. The parties felt that the leakage test is the only reliable method for determining the integrity of the air brake system and for identifying leaks. These commenters stated that the AFM only determines whether the brake pipe is

compensating for existing leaks and does not identify the severity of the leak, and thus, trains would be allowed to operate with leaks over 5-psi, which is dangerous especially in cold weather and could result in an emergency application or derailment.

Westinghouse Air Brake Company (WABCO) responded stating that both the leakage test and the AFM combined with the 15-psi gradient restriction are effective and acceptable methods of qualifying braking systems. WABCO commented that the 60-CFM limit required by the AFM and the 5-psi limit required by the leakage test are both conservative figures in view of today's braking system capabilities, and that the 5-psi limit was derived long before today's pressure maintaining feature which is an integral part of all locomotive brake valves. WABCO stated that front-to-rear gradient is the most important element of braking performance and that long trains with a 15-psi gradient can be operated with no problem. This commenter also mentioned that the 60-CFM limit of the AFM would allow higher leakage on shorter trains but nothing that would cause a problem in brake operations if the 15-psi gradient is maintained.

Based on these comments, FRA proposed the air flow method as an alternative method for qualifying train brake systems in the 1994 NPRM. *See* 59 FR 47734. In response to this proposal, labor representatives continued to express opposition to the use of the air flow method as an alternative to the leakage test contending that it would not accurately measure the overall leakage in a train's air brake system. At a minimum, these commenters recommended that short freight trains not be allowed to use the air flow method as it may allow their operation with excessive leakage; however, these commenters did not provide an indication on what the size limitation should be. These commenters also urged FRA to adopt a 92-day calibration period as that is current practice. The proposals submitted by railroad management in the RSAC Working Group meetings included the option of using the air flow method when performing brake inspections. The Working Group did not address this portion of the carrier's proposal since the discussions were focused on more general requirements related to the inspection and testing of brake equipment.

FRA Conclusions. FRA believes that if a train contains a locomotive equipped with 26L freight locomotive brake equipment and the train is equipped with an EOT device, that train should be allowed to be qualified using the AFM. The AFM would be an alternative to the leakage test for qualifying properly equipped freight train brake systems. FRA recognizes the concerns of several labor organization commenters opposing the adoption of the AFM; however, FRA believes these commenters' apprehension is based on their unfamiliarity with the method. As FRA pointed out in the ANPRM and the 1994 NPRM, and as several commenters confirmed, the AFM is a much more comprehensive test than the leakage test. *See* 57 FR 62551, 59 FR 47682–47683. The AFM tests the entire brake system just as it is used, with the pressure-maintaining feature cut in. The method has been allowed in Canada since 1984 without any problems. Based on the comments from several railroads and information obtained during the method's testing from 1981 to 1988, FRA feels the AFM is an effective and reliable alternative method of qualifying train brakes. Although FRA is not mandating the use of the AFM, FRA does encourage railroads to use the method on all trains, not necessarily for qualifying the brake systems, but as a means of providing additional information regarding the brake system to the train crew. FRA further believes that calibration of the air flow indicators should be performed at least every 92 days, based on the fact that it is the calibration period required by the current FRA waiver granted to the AAR and because most railroads stated that they already calibrate the air flow indicators every 60 to 92 days and gave no indication that the period should be altered. *See* 54 FR 5195 (Feb. 1, 1989).

FRA also shares the same concerns as some commenters in allowing the use of the AFM as a means of qualifying braking systems on relatively short freight trains. FRA tends to agree that due to the shorter length of these types of trains the use of the AFM to qualify their brake systems might allow these trains to operate with excessive brake pipe leakage. However, FRA also tends to agree that if the proposed 15-psi gradient is maintained then the leakage on these shorter freight trains should not cause a problem in brake operations. Furthermore, FRA is not currently able to adequately delineate those freight trains, if any, that should not be afforded the option of using the AFM. Consequently, FRA seeks comment from interested parties on the following:

1. What is the current industry practice and experience regarding the use of the AFM on relatively short freight trains?

2. Is there an identifiable train length at which the use of the AFM creates the potential for a train to operate with excessive leakage?

D. Brake Pipe Reduction

Present regulations require brake-pipe reductions of either 15 pounds, 20 pounds, or full service depending on which of the required train air brake test is being performed. *See* 49 CFR 232.12, 232.13. In the ANPRM, FRA sought comments from interested parties to determine if it is feasible and beneficial for FRA to establish one standard brake-pipe reduction for all required train air brake tests. *See* 57 FR 62556.

The AAR and several railroads recommended that some type of performance standard be established so that each railroad could determine the amount of reduction that best suits its operation. The AAR also suggested that if the reduction amounts were left in the discretion of the individual railroads, it would be receptive to a requirement that the railroad indicate what reduction rates it would use at different locations. Several railroads commented that one standard reduction should be required for all tests and inspections and that the standard should not require an increase to a full service reduction because such a practice could cause undesired releases. These commenters also noted that one standardized reduction for all tests would simplify air brake tests and make it easier for the railroads to train and instruct their employees. Most of the commenting railroads suggested a 20-psi reduction if a specific amount were established.

Representatives of several labor organizations recommended that one standard reduction be established by FRA rather than allowing each individual railroad to determine their own reductions. This recommendation was based on the commenters' concern that varying reduction standards among the railroads would cause confusion for train crews since many railroads swap trains and operate crews over each other's lines. These commenters also felt that one standardized reduction would make training easier.

In the 1994 NPRM, FRA proposed a standardized brake pipe reduction of 20-psi for all required brake inspections and tests. *See* 59 FR 47688. The only response FRA received to this proposal was from the BRC which contended that a 20-psi reduction was not good for determining brake pipe leakage since the higher the pressure in the brake pipe, the greater the leakage. This commenter recommended that FRA retain a 15-psi reduction requirement for the performance of the leakage test.

FRA Conclusions. FRA intends to again propose a standardized brake pipe

reduction of 20-psi for all brake inspections except in regard to the brake inspection performed on a transfer train. Due to the lower air pressure at which the transfer train brake test is performed, FRA believes that requiring only a 15-psi reduction during this inspection is the most effective for ensuring the proper operation of the brake system on these train. FRA recognizes BRC's concerns regarding impact of an increased air pressure reduction on the performance of the leakage portion of a brake test; however, FRA believes that the concerns are addressed by FRA's proposal to increase the minimum pressure at the rear of the train from 60-psi to 75-psi. Furthermore, FRA agrees with many of the commenters that a standardized brake pipe reduction of 20-psi is sufficient for the performance of all other required brake inspections and tests. FRA believes that the adoption of one standard reduction will simplify both the performance of the required inspections and the training of employees charged with performing these inspections. Under the proposal, FRA would no longer require full service reductions for any of required inspections in order to avoid the possibility of undesired releases.

FRA believes that the suggestion of several commenters to allow each railroad to determine its own brake pipe reduction is not viable. It is not uncommon to find train crews operating in several different locations or to find the train crew of one railroad operating the equipment belonging to another railroad or operating over the lines of another railroad. Thus, if various reductions were established by different railroads or by one railroad in different locations, it would cause further confusion in both the performance of the inspections and the training of personnel.

E. Charging of Air Brake System

Present regulations for air brake testing basically require that cars that have previously been tested in accordance with the regulations either ''be kept charged until road motive power is attached'' or be retested. 49 CFR 232.12(i). Based on longstanding administrative interpretation and practice, FRA presumes that a brake system is no longer adequately charged if disconnected from the charging device (supply of pressurized air) for more than two hours before coupling of locomotives; otherwise, retesting is required. In the ANPRM, FRA requested comments from interested parties regarding the viability of this interpretation and sought information for developing alternative procedures that would not jeopardize safety. *See* 57 FR 62556.

The AAR and several railroads stated that there is no reason to assume that once a train is charged and tested and then left standing without being provided with a source of compressed air that the brake system would become defective. These parties suggested that leakage on standing trains has been greatly reduced through the use of welded brake piping and fittings and ferrule-clamped air hoses. These commenters felt that FRA's interpretation of allowing trains to sit without air for only two hours is from an era when this new equipment was not used. They also stated that FRA's current interpretation costs the industry money, fuel, and time and creates pollution because trains must either be reinspected or left with a locomotive attached and idling in order to avoid performing a full initial terminal test. Several railroads suggested that trains could be off air indefinitely if the consist is not altered, or at least as long as 24 hours, and remain in the same condition. Several commenters recommended that if a set of cars is off air for an extended period, all that should be required is a set-and-release test to assure the continuity of the brake pipe. CP Rail Services mentioned that there is no such two-hour rule in Canada and stated that in Canada if cars are off air for any length of time a set-and-release continuity test is required. Every commenting railroad felt the current two-hour interpretation is onerous and unrealistic.

The BLE, BRC, and several individual carmen felt that the current interpretation is reasonable. Most of these commenters expressed concern for the integrity of the brake system if a consist were left standing for longer than two hours. These concerns were aimed at the effect that climate might have on the equipment and the increased possibility of vandalism to the equipment if consists sat without air for longer periods. One conductor recommended returning to a four-hour limit as a minimum.

FRA Conclusions. In the 1994 NPRM, FRA proposed to permit trains to be removed from a continuous source of compressed air for up to four hours without requiring the re-performance of a comprehensive brake inspection. FRA received very few comments that directly addressed the safety implications of this proposal, thus, FRA intends to propose the four hour time limitation in this NPRM. FRA agrees that our longstanding administrative interpretation, that requires the retesting of cars disconnected from a charging device for longer than two hours, was established prior to the development of new equipment that has greatly reduced leakage problems, such as welded brake piping and fittings and ferrule-clamped air hoses. However, contrary to several railroads' assertions, FRA does not believe that cars should be allowed to be off air for extended periods of time without being retested. FRA believes that the longer cars sit without air attached the greater the chances are that the integrity of the brake system will be compromised. The longer cars sit the more susceptible they may be to weather conditions or even vandalism, as some commenters suggested. Consequently, based on today's equipment, operating practices, and overriding safety concerns, FRA feels that cars should not be disconnected from a continuous supply of pressurized air for longer than four hours without being retested. FRA also believes that the source of compressed air must be sufficient to maintain the integrity of the brake system. Consequently, FRA proposes to require that the source of compressed air be maintained at a minimum level of 60 psi.

III. Movement of Equipment With Defective Brakes.

The current regulations do not contain requirements pertaining to the movement of equipment with defective power brakes. The movement of equipment with these types of defects is currently controlled by a specific statutory provision originally enacted in 1910, which states:

> (a) GENERAL.— A vehicle that is equipped in compliance with this chapter whose equipment becomes defective or insecure nevertheless may be moved when necessary to make repairs, without a penalty being imposed under section 21302 of this title, from the place at which the defect or insecurity was first discovered to the *nearest available place at which the repairs can be made*—
>
> (1) on the railroad line on which the defect or insecurity was discovered; or
>
> (2) at the option of a connecting railroad carrier, on the railroad line of the connecting carrier, if not further than the place of repair described in clause (1) of this subsection.

49 U.S.C. 20303(a) (emphasis added).

Although there is no limit contained in 49 U.S.C. 20303 as to the number of cars with defective equipment that may be hauled in a train, FRA has a longstanding interpretation which requires that, at a minimum, 85 percent of the cars in a train have operative brakes. FRA bases this interpretation on another statutory requirement which permits a railroad to use a train only if ''at least 50 percent of the vehicles in

the train are equipped with power or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in a train.'' 49 U.S.C. 20302(a)(5)(B). As originally enacted in 1903, section 20302 also granted the Interstate Commerce Commission (ICC) the authority to increase this percentage, and in 1910 the ICC issued an order increasing the minimum percentage to 85 percent. *See* 49 CFR 232.1, which codified the ICC order.

As virtually all freight cars are presently equipped with power brakes and are operated on an associated trainline, the statutory requirement is in essence a requirement that 100 percent of the cars in a train have operative power brakes, unless being hauled for repairs pursuant to 49 U.S.C. 20303. Consequently, FRA currently requires that equipment with defective or inoperative air brakes make up no more than 15 percent of the train and that if it is necessary to move the equipment from where the railroad first discovered it to be defective, the defective equipment be moved no further than the nearest place on the railroad's line where the necessary repairs can be made or, at the option of the receiving carrier, to a repair location that is no further than the repair location on the delivering line.

In addition to the general requirements relating to the movement of equipment with defective safety appliances, FRA requires 100 percent operative brakes on trains departing initial terminal locations. The 100 percent at initial terminal requirement has been a standard by which the railroad industry has operated for decades and one which FRA has endorsed since its inception. The requirement is founded on Congress' incorporation of the AAR's rules, standards, and instructions as of April 11, 1958, regarding the installation, inspection, maintenance, and repair of train brakes. In 1958, Congress amended § 9 of the Safety Appliance Acts by incorporating the inspection requirements of the AAR into the statute and permitting their change only for the purpose of achieving safety.[4] Based on a review of the legislative history surrounding that amendment, FRA believes it is clear that Congress interpreted the AAR standards as requiring 100 percent operative on all trains prior to departure from an initial terminal. As the current regulations regarding the performance of an initial terminal inspection contained at 49 CFR § 232.12 (c)–(j) were basically an adoption of the AAR inspection and testing standards as they existed in 1958, FRA believes that the current regulations are intended and do require 100 percent operative brakes at initial terminals.

In the 1994 NPRM, FRA proposed conditions for the movement of equipment with defective brakes without civil liability which incorporated the stringent conditions contained in the Safety Appliance Acts, presently codified at 49 U.S.C. 20302, 20303, 21302, and 21304. *See* 59 FR 47728. FRA proposed the codification of these requirements in order to clarify the duties of a railroad and to ensure the safe movement of this equipment. In 1994, FRA further proposed that all cars and locomotives found with defective brake equipment be required to be tagged as bad ordered and determined safe to move by a qualified person in order to be deemed as being hauled for repairs. FRA also attempted to delineate when a location would be considered a repair location by interpreting that locations where repair trucks or vehicles had visited within the last 365 days would be considered repair locations for purposes of the proposal. *See* 59 FR 47697.

Several railroad representatives commented that FRA's interpretation of a repair location with regard to mobile repair trucks was inadequate, overly broad, and failed to consider many of the factors necessary for determining whether a location is a place where repairs can be effectuated. Labor representatives not only recommended that defective equipment not be allowed to move past a yard, siding, or other location accessible to a mobile repair truck, but also suggested a 125 mile limit on the movement of such equipment. In its alternative proposal to the 1994 NPRM, the AAR proposed that all trains could depart initial terminals with only 95 percent operative brakes, regardless of whether repairs could be effectuated at the location. This proposal was premised on the contention that there is not a safety risk posed by a train operating with 95 percent operative brakes and that FRA acknowledges this because it currently permits trains to operate with only 85 percent operative brakes. The AAR's alternative proposal also would have permitted some trains to operate with less than 85 percent operative brakes if appropriate operational measures were taken to move the train safely.

The proposals submitted by both rail labor and rail management representatives as part of the RSAC Working Group deliberations contained provisions for permitting the movement of equipment with defective brakes to be hauled from or past locations where the necessary repairs could be effectuated. Similar to the AAR's alternative proposal, the carrier's proposal would have permitted all trains to operate with only 95 percent operative brakes but would have capped the percentage at 90 percent rather the current 85 percent. As noted previously, the railroad's proposal was part of a package that included 500-mile inspections and flexibility in the movement of defective equipment was considered essential by the railroads in order to accept the reduced inspection intervals. Although labor's proposal permitted some trains to operate out of initial terminals and to destination with only 95 percent operative brakes, the proposal limited the flexibility to trains that were thoroughly inspected by carmen. Furthermore, labor's proposal was also presented as a package which included many other requirements intended to ensure the safety of permitting some trains to operate with a few defective cars entrained.

FRA Conclusions. It is clear from the preceding discussion that many of the proposals received by FRA since the issuance of the 1994 NPRM are in direct conflict with various statutory requirements. As the RSAC Working Group was unable to reach a consensus on the inspection, testing, and maintenance requirements for freight train brake systems, FRA is not willing or able to propose provisions regarding the movement of equipment with defective brakes that would be contrary to existing statutory mandates. Therefore, FRA intends to propose provisions related to the movement of defective equipment which are very similar to the requirements proposed in the 1994 NPRM. *See* 59 FR 47728. However, the current proposal clarifies the tagging requirements, contains provisions regarding the placement of defective equipment, and provides a consistent method for calculating the percentage of operative brakes on a train. Consequently, in addition to being consistent with the statutory requirements, FRA believes that the proposed requirements will ensure the safe and proper movement of defective equipment and will clarify the duties imposed on a railroad when moving such equipment.

FRA proposes that all cars or locomotives found with defective or

[4] In 1994, Congress recodified the federal railroad safety laws and 45 U.S.C. § 9 of the Safety Appliance Acts is currently codified at 49 U.S.C. §§ 20301 and 20302. The reference to the AAR rules, standards, and instructions was removed during the recodification as being obsolete. *See* Pub. L. 103–272 (July 5, 1994).

inoperative braking equipment be tagged as bad ordered with a designation of the location where the necessary repairs can and will be effectuated. FRA has again attempted to expressly clarify the requirement that equipment with defective brakes shall not depart from or be moved beyond a location where the necessary repairs to the equipment can be performed. Therefore, if a car or locomotive is found with defective brakes during any of the proposed brake inspections or while the piece of equipment is en route and the location where the defective equipment is discovered is a place where repairs of the type needed can be performed, that car or locomotive shall not be moved from that location until the necessary repairs are effectuated. However, if repairs to the defective condition cannot be performed at the location where the defect is discovered, or should have been discovered, this proposal makes clear that the railroad is permitted to move the equipment with the defective condition only to the nearest location where the necessary repairs can be performed.

What constitutes the nearest location where the necessary repairs can be performed is an issue FRA has grappled with for decades and has become exceedingly more difficult with the growing use of mobile repair trucks. In the preamble to the 1994 NPRM, FRA attempted to clarify the issue by stating that any location visited in the last 365 days by a repair truck or vehicle, capable of making repairs of the type required, would be considered the nearest point where repairs could be effectuated. *See* 59 FR 47697. After consideration of all of the comments received and based upon FRA's enforcement experience, FRA believes that this statement does not sufficiently address the issue and may lead to undesired consequences. FRA believes that mobile repair trucks are a valuable asset, not only economically for the railroads but also from a safety perspective, as they provide the ability to conduct repairs at outlying locations and thus, reduce the movement of defective equipment. It became apparent to FRA that the statement made in the 1994 NPRM regarding mobile repair trucks, would lead to railroads contending that various repair trucks lacked the capability of making brake repairs because the railroad voluntarily removed spare brake equipment and air compressors from the trucks, thus, circumventing the trucks' usefulness. In addition, the statement would tend to create a potential repair location whenever a truck was used to effectuate a repair at a location where it has never conducted repairs in the past, thereby, decreasing a railroad's incentive for performing repairs on a particularly hazardous piece of equipment if it is not a certain location.

Rather than attempt to develop a standard applicable to all situations, which FRA does not believe can be accomplished, FRA intends to approach the issue of what constitutes the nearest repair location based on a case-by-case analysis of each situation. FRA believes that its field inspectors are in the best position to determine whether a railroad exercised good faith in determining when and where to move a piece of defective equipment. In making these determinations both the railroad as well as FRA's inspectors must conduct a multi-factor analysis based on the facts of each case.

The following discussion is based upon the voluminous case law which exists that establishes the guiding principles for determining whether a location constitutes the nearest location where the necessary repairs can be made as well as previous guidance provided by FRA regarding identification of repair locations. In determining whether a particular location is a location where necessary repairs can be made or whether a location is the nearest repair location, the accessibility of the location and the ability to safely make the repairs at that location are the two overriding factors that must be considered in any analysis. These two factors have a multitude of sub-factors which must be considered, such as: the type of repair required; the safety of employees responsible for conducting the repairs; the safety of employees responsible for getting the equipment to or from a particular location; the switching operations necessary to effectuate the move; the railroad's recent history and current practice of making repairs (brake and non-brake) at a particular location; and relevant weather conditions. Although the distance to a repair location is a key factor, distance alone is not the determining factor of whether a particular location is the nearest location for purposes of effectuating repairs and must be considered in conjunction with the factors noted above. Existing case law makes clear that neither the congestion of work at a particular location or convenience to the railroad are to be considered when conducting this analysis.

FRA will continue to require 100 percent operative brakes on trains at their point of origin (initial terminal). As noted above, this has been a requirement in the railroad industry for decades and FRA believes it is not only wise from a safety standpoint, as it ensures the proper operation of a train's brake system at least once during its life, but it sets the proper tone for what FRA expects to be accomplished at these locations. FRA believes that requiring 100 percent operative brakes on all trains at their inception provides the railroads with a margin for failure of some brakes while the train is in transit (up to 15 percent) and tends to ensure that defective equipment is being repaired in a timely fashion. In addition, FRA believes that the 100 percent requirement is consistent not only with Congress' understanding of the AAR inspection standards that were adopted in 1958, but also with the intent of FRA, rail management, and rail labor as to what was to occur at initial terminals when the inspection interval was increased from 500 miles to 1,000 miles in 1982. At that time, carrier representatives committed to the performance of quality initial terminal inspections in exchange for an extension in the inspection interval, for which FRA intends to hold them accountable. In addition, the 100 percent requirement is consistent with the statutory requirements regarding the movement of defective equipment because a majority of the locations where trains are initiated have the capability of conducting virtually any brake system repair, and thus, the defective equipment could not be moved from those locations anyway.

FRA recognizes that the 100 percent requirement at points of origin tends to be somewhat burdensome for some railroads at certain locations. However, FRA has made clear in its technical bulletins that railroads are free to petition for a waiver of this requirement upon showing that it is not capable of making repairs at these locations and that alternative means are provided to ensure a similar level of safety at those locations. To date, no railroad has filed such a petition. Therefore, it appears that there are very few locations where the requirement is a burden and railroads are either capable of repairing the cars at those locations or have devised alternative means for moving the cars from those locations.

The latter portion of the preceding scenario is somewhat troubling to FRA. Currently, railroads are required to have 100 percent operative brakes at initial terminals, however, railroads are permitted to pick-up defective cars at these same locations, if the necessary repairs cannot be performed, and haul them for repairs. Thus, a situation exists wherein the railroad is required to set defective cars out of a train if the train

is initiated at that location, but are then able to pick-up those same defective cars in an en route train and haul them to the nearest location where the necessary repairs can be performed. FRA recognizes that this creates a somewhat illogical situation; however, FRA believes that by retaining the 100 percent requirement at these locations the public is assured that a train's brake system is in near perfect condition at the beginning of its journey, train crews are more cognizant of the presence of defective cars in the train when they are picked-up en route, railroads are more likely to perform repairs at a location where trains are initiated in order to avoid breaking-up trains to set-out defective cars once the trains are assembled, and FRA retains a clear and consistent enforcement standard that can be easily understood by its inspectors and railroad industry employees.

Although FRA has internally attempted to develop suitable industry-wide criteria for permitting trains to depart points of origin with a minimum number of defective brakes if the location is one where the necessary repairs cannot be made, FRA is not willing to permit such flexibility without fully considering the safety hazards or potential abuses which may accompany such an approach. Therefore, FRA seeks comment from interested parties regarding the potential for permitting very limited flexibility in moving defective equipment from outlying points of origin which lack the capability of effectuating brake system repairs. Of major concern to FRA is the potential for railroads to designate a large number of locations, where trains are initiated, as being unable to effectuate brake system repairs by merely closing existing repair facilities or reducing the capability of mobile repair vehicles at the locations. Therefore, any potential flexibility must ensure that only those locations that are truly incapable of performing brake system repairs, due the physical geography or design of the location, are afforded the flexibility. In addition, FRA must have the ability to approve any designation made by a railroad to ensure that the location is truly one in need of the flexibility and that the designated repair location is actually the nearest location where proper repairs could be made. Furthermore, any approach must also ensure the adequate identification and tracking of the trains and defective equipment moved from the location.

One potential method of ensuring limited designations is to require the designation of a location within a very short distance (50–100 miles) of the outlying location where all repairs will be conducted. Under this approach, FRA would strictly limit the percentage of inoperative brakes (5 percent or less) that could be moved in a train from that location and would require a qualified inspector to determine the safety of such a move. An alternative approach might include the ability of the railroad to perform something less than a full Class I brake test at the train's point of origin and permit the movement of the train a very short distance (50 miles or less) to a designated location where the train would receive a complete Class I brake test.

FRA believes that permitting some limited flexibility in this area might have the potential of actually increasing the safety of trains originating at some outlying locations that lack the ability to effectuate brake system repairs. It would likely reduce the amount of switching that occurs at these locations as defective equipment could remain entrained until it reaches a more conducive location for being repaired, inspected, or set-out of the train. It might also reduce the percentage of defective equipment which may move in any single train from some of these locations where run-through or local trains are used to move the defective equipment to another location for repair as railroads will not let the number of cars with defects build-up. In addition, it would reduce the distance that defective equipment is hauled before proper repairs are made since any approach would limit the distance such cars could be hauled before repairs or reinspection would be required. Furthermore, a more flexible approach might have the potential for increasing the quality of inspections since the restrictions for handling a defective piece of equipment would be somewhat less and trains would have the ability to be moved to a location where highly experienced inspectors are available.

In light of the preceding discussion, FRA seeks comments from all interested parties regarding the viability of permitting some flexibility in the 100 percent requirement for trains initiated at outlying locations that lack repair capability and seeks recommendations on potential approaches for permitting such flexibility. Specifically, FRA seeks comment or information on the following:

1. How many locations currently exist that are initial terminals for some trains that lack the capability of effectuating any brake system repairs? Partial repair ability? If so, what types of repairs can generally be made?

2. How many trains are currently initiated at locations that lack the capability to perform brake system repairs?

3. How do railroads currently handle equipment found with defective brakes at initial terminals that lack the ability to effectuate the necessary repairs?

4. What operational or recordkeeping requirements should be imposed on trains if they were permitted to depart a point of origin with a minimum number of cars with defective brakes entrained?

5. Are any of the potential safety benefits described above valid? What are the potential safety hazards or concerns in permitting such flexibility?

IV. Dynamic Brakes

The issue of dynamic brakes, and the extent to which FRA should impose regulatory requirements governing their use, if at all, is one which has prompted lengthy and animated debate between all affected parties since the issuance of the ANPRM in December 1992. Coincident with the drafting of the ANPRM, the Rail Safety Enforcement and Review Act amended Section 202 of the Federal Railroad Safety Act of 1970 (recodified at 49 U.S.C. 20141), and mandated, in part, that FRA, ''where applicable, prescribe regulations that establish standards on dynamic braking equipment.'' This specific mandate is derived largely from two NTSB recommendations to FRA concerning dynamic brakes following the Southern Pacific Transportation Company (SP) accident at San Bernardino, California on May 25, 1989.

In this accident, excessive tonnage and excessive speed cresting a 2.2 percent grade, complicated by the fact that the train crew had been provided erroneous information regarding available and operative dynamic brakes, led to a train that was out of control and was ultimately unable to stop before derailing. While the NTSB determined the primary cause of the accident to be the excessive weight of the train as compared to that reported to the train crew, a secondary cause was determined to be the fact that the engineer had far less operable dynamic braking available for use than expected. The combination of these two conditions likely led to flawed decision making by the train crew in developing train handling strategies for negotiating the grade safely. In its final report, the Safety Board issued the following recommendations to the FRA regarding dynamic brakes:

1. Study, in conjunction with the AAR, the feasibility of developing a positive method to indicate to the operating engineer in the cab of the controlling locomotive unit the

condition of the dynamic brakes on all units in the train.

2. Revise regulations to require that if a locomotive unit is equipped with dynamic brakes that the dynamic brakes function.

To reiterate the general explanation of the principles of dynamic braking, as provided in both the ANPRM (57 FR 62546) and 1994 NPRM (59 FR 47676), dynamic brakes were developed as a ''free'' by-product of the diesel-electric drive train. By engaging the dynamic brake, the normally powered traction motors on each axle are changed to generators, and the power generated is dissipated through resistance grids. The effect is similar to that of shifting an automobile to a lower gear when descending a steep grade. The additional hardware needed to outfit a locomotive with dynamic brakes includes the grids and the controls and switches.

The primary selling point of dynamic brakes has been the ability to reduce freight car brake shoe wear. The dynamic brake is also useful in controlling train slack in lieu of using the locomotive independent brake. Furthermore, use of the dynamic brake in controlling train speed in lieu of power braking, where the train brake is applied with the locomotive under power, is a major factor in fuel savings. Due to these benefits, railroads currently emphasize and encourage the use of dynamic brakes as evidenced through examination of numerous carriers' operating rules which dictate the use of dynamic braking as the preferred method of slowing and/or controlling a train, especially in heavy grade territory. Historically, dynamic brakes have been applied to locomotives at the individual railroad's option, primarily based on economic considerations. It is important to note that, at present, the vast majority of new locomotives procured by the railroads are equipped with dynamic brakes.

In order to determine the types of requirements or standards that should be developed regarding the design and use of dynamic brakes, FRA requested comments from interested parties regarding the reliability, testing, and cost of dynamic brakes as well as the types of information that are or could be provided to the engineer regarding the availability and operation of the devices. *See* 57 FR 62555. Comments were received from numerous interested parties, and were discussed at length in the 1994 NPRM. *See* 59 FR 47686. Nearly all of these comments parallel discussions that transpired throughout the RSAC Working Group deliberations and negotiations, discussed later in this section, and as such, are not reiterated here in an effort to avoid redundancy. In summary, while FRA was not persuaded that dynamic brakes warrant emphasis as the primary safety system, the agency recognized that the statute communicates a valid safety concern, properly construed. That is, to the extent significant emphasis is placed on dynamic brakes, either by the railroads as a legitimate means of limiting fuel consumption, undesired emergency brake applications, and wear to freight car components, or by safety critics who do not foresee that hazard of reliance on such systems, engineers may in fact be encouraged to make errors in judgment that take them beyond prudent safety margins. At such a critical point, proper functioning of any secondary safety system, however subject to failure, is very desirable. Further, dynamic brakes offer a redundant safety feature should the engineer make a mistake in judgment leading to excessive speed under the prevailing conditions of grade, tonnage, and weather.

Although FRA did not propose requiring that locomotives be equipped with dynamic brakes in the 1994 NPRM, FRA did acknowledge that Congress, in § 20141, intended for FRA to develop meaningful and enforceable standards regarding the safe use and operation of dynamic brakes. Accordingly, and upon considering comments received in response to the ANPRM, FRA proposed the following general requirements for inclusion in the 1994 NPRM:

(1) Engineers should be informed on the safe and proper use of dynamic brakes;

(2) Engineers should be provided with information regarding the total dynamic brake retarding force available on all outbound trains equipped with dynamic brakes;

(3) Railroads operating braking systems that include dynamic brakes should have written operating rules, tailored to the specific equipment and territory of each railroad, governing the safe handling procedures for the use of dynamic brakes under all operating conditions, including procedures covering the loss of dynamic brakes;

(4) Running tests of the dynamic brake should be performed whenever the motive power or engine crew is changed so that the availability, or lack of availability, of the device can be rechecked; and

(5) Locomotives built after January 1, 1996, and equipped with dynamic brakes, should be able to (i) test the electrical integrity of the dynamic brake at rest, and (ii) display the total train dynamic brake retarding force, at certain speed increments in the cab of the controlling locomotive.

Comments received during both the public hearings and in writing, following issuance of the 1994 NPRM, predominately reiterated comments provided in response to the ANPRM. Specifically, railroads and suppliers emphasized their contention that dynamic brakes are not the primary braking system for a train, but rather are economical devices utilized to increase the efficiency of their operations. These commenters clearly stated that the decision to equip and operate locomotives with dynamic brakes is one dictated by economics, and as such, should be governed by specific operating rules and not by federal regulation. A number of railroads noted that the technology has not been developed to continuously monitor the status of available dynamic brakes on trailing locomotive units. These commenters further questioned FRA's inclusion of such a requirement in the NPRM, noting that dynamic brakes can fail at any time, and tend to fail while in use, rendering a real-time display of available dynamic braking capacity somewhat meaningless when relied upon to develop train handling strategies. Several railroads also noted that running tests as prescribed in the NPRM are unnecessary, impractical, and may increase safety risks at some locations.

Railroad labor representatives commented that if locomotives are equipped with dynamic brakes, then they should be fully operative and functional at all times and they should be maintained on a regular basis. Rail labor provided comments in response to the ANPRM stating that they did not feel that dynamic brakes could be monitored, and even if they could, monitoring would probably not be that effective since dynamic brakes tend to fail in use. In contrast, however, rail labor testified during the public hearings and in written comments to the 1994 NPRM that they fully support the use of whatever technology is available to continuously monitor the status of available dynamic braking.

At the initial RSAC Power Brake Working Group meeting in May 1996, the working group members acknowledged the need for, and established a separate task force to specifically address the issue of dynamic brakes. The working group identified four broad areas relating to dynamic brakes to be further developed by the task force as follows: (1) Operational requirements; (2) available indicators; (3) en-route failures; and (4) testing and inspection. The task force

was comprised of representatives from FRA, labor, management, suppliers, and NTSB.

The task force initially focused its efforts on identifying alternative technologies capable of providing a locomotive engineer with information regarding dynamic brakes on trailing units. Various methodologies, at differing levels of development and/or testing, were discussed as potentially viable options to provide such information including: placement of an accelerometer in the lead locomotive; incorporation of indicator lights to inform the engineer whether dynamic brakes set up on trailing units; utilization of intra-train communication links; and utilization of the ECP train brake system under development to transmit the desired information. However, these discussions quickly refocused on the larger and more fundamental question raised during the 1994 NPRM and subsequent comments; namely, even assuming that technology is or will be available in the near future to continuously monitor the status of available dynamic brakes, is this information somewhat meaningless to the engineer when formulating braking strategies given the nature of dynamic brake failures. The task force quickly lost focus and direction while contemplating this larger, more complex issue, and solicited guidance from the full Working Group to refine the broad issues established at the initial meeting of the full Working Group and further define the specific issues and information to be developed by the task force.

The Working Group developed four specific issues for detailed review by the task force. First, if a locomotive is equipped with dynamic brakes, do or must they work. Railroad representatives on the task force maintained, consistent with previous comments, that an inoperative dynamic brake is not considered an impairment to train braking, and that the automatic brake is considered the primary brake capable of controlling the speed of the train under all conditions. These representatives noted that an engineer must be prepared to operate a train with only air brakes at all times since the dynamic brake may fail at any time without advance signs of deterioration. These commenters also stressed that it is not correct to speak of ''stopping'' a train through use of the dynamic brake because the locomotive must be in motion before any retarding force is generated. Simply restated, these representatives did not feel that dynamic brakes are safety devices, but rather are economical devices whose operation should be governed by the railroads' operating procedures and not through federal regulations.

Rail labor representatives on the task force countered by noting that many railroads have published operating rules which instruct engineers to utilize dynamic brakes as an integral part of their train handling techniques. More importantly, these task force members referenced an AAR research paper presented at the Air Brake Association Meeting in September 1991 which provided results from stopping distance tests performed in grade territory with double-stack equipment with approximately 101 tons per operating brake. Summarily, this report concluded that, ''From this it can be seen that trains such as this double-stack test train cannot be safely controlled on 3% grades with the service brake alone, and that dynamic brake failure on two or more units would require a train to be stopped with an emergency application on the grade.'' Given the current emphasis of many railroads' operating procedures regarding the utilization of dynamic brakes, labor representatives strongly recommended that the railroads be required to repair defective dynamic brakes within a specified interval. These task force representatives strongly believed that the failure of the current regulation to mandate the timely repair of locomotive units with inoperative dynamic brakes has resulted in the railroads being free to repair these units at their leisure based primarily on economics and convenience. Labor representatives contended that a requirement to repair inoperative dynamic brakes concurrent with the 92-day locomotive inspection interval would impose a minimal logistical burden on the railroad and would help ensure a locomotive fleet with operating and effective dynamic brakes.

All members of the task force discussed methods by which to allow a railroad to declare a locomotive unit ''not equipped'' without physically removing the hardware necessary for operation of the dynamic brakes. There was general agreement within the task force that such a provision was necessary, specifically when considering the needs of short line railroads. These railroads typically have limited need or desire to utilize dynamic brakes within their operating environment, but tend to purchase locomotives from larger Class 1 carriers that are equipped with dynamic brakes. Although there was general agreement regarding the necessity for such a provision, the task force members were unable to reach consensus on the particulars that would ensure declarations of ''not equipped'' were not made to intentionally circumvent any prescribed maintenance requirements that might be imposed. Concerns were also raised regarding the perceived ability of a railroad under such a provision to declare a locomotive ''not equipped'' one day and ''equipped'' soon thereafter based primarily on operational considerations and/or economics.

The second specific issue assigned to the task force by the Working Group centered on whether the level of dynamic brakes can or should be continuously monitored and conveyed to the engineer, and how the locomotive engineer is notified if the dynamic brakes do not work. Comments received in response to questions posed in the ANPRM, testimony provided in the public hearings, and discussions in both the Working Group and the task force deliberations have not identified an existing, accurate, and cost-effective means by which to provide the engineer a continuous, real-time status of dynamic braking availability and capacity. Absent such a real-time status indicator of dynamic brakes, rail labor representatives on the task force clearly advocated the need for engineers to be apprised of the status of the dynamic brakes on each unit in the locomotive consist, either verbally or in writing, prior to departing each initial terminal location and at each crew change location.

The task force considered utilizing accelerometers as an interim or alternative solution to the current lack of technology. Accelerometers have become very common in the industry in the last several years, and several demonstrations of an accelerometer's ability to display braking effort were reviewed by the task force. Using various locomotive simulators, task force members observed examples of dynamic braking on both relatively flat and heavy grade conditions which demonstrated how, in some cases, an accelerometer can provide more information to the engineer than a display of the amperage from the trailing locomotives. During the simulation exercise, the amperage reading remained unchanged on all locomotives in the simulated consist during the slow down, but the accelerometer provided information as to the actual braking effort of the dynamic brake through changes in its rate of deceleration value (expressed in mph/minute) as the dynamic brake slowed the simulated train through the dynamic brake's effective range. While additional simulations further demonstrated advantages of using

accelerometers as opposed to amperage readings, the task force did not collectively endorse this equipment as a solution to the issue of dynamic brake monitoring.

In addition to the uncertainty of available technology, the task force addressed the ancillary issue of ''information overload'' associated with an additional display being shown on the engineer's console. Task force members cited a parallel example of this phenomenon related to current radio-controlled distributive power equipment and its ability to display all conditions such as brake pipe, equalizing reservoir, amperage, throttle or dynamic brake position, and locomotive brake cylinder pressure on remote locomotives. Concerns have been expressed that the redundant information being provided via these screens is not being utilized by most locomotive engineers, and that such information simply clutters an already visually challenging control stand and may contribute to decreased levels of safety by drawing the engineer's attention away from other necessary duties.

The task force contemplated the feasibility and benefits of incorporating a ''dynamic brake light'' outside the cab of a locomotive to provide the engineer with a status display of available dynamic brakes. A strobe light was recommended in order to offer visibility in foggy, rainy, and other inclement weather conditions. Upon further discussion, this option was considered questionable in that it could prove to be a distraction to the locomotive engineer by directing his/her attention to the rear when critical braking decisions would require the attention of the engineer to be in the direction of travel. Several task force members also noted that the curvature of the track in certain locations could conceivably obscure visual contact with the light, while others maintained that a light alone offered little information about the actual performance of the dynamic brake and could simply mislead the engineer.

The third specific issue assigned to the task force for resolution involved the establishment and maintenance of records concerning dynamic brakes on locomotive units. This issue was not fully developed by the task force, in that any specific recordkeeping requirements are somewhat predicated on resolution of the previously discussed issues regarding whether or not locomotives need to be equipped with operative dynamic brakes. The task force noted that appropriate records would be required if specific maintenance intervals were established (i.e. at the 92-day locomotive inspection as discussed earlier), but no consensus was reached on this issue.

The last issue provided to the task force focused on en route failures of the dynamic brakes. Railroad representatives on the task force again stated that the dynamic brakes are not the primary braking system for the train, and that they are not used to actually stop the train. Based on this assertion, these representatives did not believe that any operating restrictions should be imposed on continued movement of the train should the dynamic brakes fail on a unit or units en route. Rail labor representatives on the task force refuted this position, and maintained that a railroad should implement a number of safeguards should a dynamic brake become inoperative en route. These representatives advocated a reduction in train speed if the defective dynamic brake is on the lead locomotive, and that no train be operated on certain grades (1 percent suggested) with inoperative dynamic brakes on the lead locomotive.

A stated objective of any task force is to develop and/or gather specific information, facts, and data directly relating to the issue; in this case, dynamic brakes. The task force pursued this by formulating and distributing a questionnaire to a number of engineers soliciting their input regarding the use of dynamic brakes, the importance of a display showing available dynamic braking force, and other related issues as discussed above. The results of this questionnaire clearly support the positions stated and advocated by rail labor representatives throughout this process. Specifically, 86 percent of the 138 respondents replied that operative dynamic brake is ''very'' important to safely control a train in grade territory, 93 percent of the respondents felt it to be ''very'' important that if a locomotive is equipped with dynamic brakes, they should be required to be operative, 86 percent of the respondents felt it to be ''very'' important the dynamic brakes should continue to function during emergency applications, 83 percent of the respondents are instructed to use dynamic brakes for fuel conservation, and a significant minority felt that a real-time display of available dynamic braking effort would ''overload'' the information provided on the control stand. This questionnaire was not conducted scientifically, nor was it intended to be a statistically valid sampling of dynamic brake issues and locomotive engineers throughout the country. It did, however, provide support and confirmation of views that have been presented by rail labor over the past 5 years regarding the importance of, and reliance on, dynamic brakes in train handling by locomotive engineers.

As illustrated in the discussions above, deliberations within the dynamic brake task force largely focused on the fundamental issues posed as early as 1992 in the ANPRM. The task force was unable to reach consensus on resolution of these issues, and ceased meeting as the negotiations within the inspection and testing task force dominated the RSAC proceeding. Dynamic brake issues were included in the subsequent negotiations and deliberations of the inspection and testing task force, but did not play an integral role in shaping the numerous proposals that were generated for discussion. At the completion of the Working Group activities, it was apparent that both labor and management representatives recognized that minimum standards need to be established for the operation, testing, and maintenance of dynamic brakes. Labor representatives continued to promote shorter maintenance and repair intervals, while management representatives were hesitant to jeopardize locomotive availability due to inoperability of a feature that they view as one which provides increased operational flexibility but which is not safety-critical.

FRA Conclusions. A wealth of information has been gathered regarding the operation, testing, and maintenance of dynamic brakes in the five years since the publishing of the ANPRM. Based on the information provided, FRA proposes appropriate standards for dynamic brakes that are consistent with the statutory mandate, that take into consideration NTSB recommendations, that potentially promote progressive improvements in dynamic brake information systems through the phased introduction of technology, and that avoid excessive requirements that discourage the use of dynamic brakes. As should be evident from the preceding discussion, FRA has been confronted with issues not limited to equipping locomotives with dynamic brakes, development of standards for dynamic brakes, or implementation of technologies to advise the engineer on the condition of dynamic brakes. Rather, given the increased emphasis on dynamic brake usage as prescribed in operating rules, it is paramount to consider whether the current emphasis on the use of dynamic brakes to achieve fuel efficiency and avoid wear on power brake components has resulted in issuance of train handling instructions that can lure the engineer into a trap in those situations where dynamic brakes

must be relied upon to control speed within a zone of safety.

The RSAC Working Group and task force deliberations provided no rationale to warrant a reconsideration of FRA's stated position that dynamic brakes do not offer the technical capability to serve as a primary train braking system since: (i) they provide braking force only on powered locomotive axles and are incapable of controlling in-train forces in the same manner as the automatic braking system; (ii) they are effective only within a narrow speed range and have no capability to actually stop a train; (iii) they can fail without prior warning; and (iv) their failure mode is characterized by loss of braking force (as opposed to the automatic brake, which, properly employed, initiates an emergency brake application upon loss of system integrity).

Similarly, however, the RSAC working group and task force deliberations reinforced FRA's belief that dynamic brakes have become, *de facto*, a second-order safety system where employed. While from the point of view of logical priorities, dynamic brakes ''back up'' the automatic train brake system, in sequence of operational procedures the priority is reversed. Stated differently, either the proper functioning of these systems, or the provision of reliable information concerning degraded functioning of these systems, should prevent locomotive engineers from operating trains in a manner that might make recovery through use of the automatic brake impossible. As between these two alternatives, proper functioning is marginally preferred, since communication, perception, and comprehension of information is not a uniformly successful enterprise.

In considering the entirety of the information available, FRA concludes that it is imperative that the locomotive engineer be informed in writing of the operational status of the dynamic brakes on all locomotives in the consist at the initial terminal or point of origin for a train or at other locations where a locomotive engineer first takes charge of a train. Therefore, FRA proposes to require that locomotive engineers be provided this information at these locations. This proposed provision directly addresses the foremost concern articulated by the NTSB following the San Bernardino accident. FRA also proposes to require visible identification of locomotive units with inoperative dynamic brakes. FRA is in full agreement that when locomotives are equipped with dynamic brakes, they should be in proper operating condition and be maintained on a regular basis, to the maximum extent practical, to enhance train handling. FRA does recognize that these maintenance requirements may be overly burdensome in some instances for railroads (primarily short lines) who do not utilize dynamic brakes in their respective operations, but yet own and operate locomotives equipped with dynamic brakes. Consequently, FRA further proposes provisions for deactivating a locomotive's dynamic brakes without physically removing the components. FRA also specifically solicits input regarding the placement of a locomotive in a consist that has been declared ''deactivated'' in accordance with this proposal. Some existing railroad operating rules dictate that a locomotive which has been determined to have inoperative dynamic brakes may be dispatched in a train, but prohibit its placement in the lead position of the consist. Are there technical reasons to prohibit a locomotive with inoperative dynamic brakes from functioning as the lead locomotive, providing the deactivated locomotive still has the capability to fully control the dynamic braking functions of all other locomotives in the consist that are so equipped?

In addition to the information and maintenance requirements, FRA also proposes the development of operating rules and training programs to ensure the proper and safe use of dynamic brakes. For example, FRA proposes to require that railroads operating trains with brake systems that include dynamic brakes develop, implement, and make available to FRA upon request written operating rules governing safe train handling procedures using these dynamic brakes under all operating conditions, which shall be tailored to the specific equipment and territory of the railroad. More importantly, FRA also proposes to require that a railroad's operating rules be based on the ability of friction brakes alone to safely stop the train under all operating conditions. Furthermore, FRA also proposes to require a railroad operating a train with a brake system that includes dynamic brakes to develop, implement, and make available to FRA upon request a plan to ensure that its locomotive engineers are fully trained in the operating rules prescribed above and at a minimum includes classroom, hands-on, and annual refresher training.

FRA views the establishment of these comprehensive operating rules and training plans as the most effective means by which to minimize the possibility of future incidents caused by excessive reliance on dynamic brakes by the train crew as a method of controlling the speed of a train in its descent through a difficult grade, as was the case in the San Bernardino incident. FRA views as unfortunate, and potentially reckless, the increasing number of train handling and power brake instructions issued by freight railroads that emphasize the use of dynamic brakes without including prominent warnings that such systems may not be relied upon to provide the margin of safety necessary to stop short of obstructions and control points or to avoid overspeed operation. Such instructions, while not yet affirmatively misleading to seasoned locomotive engineers, threaten to overcome the good judgement of safety critics and regulators by leading to excessive reliance upon these systems. Given the ever-increasing weight and length of freight trains, and the severe grades that they are often required to negotiate en route, the need for locomotive engineers who are thoroughly trained and knowledgeable in all aspects of train handling is paramount for continued safety in the rail industry.

In both the ANPRM (57 FR 62555) and the 1994 NPRM (59 FR 47687), FRA requested comments from the industry on possible methods of providing information regarding the status of dynamic brakes to the engineer in the cab of the controlling locomotive. The only workable option presented to FRA in the comments received was the equipping of locomotives with a dynamic brake display. Although FRA recognizes that the technology for dynamic brake displays with the ability to provide the type of information sought by FRA in the 1994 NPRM is not readily available today, several commenters suggested that it is currently being developed. Consequently, FRA is not ready or willing to require the use of such indicators at this time. However, FRA believes that the benefit of such an indicator would be to alert engineers that they have diminished or excessive dynamic capabilities, thus permitting the engineer to control the braking of their train in the safest possible manner. In order to fully evaluate the viability and potential use of dynamic brake indicators designed to test the electrical integrity of the dynamic brakes at rest and to display the available total train dynamic brake retarding force at each speed in 5-mph increments in the cab of the controlling locomotive, FRA again seeks comments from all interested parties regarding the following specific issues:

1. What is the status on the future availability of dynamic brake indicators

capable of providing the information discussed above?

2. What are the current cost estimates associated with the acquisition and installation of such indicators?

3. What quantitative and/or qualitative operational or safety benefits can be derived from the use of these dynamic brake indicators?

4. What alternative methods are available for providing the same information that a dynamic brake indicator would provide to a locomotive engineer?

V. Training and Qualifications of Personnel

Currently, the regulations contain no specific training requirements or standards for personnel who conduct brake system inspections. The regulations merely require that a ''qualified person'' perform certain inspections or tasks. *See* 49 CFR 232.12(a). Furthermore, the current regulations do not require that railroads maintain any type of records or information regarding the training or instruction it provides to its employees to ensure that they are capable of performing the brake inspections for which they are assigned responsibility. In several cases, FRA has found that a railroad's list of ''qualified persons'' is merely a roster of all of its operating and mechanical forces.

In the 1994 NPRM, FRA proposed a series of broad qualification standards addressing various type of personnel engaged in the inspection, testing, and maintenance of brake equipment. *See* 59 FR 47731–47732. These broad qualifications were separated into distinct subgroups which identified various types of personnel based on the type of work those individuals would be required to perform under the proposal. These included: supervisors; train crew members; mechanical inspectors; and electronic inspectors. Although not proposed in the rule text of the 1994 NPRM, the preamble contained various guidelines regarding specific hours of classroom and hands-on training as well as guidelines regard the level of experience each of these types of employees would be required to possess or be provided. *See* 59 FR 47702–47703. The proposal also contained various requirements regarding the development and retention of records and information used by a railroad in determining the qualifications of its employees. *See* 59 FR 47732.

FRA proposed these training and experience requirements and guidelines based on its belief that the current training provided to the individuals charged with performing brake maintenance, tests, and inspections should be greatly improved in order to ensure that train brake system maintenance, tests, and inspections are performed properly. During the technical workshops conducted in conjunction with the ANPRM, several labor organizations and their individual members explicitly commented that they are not sufficiently trained to perform the inspections and tests required of them. In addition, several railroads admitted that the training they currently provide could be improved. Although FRA recognized that many railroads were attempting to improve their training programs, FRA believed that minimum training qualifications needed to be established to assure that brake inspections and tests are being properly performed in order to protect both the public and railroad employees from the operation of equipment that does not meet Federal standards.

Several railroads responded to the 1994 NPRM contending that the specific guidelines contained in the preamble to the proposal, regarding years of experience as well as hours of classroom and ''hands-on'' training were unnecessary and overly broad. Many of these commenters believed that railroads were in the best position to determine the type of training that is necessary in any given circumstance based on the employee or employees involved. These commenters also indicated that many railroads are currently upgrading their training programs or already have training programs in place that could be fine tuned or slightly altered to provide sufficient training to its employees to accomplish the tasks for which they are assigned. Several commenters as well as the CAPUC recommended that it would be more appropriate for FRA to specify performance objectives rather than specific years of service or classroom hours. They believed that any training requirements should specify the training objectives and goals and refer to the employee's proficiency rather than the specific method used in reaching those objectives and proficiency. Several railroads also commented that an employee should only be required to receive training for those tasks which they are required to perform. Thus, an employee who performs only intermediate type brake inspections should not be required to receive training or instruction on the repair or maintenance of the equipment.

Although several labor organizations objected to some of the specific provisions contained in the preamble to the proposal, such as the potential for train crew personnel to be deemed a mechanical inspector and the recognition of the potential use of contract employees, these commenters did not dismiss the approach as unworkable. However, several labor representatives continue to contend that all brake and mechanical inspections must be performed by carmen, or similarly qualified individuals, and that train crew members are not and can never be adequately trained to properly perform these types of inspections. Some commenters suggested that FRA would not have to propose any qualification standards if it would simply require that all brake inspections and tests be performed by a carman.

Although the subject of employee training was a subject of concern during the RSAC Working Group deliberations, particularly as it relates to train crew members, there were no discussions which specifically addressed the training or knowledge that must be provided to employees responsible for conducting train brake inspections and tests. As noted in the above discussions, the Working Group discussions generally concentrated on instances when train crews would be permitted to perform and what distances such trains or cars could move after such inspections. However, it was clear that several railroad representatives on the Working Group believed better training needs to be provided to train crews to ensure the proper performance of quality brake inspections, particularly at initial terminals. Furthermore, all members of the Working Group appeared to recognize that a journeyman carman or other similarly trained individual possesses the knowledge and experience to conduct any of the required mechanical or brake inspections would be considered a qualified inspector without further training, with the exception of periodic refresher training.

FRA Conclusions. FRA has noticed continued improvement in the training provided by railroads to individuals charged with performing brake system inspections, tests, and maintenance; however, FRA continues to believe that this training could be greatly improved and enhanced. Although there has been a decline in the number of train incidents, derailments, fatalities, and injuries over the last ten years, FRA believes that the number of these incidents will be further reduced if maintenance, inspections, and tests of the brake system are performed by individuals who have received proper training specifically targeting the activities for which an individual is assigned responsibility. As stated previously, FRA believes one of the

major factors in ensuring the quality of brake inspections and the proper operation of that equipment is the adequate training of those persons responsible for inspecting and maintaining that equipment.

Railroads continue to consolidate mechanical work to fewer and fewer locations on the railroad. This trend places an increasing premium on the ability of train crews to conduct meaningful inspections and tests of the power brake system. Increases in train speeds and increased pressure on operating personnel due to growing traffic density will continue to make it critical for train crews and mechanical forces to discharge their duties with respect to power brake systems both diligently and effectively even under the most optimistic of scenarios with respect to the operation of incentives. FRA proposes to allow increases in the distances some trains may travel between brake system inspections where mechanical forces perform all of the inspection functions (including a complete inspection under 49 CFR part 215). The latitude that would be provided to some trains under this proposal would result in fewer inspections per distance traveled and reduce the number of opportunities that will exist for a serious defect to be found before it could result in a train incident. It is imperative, therefore, that each inspection be of uniformly high quality. Consequently, FRA believes that at a minimum broad, yet enforceable, performance-based training and qualification requirements for personnel charged with conducting brake system inspections, tests, and maintenance will help raise the overall quality of these activities.

Furthermore, as noted in the 1994 NPRM, technological change presents an additional reason for placing strong emphasis on qualifications of inspection personnel. Train crew and mechanical personnel alike are confronted with an increasing variety of power brake arrangements and features. The AAR has been intensifying its effort to develop and deploy electronic braking systems on freight equipment. This trend will make it important for personnel to be fully familiar with the systems that they are required to inspect and maintain. FRA recognizes that although technological advancements may increase the need for more qualified maintenance forces, they may also reduce the complexity and extent of the inspecting and testing requirements for certain equipment with the emergence of brake indicators and sensors or the development of more reliable equipment.

Consequently, FRA proposes broad performance-based training and qualification requirements which permit railroads to develop programs specifically tailored to the type of equipment it operates and the employees designated by the railroad to perform the inspection, testing, and maintenance duties required in this proposal. FRA tends to agree with several railroad commenters that there is no reason for individuals who solely perform pre-departure air brake tests and inspections to be as highly trained as a carman since carmen perform many other duties which involve the maintenance and repair of equipment in addition to brake inspections. Therefore, the proposed training and qualification requirements permit railroads to tailor their training programs to ensure the capability of its employees to perform the tasks for which they are assigned. FRA intends for the proposed training and qualification requirements to apply not only to railroad personnel but also to contract personnel and personnel in plants that build cars and locomotives that are responsible for brake system inspections, maintenance, or tests.

Contrary to the 1994 NPRM, FRA does not intend to issue specific experience, classroom training, or ''hands-on'' training guidelines. FRA agrees that many of the guidelines contained in the preamble to that proposal were overly restrictive and may have impeded the implementation of certain training protocols capable of achieving similar results with less emphasis on solely the time spent in the training process. Furthermore, the proposed guidelines failed to consider the potentially narrow scope of training that might be required for some employees, particularly some train crew personnel, that perform very limited inspection functions on very limited types of equipment. Consequently, although the training and qualification requirements currently proposed continue to require that any training provided include classroom and ''hands-on'' training as well as verbal or written examinations and ''hands-on'' proficiency, they do not mandate a specific number of hours that this training must encompass as that will vary depending on the employee or employees involved, which is probably best determined by the railroad. The proposed requirements also contain provisions for conducting periodic refresher training and supervisor oversight of an employee's performance once training is provided.

FRA believes that the recordkeeping and notification requirements contained in this proposal are the cornerstone of the training and qualification provisions. As FRA is not proposing specific training curriculums or specific experience thresholds, FRA believes that these recordkeeping provisions are vital in ensuring that proper training is being provided to railroad personnel. FRA believes these requirements provide the means by which FRA will judge the effectiveness and appropriateness of a railroad's training and qualification program. These provisions also provide FRA with the ability to independently assess whether the training provided to a specific individual adequately addresses the tasks for which the individual is deemed capable of performing and will most likely prevent potential abuses by railroads to use insufficiently trained individuals to perform the necessary inspections, tests, and maintenance required by this proposal. FRA proposes to require that railroads maintain specific personnel qualification records for all personnel (including contract personnel) responsible for the inspection, testing, and maintenance of train brake systems. FRA proposes that these records contain detailed information regarding the training provided as well as detailed information on the types of equipment the individual is qualified to inspect, test, or maintain and the duties the individual is qualified to perform. Most Class I and larger Class II railroads already keep records of this type; however, they are not always easily obtained by FRA. As an additional means of ensuring that only properly qualified individuals are performing only those tasks for which they are qualified, FRA proposes to require that railroads promptly notify personnel of changes in their qualification status and specifically identify the date that the employee's qualification ends unless refresher training is provided.

FRA recognizes that some railroads will be forced to place a greater emphasis on training and qualifications than they have in the past, and this requirement will result in additional costs for those railroads. However, the proposed rule allows the railroads the flexibility that they need to provide only that training which an employee needs for a specific job. The proposed rule does not require an employee who only performs brake inspections while en route (i.e., Class II brake tests) to receive the intensive training needed for an employee who performs Class I brake tests or one who is charged with the maintenance or repair of the equipment. The training can be tailored to the specific needs of the railroad. Across the industry as a whole, this proposal will

not require extensive changes in the way most railroads currently operate, but it will require some railroads to invest more time in the training of their personnel and should prevent railroads from using minimally trained and unqualified people to perform crucial safety tasks.

FRA recognizes that the costs of the proposed training requirements are fairly substantial, however, FRA believes that most Class I railroads have already invested in training, routinely schedule training for their employees, and offer training to other interested parties. For example, the Union Pacific, Southern Pacific, CSX Transportation, and Norfolk Southern and all other Class I railroads have a training department, have training staff available, and have the knowledge to complete this proposed requirement. However, it is unlikely that Class I railroads have identified each task or the steps necessary to complete each task of inspection, testing, and maintenance of each type of freight car they operate. Furthermore, most railroads do not engage in the ''hands-on'' training and testing contained in this proposal nor do most railroads maintain the records required in this proposal. It should be noted that many Class I railroads have participated in a Safety Assurance and Compliance Program (SACP) with FRA and labor. Most of the SACP's have required additional training by the participating railroads. Many of the proposed training requirements would already be met by those railroads that have completed the training required under the SACP.

Short line railroads, particularly Class II railroads may send employees to other railroads for training, participate in ASLRA and FRA training, and have on-the job training. Class III railroads are less likely to send employees to other railroads for training, most of the training would be on-the-job training, training by FRA, or through ASLRA programs. Typically on-the-job training on these smaller railroads involves having their employees work with a more experienced employee or an individual who may have been previously employed by a Class 1 railroad and received formal training with that railroad. Furthermore, Class III railroad employees are not likely to require extensive training on different types of brake equipment since most of the equipment used by Class III railroads have only one type of brake valve. Furthermore, the employees of these small railroads would likely not be required to receive any training in the areas of EPIC brakes, dynamic brakes, two-way EOT devices, or on some of the brake tests and maintenance mandated in the proposal due to the limited distances traveled by these trains, the low tonnages hauled, and because many of the maintenance functions are contracted out to larger railroads.

Although FRA is proposing broad performance-based training requirements rather than specific experience, classroom training, or ''hands-on training guidelines, FRA expects that railroads will incur a significant cost to comply with the requirements contained in this proposal. Training related costs have been identified as the most significant cost item contained in this proposal, accounting for nearly $77 million dollars of the approximate $98 million cost of this proposal. *See* Regulatory Impact Analysis and Regulatory Impact discussion below. However, virtually all of the safety related benefits, conservatively estimated at over $31 million, for this proposal are derived from the increase and improvement in the training of railroad personnel, which FRA believes will result in the reduction and prevention of accidents and the resulting fatalities, injuries, and property damage. There are also a number of unquantifiable safety and economic benefits which will be derived from the prevention of accidents such as: associated accident clean-up costs, evacuation and medical costs, road closures, and the environmental damage caused by hazardous materials releases. It should be noted that FRA also believes that there will be a significant unquantifiable operational benefit derived from the enhanced training of railroad personnel, particularly in the areas of increased equipment utilization, reduced train delays, repair costs, and debris removal. In order to further assess both the cost and benefits as well as other impacts the proposed training and qualification requirements will have, particularly on smaller railroads, FRA requests comments from interested parties on the following:

1. What is the potential impact of the proposed training and qualification requirements on short line railroads (i.e., Class II and Class III railroads)? How will these types of railroads meet the proposed requirements?

2. What is the potential impact of the proposed recordkeeping requirements to smaller railroads (i.e., Class III railroads)? Do these railroads currently maintain some sort of training records?

3. As FRA believes these records are a key element of the proposed training and qualification requirements, are there alternative methods available to smaller railroads (i.e., Class III railroads) for maintaining and developing the required information?

4. Currently, what percentage of employees will require additional training?

5. Are there a sufficient number of ''qualified'' employees at present to ensure that no operational difficulty will result? If not, what is a reasonable timeline for permitting railroads (particularly smaller railroads) to reach full compliance with regard to these requirements?

VI. Air Source Requirements

In the ANPRM, FRA provided background information and presented questions on the issue of requiring additional testing of train air brakes in extremely cold weather, especially in mountainous territory. *See* 57 FR 62552. Though it is acknowledged that cold temperatures may affect the train air brake system in many ways, the freezing of moisture that has accumulated in the trainline which potentially causes blockages or restrictions in air flow in the brake pipe and reduces braking effort is an obvious and major concern. As a means to combat this dangerous combination of factors that could lead to a loss of or a reduction in braking effort, the industry has historically utilized methanol and other alcohols in the trainline to act as an anti-freeze during these cold weather operations. However, based on FRA experience and the statements of several commenters, it is evident that the use of these chemicals in the trainline causes untimely wear and tear to brake system components and has a long-term detrimental effect on train air brakes. Comments provided to FRA indicated that air dryers on locomotives are very effective in improving the performance of train brake systems, particularly under cold weather conditions, and generally eliminate the need to use alcohol and other foreign substances in the trainline. Several railroads commented that they have already equipped their locomotives with air dryers in order to curb the use of chemicals in the trainline. Furthermore, several railroads frequently operating under extreme cold weather conditions commented that they have prohibited chemicals from being placed in brake air systems to prevent freeze-up. These railroads stated that they have been able to operate trains in cold weather without resorting to chemicals, such as alcohol.

Based on these comments and experiences, FRA proposed in the 1994 NPRM to ban the use of anti-freeze chemicals in train air brake systems. *See* 59 FR 47728. In addition, FRA proposed

that all new and rebuilt locomotives and all yard air sources be equipped with air dryers capable of achieving a 30 °F air dew point depression at a 100 cfm air flow rate, unless the new or rebuilt locomotive would not be operated in cold weather conditions, would power only trains limited to 30 mph or less, or would power only trains of 20 cars or less. FRA believed that an exception from the proposed requirements for these types of operations was warranted based on the comments received and on FRA's experience that moisture in the brake line in these types of operations has never been a problem.

Many railroads commented that the proposed requirements for air dryers would be costly and ineffective if implemented. These commenters cited testimony provided by Canadian railroads, operating in extreme cold weather conditions, which indicated that none of their locomotives are currently equipped with air dryers, yet they have not experienced problems with frozen brake lines. Additional comments provided by Canadian railroads maintained that their experience shows that the prevention of brake pipe freeze-up is not a direct benefit of equipping air sources with air dryers. These commenters stated that freezing of the brake pipe is of much less concern when trains are operated with two-way end-of-train devices, in that any restriction or blockage in the brake pipe will be recognized and appropriate steps will be taken to stop the train safely. Commenters noted that the majority of railroads have adopted operating rules which prohibit the use of chemicals in the trainline as proposed in the NPRM. A supplier of air brake equipment commented that in order for air dryers to be effective, the temperature of the air going into the dryers must be controlled. This would typically be accomplished through equipping the air source with an aftercooler to get the input air to within 20 degrees of the ambient temperature. Railroad commenters supported the use of aftercoolers as advocated by this supplier representative, acknowledging that locomotives equipped with aftercoolers help reduce the relative humidity, ensuring moisture will not precipitate. These commenters noted that experience has shown aftercoolers to be much cheaper to install and maintain when compared to air dryers.

At the initial meeting of the full Power Brake Working Group, members discussed the broad topic area of ''Design Requirements—Locomotive Standards.'' The issue of air dryers on locomotives, and also on yard/ground air sources, was included in this discussion. Several members of the Working Group suggested that any requirements for air dryer or similar technology be expressed in terms of a performance standard for air dryness, and that such a standard should be developed by a separate task force. Consequently, a task force was formed and was comprised of representatives from FRA, labor, management, and suppliers (through the participation of the RPI). The Working Group articulated the task of this subgroup as follows: (1) Determine how dry the air should be, and subsequently, (2) what technology/hardware exists and is available to achieve these prescribed levels. The task force was also directed to consider and evaluate any economic implications that may impact prospective air dryer requirements.

At the second meeting of the full Working Group, members of the task force presented a general discussion of the basic principles of air and the amount of water contained in air. This discussion provided detailed information regarding the weight or amount of water contained in air, the effect of water condensation when air pressure is increased, how temperature affects water condensation, and the quantity of air required to charge a train. Several methodologies and technologies capable of drying air and preventing condensation were described and discussed, including broad economic considerations associated with each. Several members of the Working Group noted that the discussions had centered predominately on locomotives, and that more information was needed regarding ground/yard air sources such as those used to charge the trainline prior to the addition of locomotives. These members indicated that they felt ground/yard air plants used in this capacity are the major cause of moisture in a train.

Members of the task force addressed the issue of ''dew point depression'' in detail, defining dew point depression as the temperature reduction below ambient conditions at which moisture begins to form, describing how it is calculated, and identifying specifications utilized by other industries when considering dew point depression parameters. As the Working Group had emphasized their preference that any requirements developed for dry air be based on a performance-type standard, the group quickly focused task force efforts toward the development of a specific numerical value of dew point depression that would minimize the possibility of water being introduced into the brake system. One member of the task force recommended, based on information that had been presented and practical field experience, that a dew point depression of −6° to −10° Fahrenheit would be sufficient to prevent the development of condensation in train operations. This member noted that aftercoolers alone can achieve this level of dew point depression, and could be utilized in conjunction with air dryers to produce even lower levels. It is important to note that these conclusions and recommendations were made by one member of the task force, and did not represent consensus conclusions or recommendations of the task force. Numerous concerns were raised regarding the technical rationale employed in formulating this ''acceptable range'' of temperatures, and several members voiced apprehension regarding FRA's ability to effectively and uniformly enforce such a requirement, should it be imposed.

Extended discussions ensued regarding the establishment of a performance standard for dry air which would serve to eliminate or minimize the introduction of moisture into the train brake system, using dew point depression as the defining parameter. The Working Group members were unwilling to unanimously and fully endorse the −6° to −10° Fahrenheit temperature range proposed by the task force leader given the lack of detailed, documented, and substantiated test data to support this conclusion. Noting that fact finding and data development are the major functions of a task force under the stated guiding principles of the RSAC process, the Working Group directed the task force to study, through instrumented testing, the appropriate value of dew point depression that is required to ensure safe operations for both locomotives and yard/ground air systems.

In an effort to gather field data to either confirm the proposed parameters or to develop alternative measures, task force members visited two train yards and gathered data using a device specifically designed to measure dew points. The task force performed tests on numerous locomotives and yard air plants, with and without air dryers, to determine the amount of dew point depression in the air lines. The results of these tests confirmed the assumptions of the Working Group members in that the vast majority of locomotives did not contribute to moisture in the train air lines, but rather, the main source of raw water came from yard charging units. Further, the majority of the yard units which were tested were relatively old and had not been properly maintained or upgraded in years. During the task force tests, it was noted that all units

equipped with air dryers produced minimal moisture in the system. Based on these results, some member of the task force believed that both yard charging units and locomotives be equipped with a device which would assist in the reduction of moisture in the train air lines. Since a large number of trains are charged by yard air sources (up to 80 percent by some estimations), it appeared that yard air charging units should be given the greatest priority. Several members of the task force suggested that all yard air sources be equipped with a device which will produce a minimum dew point depression of −25 °F and similarly equip locomotives to produce a minimum dew point depression of −8 °F. This was not a consensus recommendation from the task force, as some members of the task force felt that the issue of moisture in the trainline is not a safety issue, but more appropriately an item addressed through improved maintenance procedures. In addition, these members firmly believed that the installation of air dryers as proposed was cost prohibitive given the limited safety benefit to be realized, and that the task force had not adequately addressed the economic implications of requiring locomotives and yard air units to meet the recommendations as forwarded to the Working Group.

FRA Conclusions. FRA intends to ban the use of anti-freeze chemicals in train air brake systems, reiterating the position stated in the 1994 NPRM, in order to prevent the untimely damage and wear to the brake system components. *See* 59 FR 47728. FRA did not receive any adverse comments on this issue in response to the 1994 NPRM, and based on the statements and considerations raised in various Working Group meetings it appears that both rail labor and management representatives believe that such a provision would be acceptable.

Based on information gathered throughout the RSAC process, previous comments by industry parties, and agency experience, FRA firmly believes that the presence of moisture in the train air brake system poses potential safety, operational, and maintenance issues that require attention in this rulemaking. After completion of detailed, instrumented testing on both locomotives and yard test plants performed as part of the task force activities, FRA tends to believe that locomotives rarely contribute to moisture in the trainline. As such, FRA is not proposing that air dryers be installed on new locomotives, as was proposed in the 1994 NPRM (59 FR 47729).

The results of this same testing clearly indicated that yard air plants often provide unacceptably high levels of moisture while charging the train air brake system due to the age of the system, improper design, inadequate maintenance, or a combination thereof. Task force efforts also estimated that upwards of 80 percent of train air brake systems are charged using yard/ground air plants. However, FRA believes that simply requiring that yard air sources be equipped with air dryers may not alone necessarily effectuate the desired results unless the air dryers are appropriately placed to sufficiently condition the air source. Many yard air sources are configured such that a single air compressor services several branch lines used to charge train air brake systems, and as such, multiple air dryers may be required to eliminate the introduction of wet air into the brake system. FRA believes that, as with locomotives, requiring yard air sources to be equipped with air dryers will likely impose a significant and unnecessary cost burden on the railroads.

Based on the above discussion, FRA is proposing that each railroad develop and implement a system by which they monitor all yard air sources to ensure that they operate as intended and do not introduce contaminates into the brake system. FRA believes that implementation of this monitoring program as proposed represents a method by which the industry can truly maximize the benefits to be realized through air dryer technology, which all parties acknowledge has been proven to reduce the level of moisture introduced into the trainline, at a cost that is commensurate with the subsequent benefits. This proposed program requires a railroad to take remedial action with respect to any yard air sources that are found not to be operating as intended, and further proposes to establish a retention requirement with respect to records of these deficient units to facilitate the tracking and resolution of continuing problem areas. Further, FRA believes that yard air reservoirs should either be equipped with an operable automatic drain system or be manually drained at least once each day that the devices are used or when moisture is detected in the system. FRA believes that these provisions, in concert with assurances that condensation is blown from the pipe or hose from which compressed air is taken prior to connecting the yard air line or motive power to the train as currently prescribed in § 232.11(d), will minimize the possibility of moisture being introduced into the train air brake system.

It should be noted that FRA recently published a final rule mandating the incorporation of two-way end-of-train telemetry devices (two-way EOTs) on a variety of freight trains, specifically those operating at speeds of 30 mph or greater or in heavy grade territories. *See* 62 FR 278. Two-way EOTs provide locomotive engineers with the capability of initiating an emergency brake application that commences at the rear of the train in the event of a blockage or separation in the train's brake pipe that would prevent the pneumatic transmission of the emergency brake application throughout the entire train. These devices consist of a front unit, located in the cab of the controlling locomotive, and a rear unit, located in the rear of the train and attached to the brake pipe. Radio communication between the front and rear end units is continually monitored and confirmed at regular intervals, and the rear unit is only activated when continuity of these radio transmissions is not maintained over a specified time interval. This discussion of two-way EOTs is particularly appropriate within the context of the air source requirements and air dryers. In the unlikely event that the proposed requirements regarding air dryers fail to sufficiently eliminate moisture from the trainline, and a restriction or obstruction in the form of ice forms as the result of the freezing of this moisture during cold weather operations, the two-way EOT device becomes a first order safety device and will initiate an emergency application of the brakes from the rear of train. As such, the vast majority of concerns associated with moisture in the trainline freezing in cold weather operations have been alleviated through the incorporation of this technology in most freight operations.

In an effort to further develop and evaluate this proposal, FRA seeks comments from all interested parties regarding the following specific issues:

(1) How many yard sources are there that are used to charge train air brake systems?

(2) What time period will be required to effectively institute the monitoring program as prescribed?

(3) How many of these yard air sources are equipped with automatic drain valves?

(4) If the yard air source is not equipped with an automatic drain valve, how long does it take to drain manually?

VII. Maintenance Requirements

In the ANPRM, FRA solicited comments from interested parties regarding the elimination of cleaning, oiling, testing, and stencilling (COT&S) requirements for freight brake valves as a result of the AAR's adoption of enhanced single car and repair track air brake testing requirements in 1990. *See* 57 FR 62556. In response, all industry representatives, including rail management, labor, and suppliers, acknowledged that the improved single car test constituted a significant improvement over the previous time-based COT&S requirements in detecting and eliminating defective brake equipment and components. However, labor representatives contended that the railroads are circumventing the use of the new procedures by eliminating repair tracks all over the nation in order to avoid performing these single car tests. Several individuals presented examples of how the single car test and repair track test are being circumvented, such as making repairs in the field or moving cars to expediter tracks for repairs rather than to repair tracks. Therefore, these commenters recommended that some type of in-date testing or attention must be reinstated. The RLEA also recommended that periodic attention be reinstated, contending that acceptance of AAR's unilateral change in the maintenance requirements allows the AAR to unilaterally establish regulations without public comment. Labor representatives forwarded similar recommendations, stating that any changes made by the AAR in their recommended maintenance practices should be reviewed and approved by the FRA.

Based on the comments received, FRA agreed that the new single car test established a better and more comprehensive method of detecting and eliminating defective brake equipment and components, but further agreed that cars must receive the test in order to fully benefit from the advantages of the enhanced single car test. Accordingly, in the 1994 NPRM, FRA proposed to require the single car or repair track test be conducted on any car that is on a repair or shop track for various wheel or brake equipment defects, and that at a minimum, freight service equipment should receive the test every one or two years depending on whether the equipment is high-utilization or non-high-utilization equipment (as defined in the 1994 NPRM). *See* 59 FR 47741. FRA did not feel that requiring the performance of the repair track or single car test at the proposed time periods would be overly burdensome on the industry since, according to studies conducted by the AAR showing that a car is typically on the repair track 1.7 times a year, most cars will be on a repair or shop track within the proposed time limits. The proposal further allowed parties to request a change in the time interval for performing the single car test by monitoring their single car tests and conducting a statistical analysis of the results. In order to ensure that the single car tests are properly performed, FRA proposed that only qualified brake system inspectors should conduct the tests and that the single car testing devices should be tested at least once a day and receive maintenance at least every 92 days. Furthermore, in order to ensure proper maintenance of brake equipment, FRA proposed that each railroad should develop and enforce written maintenance procedures for all types of brake systems it operates which meet or exceed current industry standards and all federal train brake system safety requirements. The maintenance required by these proposed procedures would be performed only by individuals qualified as mechanical or electronic brake system inspectors as designated in other sections of the 1994 NPRM. Spot checks of both the single car tests and the maintenance procedures would be conducted by qualified supervisory personnel to ensure the procedures are being followed and the tests are properly performed.

In response to the 1994 NPRM, many railroads commented that car utilization would be significantly decreased if the proposed requirements were adopted. These commenters felt that this decline would be directly attributable to the proposed requirements regarding craft-specific designation for the conduct of the single car tests, periodic intervals for conduct of the tests that were viewed as overly burdensome, and stencilling requirements that were viewed as similarly burdensome and costly. Labor organizations countered, reiterating their comments provided in response to the ANPRM regarding a perception that the carriers are directly circumventing the single car and repair track test by moving cars to expediter tracks for repairs rather than to repair tracks, or simply by making repairs in the field. Therefore, these labor organizations strongly advocated that FRA require and enforce periodic testing and inspection to ensure the continued safety of both railroad employees and the general public through realization of brake equipment that will be in better and safer condition as a result.

At the initial meeting of the Freight Power Brake Working Group, the specific issues of periodic maintenance and single car test requirements were identified as topics best addressed through formation of a separate task force. Thus, a task force was created and was charged with assembling and analyzing existing data pertaining to single car and repair track testing, and formulating appropriate recommendations based on an evaluation of this data. This task force was comprised of representatives from rail management, labor, and FRA. Task force deliberations commenced with a review of recent changes incorporated by the AAR with regard to single car and repair track test procedures, and a presentation of related data and statistics showing the direct benefits realized as a result of these revised procedures in terms of the number of defective brake system components detected and repaired. However, several members of the task force voiced strong objections regarding the accuracy and credibility of the data accumulated in the development of the presentation material. Beyond a fundamental questioning of the accuracy and credibility of this data, the group identified specific issues of concern to include incorrect data reported from the field, brake tests performed on defective cars, problems with accessibility to the AAR's UMLER reporting system, and questions regarding the service life of brake valves as reported.

The task force related their reservations regarding reliability of the available data to the Working Group, specifically with respect to the manner in which it has been collected and analysed, and requested clarification regarding the definition of their specific assignment. Extensive discussions ensued regarding the source and accuracy of data that had been presented by each the FRA, AAR, and labor. Working Group members conceded that each respective database was likely biased to some extent due to variances in the way inspections are conducted and alternative methodologies used in collecting and evaluating the resulting data. Several members felt that FRA's database does not accurately reflect defect ratios since railroads are permitted to repair defects prior to the FRA taking exceptions, and others suggested that FRA's data is skewed toward problem areas, and that more random and unbiased data is necessary to formulate an accurate portrayal of the current state of the industry. Given the divergent views on the existing data, several members of the

Working Group suggested that the group consider the purposes for which the data is needed, and whether it is needed at all. The group agreed that a uniform understanding of the data and its relevance by all parties was necessary to validate current practices, and that there is great difficulty in detecting a systematic problem with the existing methodologies unless data is collected.

The task force elected to continue discussions regarding the applicability and content of AAR's Rule 3, Chart A, which prescribes tests and attention required per AAR Specification S–486 (Code of Air Brake System Tests for Freight Equipment). In doing so, the Working Group instructed the task force to consider the extent to which an industry rule such as AAR's Rule 3, and specifically, Chart A, could be incorporated into a Federal regulation, and the necessary restrictions associated with publication date and subsequent changes that would need to be addressed. The task force continued its exhaustive review of AAR's Rule 3, Chart A, and made significant progress in reaching full consensus on the provisions contained therein. However, as the broad issues under consideration by this task force were directly tied to acceptance of the available data, continued progress was significantly impeded by the inability of the Inspection and Testing task force to reach resolution of what developed as a core issue of the working group proceeding in general; namely, data validity and reliability. Nonetheless, the task force continued efforts to evaluate the effectiveness of the AAR's UMLER reporting system, and examined possible modifications that would facilitate tracking maintenance and testing of equipment via this system as opposed to stencilling. Members of the task force also visited three facilities to view their approaches to periodic maintenance, single car testing, and repair track air tests. Ultimately, this task force was unable to provide consensus recommendations to the Working Group regarding periodic maintenance and testing requirements due to the Working Group members' collective unwillingness to agree on the issues relating to data collection, evaluation, and relevance as discussed in detail above.

FRA Conclusions. Based on comments received in response to the 1994 NPRM, deliberations of the Working Group and task force, and field experience, FRA remains confident that the ''new'' repair track and single car test, which have been used industry-wide since January of 1992, are a much better and more comprehensive method of detecting and eliminating defective brake equipment and components than the old, time-based COT&S requirements. FRA believes that performance of the single car test significantly reduces the number of defective components and dramatically increases the reliability of brake equipment. Accordingly, FRA proposes to incorporate AAR Interchange Rule 3 and Chart A into this regulation, thus codifying the repair track air test requirements per Chart A such that a railroad is required to perform a repair track brake test on freight cars when: (i) A freight car is removed from a train due to an air brake related defect; (ii) a freight car has its brakes cut-out when removed from a train or when placed on a shop or repair track; (iii) a freight car is on a repair or shop track for any reason and has not received a repair track brake test within the previous 12 month period; (iv) a freight car is found with missing or incomplete repair track brake test information; (v) the brake reservoir(s), the control valve mounting gasket, and the pipe bracket stud is removed, repaired, or replaced; or (vi) a freight car is found with a wheel with built-up tread, slid flat, or thermally cracked. Further, FRA proposes that each freight car shall receive a repair track air test no less frequently than every 5 years, and not less than 8 years from the date the car was built or rebuilt. Similarly, the single car test requirements of Chart A will be codified such that a railroad will perform a single car test on a freight car when one or more of the service portion, the emergency portion, or the pipe bracket is removed, repaired, or replaced.

FRA recognizes that circumstances arise such that required repair track brake tests or single car tests cannot always be performed at the point where repairs can be made. In these instances, FRA proposes to allow a car, after repairs are effectuated, to be moved to the next forward location where the test can be performed. FRA intends to make clear that the inability to perform a repair track brake test or a single car test does not constitute an inability to effectuate the necessary repairs. At the same time, however, FRA recognizes rail labor's contention that some carriers often attempt to circumvent the requirements for single car and repair track testing through the elimination of repair tracks, by moving cars to expediter tracks for repair, or simply by making the repairs in the field. As a means to curtail these practices, FRA proposes to impose extensive tagging requirements on freight cars which, due to the nature of the defective condition(s) detected, require a repair track brake test or single car test but which are moved from the location where repairs are performed prior to receiving the required test. As an alternative to the tagging requirements, FRA proposes to permit a railroad to utilize an automated tracking system to monitor these cars and ensure they receive the requisite tests provided the automated system is approved by FRA. FRA also proposes to require stencilling requirements regarding the location and date of the last repair track or single car test. Alternatively, FRA intends to permit railroads to utilize an electronic record keeping system to accomplish this tracking requirement, provided such a system is approved by FRA. FRA believes these requirements are necessary to ensure the timely performance of these important tests. Without such information, there would be virtually no way for FRA to verify a railroad's compliance with the proposed repair track and single car test requirements.

As in the 1994 NPRM, FRA continues to believe that single car testing devices should be tested at least once a day and receive routine maintenance at least every 92 days. Additionally, FRA feels that mechanical and electronic test devices should be regularly calibrated. FRA received no comments objecting to these requirements when previously proposed.

FRA agrees that any changes to the AAR standards incorporated into regulation should be reviewed and approved by all affected parties, including FRA and rail labor. Consequently, FRA proposes to implement a Special Approval process, whereby the AAR will be required to submit any proposed changes to the FRA. FRA will review the proposed change to determine whether the change is ''safety-critical,'' to include, but not limited to (i) any changes to Chart A, (ii) changes to established maintenance intervals, and (iii) changes to UMLER reporting requirements. If the proposed change is deemed by FRA to be ''non safety-critical,'' FRA will permit the change to be implemented immediately. If the proposed change is deemed ''safety-critical,'' FRA proposes to publish a **Federal Register** Notice, conduct a Public Hearing if necessary, and act based on the information developed and submitted in regard to these proceedings.

FRA proposes development of this Special Approval process in response to comments from several railroads and manufacturers, both in response to the 1994 NPRM and at the RSAC Working Group meetings, that FRA needed to

devise some sort of quick approval process in order to permit the industry to make modifications to existing standards or equipment based on the development of new technology. Thus, FRA has attempted to propose an approval process it believes should speed the process for taking advantage of new technologies over that which is currently available under the waiver process. However, in order to provide an opportunity for all interested parties to provide input for use by FRA in its decision-making process as required by the Administrative Procedure Act, FRA believes that any special approval provision must, at a minimum, provide proper notice to the public of any significant change or action being considered by the agency with regard to existing regulations.

VIII. Two-way End-of-Train Devices

On January 2, 1997, FRA issued a final rule which contained design, performance, and testing requirements relating to end-of-train devices (EOTs), which became effective for all railroads on July 1, 1997, except for those for which the effective date was extended to December 1, 1997 by notice issued on June 4, 1997. *See* 62 FR 278 and 62 FR 30461. FRA intends to incorporate the provisions contained in that final rule into this proposal. As the provisions contained in that rule were just recently issued, there is little need to discuss these requirements in detail as they were fully discussed in the publications noted above. However, since their issuance, FRA has discovered that a few of the provisions are in need of minor modification for clarification purposes and to address some valid concerns that have been raised both internally by FRA inspectors and by outside parties. Consequently, FRA intends to propose a few specific modifications to the currently effective requirements which are discussed in detail in the ''Section-by-Section'' portion of this preamble regarding Subpart E of this part.

Although FRA is proposing only a few specific changes to the current two-way EOT requirements, the following discussion details several issues which have arisen since the issuance of the final rule on EOTs. FRA seeks comment and information from all interested parties related to the issues discussed below in order to potentially take appropriate action on these issues at the final rule stage of this proceeding.

The first issue of concern involves the ability of a railroad to test the ability of the devices to initiate an emergency brake application via a bench test. In the final rule, FRA elected to permit railroads some flexibility in determining that a device is capable of initiating an emergency brake application. Thus, FRA included a broad performance requirement and then discussed various methods of complying with the requirement in the preamble to the rule, one of which permitted a bench test of the devices. *See* 62 FR 287, 290, and 295. Based on information and questions received by FRA, it is obvious that the bench testing option needs further clarification. The reason FRA requires that the devices be tested at the initial terminal or other point of installation is to ensure that the front unit will transmit an emergency brake application signal to the rear device and that the rear device is capable of initiating an emergency brake application from the rear of the train. Thus, the test must include a testing of both the front and rear units (devices) that will be used on a train. The bench test allows railroads to perform the above test in a shop environment that may be more conducive to finding problems with the devices and making appropriate repairs as well as permitting railroads some efficiency in performing the test.

In order to clarify what is required when a railroad performs a bench test, FRA issued guidance to its inspectors on July 28, 1997. *See* Technical Bulletin MP&E 97–8. In this guidance FRA made clear that a bench test could be performed on both the front and rear units, independent of each other, as long as the test is performed within the yard limits or location where the device will be installed on the train. In FRA's view, bench testing the rear unit requires applying air pressure to the device and then transmitting an emergency brake application from a front unit using the front unit manual switch. The individual performing the test would determine the emergency valve functions properly by either observing the emergency indicator pop out or observing brake pipe pressure at the rear device go to zero while hearing the exhaust of air from the device. Whereas, bench testing the front unit would entail transmitting an emergency brake application from the front unit, using the front unit manual switch, and observing that a rear device successfully receives the signal and activates the emergency air valve.

FRA further believes that both tests must be performed within a reasonable time period prior to the device being armed and placed on the train. To determine a reasonable time period, the environment where the device is stored and the conditions the device is subjected to after completing a successful bench test have to be considered. If the devices are tested and stored in a controlled environment that is free from weather elements, excessive dust, grease, and dirt prior to the immediate installation on a train, then 4–8 hours would be acceptable. If the devices are tested and haphazardly thrown into a corner of a shop or are placed in the rear of a truck to be bounced around a yard, 1 hour would likely be considered reasonable before installation. FRA also made clear that bench tests must be performed at the location or yard where the device will be installed on a train.

To further develop the details of this issue, FRA seeks comments from all interested parties on the following:

1. What procedures do railroads currently have in place regarding the performance of bench tests on two-way EOTs?

2. How many railroads currently conduct bench testing of these devices? What number of devices are tested in this manner?

3. As noted above, FRA believes that 8 hours is about the maximum time limit that should be permitted between the performance of a bench test and the installation of a device on a train. Is this reasonable?

4. Should FRA specifically include provisions regarding the performance of a bench test in the regulations?

Another subset of issues that has arisen regarding two-way devices, is the requirements related to handling trains on heavy grades. The two most prevalent issues involve the actions that must be taken when the devices fail en route on a heavy grade and situations where a train must be separated in order to traverse a grade. FRA does not intend for engineers to place themselves in an unsafe situation when they encounter an en route failure of the device when traversing a heavy grade. Although the rule prohibits the operation of a train over certain heavy grades when a failure of the device occurs en route, FRA did not intend that the train be immediately stopped when a failure of the device occurs while operating on a heavy grade. Rather, FRA intends for the locomotive engineer to conduct the movement in accordance with the railroad's operating rules for bringing the train safely to a stop at the first available location. Therefore, safety may require that the train continue down the grade or to a specific siding rather than to an immediate halt. Consequently, FRA expects railroads to develop appropriate procedures and train their engineers on those procedures related to the handling of trains on heavy grades when a two-way EOT fails during heavy grade operation.

A second issue related to heavy grades involves situations where a train must be divided in two in order to traverse a particularly heavy grade due to the lack of sufficient motive power to haul the entire train up the grade. This practice is referred to in the industry as ''doubling a hill.'' Initially, FRA felt that the two-way EOT should be connected to that portion of the train traversing the grade. However, such an approach creates a multitude of operational as well as safety concerns. Such an approach would require train crews to repeatedly switch the rear unit from one portion of the train to another, which would require these individuals to repeatedly walk sections of the train at locations where it may not be safe to do so. Alternatively, such an approach might require some trains to carry extra devices while in transit. Both options tend to compromise the proper operation of the rear devices. Consequently, FRA is seeking information and suggestions on how to handle these types of situations that most effectively deal with all of the safety hazards involved in these types of operations.

In order to further develop the two issues discussed above, FRA seeks comment and information from all interested parties on the following:

1. What procedures do railroads currently have in place concerning the handling of a train that experiences a failure of the two-way EOT while operating on a heavy grade?

2. Should trains be permitted to continue down a heavy grade if a failure of the two-way EOT occurs while descending the grade? For what distance or to what type of location?

3. How many railroads currently engage in the practice of having trains ''double a hill?'' How many trains engage in this activity? At what locations?

4. Are there helper locomotives stationed near the locations where trains engage in the practice of ''doubling a hill?'

5. Is safety better served by permitting railroads to leave the rear unit on the rear of the train and proceeding with the front section of the train over the grade? What safety hazards are created by permitting such operation? Are there operational restrictions that could be imposed to limit the potential safety hazards?

Section-by-section analysis

Amendments to 49 CFR Part 229

The amendments to part 229 contained in this proposal principally concern the testing of electronic gauges commonly used in electronically controlled locomotive brake systems. Currently, there are two electronically controlled locomotive brake systems in use on the nation's railroads, the Electro-Pneumatic Integrated Control (EPIC) system supplied by Westinghouse Air Brake Company and the Computer Controlled Brake (CCB) system developed by New York Air Brake Company. It is projected that by the end of 1997 there will be over 1,000 locomotives in service equipped with the CCB system and over 1,400 locomotives in service equipped with the EPIC system.

In May of 1996, the RSAC Working Group decided to form a task force to consider issues related to electronically controlled locomotive brake systems. Rather than create an entirely new task force, the Working Group assigned the task to a group of individuals that were members of the previously established ''New Technology Joint Information Committee'' created to address issues related to the operation of these types of brake systems as well as the training of those individuals using this new technology. This task force addressed several issues related to these braking systems including: design; training; inspection and testing; and maintenance. The task force concluded that additional regulation of these types of locomotive braking systems was unnecessary since the current regulations or waivers sufficiently address the training, inspection, and maintenance of these systems and any additional design requirement would most likely not enhance safety and would probably restrict the advancement of new technology.

The task force did recommend that some changes be made to language contained in part 229 to permit an extension in the testing cycles for the electronic gauges used in these types of locomotive brake systems. The task force recommended that part 229 be revised to increase the testing interval for these electronic gauges from 92 days to an annual cycle. The task force believed that such an extension was warranted based on the technology incorporated into these types of electronic gauges, which has significantly increased their reliability over standard mechanical gauges. Some of the items noted by the task force which create greater reliability of these gauges included the following: the electronic components have longer life cycles than those in mechanical gauges; the accuracy and durability of the transducer has been extended; and internal computer diagnostics detect inaccuracies prior to gauges becoming defective under federal regulations. FRA concluded from facts and judgements expressed by individual members of the Working Group that the recommendations of the task force would be acceptable. Furthermore, FRA agrees with the findings of the task force, and thus, proposes the changes to part 229 recommended by the task force.

FRA also proposes to amend part 229 by adding a new provision to the annual test required by § 229.27 to require that the locomotive compressor or compressors be tested for capacity by orifice test at this interval. This requirement is currently contained in § 232.10(c) but does not currently specify a time frame within which the testing must occur. Thus, in order to clarify the requirement FRA believes that the performance of this test on an annual basis will ensure the proper operation of these compressors. FRA believes that the specification of a time frame for performance of this test will have little or no impact on the railroads as many railroads currently perform this test at this interval and because the test is fairly simple to perform.

Amendments to 49 CFR Part 231

FRA proposes minor clarifying changes in the applicability section of this part. These changes are intended to make the regulatory exceptions consistent with the exceptions contained in the statute. The added exceptions are taken directly from 49 U.S.C. 20301 (previously codified at 45 U.S.C. 6). It is noted that the word ''freight'' has been added to the exceptions in order to remain consistent with Congress' intent when the statutory exceptions were created. At the time Congress provided an exception from the requirements of the Acts, Congress did not and could not envision that the equipment used in these operations would be modified for the purposes of hauling passengers, which FRA has discovered with regard to four-wheel coal cars. Consequently, FRA will only except freight operations which employ the types of equipment contained in these amendments.

FRA also proposes to move the provisions related to drawbars from part 232 where they are currently contained to this part. FRA believes that part 231 is a more logical place for the drawbar provisions to be located as they are more of a safety appliance-type component than a brake system component. Although FRA has redrafted the provisions for clarity and readability, FRA does not intend to change any of the basic drawbar provisions currently contained in § 232.2.

49 CFR Part 232

Subpart A—General

Section 232.1 Purpose and Scope

This section contains a formal statement of the proposed rules' purpose and scope. FRA intends the proposed rules to cover all brakes systems and brake components used in any freight train operation or any other non-passenger train operation.

Section 232.3 Applicability

As a general matter, in paragraph (a), FRA proposes that this rule apply to all railroads that operate freight or other non-passenger train service on standard gage track which is part of the general railroad system of transportation. In paragraph (b) of this section, FRA makes clear that Subpart E of this proposal applies to all trains that operate on the general system regardless of the commodity it hauls, unless it is specifically excepted by the provisions contained in Subpart E. Subpart E contains the requirements regarding the use of two-way end-of-train devices which were issued on January 2, 1997 and became effective on July 1, 1997. Although FRA proposes some minor changes to these requirements, principally for clarification, the provisions contained in Subpart E are virtually identical to the existing requirements.

Paragraph (c) of this section contains a listing of those operations and equipment for which FRA does not intend this proposed rule to apply. These include: rapid transit operations not connected to the general system; commuter, intercity, and other short-haul passenger operations; and tourist, scenic, historic, or excursion operations. In 1994, FRA issued a power brake NPRM in which FRA attempted to draft a proposal covering all railroad operations. FRA received a multitude of comments suggesting that similar treatment of passenger and freight operations was not a viable approach due to the significant differences in the operating environment and equipment used in these operations. Based on these comments, FRA decided to separate passenger and freight operations and FRA is currently addressing the power brake issues related to passenger and commuter operations in a separate rulemaking specifically tailored to those types of operations. Similarly, the Federal Railroad Safety Authorization Act of 1994 directs FRA to examine the unique circumstances of tourist and historic railroads when establishing safety regulations. The Act, which amended 49 U.S.C. 20103, states that:

In prescribing regulations that pertain to railroad safety that affect tourist, historic, scenic, or excursion railroad carriers, the Secretary of Transportation shall take into consideration any financial, operational, or other factors that may be unique to such railroad carriers. The Secretary shall submit a report to Congress not later than September 30, 1995, on actions taken under this subsection.

Pub. L. No. 103–440, § 217, 108 Stat. 4619, 4624, November 2, 1994. In response to this mandate, FRA has established a Tourist and Historic Railroads Working Group formed under RSAC to specifically address the applicability of FRA's regulations to these unique types of operations. Consequently, any requirements proposed by FRA for these types of operations will be part of a separate rulemaking proceeding. However, FRA may retain existing provisions of part 232 as applicable to such operations to the extent part 232 currently applies in order to avoid regulatory gaps while power brake provisions for such service are finalized.

Similar to the amendments proposed for part 231, paragraph (c)(6)-(c)(8) of this section also contains the expressed exceptions currently contained in the statute for certain coal cars and logging cars. These proposed provisions are intended to make the regulatory exceptions consistent with the exceptions contained in the statute. The added exceptions are taken directly from 49 U.S.C. 20301 (previously codified at 45 U.S.C. 6). It is noted that the word ''freight'' has been added to the exceptions in order to remain consistent with Congress' intent when the statutory exceptions were created. At the time Congress provided an exception from the requirements of the Acts, Congress did not and could not envision that the equipment used in these operations would be modified for the purposes of hauling passengers, which FRA has discovered with regard to four-wheel coal cars. Consequently, FRA will only except freight operations which employ the types of equipment contained in these amendments.

Proposed paragraph (d) and (e) of this section revokes the Interstate Commerce Commission Order 13528, of May 30, 1945, as amended (codified in existing § 232.3 and Appendix B to part 232), and codifies some of the relevant provisions of that Order. Thus, paragraph (e) of this section contains a list of equipment which were excepted from the Order's specifications and requirements for operating power-brake systems for freight service and to which the proposed requirements are not applicable. FRA believes that the Order is no longer completely relevant or necessary and believes that the relevant provisions should be incorporated into this section. In addition, FRA intends to reference current industry standards containing performance specifications for freight power brakes in other portions of this proposal which mirror the provisions contained in the Order.

It should be noted that this section contains no specific reference to private cars or circus trains. As private cars are designed to carry passengers and are generally hauled in both freight and passenger trains, FRA intends that these types of cars be covered by both the recently proposed Passenger Equipment Safety Standards and these proposed requirements. For example, these types of cars will be subject to the maintenance and equipment standards applicable to passenger equipment but will be covered by the inspection requirements contained in this proposal when hauled in a freight train. With regard to circus trains, FRA intends that these operations be covered by this proposal due to the unique nature of this equipment and operations. Although circus trains carry some employees, the majority of the train is composed of freight-type equipment and are operated in manner similar to a freight train. Thus, for consistency purposes, FRA intends that the proposed rules apply to circus train operations.

Section 232.5 Definitions

This section contains an extensive set of definitions to introduce the regulations. FRA intends these definitions to clarify the meaning of important terms as they are used in the text of the proposed rule. The proposed definitions are carefully worded in an attempt to minimize the potential for misinterpretation of the rule. Several of the definitions introduce new concepts or new terminologies which require further discussion.

''Brake indicator'' means a device, actuated by brake cylinder pressure, which indicates whether brakes are applied or released on a car. The use of brake indicators in the performance of brake tests is a controversial subject. Rail labor organizations correctly maintain that brake indicators are not fully reliable indicators of brake application and release on each car in the train. Further, railroads correctly maintain that reliance on brake indicators is necessary because inspectors cannot always safely observe brake application and release. FRA believes that brake indicators can serve an important role in the performance of brake tests, particularly in those

instances where the design of the equipment requires inspectors to place themselves in potentially dangerous position in order to observe the brake actuation or release.

The concept of ''ordered'' or ''date ordered'' is vital to the correct application of this proposed rule. The terms mean the date on which notice to proceed is given by a procuring railroad to a contractor or supplier for new equipment. Some of the provisions of the proposed rule will apply only to newly constructed equipment. When FRA proposes to apply requirements only to equipment ordered on or after January 1, 1999, or placed in service for the first time on or after January 1, 2001, FRA intends to grandfather any piece of equipment that is both ordered before January 1, 1999, and placed in service for the first time before January 1, 2001. FRA believes this approach will allow railroads to avoid any costs associated with changes to existing orders and yet limit the delay in realizing the safety benefits of the requirements proposed in this rule.

The definition of ''point of origin'' is intended to encompass those locations traditionally considered initial terminals, that is the location where a train is originally assembled. For clarity purposes, FRA will consider a location to be a place where a train is originally assembled, to be the location where a vast majority of the cars in a train are added to the train. FRA has discovered that some railroads are assembling two or more locomotives together with only a few cars at one location and performing an initial terminal inspection pursuant to § 232.12 on the train at that location. The train is then moved a very short distance (less than 20 miles) where forty or more cars are added to the train with the performance of only an intermediate brake inspection being performed. FRA believes this practice is clearly an attempt to circumvent the inspection requirements currently contained in the regulations. Consequently, FRA intends to make clear that it will consider that location where the majority of cars are added to the train to be the point of origin or initial terminal for that train, as that is the location where the train is in fact assembled. FRA recognizes that such a standard will have to be looked at on a case-by-case basis, but believes that the above mentioned scenario is a clear case where a railroad is attempting to avoid the comprehensive inspection requirements imposed on a train at its point of origin.

The definitions of ''qualified person'' and ''qualified mechanical inspector'' are vital to interpreting the proposed inspection, testing, and maintenance provisions of the rule. A ''qualified person'' is a person determined by the railroad to have the knowledge and skills necessary to perform one or more functions required under this part. With the proper training, a train crewmember could be a qualified person. Whereas, a ''qualified mechanical inspector'' is a ''qualified person'' who as a part of the training, qualification, and designation program required under § 232.203 has received instruction and training that includes ''hands-on'' experience (under appropriate supervision or apprenticeship) in one or more of the following functions: trouble-shooting, inspection, testing, maintenance, or repair of the specific train brake and other components and systems for which the inspector is assigned responsibility. Further, the mechanical inspector must be a person whose primary responsibility includes work generally consistent with those functions. Consequently, a train crewmember would likely not be a qualified mechanical inspector.

FRA includes a clear definition of ''qualified person'' to allow railroads the flexibility of having train crews continue to perform various brake tests. A qualified person must be trained and designated as able to perform the types of brake inspections and tests that the railroad assigns to him or her. However, a qualified person need not have the extensive knowledge of brake systems or components or be able to trouble-shoot and repair them. The qualified person is the ''checker.'' He or she must have the knowledge and experience necessary to be able to identify brake system problems.

FRA provides a clear definition of qualified mechanical inspector so that a differentiation can be made between the comprehensive knowledge and training possessed by a professional mechanical employee, and the more specialized training and general knowledge possessed by train crews. This definition largely rules out the possibility of train crewmembers becoming a qualified mechanical inspector. Part of the definition requires the primary job of a qualified mechanical inspector to be inspection, testing, or maintenance of freight brake equipment. FRA intends the definition to allow the members of the trades associated with testing and maintenance of equipment such as carmen, machinists, and electricians to become qualified mechanical inspectors. However, membership in labor organizations or completion of apprenticeship programs associated with these crafts is not required to be a qualified mechanical inspector. The two primary qualifications are possession of the knowledge required to do the job and a primary work assignment inspecting, testing, or maintaining the equipment.

Discussions conducted in the Working Group meetings revealed that railroad operators believe these definitions are too restrictive and will require training beyond the minimum needed for many employees to do their jobs. On the other hand, the representatives of labor organizations maintain that this approach will allow unqualified train crewmembers to conduct tests and inspections that should be performed only by mechanical employees.

FRA believes the proposed rule strikes the correct balance between these conflicting points of view. FRA agrees with labor representatives that mechanical employees generally conduct a more thorough inspection than train crewmembers. As a result, FRA will only permit trains which have been inspected by mechanically qualified inspectors to move beyond the currently permitted 1,000 mile limit without an additional brake inspection. At the same time, FRA agrees with railroad operators that properly trained train crewmembers are capable of performing brake tests and have been doing so effectively for years. As a result, the proposed rule grants flexibility to railroads to continue to use properly trained train crewmembers to perform certain brake tests, while providing the incentive of extended movements to railroads that use more highly qualified mechanical inspectors to perform other brake tests.

The definition of ''solid block of cars'' is included in order to clarify some serious misunderstandings currently existing in various segments of the industry. FRA believes that the definition provided in this proposal is consistent with longstanding agency interpretation and the clear intent of the regulations. This definition makes clear that the phase ''solid block of cars'' is intended to describe a set of cars that were all a part of one train and that have remained coupled together until added to another train. The phrase was never intended, nor is it intended in this proposal, to mean groups of cars removed from various different trains that are then assembled into a block for addition into another train. In FRA's view, the above described action constitutes the assembling of a new train which would require the performance of an appropriate brake test and inspection.

The definitions of ''transfer train,'' ''yard train,'' and ''switching service'' are somewhat interrelated since the determination as to whether, at a minimum, a transfer train brake test is required is based on whether the movement is a switching movement or a train movement. A ''transfer train'' is defined as a train that travels between a point of origin and a point of destination, located no more than 20 miles apart, and which is not performing switching service. A ''yard train'' is defined as a train that only performs switching service within a single yard complex. ''Switching service'' is defined as the classification of cars according to commodity or destination; assembling of cars for train movements; changing the position of cars for purposes of loading, unloading, or weighing; placing of locomotives or cars for repair or storage; or moving of rail equipment in connection with work service that does not constitute a train movement. Thus, a train engaged in switching service carries the potential of becoming a transfer train, subject to a transfer train's testing requirements, if the movement it will be engaged in is considered a ''train movement'' rather than a ''switching movement.'' FRA's determination of whether the movement of cars is a ''train movement,'' subject to the requirements of this section, or a ''switching movement'' is and will be based on the voluminous case law developed by various courts of the United States.

FRA's general rule of thumb as to whether a trip constitutes a ''train movement'' requires five or more cars traveling a distance of at least one mile without a stop to set off or pick up a car and not moving for the purpose of assembling or disassembling a train. However, FRA may consider movements of less than one mile ''train movements'' if various circumstances exist. In determining whether a particular movement constitutes a ''train movement,'' FRA conducts a multi-factor analysis based upon the discussions contained in various court decisions on the subject. *See e.g. United States* v. *Seaboard Air Line R. R. Co.*, 361 U.S. 78 (1959); *Louisville & Jeffersonville Bridge Co.* v. *United States*, 249 U.S. 543 (1919). The following factors are taken into consideration by FRA: the purpose of the movement; the distance traveled without a stop to set out or pick up cars; the number of cars hauled; and the hazards associated with the particular route traveled (e.g., the existence of public or private crossings with or without crossing protection, the steepness of the grade, the existence of curves, any other conditions that minimize the locomotive engineer's sight distance, and any other conditions that may create a greater need for power brakes during the movement). The existence of any of these hazards would tend to weigh towards the finding of a ''train movement,'' since these are the types of hazards against which the power brake provisions of the Federal rail safety laws were designed to give protection.

Section 232.7 Waivers

This section sets forth the procedures for seeking waivers of compliance with the requirements of this rule. Requests for such waivers may be filed by any interested party. In reviewing such requests, FRA conducts investigations to determine if a deviation from the general criteria can be made without compromising or diminishing rail safety.

Section 232.9 Responsibility for Compliance

General compliance requirements are contained in this section. In accordance with the ''use'' or ''haul'' language previously contained in the Safety Appliance Acts (49 U.S.C. chapter 203), and with FRA's general rulemaking authority under the Federal railroad safety laws, FRA proposes that any train, railroad car, or locomotive covered by this part will be considered ''in use'' prior to departure but after it receives or should have received the necessary tests and inspections required for movement. FRA would no longer necessarily wait for a piece of equipment with a power brake defect to be hauled before issuing a violation, a practice frequently criticized by the railroads. FRA believes that this approach will increase FRA's ability to prevent the movement of defective equipment that creates a potential safety hazard to both the public and railroad employees. FRA does not feel that this approach increases the railroads' burden since equipment should not be operated if it is found in defective condition in the pre-departure tests and inspections, unless permitted by the regulations. In fact, this modification of FRA's perspectives as to when a piece of equipment will be considered ''in use'' was fully discussed by members of the Working Group and based upon the opinions and judgments expressed by individual members of the group, FRA has concluded that the proposal is an appropriate approach. Both rail labor and rail management representatives supported the approach contained in this proposal agreeing that the current practice of waiting for a defective piece of equipment to depart from a location does very little to promote or ensure the safety of trains.

This section also clarifies FRA's position that the requirements contained in the proposed rules are applicable to any ''person,'' as broadly defined in § 232.11, that performs any function required by the proposed rules. Although various sections of the proposed rule address the duties of a railroad, FRA intends that any person who performs any action on behalf of a railroad or any person who performs any action covered by the proposed rule is required to perform that action in the same manner as required of a railroad or be subject to FRA enforcement action. For example, private car owners and contract shippers that perform duties covered by these proposed regulations would be required to perform those duties in the same manner as required by a railroad.

Paragraph (c) proposes that any person as broadly defined in § 232.11 that performs any function or task required by this part will be deemed to have consented to FRA inspection of their operation to the extent necessary to ensure that the function or task is being performed in accordance with the requirements of this part. This proposed provision is intended to put railroads, contractors, and manufacturers which elect to perform tasks required by this part on notice that they are consenting to FRA's inspection of that portion of their operation which is performing the function or task required by this part. In most cases, this involves a contractor's performance of certain required brake inspections or the performance of specified maintenance on cars, such as, conducting single car or repair track tests on behalf of a railroad. FRA believes that if a person is going to perform a task required by this part, FRA must have the ability to view the performance of such tasks to ensure that they are conducted in compliance with federal regulations. Without such oversight, FRA believes that the requirements contained in the regulations would become illusionary and could be easily circumvented by some railroads. FRA believes that it has the statutory authority pursuant to 49 U.S.C. 20107 to inspect any facility or operation which performs functions or tasks required under this part, and this provision is merely intended to make that authority clear to all persons performing such tasks or functions.

Section 232.11 Penalties

This section identifies the civil penalties that FRA may impose upon

any person, including a railroad or an independent contractor providing goods or services to a railroad, that violates any requirement of this part. These penalties are authorized by 49 U.S.C. 21301, 21302, and 21304. The penalty provision parallels penalty provisions included in numerous other safety regulations issued by FRA. Essentially, any person who violates any requirement of this part or causes the violation of any such requirement will be subject to a civil penalty of at least $500 and not more than $11,000 per violation. Civil penalties may be assessed against individuals only for willful violations, and where a grossly negligent violation or a pattern of repeated violations creates an imminent hazard of death or injury to persons, or causes death or injury, a penalty not to exceed $22,000 per violation may be assessed. In addition, each day a violation continues will constitute a separate offense. It should be noted that, the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101–410 Stat. 890, 28 U.S.C. 2461 note, as amended by the Debt Collection Improvement Act of 1996 Pub. L. 104–134, April 26, 1996 required agencies to adjust for inflation the maximum civil monetary penalties within the agencies jurisdiction. The resulting $11,000 and $22,000 maximum penalties noted in this section were determined by applying the criteria set forth in sections 4 and 5 of the statute to the maximum penalties otherwise provided for in the Federal railroad safety laws. Finally, paragraph (b) makes clear that a person may be subject to criminal penalties under 49 U.S.C. 21311 for knowingly and willfully falsifying reports required by these regulations. FRA believes that the inclusion of penalty provisions for failure to comply with the regulations is important in ensuring that compliance is achieved.

The final rule will include a schedule of civil penalties as appendix A to this part. Because such penalty schedules are statements of policy, notice and comment are not required prior to their issuance. See 5 U.S.C. 553(b)(3)(A). Nevertheless, commenters are invited to submit suggestions to FRA describing the types of actions or omissions under each regulatory section that would subject a person to the assessment of a civil penalty. Commenters are also invited to recommend what penalties may be appropriate, based upon the relative seriousness of each type of violation.

Section 232.13 Preemptive Effect

This section informs the public as to FRA's views regarding what will be the preemptive effect of the final rule. While the presence or absence of such a section does not in itself affect the preemptive effect of a final rule, it informs the public concerning the statutory provision which governs the preemptive effect of the rule. Section 20106 of title 49 of the United States Code provides that all regulations prescribed by the Secretary relating to railroad safety preempt any State law, regulation, or order covering the same subject matter, except a provision necessary to eliminate or reduce an essentially local safety hazard that is not incompatible with a Federal law, regulation, or order and that does not unreasonably burden interstate commerce. With the exception of a provision directed at an essentially local safety hazard, 49 U.S.C. 20106 will preempt any State regulatory agency rule covering the same subject matter as the regulations proposed today when issued as final rules. This section further informs the public that FRA does not intend to preempt provisions of State criminal law that impose sanctions for reckless conduct that leads to actual loss of life, injury, or damage to property, whether such provisions apply specifically to railroad employees or generally to the public at large.

Section 232.15 Movement of Defective Equipment

This section contains the provisions regarding the movement of equipment with defective brakes without civil penalty liability. The proposed provisions contained in this section are almost identical to the provisions proposed in the 1994 NPRM and incorporate the stringent conditions currently contained in 49 U.S.C. 20302, 20303, 21302, and 21304 (previously codified at 45 U.S.C. 13). As pointed out in the previous discussion, most of the alternative proposals received by FRA in response to the 1994 NPRM and the subsequent RSAC Working Group meetings all contained provisions regarding the movement of equipment with defective brakes which are in direct conflict with the statutory requirements. *See* Discussion of Issues and General FRA Conclusions portion of the preamble under the heading ''Movement of Equipment with Defective Brakes.'' Therefore, FRA intends to propose provisions related to the movement of defective equipment which are very similar to the requirements proposed in the 1994 NPRM. *See* 59 FR 47728. However, the current proposal clarifies the tagging requirements, contains provisions regarding the placement of defective equipment, and provides a consistent method for calculating the percentage of operative brakes on a train. Consequently, in addition to being consistent with the statutory requirements, FRA believes that the proposed requirements will ensure the safe and proper movement of defective equipment and will clarify the duties imposed on a railroad when moving such equipment.

Paragraph (a) of this section proposes various parameters which must exist in order for a railroad to be deemed to be hauling a piece of equipment with defective brakes for repairs. The majority of the proposed requirements in this paragraph should pose absolutely no burden to railroads as they are merely a codification of existing statutory requirements. The only new requirement being proposed by FRA in this paragraph is that all cars or locomotives found with defective or inoperative braking equipment be tagged as bad ordered with a designation of the location where the necessary repairs can and will be effectuated and that a qualified person determine the safety parameters for moving a piece of defective equipment. Although these are new requirements, most railroads already tag defective brake equipment upon its discovery. In paragraph (a), FRA has again attempted to expressly clarify the requirement that equipment with defective brakes shall not depart from or be moved beyond a location where the necessary repairs to the equipment can be performed. Therefore, if a car or locomotive is found with defective brakes during any of the proposed brake inspections or while the piece of equipment is en route and the location where the defective equipment is discovered is a place where repairs of the type needed can be performed, that car or locomotive shall not be moved from that location until the necessary repairs are effectuated. However, if repairs to the defective condition cannot be performed at the location where the defect is discovered, or should have been discovered, this proposal makes clear that the railroad is permitted to move the equipment with the defective condition only to the nearest location where the necessary repairs can be performed.

Paragraph (a) also codifies and clarifies the statutory restrictions on the movement of equipment with defective brakes onto the line of a connecting railroad. Hence, the delivery of defective equipment in interchange would be covered by these restrictions. In addition to fulfilling the other requirements set out in this section, the railroad seeking relief from civil penalty liability must show that the connecting

railroad has elected to accept the non-complying equipment and that the point of repair on the connecting railroad's line, where the equipment will be repaired, is no further than the point where the repairs could have been made on the line where the equipment was first found to be defective.

What constitutes the nearest location where the necessary repairs can be performed is an issue FRA has grappled with for decades and has become exceedingly more difficult with the growing use of mobile repair trucks. As discussed in detail above, FRA does not believe that one standard can be adequately developed which would be applicable to all situations. Thus, FRA intends to approach the issue of what constitutes the nearest repair location based on a case-by-case analysis of each situation. FRA believes that its field inspectors are in the best position to determine whether a railroad exercised good faith in determining when and where to move a piece of defective equipment. In making these determinations both the railroad as well as FRA's inspectors must conduct a multi-factor analysis based on the facts of each case.

In determining whether a particular location is a location where necessary repairs can be made or whether a location is the nearest repair location, the accessibility of the location and the ability to safely make the repairs at that location are the two overriding factors that must be considered in any analysis. These two factors have a multitude of sub-factors which must be considered, such as: the type of repair required; the safety of employees responsible for conducting the repairs; the safety of employees responsible for getting the equipment to or from a particular location; the switching operations necessary to effectuate the move; the railroads recent history and current practice of making repairs (brake and non-brake) at a particular location; and relevant weather conditions. Although the distance to a repair location is a key factor, distance alone is not the determining factor of whether a particular location is the nearest location for purposes of effectuating repairs and must be considered in conjunction with the factors noted above. Existing case law makes clear that neither the congestion of work at a particular location or convenience to the railroad are to be considered when conducting this analysis.

Paragraph (b) of this section contains the specific requirements regarding the tagging of equipment found with defective brake components. The requirements proposed in this paragraph are very similar to the tagging requirements currently contained in part 215, regarding the movement of equipment not in compliance with the Freight Car Safety Standards, and are generally consistent with how most railroads currently tag equipment found with defective brakes. FRA recognizes that the industry is attempting to develop some type of automated tracking system capable of retaining the information required by this section and tracking defective equipment electronically, which FRA envisions would be used on an industry-wide level. Consequently, FRA has expressly provided the option to use an automated tracking system if it is approved by FRA. Currently, FRA has several concerns regarding the accessibility, reliability, and security of the system being considered by the industry and would not approve such a system without having those concerns addressed.

Paragraph (c) contains the proposed provision restricting the movement of a vehicle with defective brakes for the purpose of unloading or purging only if it is necessary for the safe repair of the car. This proposed restriction is fully consistent with the statutory provisions regarding the movement of equipment with defective safety appliances.

Paragraph (d) explains the term ''inoperative power brakes'' and proposes a new method for calculating the percentage of operative power brakes (operative primary brakes) in a train. Regarding the term itself, a cut-out power brake is an inoperative power brake, but the failure or cutting out of a secondary brake system does not result in inoperative power brakes; for example, failure of the dynamic brake does not render a power brake inoperative. FRA also intends to make clear that inoperative handbrakes or power brakes overdue for maintenance or stenciling should not be considered inoperative for purposes of calculation. Furthermore, although a car may be found with piston travel which is in excess of the Class I brake test limits, it should not be considered inoperative until it exceeds the outside limits established for that particular type of piston design. However, a car found with piston travel that exceeds its Class I brake test limits would be considered a defective condition if the piston travel were not adjusted at the time that a Class I brake test were performed.

Although the statute discusses the percentage of operative brakes in terms of a percentage of vehicles, the statute was written nearly a century ago and at that time the only way to cut out the brakes on a car or locomotive was to cut out the entire unit. *See* 49 U.S.C. 20302(a)(5)(B). Today, many types of freight equipment can have the brakes cut out on a per-truck basis and FRA expects this tend to increase as the technology is applied to newly acquired equipment. Consequently, FRA merely proposes a method of calculating the percentage of operative brakes based on the design of equipment used today, and thus, a means to more accurately reflect the true braking ability of the train as a whole. FRA believes that the proposed method of calculation is consistent with the intent of Congress when it drafted the statutory requirement and simply recognizes the technological advancements made in braking systems over the last century. Consequently, FRA proposes to permit the percentage of operative brakes to be determined by dividing the number of control valves that are cut-in by the total number of control valves in the train.

Paragraph (e) contains the proposed requirements regarding the placement of cars in a train that have inoperative brakes. The proposed restrictions are consistent with current industry practice and are part of almost every major railroad's operating rule. The proposed provision would prohibit the placing of a vehicle with inoperative brakes at the rear of the train. In addition, the proposal would prohibit the consecutive placing of more than two vehicles with inoperative brakes as test rack demonstrations have indicated that when three consecutive cars have their brakes cut-out it is not always possible to obtain an emergency brake application on trailing cars. FRA has extrapolated the restriction on the consecutive placing of defective cars to multi-unit articulated equipment, prohibiting the placement in a train of such equipment if it has consecutive individual control valves cut-out or inoperative, which is consistent with current industry practice.

Section 232.17 Special Approval Process

This section contains the procedures to be followed when seeking to obtain FRA approval of a pre-revenue service acceptance plan under § 232.505 for completely new brake system technologies or major upgrades to existing systems or when seeking to change one of the established industry maintenance standards referenced in §§ 232.303, 232.305, or 232.307. Several railroads and manufacturers contended, both in response to the 1994 NPRM and at the RSAC Working Group meetings, that FRA needed to devise some sort of quick approval process in order to permit the industry to make

modifications to existing standards or equipment based on the development of new technology. Thus, FRA has attempted to propose an approval process it believes should speed the process for taking advantage of new technologies over that which is currently available under the waiver process. However, in order to provide an opportunity for all interested parties to provide input for use by FRA in its decision making process, as required by the Administrative Procedure Act, FRA believes that any special approval provision must, at a minimum, provide proper notice to the public of any significant change or action being considered by the agency with regard to existing regulations.

Subpart B—General Requirements

Section 232.101 Scope

This section contains a formal statement of the scope of this specific subpart of the proposal. This subpart is intended to provide general operating, performance, and design standards for railroads that operate freight or other non-passenger trains and further contains specific requirements for equipment used in these types of operations.

Section 232.103 General Requirements for All Train Brake Systems

This section contains general requirements that are applicable to all freight and non-passenger train brake systems. FRA proposes to specifically include basic train brake system practices and procedures that form the foundation for the safe operation of all types of trains. Some of these basic principles are so obvious that they have not been specifically included in past rules. For example, in paragraphs (a)–(c) FRA has included the most basic safety requirements for all train brake systems which include having the ability to stop a train within the existing signal spacing, maintaining and monitoring the integrity of the train brake communication line, and having the train brake system respond as intended to signals from the brake communication line.

In paragraph (d), FRA proposes to continue the requirement that prior to use or departure from a point of origin (initial terminal) all trains shall have 100 percent operative and effective brake systems. This has been a requirement in the railroad industry for decades and FRA believes it is not only wise from a safety standpoint, as it ensures the proper operation of a train's brake system at least once during its life, but it sets the proper tone for what FRA expects to be accomplished at these locations. FRA believes that requiring 100 percent operative brakes on all trains at their inception provides the railroads with a margin for failure of some brakes while the train is in transit (up to 15 percent) and tends to ensure that defective equipment is being repaired in a timely fashion. In addition, FRA believes that the 100 percent requirement is consistent not only with Congress' understanding of the AAR inspection standards that were adopted in 1958, but also with the intent of FRA, rail management, and rail labor as to what was to occur at initial terminals when the inspection interval was increased from 500 miles to 1,000 miles in 1982. At that time, carrier representatives committed to the performance of quality initial terminal inspections in exchange for an extension in the inspection interval, for which FRA intends to hold them accountable. In addition, the 100 percent requirement is consistent with the statutory requirements regarding the movement of defective equipment because a majority of the locations where trains are initiated have the capability of conducting virtually any brake system repair, and thus, the defective equipment could not be moved from those locations anyway.

FRA recognizes that the 100 percent requirement at points of origin tends to be somewhat burdensome for some railroads at certain locations. Although railroads are required to have 100 percent operative brakes at initial terminals, railroads are currently permitted to pick-up defective cars at these same locations, if the necessary repairs cannot be performed, and haul them for repairs. Thus, a situation exists wherein the railroad is required to set a defective car out of a train if the train is initiated at that location, but are then able to pick-up that same defective car in an en route train and haul it to the nearest location where the necessary repairs can be performed. FRA recognizes that this creates a somewhat illogical situation; however, FRA believes that by retaining the 100 percent requirement at these locations the public is assured that a train's brake system is in near perfect condition at the beginning of its journey, train crews are more cognizant of the presence of defective cars in the train when they are picked-up en route, railroads are more likely to perform repairs at a location where trains are initiated in order to avoid breaking-up trains to set-out defective cars once the trains are assembled, and FRA retains a clear and consistent enforcement standard that can be easily understood by its inspectors and railroad industry employees.

Although FRA has internally attempted to develop suitable industry-wide criteria for permitting trains to depart points of origin with a minimum number of defective brakes if the location is one where the necessary repairs cannot be made, FRA is not willing to permit such flexibility without fully considering the safety hazards or potential abuses which may accompany such an approach. Therefore, FRA seeks comment from interested parties regarding the potential for permitting very limited flexibility in moving defective equipment from outlying points of origin which lack the capability of effectuating brake system repairs. Of major concern to FRA is the potential for railroads to designate a large number of locations, where trains are initiated, as being unable to effectuate brake system repairs by merely closing existing repair facilities or reducing the capability of mobile repair vehicles at the locations. Therefore, any potential flexibility must ensure that only those locations that are truly incapable of performing brake system repairs, due to the physical geography or design of the location, are afforded the flexibility. In addition, FRA must have to have the ability to approve any designation made by a railroad to ensure that the location is truly one in need of the flexibility and that the designated repair location is actually the nearest location where proper repairs could be made. Furthermore, any approach must also ensure the adequate identification and tracking of the trains and defective equipment moved from the location.

One potential method of ensuring limited designations is to require the designation of a location within a very short distance (50–100 miles) of the outlying location where all repairs will be conducted. Under this approach, FRA would strictly limit the percentage of inoperative brakes (5 percent or less) that could be moved in a train from that location and would require a qualified inspector to determine the safety of such a move. An alternative approach might include the ability of the railroad to perform something less than a full Class I brake test at the train's point of origin and permit the movement of the train a very short distance (50 miles or less) to a designated location where the train would receive a complete Class I brake test.

FRA believes that permitting some limited flexibility in this area might have the potential of actually increasing the safety of trains originating at some

outlying locations that lack the ability to effectuate brake system repairs. It would likely reduce the amount of switching that occurs at these locations as defective equipment could remain entrained until it reaches a more conducive location for being repaired, inspected, or set-out of the train. It might also reduce the percentage of defective equipment which may move in any single train from some of these location where run-through or local trains are used to move the defective equipment to another location for repair as railroad's will not let the number of cars with defects build-up. In addition, it would reduce the distance that defective equipment is hauled before proper repairs are made since any approach would limit the distance such cars could be hauled before repairs or reinspection would be required. Furthermore, a more flexible approach might have the potential for increasing the quality of inspections since the restrictions for handling a defective piece of equipment would be somewhat less and trains would have the ability to be moved to a location where highly experienced inspectors are available.

In light of the preceding discussion, FRA seeks comments from all interested parties regarding the viability of permitting some flexibility in the 100 percent requirement for train initiated at outlying locations that lack repair capability and seeks recommendations on potential approaches for permitting such flexibility. Specifically, FRA seeks comment or information on the following:

1. How many locations currently exist that are initial terminals for some trains that lack the capability of effectuating any brake system repairs? Partial repair ability? If so, what types of repairs can generally be made?

2. How many trains are currently initiated at locations that lack the capability to perform brake system repairs?

3. How do railroads currently handle equipment found with defective brakes at initial terminals that lack the ability to effectuate the necessary repairs?

4. What operational or record keeping requirements should be imposed on trains if they were permitted to depart a point of origin with a minimum number of cars with defective brakes entrained?

5. Are any of the potential safety benefits described above valid? What are the potential safety hazards or concerns in permitting such flexibility?

In paragraph (e), FRA proposes a clear and absolute prohibition on train movement if more than 15 percent of the cars in a train have their brakes cut out or have otherwise defective brakes. Although there is no limit contained in the statute regarding the number of cars with defective brake equipment that may be hauled in a train, the 15 percent limitation is a longstanding industry and agency interpretation of the hauling-for-repair provision currently codified at 49 U.S.C. 20303, 21302, and 21304, and has withstood the test of time. This interpretation is extrapolated from another statutory requirement which permits a railroad to use a train only if ''at least 50 percent of the vehicles in the train are equipped with power or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in a train.'' 49 U.S.C. 20302(a)(5)(B). As originally enacted in 1903, section 20302 also granted the Interstate Commerce Commission (ICC) the authority to increase this percentage, and in 1910 the ICC issued an order increasing the minimum percentage to 85 percent. *See* 49 CFR 232.1, which codified the ICC order. FRA proposed this same restriction in the 1994 NPRM and no major objections to this limitation were raised by any of the commenters. *See* 59 FR 47727. Consequently, FRA will continue to require that equipment with defective or inoperative air brakes makeup no more than 15 percent of any train.

As virtually all freight cars are presently equipped with power brakes and are operated on an associated trainline, the statutory requirement cited above is in essence a requirement that 100 percent of the cars in a train have operative power brakes, unless being hauled for repairs pursuant to 49 U.S.C. 20303. Consequently, in paragraph (f) FRA makes clear that a train's air brakes shall be in effective and operable condition unless a car is being hauled for repairs pursuant to the conditions proposed in § 232.15. This section also proposes the standard for determining when a freight car's air brakes are not in effective operating condition based on piston travel. The piston travel limits for standard 12-inch stroke brake cylinders are the same as currently required under § 232.11(c). However, the experience of FRA indicates a proliferation of equipment with other than standard 12-inch stroke brake cylinders. As a result, mechanical forces and train crew members performing brake system inspections often do not know the acceptable range of brake piston travel for this non-standard equipment. In an attempt to improve this situation and to ensure the proper operation of a car's brakes after being inspected, FRA in paragraph (g) intends to require badge plates, stickers or stenciling of cars with the acceptable range of piston travel for all vehicles equipped with other than standard 12-inch stroke brake cylinders. The information on the badge plate, sticker, or stencil must include both the permissible brake cylinder piston travel range for the vehicle at Class I brake tests and the length at which the piston travel renders the brake ineffective. FRA believes that this information is essential in order for a person to properly perform the brake inspections proposed in this rule due to the growing number of cars with other than standard brake designs.

Paragraph (h) requires that all equipment ordered on or after January 1, 1999, or placed in service for the first time on or after January 1, 2001, be designed not to require an inspector to place himself or herself on, under, or between components of the equipment to observe brake actuation or release. The proposal allows railroads the flexibility of using a reliable indicator in place of requiring direct observation of the brake application or piston travel because the current or future designs of some freight car brake systems make direct observation extremely difficult without the inspector placing himself or herself underneath the equipment. Brake system piston travel or piston cylinder pressure indicators have been used with satisfactory results for many years. Although indicators do not provide 100 percent certainty that the brakes are effective, FRA believes that they have proven themselves effective enough to be preferable to requiring an inspector to assume a dangerous position.

This proposed requirement stems primarily from the brake system design of double-stack equipment currently used by several larger freight operations. Several commenters have indicated that the functioning of the brakes on this type of equipment cannot be observed without inspectors placing themselves in potentially dangerous positions. In addition, a complete inspection of the brake equipment and systems used on double-stack equipment is time consuming. Consequently, inspectors are reluctant to conduct a complete brake inspection test on departing trains that contain this type of equipment. FRA feels that double-stack equipment is becoming a mainstay of the freight railroad industry and that this design deficiency must be corrected. Thus, FRA has attempted to make this a performance requirement by simply specifying how the equipment must

function and allowing the industry to determine the method of compliance.

Paragraph (i) proposes to require that an emergency brake application feature be available at any time and that it produce an irretrievable stop. This section merely codifies current industry practice and ensures that all equipment will continue to be designed with an emergency brake application feature. In the 1994 NPRM on power brakes, FRA proposed a requirement that all trains be equipped with an emergency application feature capable of increasing the train's deceleration rate a minimum of 15 percent. *See* 59 FR 47729. This proposed requirement merely restated the emergency specification currently contained in Appendix B to part 232. Comments received in response to that proposal indicated that some brake equipment currently in use or being developed could provide a deceleration rate with a full service application that is close to the emergency brake rate and that the proposed requirement would require the lowering of full service brake rates, thereby compromising safety and lowering train speeds. Based on these comments, FRA proposes the current requirement which is in accordance with suggestions made by several commenters.

Paragraph (j) proposes to require that the air brake components that control brake application and release be adequately sealed to prevent contamination by foreign material. This proposed requirement is merely a reiteration of a general specification requirement currently contained in Appendix B to part 232. It is intended to ensure that the air brake components are not compromised due to contamination from foreign materials which can cause premature failure of certain components resulting in the loss of braking ability.

Paragraphs (k) and (l) impose on the railroads the responsibility for determining maximum air brake system working pressure and maximum brake pipe pressure. These proposed provisions were contained in the 1994 NPRM, and FRA received no comments objecting to their inclusion. *See* 59 FR 47743. Thus, FRA intends to continue to allow individual railroads the wide latitude currently permitted in determining these pressures.

Paragraph (m) provides that except as provided by other provisions of this part, all equipment used in freight or other non-passenger trains shall, at a minimum, meet the performance specification for freight brakes in AAR standard S–469–47. The AAR standard referenced in this paragraph contains all the provisions currently contained in Appendix B to part 232. FRA recognizes that the provisions contained in the AAR standard have not been revised since 1947 and that some of the requirements may be outdated due to technological data. Consequently, FRA seeks comments from interested parties as to the necessity of referencing these standards as well as any information on any updated standards related to the performance of freight equipment that is currently being used throughout the industry.

Paragraph (n) proposes to require that en route trains qualified by the Air Flow Method that experience a brake pipe air flow of greater than 60 CFM or brake pipe gradient of greater than 15 psi and the movable pointer does not return to those limits within a reasonable time be stopped at the next available location and inspected for leaks in the brake system. This requirement was part of the general waiver granted to the AAR allowing the use of the air flow method to qualify train air brakes. FRA believes that this requirement is necessary to prevent trains with excessive leakage from continuing to operate. If a train has excessive leakage the engineer may lack the ability to stop the train using the air brake system.

Paragraph (o) contains the requirements regarding the setting and releasing of hand brakes prior to releasing the air brake and after the air brake is charged. The requirements contained in this paragraph are generally a reiteration of the guidance issued by FRA in Safety Advisory 97–2 on September 15, 1997. *See* 62 FR 49046. The securement guidance contained in Safety Advisory 97–2 is based upon FRA's review of the Fort Worth incident that occurred on August 20, 1997, and its awareness of other incidents involving the improper securement of rolling equipment. The Safety Advisory was issued in order to provide the industry with some assistance and guidance regarding securement procedures and to provide information on current practices of the industry related to the securement of rolling stock. *See* 62 FR 49046. The Safety Advisory contains certain recommended procedures which FRA believes will greatly reduce the likelihood of further accidents due to improperly secured rail equipment.

On August 20, 1997, a fatal head-on collision between a Union Pacific Railroad Company (UP) freight train and an unattended, runaway UP locomotive consist near Fort Worth, Texas, has caused FRA to focus on the effectiveness of certain railroad procedures for protection of people and property from hazards caused by failure to properly secure locomotives, cars, and other rolling equipment left unattended on sidings or other tracks. Although FRA and NTSB are currently investigating this incident, FRA's preliminary findings indicate that the UP crew applied the hand brake on the lead locomotive of the locomotive consist and then applied the independent air brake. The crew then released the independent brake to verify that the hand brake would hold, which it appeared to do. Sometime later, after the locomotive consist was left unattended, it is believed that the air brakes eventually leaked off and that the single hand brake did not, by itself, sufficiently secure the locomotive consist, enabling it to roll out of the siding eastward and onto the main track where it collided head-on with a UP freight train.

An issue related to improperly secured rail equipment is the practice known as ''bottling the air'' in a standing cut of cars. The practice of ''bottling the air'' occurs when a train crew sets out cars from a train with the air brakes applied and the angle cocks on both ends of the train closed, thus trapping brake pipe pressure in the cut of cars they intend to leave behind. This practice has the potential of causing an unintentional release of brakes on these cars and the potential for a runaway exist. Many railroad operating rules require that a 20 pound reduction in brake pipe pressure be made when stopping a train to remove a cut of cars from the train. Thus, if the trainman closes the angle cock where the cut is to be made before pressure equalizes in the trainline, an air wave action may form which can be of sufficient amplitude to initiate an unintentional release of the brakes.

Brake pipe gradient is another factor that makes bottling the air dangerous. ''Normal Gradient'' is a term used to express the difference between the higher pressure on the front end of the train and the lower pressure on the rear end of the train, which is dependent upon brake pipe leakage and train length. Each train establishes its own normal gradient value. ''Inverse Gradients'' and ''False Gradients'' are temporary gradients which are a result of brake operations. Inverse gradients occur when a brake pipe reduction is made, temporarily making the brake pipe pressure higher on the rear of the train. The false gradient is created anytime the train brakes are set and released, thus temporarily resulting in higher than normal pressure differential between the front and rear end of the train as the brake pipe charges. Therefore, if the engineer sets and

releases a train's brakes a sufficient number of times prior to stopping to remove a cut of cars, a false gradient could be established. Even if the engineer made a 20 pound brake pipe reduction and listened for the air to stop exhausting at the automatic brake valve before giving the signal to the trainman to cut off the cars, the potential exists for an unintentional release of air brakes if the air on the cars is bottled. The false gradient could be of such magnitude, that as the trainline attempts to equalize, the higher pressure on the front end flowing to the rear will exceed the 1½ pound differential across the service piston and cause a release of air brakes. An inverse gradient can also create an unintentional release of brakes. As brake pipe pressure is reduced at the front of the train, the rear end temporarily has a higher pressure. As the trainline attempts to equalize, the front end will rise. In some circumstances, this rise could be enough to initiate a release of air brakes.

On June 5, 1998, the NTSB issued the following recommendation to FRA:

> Issue a regulation that requires the brake pipe pressure to be depleted to zero and an angle cock to remain open on standing railroad equipment that is detached from a locomotive controlling the brake pipe pressure. (R–98–17)

This recommendation was the result of NTSB's investigation of an incident that occurred on January 27, 1997, on the Apache Railway near Holbrook, Arizona. The incident involved the runaway of 77 cars down a 1.7 percent grade for 14 miles resulting in the eventual derailment of 46 cars and the release of hazardous materials. Although there were no fatalities, 150 people were evacuated from nearby residential areas. The NTSB determined that the 77 cars rolled away unattended because the conductor of the train had trapped the air in the brake system, i.e. ''bottled the air,'' which resulted in an undesired release of the brakes on the standing cars. In its recommendation the NTSB correctly noted FRA statistics show that ten accidents occurred between 1994 and 1995 which were attributable to the practice of ''bottling the air.''

The procedures proposed in paragraph (o) regarding the securement of standing equipment tend to address the issue of ''bottling air'' on such standing equipment. Paragraph (o)(2)(iii) proposes to require that when freight cars are left standing the locomotives shall be detached from the cars to allow an emergency brake application to be initiated. Thus, FRA intends to require that an emergency brake application be initiated on standing equipment whenever locomotives are removed from the consist. Consequently, the requirements proposed in this section tend to address the recommendation issued by the NTSB but may need to be further investigated when FRA begins the drafting of the final rule.

In light of NTSB's recent recommendation and based on FRA's recent issuance of Safety Advisory 97–2 and its awareness of other incidents involving improper securement of rolling equipment and the practice of ''bottling the air,'' FRA seeks comment and information regarding railroads' experience with implementing the recommended practices contained in Safety Advisory 97–2 and with regard to its procedures for securing standing equipment. Consequently, FRA seeks comment and information from all interested parties on the following:

(1) What has been the railroads' experience with implementing the recommended procedures contained in Safety Advisory 97–2? Are railroads implementing the recommendations?

(2) What operational or equipment costs would be incurred should the recommended procedures contained in Safety Advisory 97–2 be mandated in a final rule?

(3) Are there additional practices or procedures that should be addressed related to the securement of unattended rolling stock?

(4) Are there alternative methods, practices, or procedures that are currently in place or that could be implemented which would provide an equivalent level of safety to the recommended procedures contained in Safety Advisory 97–2?

(5) Are there situations where a railroad could justify not depleting the brake pipe to zero when cars are left standing and unattended?

(6) Do any railroads currently endorse the practice of ''bottling the air?'' Under what circumstances?

Paragraph (p) proposes to require that air pressure regulating devices be adjusted in accordance with the air pressures contained in the chart contained in this paragraph. The chart is very similar to that currently provided in § 232.10(n), but has been updated to include equipment that is not currently addressed by the existing chart and has been modified in accordance with the provisions contained in this proposal. FRA requests that interested parties inform FRA of any existing air pressure regulating devices that have not been included or addressed in the proposed updated chart.

Section 232.105 General Requirements for Locomotives

For the most part, this section contains general provisions related to locomotives that are either currently contained in § 232.10 or that were previously proposed in the 1994 NPRM. As discussed in detail in the general preamble portion of this document, FRA does not intend to include provisions in this proposal related to the inspection and maintenance of locomotive braking systems. FRA believes that these requirements are adequately addressed in part 229 and would only add to the complexity of this proposal and potentially cause confusion or misunderstanding by members of the regulated community. Therefore, while many of the requirements currently contained in § 232.10 are no longer necessary as they are adequately addressed in part 229, paragraphs (a) and (c) are all provisions currently contained in § 232.10 which FRA believes need to be retained. *See* 49 CFR 232.10(b), (f)(2), and (g). The only change to these provisions is that in paragraph (c) FRA proposes to require that the hand or parking brake be inspected and repaired, if necessary, at least every 368 days. FRA believes that this proposal will have little or no impact on railroads as this inspection is intended to coincide with the annual locomotive inspection required under § 229.27 and many railroads currently inspect these devices at this annual inspection. FRA believes that a thorough inspection of these devices on an annual basis is sufficient to ensure the proper and safe functioning of the devices.

Paragraph (b) proposes to require that, except for a locomotive that is ordered before January 1, 1999, and placed in service for the first time before January 1, 2001, all locomotives shall be equipped with a hand or parking brake that can be set and released manually and can hold the equipment on the maximum grade anticipated by the operating railroad. A hand or parking brake is an important safety feature that prevents the rolling or runaway of parked locomotives. The proposed requirement represents current industry practice. In the 1994 NPRM on power brakes, FRA proposed requiring that a hand brake be equipped on locomotives. *See* 59 FR 47729. FRA received several comments to that proposal suggesting that the term ''parking brake'' be added to the requirement since that is what is used on many newly built locomotives. A parking brake generally can be applied other than by hand such as spring pressure or air pressure when the

brake pipe air is depleted or by other means such as driven by an electrical motor. Parking brakes usually incorporate some type of manual application or release feature, although these features are generally more difficult to operate. FRA believes that parking brakes are the functional equivalent of a traditional handbrake and are capable of providing a similar level of security to stationary equipment. Consequently, FRA has added the term ''parking brake'' in this proposal.

In paragraph (d), FRA proposes to require that the leakage on equalizing reservoirs on locomotives and related piping be zero. The equalizing reservoir contains the controlling volume of air pressure, which is set to a desired pressure by the locomotive engineer by setting the regulating valve (also known as the feed valve) on the automatic air brake system. When the automatic brake valve handle is moved to the release position, air supplied from the locomotive air compressor and the main air reservoirs is supplied to the equalizing reservoir through the regulating valve. The brake pipe pressure will then charge to the air pressure contained in the equalizing reservoir. When an application of the train brakes is desired, the engineer moves the automatic brake valve handle into the application zone. The movement of the brake valve handle into the application zone shuts off the supply of air to the equalizing reservoir being supplied from the regulating valve, leaving the volume of air contained in the equalizing reservoir trapped in the equalizing reservoir. The trapped air pressure can then be reduced to a desired amount by movement of the automatic brake valve handle. This will result in the brake pipe pressure responding and being reduced to a pressure equal to the pressure contained in the equalizing reservoir. Furthermore, the air pressure in the brake pipe on most freight equipment will be maintained at the pressure in the equalizing reservoir due to the maintaining features of the brake system. Consequently, any leakage from the equalizing reservoir will effect the maintaining feature of the automatic air brake resulting in the engineer losing his ability to effectively maintain control of the brake pipe pressure and thus, affect the ability of the engineer to safely control the train in some circumstances.

In paragraph (e), FRA proposes to prohibit the use of ''feed or regulating valve braking,'' in which reductions and increases in the brake pipe pressure are effected by manually adjusting the feed valve. ''Feed valve braking'' has been recognized by both the railroad industry and FRA as an unsafe practice. Most railroads already have some type of operating rule prohibiting this type of braking.

In paragraph (f), FRA also proposes to prohibit the use of the ''passenger'' position on the locomotive brake control stand on conventional freight trains when the trailing equipment is not designed for graduated brake release. The ''passenger'' position was intended only for use with equipment designed for graduated brake release. Therefore, use of the ''passenger'' position with other equipment can lead to potentially dangerous situations where undesired release of the brakes can easily occur due to the slightest movement of the automatic brake valve. In FRA's view, the only situation when the use of the passenger position might become necessary to safely control a train is when equalizing reservoir leakage occurs en route. If such a situation arises the train may move only to the nearest forward location where the equalizing reservoir leakage can be corrected.

Section 232.107 Air Source Requirements

This section contains proposed requirements directed at ensuring that freight brake systems are devoid, to the maximum extent practical, of water and other contaminates which could conceivably deteriorate components of the brake system, and thus, negatively impact the ability of the brake system to function as intended. As part of the Working Group proceedings, a task force was formed and charged with identifying the source of contaminates in the trainline and to determine the degree to which these contaminates pose a safety, operational, and/or maintenance problem. The task force performed tests on numerous locomotives and yard air plants, with and without air dryers, to determine the amount of dew point depression in the air lines. The results of these tests confirmed the assumptions of the Working Group members in that the vast majority of locomotives tested did not contribute to moisture in the train air lines, but rather, the main source of raw water came from yard charging devices. Further, the majority of the yard devices which were tested were relatively old and had not been properly maintained or upgraded in years. During the task force tests, it was noted that all units equipped with properly maintained air dryers produced minimal moisture in the system. Since a large number of trains are charged by yard air sources (up to 80 percent by some estimations), the group provided a non-consensus recommendation that yard air charging devices be given the greatest priority.

Based on the work performed by the task force and on FRA field experience, FRA agrees with the above conclusion and believes that requiring locomotives to be equipped with air dryers would provide minimal safety benefits and would impose an enormous and unwarranted cost burden on the railroads. Further, FRA believes that simply requiring that yard air sources be equipped with air dryers may not alone necessarily effectuate the desired results unless the air dryers are appropriately placed to sufficiently condition the air source. Many yard air sources are configured such that a single air compressor services several branch lines used to charge train air brake systems, and as such, multiple air dryers may be required to eliminate the introduction of wet air into the brake system. FRA believes that, as with locomotives, requiring yard air sources to be equipped with air dryers will likely impose a significant and unnecessary cost burden on the railroads. Thus, FRA proposes in paragraphs (a)(1)–(5) to require a monitoring program designed to ensure that yard air sources operate as intended. FRA believes that implementation of this monitoring program as proposed represents a method by which the industry can truly maximize the benefits to be realized through air dryer technology, which all parties acknowledge has been proven to reduce the level of moisture introduced into the trainline, at a cost that is commensurate with the subsequent benefits. This proposed program requires a railroad to take remedial action with respect to any yard air sources that are found not to be operating as intended, and further proposes to establish a retention requirement with respect to records of these deficient units to facilitate the tracking and resolution of continuing problem areas.

FRA proposes additional measures to minimize the possibility of moisture being introduced into the trainline. Paragraph (b) of this section reiterates the current requirement contained at § 232.11(d) which requires that condensation be blown from the pipe or hose from which compressed air is taken prior to connecting the yard air line or motive power to the train. As an additional precaution, paragraph (d) of this section proposes to require yard air reservoirs be equipped with an operable automatic drain system, or be manually drained at least once each day that the devices are used or more often when moisture is detected in the system.

In paragraph (c) of this section, FRA proposes to ban the use of anti-freeze chemicals in train air brake systems, reiterating the position stated in the 1994 NPRM, in order to prevent the untimely damage and wear to the brake system components. *See* 59 FR 47728. FRA did not receive any adverse comments on this issue in response to the previous NPRM, and both rail labor and management representatives had agreed on this provision as a consensus item prior to the discontinuance of Working Group deliberations in December 1996. FRA intends to closely monitor compliance with this provision, as recent field experience indicates that alcohol is still being used to combat moisture build-up in brake pipes, especially in extremely cold weather operations. As the majority of railroads providing comments on this issue have stated that they are able to operate trains in cold weather without resorting to the use of chemicals as an anti-freeze, railroads are not expected to incur any operational or economic hardships as a result of this requirement.

FRA recently published a final rule mandating the incorporation of two-way EOTs on a variety of freight trains, specifically those operating at speeds of 30 mph or greater or in heavy grade territories. *See* 62 FR 278. Two-way EOTs provide locomotive engineers with the capability of initiating an emergency brake application that commences at the rear of the train in the event of a blockage or separation in the train's brake pipe that would prevent the pneumatic transmission of the emergency brake application throughout the entire train. These devices consist of a front unit, located in the cab of the controlling locomotive, and a rear unit, located in the rear of the train and attached to the brake pipe. Radio communication between the front and rear end units is continually monitored and confirmed at regular intervals, and the rear unit is only activated when continuity of these radio transmissions is not maintained over a specified time interval. This discussion of two-way EOTs is particularly appropriate within the context of the air source requirements. In the unlikely event that the proposed requirements regarding dry air fail to sufficiently eliminate moisture from the trainline, and a restriction or obstruction in the form of ice forms as the result of freezing of this moisture during cold weather operations, the two-way EOT device becomes a first order safety device and will initiate an emergency application of the brakes from the rear of train. As such, the vast majority of concerns associated with moisture in the trainline freezing in cold weather operations have been alleviated through the incorporation of this technology in most freight operations.

Paragraph (e) proposes to require that railroads develop and implement detailed written operating procedures tailored to the equipment and territory of that railroad to cover safe train operations during cold weather situations. In 1990, the NTSB in response to an accident which occurred in Helena, Montana, recommended that FRA amend the power brake regulations to require additional testing of air brake systems when operating in extreme cold weather, especially when operated in mountain grade territory. *See* NTSB Recommendation R–89–081 (February 12, 1990). In response to this recommendation and to various petitions for rulemaking requesting similar action, FRA in the 1994 NPRM proposed various requirements regarding cold weather operations, which included: Use of two-way EOTs; prohibition on the use of alcohol in trainlines; air dryers on locomotives; and requirements for railroads to develop operating procedures in cold weather and mountain grade territories. As noted previously, a final rule regarding the use of two-way EOTs has been issued and is in effect. The current proposal reiterates the prohibition on the use of anti-freeze chemicals and proposes other requirements to ensure that dry air is being added to brake systems. This paragraph reiterates the previously proposed requirement that railroads develop and implement operating requirements for cold weather operations.

FRA recognizes that in the past there has been little support for mandating additional brake system testing in cold weather territory. FRA agrees that the development and use of welded pipe fittings, wide-lip hose couplings, and ferrule clamps have greatly reduced the effects of cold weather on the air brake system. However, FRA believes that cold weather situations do involve added safety risks and need to be further addressed. FRA believes that requiring the development of written operating procedures will require railroads to go through the thought process necessary to analyze their operations during cold weather conditions in order to determine the inherent safety hazards involved and develop procedures to minimize those hazards. Due to the unique nature of each railroad and the difficulty in developing specific requirements that are applicable to all operations, FRA does not intend to mandate specific operating requirements at this time. However, FRA might consider mandating specific operating requirements that should be included in any railroad's cold weather operating practices at the final rule stage based on the comments received and on FRA's continuing review of cold weather operations by various railroads.

FRA recognizes that some railroads have already developed certain cold weather operating procedures which might be useful as models on other similarly situated railroads. For example, BNSF has unilaterally instituted a cold weather operating plan for certain trains at specific locations in Montana. This plan requires trains with greater than 100 tons per operative brake to be inspected and/or operated in a certain manner when temperatures fall below zero degrees. Part of the plan requires that after the performance of a 1,000-mile or initial terminal brake test on such trains, the brakes be reset and held for 30 minutes after which time the train is to be reinspected to ensure that 100% of the brakes remained applied. Brakes found not to have remained applied must be set-out of the train or repaired. FRA believes procedures such as these could greatly enhance the safety of the trains operated in cold weather conditions. FRA recognizes that there may be other types of operating or inspection criteria that could be implemented in extreme cold weather conditions instead of or in addition to that noted above; such as limits on the length or tonnage of such trains; limits on the use of yard air sources; or other enhanced inspection criteria.

In an effort to further develop and evaluate this proposal, FRA seeks comments from all interested parties regarding the following specific issues:

(1) How many yard sources are there that are used to charge train air brake systems?

(2) What time period will be required to effectively institute the monitoring program as prescribed?

(3) How many of these yard air sources are equipped with automatic drain valves?

(4) If the yard air source is not equipped with an automatic drain valve, how long does it take to drain manually?

(5) What operating procedures do railroads currently have in place to address the added safety risks that are inherent to cold weather operations?

(6) What has been the impact on the railroad operations that have adopted cold weather procedures similar to those noted above?

(7) Are there certain cold weather operating practices and procedures that

have been adopted by most segments of the industry?

(8) FRA is aware that at least one railroad is currently engaged in the testing and tear-down of certain brake valves to ensure that the valves operate properly in cold weather. What has been the results of these tests?

Section 232.109 Dynamic Brake Requirements

This section contains the proposed operating requirements for trains equipped with dynamic brakes. Most, if not all, of the railroads have provided comments stating that they do not consider dynamic brakes to be a safety device. However, these same commenters stated that they promote and encourage the use of dynamic brakes for purposes of fuel efficiency and to avoid wear to brake components. Due to this encouragement, dynamic brakes are relied on to control train speed and to provide assistance in controlling trains on heavy grades. Contrary to continued comments of several labor representatives, FRA does not feel that locomotives should be required to be equipped with dynamic brakes. FRA believes that the decision to equip a locomotive with dynamic brakes is mainly an economic one, best determined by each individual railroad. However, in order to prevent accidents and injuries that may result from an over-reliance on the dynamic brake, which may fail at any time, FRA believes that if the devices are available, engineers should be informed on their safe and proper use and be provided with information regarding the amount of dynamic braking power actually available on their respective trains. FRA believes that by providing an engineer with as much information as possible on the status of the dynamic brakes on a train, a railroad better enables that engineer to operate the train in the safest and most efficient manner.

Based on the preceding discussion, paragraphs (a) and (c) of this section delineate specific proposed communication requirements regarding the status of the dynamic brakes on all locomotive units in a consist to ensure that locomotive engineers are provided with a clear indication of the total available braking effort at their disposal. FRA proposes to require written notification of the operational status of the dynamic brakes on all locomotive units in the consist be provided to the locomotive engineer at the initial terminal or point of origin for a train or at other locations where a locomotive engineer first takes charge of a train. Further, FRA believes that this information should include a clear, written method of communicating to a locomotive engineer that the locomotive or locomotives in his or her consist has been discovered to have inoperative dynamic brakes. Accordingly, FRA proposes that a tag bearing the words ''inoperative dynamic brake'' be securely attached and displayed in a conspicuous location in the cab of the locomotive at the point where the defective condition(s) are discovered.

Locomotive engineers have long advocated the philosophy, ''If it is equipped, then it should work'' with respect to dynamic brakes. There are currently no requirements governing the maintenance and repair of locomotives equipped with dynamic brakes. Experience has shown that, since railroads do not consider dynamic brakes to be a critical safety item, repairs are typically effectuated when it is convenient and economical for the railroad with little regard for timeliness. FRA believes that, as railroads have become increasingly dependent on the use of dynamic brakes as an integral part of their published safe train handling procedures, it is a reasonable expectation on behalf of locomotive engineers to have operable dynamic brakes on those locomotive units which are so equipped. Consequently, in paragraph (b) FRA proposes to require that all inoperative or ineffective dynamic brakes be repaired within 30 days of becoming inoperative or at the locomotive's next periodic inspection, whichever occurs first. FRA believes that this proposed maintenance requirement strikes an appropriate balance between the operational considerations important to the locomotive engineer and the logistical and repair considerations that will be imposed on the railroads.

FRA acknowledges that some railroads, primarily short lines, may own locomotives that are equipped with dynamic brakes but due to the physical terrain over which the railroad operates or the operating assignments of the particular locomotive, the railroad rarely, if ever, has the need to employ the dynamic braking capabilities of the individual locomotive. In these instances, the maintenance requirements discussed above become unnecessarily burdensome. Therefore, FRA believes relief is warranted in these situations provided a specified set of parameters is developed and adhered to that prevents direct and intentional circumvention of the proposed repair requirements. Consequently, in paragraph (d) of this section, FRA proposes to permit a railroad to declare a locomotive's dynamic brakes ''deactivated'' if the following requirements are met: (i) the locomotive is clearly stencilled on both the interior and exterior of the locomotive stating that the dynamic brake has been deactivated; and (ii) the railroad has taken appropriate action to ensure that the deactivated locomotive is incapable of utilizing dynamic braking effort to retard or control train speed. FRA does not intend to prescribe the specific manner in which the locomotive is to be deactivated, so long as the unit is not physically capable of employing its dynamic brakes to aid in train handling. Although, FRA does not envision a significant number of instances where a locomotive which has been declared ''deactivated'' would need to be ''reactivated,'' FRA does recognize that some railroads may need to reactivate the dynamic brakes in some circumstances, such as changes in a locomotive's operating environment or situations where a locomotive with previously ''deactivated'' dynamic brakes is purchased by another railroad. However, FRA intends to interpret the provision for ''deactivating'' a locomotive's dynamic brakes rather literally to minimize contentions that railroads are merely playing a cat and mouse game with the proposed maintenance interval to avoid repairing the units.

The operating requirements contained in this section attempt to address the controversy over the role of dynamic brakes in overall train safety. Most railroads commented that dynamic brakes are a secondary system that plays no role in train safety. However, many railroads have become somewhat dependent on dynamic brakes for normal train handling procedures, and this dependency gives rise to the likelihood of overreliance. Therefore, in paragraph (e) FRA proposes to require that railroads using dynamic brakes have written operating requirements governing how dynamic brakes are to be used to safely handle trains based on the operating conditions and the territory covered by that railroad. FRA intends for these operating requirements to sufficiently cover the loss of dynamic brakes or other non-friction brakes and must be fundamentally based on the use of friction brakes to safely stop a train under all operating conditions. Furthermore, in paragraph (f) FRA proposes to require each railroad to ensure that its locomotive engineers are fully trained in the operating rules prescribed above by including them in the certification process contained in the knowledge, skill, and ability requirements contained in 49 CFR part 240.

FRA believes that the establishment of these comprehensive operating rules and training plans is the most effective means by which to minimize the possibility of future accidents caused by excessive reliance on dynamic brakes by the train crew as a method of controlling the speed of a train in its descent through a difficult grade, as was the case in the San Bernardino incident. FRA views as unfortunate, and potentially reckless, the increasing number of train handling and power brake instructions issued by freight railroads that emphasize the use of dynamic brakes without including prominent warnings that such systems may not be relied upon to provide the margin of safety necessary to stop short of obstructions and control points or to avoid overspeed conditions. Such instructions, while not misleading to seasoned locomotive engineers, threaten to overcome the good judgement of safety critics and regulators by leading to excessive reliance upon these systems. Given the ever-increasing weight and length of freight trains, and the severe grades that they are often required to negotiate en route, the need for locomotive engineers who are thoroughly trained and knowledgeable in all aspects of train handling is paramount for continued safety in the rail industry.

Only limited information regarding the technical feasibility, availability, and cost of incorporating dynamic brake indicators and/or displays in the locomotive cab has been provided to the FRA in response to questions posed in the ANPRM and the 1994 NPRM. *See* 57 FR 62555 and 59 FR 47687. FRA recognizes that the technology for dynamic brake displays with the ability to provide information regarding the total train dynamic brake retarding force, at certain speed increments, in the cab of the locomotive has not been developed for industry-wide implementation on a cost-effective basis at this time. At the same time, FRA maintains that such an indicator would provide great benefits to engineers in alerting them to diminished or excessive dynamic braking capabilities, thus permitting the engineer to control the braking of their train in the safest possible manner. Previous discussions regarding the capabilities and limitations of dynamic brakes provided in the ANPRM, the 1994 NPRM, and the preamble to this NPRM have clearly shown that in order to completely test the functioning of dynamic brakes the train must be moving. However, these discussions have also clearly concluded that while running tests of dynamic brakes provide information to the locomotive engineer regarding the availability of dynamic brakes, such tests are limited to the specific moment they are performed. Thus, running tests do not provide continuous information on the current status of the dynamic brakes to the locomotive engineer. Because dynamic brakes could fail at any time, FRA feels there is merit in the development of technology whereby engineers are able to continuously monitor the operation of their available dynamic brakes. FRA once again seeks comments from all interested parties regarding the following specific issues:

1. What is the status on the future availability of dynamic brake indicators capable of providing the information discussed above?
2. What are the current cost estimates associated with the acquisition and installation of such indicators?
3. What quantitative and/or qualitative operational or safety benefits can be derived from the use of these dynamic brake indicators?
4. What alternative methods are available for providing the same information that a dynamic brake indicator would provide to a locomotive engineer?

FRA also specifically solicits input regarding the placement of a locomotive in a consist that has been declared ''permanently disabled'' in accordance with section 232.111(d) of this proposal. Some existing railroad operating rules dictate that a locomotive which has been determined to have inoperative dynamic brakes may be dispatched in a train, but prohibit its placement in the lead position of the consist. Are there technical reasons to prohibit a locomotive with inoperative dynamic brakes from functioning as the lead locomotive, *provided* the disabled locomotive still has the capability to fully control the dynamic braking functions of all other locomotives in the consist that are so equipped?

Section 232.111 Train Information Handling

This section contains the proposed requirements regarding the handling of train information. The purpose of these train-information handling requirements is to ensure that train crews are given accurate information on the condition of the train brake system and other factors that affect the performance of the train brake system when they assume responsibility for the train. This section contains a list of the specific information FRA proposes to require railroads to furnish train crew members about the train and the train's brake system at the time they take over the train. FRA believes that train crews need this information in order to avoid potentially dangerous train handling situations and to be able to comply with various Federal safety standards. Most railroads already provide their train crews with most of the information required in this proposal or have a process set-up which is capable of transmitting such information, thus the impact of this proposed requirement should be relatively minor.

It should be noted that, FRA has left the method in which railroads will convey the required information to the train crews to the discretion of the railroad since FRA feels that each individual railroad is in the best position to determine the method in which to dispense the required information based on the individual characteristics of its operations. However, the means for conveying the required information will be part of the written operating requirements, and railroads will be required to follow their own requirements.

Subpart C—Inspection and Testing Requirements

Section 232.201 Scope

This section contains the general statement regarding the scope of this subpart, indicating that it contains the inspection and testing requirements for brake systems used in freight and other non-passenger trains. This section also indicates that this subpart contains the general training requirements for railroad and contract personnel used to perform the inspection and tests required by this part.

Section 232.203 Training Requirements

This section contains the proposed general training requirements for railroad employees and contractors that are used to perform the inspections required by this part. (See ''Discussion of Issues and General FRA Conclusions'' portion of the preamble under the heading ''V. Training and Qualifications of Personnel'' for a detailed discussion pertaining to the provisions contained in this section).

Paragraph (a) proposes that each railroad develop and implement a training, qualification, and designation program for employees and contractors that perform train air brake system tests and maintenance. For purposes of this section, a ''contractor'' is defined as a person under contract with the railroad or car owner or an employee of a person under contract with the railroad or car owner. FRA intends for the proposed training and qualification requirements to apply not only to railroad personnel

but also to contract personnel that are responsible for performing brake system inspections, maintenance, or tests required by this part. FRA believes that railroads are in the best position to determine the precise method of training that is required for the personnel they elect to use to conduct the required brake system inspections, tests and maintenance. Although FRA provides railroads with broad discretion to develop training programs specifically tailored to the type of equipment it operates and the personnel it employs, FRA will expect railroads to fully comply with the training and qualification plans they develop. A critical component of this training will be making employees aware of specific Federal requirements that govern their work. Currently, many railroad training programs fail to distinguish Federal requirements from company policy.

Paragraph (b) proposes a series of general requirements or elements which must be part of any training and qualification plan developed and implemented by a railroad. FRA believes that the elements contained in this section are specific enough to ensure high quality training while being sufficiently broad to permit a railroad to develop a training plan that is best suited to its particular operation. This paragraph requires railroads to identify the specific tasks related to the inspection, testing and maintenance of the brake systems operated by that railroad, develop written procedures for performing those tasks, identify the skills and knowledge necessary to perform those tasks, and specifically identify and educate its employees on the Federal requirements contained in this part related to the performance of those tasks. FRA believes that these requirements will ensure that, at a minimum, the railroad surveys its entire operation and has identified the various activities its employees perform. FRA intends for these written procedures and the identified skills and knowledge to be used as the foundation for any training program developed by the railroad.

This paragraph also makes clear that railroads are permitted to train employees only on those tasks that they will be responsible for performing. FRA tends to agree with several railroad commenters that there is no reason for individuals who solely perform pre-departure air brake tests and inspections to be as highly trained as a carman or other mechanical personnel since these individuals perform many other duties which involve the maintenance and repair of equipment in addition to brake inspections. This paragraph also permits railroads to incorporate an already existing training program, such as an apprenticeship program. Thus, railroads would most likely not need to provide much additional training, except training specifically addressing the requirements contained in this part and possibly refresher training, to its carmen forces that have completed an apprentice program for their craft.

This paragraph also contains requirements that any program developed must include ''hands-on'' training as well as classroom instruction. FRA believes that classroom training by itself is not sufficient to ensure that an individual has retained or grasped the concepts and duties explained in a classroom setting. In order to adequately ensure that an individual actually understands the training provided in the classroom, some sort of ''hands-on'' capability must be demonstrated. FRA believes that the ''hands-on'' portion of the training program would be an ideal place for railroads to fully involve its labor forces in the training process. Appropriate trained and skilled employees would be perfectly suited to provide much of the ''hands-on'' training envisioned by FRA. Consequently, FRA strongly suggests that railroads work in partnership with their employees to develop a training program which utilizes the knowledge, skills, and experience of the employees to the greatest extent possible.

FRA does not intend to issue specific experience, classroom training, or ''hands-on'' training guidelines. FRA agrees that many of the guidelines contained in the preamble to the 1994 NPRM were overly restrictive and may have impeded the implementation of certain training protocols capable of achieving similar results with less emphasis on solely the time spent in the training process. Furthermore, the guidelines contained in the 1994 NPRM failed to adequately consider the potentially narrow scope of training that might be required for some employees, particularly some train crew personnel, that perform very limited inspection functions on very limited types of equipment. Although the training and qualification requirements currently proposed continue to require that any training provided include classroom and ''hands-on'' training as well as verbal or written examinations and ''hands-on'' capability, they do not mandate a specific number of hours that this training must encompass as that will vary depending on the employee or employees involved, which is probably best determined by the railroad.

This paragraph specifically proposes that employees pass either a written or oral examination covering the equipment, tasks, and Federal regulatory requirements for which they are responsible as well as requiring that each individual deemed qualified demonstrate ''hands-on'' capability. This paragraph makes clear that a person's ''hands-on'' capability is to be demonstrated by having the person successfully perform all of the tasks required to be performed as part of the duties for which they are being qualified in the presence of a supervisor or a designated instructor. FRA believes that in order for a person to be adequately trained to perform a task that individual must not only possess the knowledge of what is required to be performed but also must possess the capability of applying that knowledge to the actual performance of the task. Consequently, FRA proposes that the physical capability to perform the task be demonstrated by the individual in the presence of the person's supervisor or instructor.

This paragraph also contains proposed provisions for conducting periodic refresher training and supervisor oversight of an employees performance once training is provided. FRA believes both these requirements are essential to ensure that an individual continues to possess the knowledge and skills necessary to continue to perform the tasks for which the individual is assigned responsibility. Furthermore, employees must be periodically retrained in order to keep up with technological advances relating to braking systems that are constantly being made by the industry.

Paragraph (c) proposes to require that each railroad which operates trains required to be equipped with two-way EOTs develop and implement a training program which specifically addresses the testing, operation, and maintenance of the devices. The final rule requiring the use of two-way EOTs became effective on July 1, 1997. Since that time, FRA has discovered numerous operating and mechanical employees which do not fully understand when the devices are required or how the inspection and testing of the devices is to be accomplished. Furthermore, FRA believes that it is vital for those employees responsible for the use of the devices (i.e. engineers and conductors) to be intimately familiar with the use and operation of the devices to ensure that the full safety potential of the devices is utilized and available. Consequently, FRA believes that adequate training must be provided to those employees responsible for the inspection, testing, operation and use of two-way EOTs.

Paragraph (d) contains the proposed requirements related to maintaining adequate records for establishing that individuals are capable of performing the tasks for which they are assigned responsibility. FRA believes that the proposed record keeping and notification requirements contained in this paragraph are the cornerstone of the training and qualification provisions. As FRA is not proposing specific training curriculums or specific experience thresholds, FRA believes that these record keeping provisions are vital to ensuring that proper training is being provided to railroad personnel. FRA believes these requirements provide the means by which FRA will judge the effectiveness and appropriateness of a railroad's training and qualification program. These provisions also provide FRA with the ability to independently assess whether the training provided to a specific individual adequately addresses the tasks for which the individual is deemed capable of performing and will most likely prevent potential abuses by railroads to use insufficiently trained individuals to perform the necessary inspections, tests, and maintenance required by this proposal. This paragraph makes clear that FRA intends to require that railroads maintain specific personnel qualification records for all personnel (including contract personnel) responsible for the inspection, testing, and maintenance of train brake systems. This paragraph also makes clear that the records maintained by a railroad contain detailed information regarding the training provided as well as detailed information on the types of equipment the individual is qualified to inspect, test, or maintain and the duties the individual is qualified to perform. Furthermore, this paragraph requires that records maintained by the railroad contain a description of the employee's ''hands-on'' performance of the tasks for which the employee is assigned and the basis for finding that the tasks were successfully completed. Most Class I and larger Class II railroads already keep records of this type in some fashion; however, they are not always easily obtained by FRA. As an additional means of ensuring that only properly qualified individuals are performing only those tasks for which they are qualified, FRA also proposes to require that railroads promptly notify personnel of changes in their qualification status and specifically identify the date that the employee's qualification ends unless refresher training is provided.

Paragraph (e) proposes to require that each railroad adopt and comply with an internal audit process of their training, qualification, and designation program. The internal audit process should ensure that all necessary training is being conducted and documented. The audit process should be designed to evaluate the effectiveness of the training program. FRA believes that the audit process should not only review the completeness and accuracy of the certification but should also review the content and presentation of materials, the testing and grading of the employees, and the effectiveness of the classroom and ''hands-on'' portions of the training program. FRA further believes that any auditing of a training program must involve all segments of the workforce involved in the training. Thus, FRA believes it is vital that labor be intrinsically involved in the auditing process, from beginning to end. Evaluation of training techniques might best be approached through a ''team'' method, where several observers, including labor representatives, periodically evaluate course or ''hands-on'' training content and presentation. FRA believes that the consistency, effectiveness, and quality of the classroom, ''hands-on'', and refresher training should be an essential part of any internal audit process developed by a railroad.

FRA recognizes that some railroads will be forced to place a greater emphasis on training and qualifications than they have in the past, and this requirement will result in additional costs for those railroads. However, the proposed rule allows the railroads the flexibility that they need to provide only that training which an employee needs for a specific job. The proposed rule does not require an employee who only performs brake inspections while en route (i.e., Class II brake tests) to receive the intensive training needed for an employee who performs Class I brake tests or one who is charged with the maintenance or repair of the equipment. The training can be tailored to the specific needs of the railroad. Across the industry as a whole, this proposal will not require extensive changes in the way most railroads currently operate, but it will require some railroads to invest more time in the training of their personnel and should prevent railroads from using minimally trained and unqualified people to perform crucial safety tasks. In order to further assess the impact these proposed requirements will have, particularly on smaller railroads, FRA requests comments from interested parties on the following:

1. What is the potential impact of the proposed training and qualification requirements on short line railroads (i.e., Class II and Class III railroads)? How will these types of railroads meet the proposed requirements?

2. What is the potential impact of the proposed record keeping requirements to smaller railroads (i.e., Class III railroads)? Do these railroads currently maintain some sort of training records?

3. As FRA believes these records are a key element of the proposed training and qualification requirements, are there alternative methods available to smaller railroads (i.e., Class III railroads) for maintaining and developing the required information?

4. Currently, what percentage of employees will require additional training?

5. With the exception of training directed specifically at the provisions of these revised regulations, are there a sufficient number of ''qualified'' employees at present to ensure that no operational difficulty will result? What is a reasonable timeline for permitting railroads (particularly smaller railroads) to reach full compliance with regard to these requirements?

Section 232.205 Class I Brake Test—Initial Terminal Inspection

This section describes the circumstances that would mandate the performance of a Class I brake test and outlines the tasks that must be performed when performing this inspection. Most of the provisions contained in this section are currently contained in § 232.12(a) and (c)–(h) but FRA has modified the provisions to some extent in order to clarify existing requirements, to eliminate potential abuses, and to standardize certain provisions. Basically a Class I brake test is intended to be the functional equivalent to what is currently referred to as an initial terminal brake inspection.

Paragraph (a) proposes to identify those trains that are required to receive a Class I brake test prior to further movement. The provisions contained in this paragraph are similar to those currently contained in § 232.12(a), but have been somewhat expanded upon. Paragraph (a)(1) requires that trains receive a Class I brake test at the location where they are originally assembled. For clarity purposes, FRA will consider a location to be a place where a train is originally assembled, to be the location where a vast majority of the cars in a train are added to the train. FRA has discovered that some railroads are assembling two or more locomotives together with only a few cars at one location and performing an initial terminal inspection pursuant to § 232.12 on the train at that location. The train

is then moved a very short distance (less than 20 miles) where a large number of cars are added to the train with the performance of only an intermediate brake inspection being performed. FRA believes this practice is clearly an attempt to circumvent the inspection requirements currently contained in the regulations. FRA intends to make clear that it will consider that location where the majority of the cars are added to the train to be the point of origin or initial terminal for that train, as that is the location where the train is in fact assembled. FRA recognizes that such a standard will have to be looked at on a case-by-case basis, but believes that the above mentioned scenario is a clear case where a railroad is attempting to avoid the comprehensive inspection requirements imposed on a train at its point of origin.

FRA has also attempted to clarify the provision requiring the performance of a Class I brake test when the train consist is changed other than adding or removing a solid block of cars. Currently, there appears to be some confusion over what constitutes a ''solid block of cars.'' Therefore, FRA has included a definition of the term in this proposal and references it in paragraph (a)(2). FRA believes that the definition provided in this proposal is consistent with longstanding agency interpretation and the clear intent of the regulations. This definition makes clear that the phrase ''solid block of cars'' is intended to describe a set of cars that were all a part of one train and that have remained coupled together until added to another train. The phrase was never intended, nor is it intended in this proposal, to mean groups of cars removed from various different trains that are then assembled into a block for addition into another train. In FRA's view, the above described action constitutes the assembling of a new train which would require the performance of a Class I brake test.

In paragraph (a)(3) incorporates FRA's longstanding administrative interpretation which permits trains to remain disconnected from a source of compressed air (''off air'') for a short length of time without having to be retested. Currently, FRA only permits trains to remain ''off air'' for a period of approximately 2 hours before an initial terminal brake inspection must be performed. In this paragraph, FRA proposes to extend the permissible time ''off air'' to 4 hours. FRA agrees that our longstanding administrative interpretation was established prior to the development of new equipment that has greatly reduced leakage problems, such as welded brake piping and fittings and ferrule-clamped air hoses. However, contrary to several railroads' assertions FRA does not believe that cars should be allowed to be off air for extended periods of time without being retested. FRA believes that the longer cars sit without air attached the greater the chances are that the integrity of the brake system will be compromised. The longer cars sit the more susceptible they may be to weather conditions or even vandalism, as some commenters suggested. Consequently, based on today's equipment, operating practices, and overriding safety concerns, FRA feels that cars should not be disconnected from a continuous supply of pressurized air for longer than four hours without being retested. FRA also believes that the source of compressed air must be sufficient to maintain the integrity of the brake system. Consequently, FRA proposes to require that the source of compressed air be maintained at a minimum level of 60 psi.

Paragraph (a)(4) contains the proposed requirement that a train receive a Class I brake test whenever it has traveled 3,000 miles since receiving its last Class I brake test. This proposed revision is aimed at ensuring that unit trains or captive service trains receive a quality brake inspection at least every 3,000 miles. Under the current regulations certain trains can operate almost indefinitely on only one initial terminal brake inspection and then a continuing series of 1,000-mile brake inspections since the trains are rarely broken up and are not interchanged with other railroads. FRA proposes this requirement in order to ensure that these trains are not continuously operated with only a series of Class IA brake tests being performed. FRA believes that the 3,000 mile limit strikes an appropriate balance as it will continue to permit railroads to operate trains distances they currently operate without requiring the conduct of an additional Class I brake test but will ensure that unit trains and captive service operations are provided a comprehensive brake inspection on a periodic basis.

Paragraph (a)(5) contains the proposed provision for when trains received in interchange must receive a Class I brake test. These are similar to what is currently contained in § 232.12(a)(1)(iii); however, the current proposal contains two new provisions. FRA proposes to permit trains received in interchange to have a previously tested solid block of cars added to the train without requiring the performance of a Class I brake test. Currently, the addition of a these types of cars to a train received in interchange would require the performance of an initial terminal inspection. As long as the added block of cars has been previously tested, FRA sees no safety hazard in permitting the cars to be added to a train at an interchange location. Furthermore, FRA also proposes to permit trains which are received in interchange, and that will travel no more than 20 miles from the interchange location, to have its consist changed other than provided in paragraph (a)(5) without being required to receive a Class I brake test; provided that, any cars added to the consist at the interchange location receive at least a Class II brake test pursuant to § 232.209. Historically, FRA has not had a problem with these shorter distance trains and believes that a Class II brake test on those cars added to the train is sufficient to ensure the safety of these operations.

Paragraph (b) details the required tasks comprising a Class I brake test. A proper Class I brake test ensures that a train is in proper working condition and is capable of traveling to its destination with minimal problems en route. Specific tasks of the Class I brake test include most of the tasks currently required in initial terminal brake tests contained at § 232.12 (c)–(h) with some modification in the interest of standardization and clarity.

FRA again proposes a standardized brake-pipe reduction of 20 psi for virtually all brake inspections and tests. FRA agrees with both labor and management commenters that a standard brake-pipe reduction will simplify train brake tests and will make it easier to train workers. The 20-psi standardized reduction was suggested by both labor and management representatives and was previously proposed in the 1994 NPRM.

The brake-pipe leakage test will continue to be a valid method of qualifying brake systems. However, FRA proposes that the air flow method of testing the condition of the brake pipe become an acceptable alternate to the brake-pipe leakage test. The air flow method would only be an alternative for trains having locomotives equipped with a 26–L brake valve or equivalent and outfitted with an EOT device. The maximum allowable flow would be 60 CFM. FRA believes that the air flow method is a much more comprehensive test than the leakage test. Although FRA is not proposing to mandate the use of the air flow method, it does recommend that railroads use the method when possible, not just to qualify brake systems, but in order to provide additional information regarding the brake system to the train crew. The air

flow method has been approved for use by AAR member railroads after extensive testing, and the method has been available in Canada as an alternate means of qualifying train brakes since 1984.

The brake-pipe gradient of 15 psi has been retained for both the leakage and air flow method of train brake testing; however, the minimum rear-car pressure has been increased to 75 psi, which will require a locomotive brake-pipe pressure of 90 psi. FRA feels that the added margin of braking power justifies the increase in pressure.

Based on FRA's experience over the last several years and based on numerous comments received by FRA verifying the high reliability of the rear-car pressure transducers used in reporting brake-pipe pressure by an end-of-train (EOT) device, FRA now feels comfortable and justified in allowing the use of EOT devices in establishing the rear car pressure for Class I brake tests. FRA currently has requirements in place for the inspection and testing of EOT devices at the time of installation, which have been incorporated into subpart E of this proposal. However, in using an EOT to verify rear car pressure during a Class I brake test, the reading of the rear car air pressure is only permitted from the controlling or hauling locomotive of the train. Under no circumstances will train air brake pressure be read from a remote highway vehicle, another locomotive not attached to the train, or at any other location such as a remote unit installed in an office or shop.

FRA has proposed paragraph (b)(2) in order to clarify the duties of individuals performing brake inspection contained in this proposal. The language in this paragraph is reiterated in both the Class IA and Class II brake tests contained in this proposal in order to ensure the proper performance of brake inspections. Over the last few years there has been extensive debate concerning what constitutes a proper train air brake test under the current provisions contained in part 232, particularly relating to the positioning of the person performing the brake inspection. In early 1997, FRA issued a technical bulletin to its field inspectors in an attempt to clarify what must be done in order to properly perform a brake test. This technical bulletin stated that inspectors must position themselves in such a manner so as to be able to observe all of the movable parts of the brake system on each car. At a minimum, this requires that the inspector observe both sides of the equipment sometime during the inspection process. FRA further believes that both sides of the equipment must be observed sometime after the occurrence of activities that have the likelihood of compromising the integrity of the brake components of the equipment, such as: hump switching; multiple switching; loading; or unloading. FRA also agrees with several railroad commenters to the technical bulletin, that if one side of the equipment is inspected to ensure the proper attachment and condition of brake components and the proper condition of brake shoes on that side and the application of the brakes is observed from the other side of the equipment, then based on the design of brake systems today it can be safely assumed that in virtually every case an application of the brakes is occurring on the other side of the equipment. Consequently, FRA would like to make clear that both sides of the equipment do not necessarily have to be inspected while the brakes are applied if an adequate inspection of the brake components was conducted on both sides of the equipment sometime during the inspection process. However, FRA also intends to make clear that the piston travel on each car must be inspected while the brakes are applied; thus, an inspector must take appropriate steps to make this observation.

Similarly, paragraph (b)(4) is also an attempt to clarify language contained in the current regulation which requires that the brakes ''apply.'' This language has been misinterpreted by some to mean that if the piston applies in response to a command from a controlling locomotive or yard test device, and releases before the release signal is given, the brake system on that car is in compliance with the regulation because the brake simply applied. The intent of the regulation has always been that the brakes apply and remain applied until the release signal is initiated from the controlling locomotive or yard test device. Therefore, clarifying language has been added in this paragraph to eliminate all doubt as to what is required. Consequently, the brakes on a car must remain applied until the appropriate release signal is given. If it fails to do so the car must either be removed from the train or repaired in the train and retested as discussed below.

FRA recognizes that some defective train air brake conditions found when performing a train air brake test, which may cause insufficient application of the brakes on a piece of equipment, are of such an obvious nature they can be quickly repaired in the train. For example, a brake connection pin might be missing, a slack adjuster might be disconnected, or some other minor part of the brake system might be defective. FRA does not intend to mandate that these types of obvious defective conditions require the car to be removed from the train, if repaired. Rather, in paragraph (b)(4) FRA proposes to allow a retest from the controlling locomotive or head end of the consist if the car is repaired in the train. Furthermore, if a retest is conducted, the brakes on the retested car shall remain applied for a minimum of five (5) minutes. The five minute requirement is based on the leakage parameters established for locomotives contained at § 229.59(c).

In paragraph (b)(5), FRA will continue to require that piston travel be adjusted during the performance of a Class I brake test if it is found outside the nominal limits established for standard 8½ inch and 10-inch diameter brake cylinder or outside the limits established for other types which will be contained on a stencil, sticker, or badge plate. This provision is similar to the provision currently contained at § 232.12(f). The major difference is that FRA has modified the provision to require that piston travel found to be less than 7 inches or more than 9 inches must be adjusted nominally to 7½ inches. This change is based on a request by AAR to change the adjustment to 7½ inches from 7 inches as its member railroads were finding it extremely difficult to adjust the piston travel to precisely 7 inches and that in some cases the adjustment would be marginally less than 7 inches, thus requiring a readjustment. Thus, AAR sought the extra ½ inch in order to provide a small measure for error when the piston travel is adjusted. As FRA believes that AAR's concerns are validly placed and would have no impact on safety, FRA has accommodated the request.

In paragraph (b)(7), FRA makes clear that brake connection bottom rod supports will no longer be required on bottom connection rods secured with locking cotter keys. FRA recognizes that there is no need for bottom rod safety supports in these incidents and intends to relieve railroads of this unnecessary expense, which will provide the industry a cost savings without compromising safety.

Paragraph (b)(8) contains the provisions relating to the performance of ''roll-by'' inspections of the brake release. These types of inspections have been conducted for years even though there is nothing in the current regulation which specifically addresses the conduct. The ability to perform this type of inspection of the brake release permits railroads to expedite the

movement of trains and has not proven to be a safety hazard. Therefore, FRA proposes this provision to clarify the ability to perform such an inspection and to ensure that the inspection is performed properly. This paragraph makes clear that when performing a ''roll-by'' inspection of the brake release the train's speed shall not exceed 10 mph, that the qualified person performing the ''roll-by'' inspection shall notify the engineer when and if the ''roll-by'' has been successfully completed, and that the operator of the train will note successful completion of the release portion of the inspection on the written or electronic notification required by this proposal. FRA intends to make clear that the notification to the engineer could be made via a hand held radio, a cellular telephone, or through communication with a train dispatcher but that such information must be provided to the engineer prior to the train's departure. Based on the rationale provided for permitting only one side of a train to be inspected during the application of the brakes, FRA intends to make clear that only one side of the train needs be inspected during the release portion of a brake test.

Paragraph (c) retains the language currently contained in § 232.12(a), with slight modification for clarity, stating that a carman alone will be considered a qualified person if a railroad's collective bargaining agreement provides that carmen are to perform the inspections and tests required by this section. The original provision was added to the regulations in 1982 when the distance between brake inspections was increased from 500 miles to 1,000 miles. The provision was included as part of an agreement between the railroads and rail labor for permitting the distance between brake tests to be increased and was presented to FRA at the time. The language contained in that agreement was included in the 1982 regulatory revisions without change by FRA. Consequently, due to the circumstances under which this provision was added to the regulations and because it has existed for over 16 years, FRA feels compelled to retain the language at this time. However, FRA intends to make clear that it will interpret the language contained in this provision to mean that only in circumstances where a railroad's collective bargaining agreement specifically requires that only a carman may perform the inspections and tests required by this section, will a carman alone be considered a qualified person. FRA believes that this interpretation clarifies the meaning of the provision and provides the most reasonable, enforceable, and understandable interpretation of the requirement and is consistent with the approach to inspections envisioned in this proposal.

As FRA lacks the authority to issue binding interpretations of collective bargaining agreements, FRA lacks the ability to settle a dispute between a railroad and its employees as to which group of its employees is to perform what work. FRA intends to make clear, that in order for FRA to proceed with an enforcement action under this provision, one of the parties to the collective bargaining agreement would first have to obtain a decision from a duly authorized body interpreting the relevant agreement, specifically identifying the involved location, and adequately resolving all of the interpretative issues necessary for FRA to conclude that the work belongs to a particular group of employees.

This paragraph makes clear that in circumstances where a collective bargaining agreement requires that only carmen are to perform the inspections and tests required by this section that the railroad shall ensure that those carmen responsible for performing these tasks are properly trained and designated as qualified for the tasks they are to perform. In these circumstances FRA believes that the railroad must ensure that the employees with which they have collectively bargained to exclusively perform the inspections and tests required by this section are properly trained and designated to perform the task. Furthermore, FRA believes that on virtually all railroads carmen will be sufficiently trained and experienced to be considered ''qualified persons'' and ''qualified mechanical inspectors'' as defined in this proposal, except that they might need some additional training on the specific requirements contained in this proposal.

Paragraph (d) contains a new proposed requirement regarding written notification of the successful completion of a Class I brake test by a qualified person. Labor organizations have commented for years that when crews board trains at points of interchange, crew change points, and on main lines where the hours of service has halted a train that they have no information as to when or where the train last received a brake inspection or test. FRA has encountered this same difficulty when investigating train accidents and other incidents requiring FRA attention. FRA has found that train symbols change when trains are interchanged and that train crews do not know where their train originated, how many miles it has mileage traveled, or when the last tests and inspections were performed. Without this knowledge of a train's history, railroads and train crews cannot possibly comply with Federal regulations in many instances. Therefore, FRA has included language in this paragraph in an attempt to eliminate some these potential problems and further enhance the safety of train operations by proposing to require that the qualified person conducting the Class I brake test notify the locomotive engineer in writing, or place such notification in the cab of the controlling locomotive that the Class I brake test was successfully performed. FRA believes this information could be provided to an engineer electronically via the computer equipment currently installed on locomotives. If the information is provided by this medium, the system must be capable of identifying the qualified inspector entering the information, include all of the information required on the written notification, and be available to FRA upon request. FRA further proposes that the written or electronic notification remain in the cab of the controlling locomotive until the train reaches its destination. FRA believes that these proposed provisions will ensure that train crews are aware of the condition of their train throughout its trip and thereby enhance the safety of train operations.

Paragraph (f) is included in order to clarify existing requirements relating to the adding of cars or blocks of cars while a train is en route. This proposed paragraph informs railroads that cars picked-up en route that have not been previously tested and kept connected to a source of compressed air are to receive a Class I brake test when added to the train. Alternatively, a railroad may elect to perform only a Class II brake test at the time that a car is added to the train en route, but FRA intends to make clear that if this option is elected then the cars added in this fashion must be given a Class I brake test at the next forward location where facilities are available for providing such attention.

Section 232.207 Class IA Brake Tests—1,000-mile Inspection

This section contains the proposed requirements related to the performance of a Class IA brake test. Many of the proposed provisions contained in this section are currently contained at § 232.12(b) regarding the performance of 1,000 mile inspections. FRA has modified some of the current requirements for purposes of clarity and has added a few additional requirements in order to make the inspection requirement more

enforceable and to prevent some of the current abuses which FRA field inspectors have experienced in their enforcement activities.

Paragraph (a) provides that each train shall receive a Class IA brake test at a location that is not more than 1,000 miles from the point where any car in the train last received a Class I or Class IA brake test. FRA intends to make clear that the most restrictive car or block of cars in the train will determine the location where this test must be performed. For example, if a train departs point A and travels to point B where it picks-up a previously tested block of cars en route which has travelled 800 miles since its last Class I brake test and the crew does not perform a Class I brake test when entraining the cars, then the entire train must receive a Class IA brake test within 200 miles from point B even though that location may only be 600 miles from point A.

Paragraph (b) contains the proposed tasks which must be performed when conducting a Class IA brake test. These tasks are virtually identical to some of the tasks required to be performed during a Class I brake test. A leakage or air flow test must be performed. Thus, when locomotives are equipped with a 26–L brake valve or equivalent, FRA will permit the use of the air flow method as an alternative to the brake pipe leakage test. This paragraph is also intended to make clear that in order to properly perform an inspection under this section both sides of the equipment must be observed sometime during the inspection process. This paragraph also makes clear that the brakes shall apply on each car in response to a 20-psi brake pipe reduction and shall remain applied until a release is initiated and reiterates the parameters for performing a retest on those cars found not to have sufficiently applied that are proposed for Class I brake tests. It should be noted that defective equipment may be moved from or past a location where a Class IA brake test is performed only if all of the requirements contained in § 232.15 have been satisfied.

Paragraph (c) contains the proposed provision which would require railroads to maintain a list of locations where Class IA inspection will be performed and that FRA be notified at least 30 days in advance of any change to that list of locations. The current regulations merely require that railroads designate locations where intermediate 1,000-mile brake inspections will be performed but places no limitation on changing the locations. Therefore, FRA has found some railroads changing the locations where these intermediate inspections are to occur on a daily basis in order to prevent FRA from observing these inspections being performed or to avoid full performance of the required inspection by mechanical forces. Consequently, in order to ensure that these types of inspections are being properly performed, FRA must be able to determine where the railroad plans to conduct these types of inspections. FRA recognizes that there may be occurrences or emergencies, such as derailments, that make it impossible or unsafe for a train to reach a location that the railroad has designated as a Class IA inspection site. Consequently, FRA proposes to permit railroads to bypass the 30-day written notification requirement in these instances provided FRA is notified within 24 hours after a designation has been changed. This paragraph also makes clear that failure to perform a Class IA brake test at a designated location will constitute a failure to properly perform the inspection.

Section 232.209 Class II Brake Tests—Intermediate Inspection

This section contains the proposed requirements related to the performance of Class II brake tests. The requirements proposed in this section mirror the requirements currently contained in § 232.13(d) but have been slightly modified for clarity and standardization. In paragraph (a), FRA proposes that, at a minimum, a Class II brake test be performed on all cars that are added to a train at a location that is not the train's point of origin and that have not received a Class I brake test or that have been off a source of compressed air for more than four hours. In paragraph (d), FRA makes clear that if cars are added in this fashion then they must receive a Class I brake test at the next forward location where the facilities are available for performing such an inspection.

Paragraph (b) contains the proposed tasks which must be performed when conducting a Class II brake test. A Class II brake test is intended to ensure that the brakes on those cars added apply and release and that the added cars do not compromise the integrity of the train's brake system. Therefore, a leakage or air flow test must be performed when the cars are added to the train to ensure the integrity of the train's brake system. This paragraph makes clear that in order to properly perform an inspection under this section both sides of the equipment must be observed sometime during the inspection process. This paragraph also makes clear that the brakes shall apply on each car added to the train and remain applied until a release is initiated and reiterates the parameters for performing a retest on those cars found not to have sufficiently applied that are proposed for Class I brake tests. It should be noted that, defective equipment may be moved from or past a location where a Class II brake test is performed only if all of the requirements contained in § 232.15 have been satisfied. Paragraph (b) also requires that the release of the brakes on those cars added to the train and on the rear car of the train be verified and allows railroads to conduct ''roll-by'' inspections for this purpose.

Paragraph (c) permits an alternative to the rear car application and release portion of this test. This alternative permits the locomotive engineer to rely on a rear car gauge or end-of-train device to determine that the train's brake pipe pressure is being reduced by at least 5-psi and then restored by at least 5-psi in lieu of direct observation of the rear car application and release. This alternative has been permitted for years under the current regulations without any degradation to safety, and thus, FRA intends to permit the practice to continue.

Section 232.211 Class III Brake Tests—Trainline Continuity Inspection

This section contains the proposed requirements related to the performance of Class III brake tests. The requirements proposed in this section incorporate the requirements currently contained in § 232.13(c) but have been slightly modified for clarity and standardization. The purpose of a Class III brake test is to ensure the integrity of the trainline when minor changes in the train consist occur. Basically, a Class III brake test ensures that the train brake pipe is properly delivering air to the rear of the train. FRA intends to make clear that this inspection is designed to be performed whenever the continuity of the brake system is broken or interrupted. For example, if a railroad disconnects a locomotive from a train consist to perform switching duties for a short period and then reattaches the locomotive to the consist, without any other change being made in the consist, the railroad would be required to perform a Class III brake test prior to the train's departure. Similarly, a Class III brake test would be required if a railroad disconnects a locomotive from the train and adds a different locomotive to the train, only to discover that the added locomotive is not operating properly, and thus, adds the original locomotive back into the consist. Because the continuity of the trainline was interrupted when the

locomotive was removed and then placed back in the train, even though the same cars and locomotives remained in the consist, a Class III brake test must be performed. Paragraphs (b) and (c) contain the tasks related to the performance of this brake test. The proposed tasks require an application of the brakes on the rear car of the train in response to a 20-psi brake pipe reduction and a subsequent release of the brakes on that car when initiated. Similar to Class II brake tests, paragraph (c) permits an alternative to direct observation of the application and release of the rear car's brakes by permitting the operator to rely on a rear car gauge or end-of-train device to determine that the brake pipe pressure is being reduced and restored in response to the controlling locomotive.

Section 232.213 Extended Haul Trains

This section contains the proposed provisions which would permit an extension of the allowable distance a train may travel between train brake system tests. Currently, trains are not permitted to travel more than 1,000 miles without receiving an intermediate brake inspection. *See* 49 CFR 232.12(b). FRA believes that if a train is properly and thoroughly inspected, with as many defective conditions being eliminated as possible, that the train is capable of traveling well over 1,000 miles between brake inspections. By this, FRA contends that not only must the brake system be in quality condition but that the mechanical components of the equipment must be in equally prime condition. As the distance a train is allowed to travel increases, the mechanical condition of the equipment is a key factor in ensuring the proper and safe operation of the train brake system throughout the entire trip. FRA also continues to believe that the best place to ensure the proper conduct of these inspections and to ensure that the train's brake system and mechanical components are in the best condition possible is at a train's point of origin (initial terminal).

In paragraph (a), FRA proposes to permit railroads to designate specific trains which will be permitted to move up to 1,500 miles between brake and mechanical inspections provided the railroad meets various stringent inspection and monitoring requirements, which FRA believes will ensure the safe and proper operation of these trains. FRA intends to make clear that a railroad must meet all of the requirements contained in this paragraph in order to designate a train as an extended haul train. Paragraph (a)(1) proposes that railroads must designate specific trains it intends to move in accordance with this section. This paragraph sets forth the information that must be provided to FRA in writing when designating a train for such operation. The information required to be submitted is necessary to facilitate FRA's ability to independently monitor a railroad's operation of these extended haul trains.

FRA believes that in order for a train to be permitted to travel 1,500 miles between inspections, the train must receive inspections that ensure the optimum condition of both the brake system and the mechanical components. In paragraphs (a)(2), (a)(3), and (a)(8), FRA proposes to require that these inspections be performed by highly qualified and experienced inspectors in order to ensure that quality inspections are being performed. As FRA intends the Class I brake tests that are required to be performed on these trains to be as in-depth and comprehensive as possible, FRA believes that these inspections must be performed by individuals possessing the knowledge to not only identify and detect a defective condition in all of the brake equipment required to be inspected but also possess the knowledge to recognize the interrelational workings of the equipment and the ability to trouble-shoot and repair the equipment. Therefore, in paragraphs (a)(2) and (a)(8) FRA proposes the term ''qualified mechanical inspector'' to identify and describe those individuals it believes possess the necessary knowledge and experience to perform the proposed Class I brake tests on these trains. A ''qualified mechanical inspector'' is a person with training or instruction in the troubleshooting, inspection, testing, maintenance, or repair of the specific train brake systems the person is assigned responsibility and whose primary responsibilities include work generally consistent with those functions. (See § 232.5 of the section-by-section for a more detailed discussion of ''qualified mechanical inspector.'') FRA further believes these same highly qualified inspectors must be the individuals performing the proposed inbound inspection, contained in paragraph (a)(6), on these extended haul trains in order to ensure that all defective conditions are identified at the train's destination or 1,500 mile location. Similarly, in paragraph (a)(3), FRA proposes that all of the mechanical inspections required to be performed on these trains be conducted by inspectors designated pursuant to 49 CFR 215.11, rather than train crew members, in order to ensure that all mechanical components are in proper condition prior to the trains departure.

As no trains are currently permitted to travel in excess of 1,000 miles between inspections, FRA is not willing to propose more than 1,500 miles between such inspections until appropriate data is developed which establishes that equipment moved under the proposed criteria remains in proper condition throughout the train's journey. FRA believes that the proposed provisions contained in paragraphs (a)(6)and (a)(7), requiring the performance of an inbound inspection at destination or at 1,500 miles and requiring carriers to maintain records of all defective conditions discovered on these trains for a period of one year creates the basis for developing such data. FRA believes the information generated from these inbound inspections will be extremely useful in assessing the quality of a railroad's inspection practices and will help FRA identify any systematic brake or mechanical problems that may result in these types of operations.

In paragraphs (a)(4) and (a)(8), FRA proposes that these trains have 100 percent operative brakes and contain no cars with mechanical defects under part 215 at either the train's point of origin or at the time of departure from a 1,500 point, if moving in excess of 1,000 miles from that location. Furthermore, in paragraph (a)(5) FRA proposes that these trains not conduct any pick-ups or set-outs en route, except for the removal of defective equipment. FRA believes that these two provisions are essential to ensuring the accuracy of the data being collected by the railroads as well as ensuring the proper and safe operation of these trains. FRA also believes that prohibiting pick-ups and set-out on these trains will significantly minimize the disruptions made to the integrity of the trains brake system and reduce mechanical damage that may occur during switching operations. Furthermore, there is currently no reliable tracking system available to FRA to ensure that cars added to the train en route have been inspected in accordance with the provisions contained in this section.

Paragraph (b) makes clear that failure to comply with any of the restrictions contained in this section will be considered an improper movement of a designated priority train for which appropriate civil penalties may be assessed. Thus, FRA would list specific civil penalties in the final rule pertaining to the improper movement of these types of trains. In addition to the imposition of civil penalties, FRA also makes clear in this paragraph that it reserves the right to revoke a railroad's

ability to designate any or all trains for repeated or willful noncompliance with any of the provisions contained in this section.

Section 232.215 Transfer Train Brake Tests

This section contains the proposed requirements related to the performance of transfer train brake tests. The requirements proposed in this section incorporate the requirements currently contained in § 232.13(e) but have been slightly modified for clarity and standardization. ''Transfer train'' is defined in § 232.5 as a train that travels between a point of origin and a point of destination, located not more than 20 miles apart, and which is not performing switching service. The new definitions, in § 232.5, would clearly define ''yard trains'' and would exclude them from the definition of ''transfer train.'' ''Yard train'' would be defined as a train that only performs switching service within a single yard complex. Switching movements by ''yard trains'' would not require a transfer train air brake test. However, as noted previously, a yard train or other train engaged in switching service carries the potential of becoming a transfer train, subject to a transfer train's testing requirements if the movement engaged in is considered a ''train movement'' rather than a ''switching movement.'' FRA's determination of whether the movement of cars is a ''train movement,'' subject to the requirements of this section, or a ''switching movement'' is and will be based on the voluminous case law developed by various courts of the United States. (See section-by-section for § 232.5 for a more detailed discussion of the terms ''train movement'' and ''switching movements.'')

FRA intends to make clear that a train will only be considered a transfer train if there is no more than 20 miles between the train's point of origin and point of final destination. If the train will move greater than 20 miles between the point of origin and point of final destination it cannot be considered a transfer train and a Class I brake test must be performed on the train prior to departure from its point of origin. Although cars may be added to a transfer train while the train is en route, with a transfer train brake test being performed on the cars added, the train is limited to a total of 20 miles from its point of origin, not from the location where new cars are added. The distance the entire train will move between its point of origin and point of final destination is the determinative factor in determining whether the train is a transfer train, cars dropped-off or picked-up en route do not affect this distance.

Paragraph (a) contains the proposed tasks that are required to be performed when conducting a transfer train brake test. Due to the short distance these types of trains will travel FRA will continue to permit the brake system to be charged to only 60-psi but will make clear that this must be verified by an accurate gauge or end-of-train device. Although the current regulations do not require the use of a gauge or device, FRA is at a loss to understand how an inspector can know the pressure in the brake system without getting a reading from the rear of the train. FRA will also continue to require that the brakes apply in response to a 15-psi reduction. This section contains modifications for performing a transfer train brake test. FRA believes that the reduced pressure at which this test is performed (i.e., 60-psi rather than 75-psi) requires that an application be obtained with a smaller pressure reduction than proposed for other brake tests. FRA also intends to make clear that an inspection be made to determine that the brakes on each car apply and remain applied until the release is initiated by the controlling locomotive.

This paragraph permits cars found with readily identifiable problems which causes the brakes not to remain applied, to be retested. The retest must be conducted from the controlling locomotive or head of the consist and the cars brakes must remain applied for at least 5 minutes. The reasoning for this is to assure safe train operation and handling by requiring a mandatory time frame for which the brakes shall remain applied on each car in the train. Consequently, cars whose brakes release prior to an initiation by the controlling locomotive shall either be repaired and retested or may be moved pursuant to the provisions proposed in § 232.15, if applicable.

Section 232.217 Train Brake System Tests Conducted Using Yard Air

This section proposes the requirements for performing train brake system tests when using yard air and are basically identical to the requirements currently contained in § 232.12(i) with slight modification for clarity and standardization with other provisions contained in this proposal. In paragraph (a), FRA will continue to require that the testing device be connected to the end of the train or cut of cars that will be nearest the controlling locomotive. FRA believes that if the yard test plant was connected to the rear of the train or cut of cars being tested, the possibility of an overcharge condition will exist which presents safety concerns. An overcharge condition describes a situation in which the brake equipment of cars and/or locomotives is charged to a higher pressure than the maximum brake pipe pressure that can normally be achieved in that part of the train, this may result in the locomotive engineer lacking the ability to control the application or release of the brakes at the rear of the train. FRA recognizes that some currently existing yards are designed in such a manner so that performance of a test from the front of the consist is extremely difficult or impossible. Consequently, FRA seeks comment from all interested parties addressing the following:

1. Are there potential operating or procedural restrictions that could be required which would permit the connection of the testing device to some location in the train other than the front of the consist that would alleviate overcharge concerns?

2. Are there other potential safety hazards created by permitting yard test devices to be connected to the consist at other than the end nearest the controlling locomotive?

Paragraph (b) proposes to make clear that a Class III brake test as proposed in § 232.211 must be performed on the cars at the time that the road locomotive is attached. This paragraph also remains consistent with other provisions of this proposal by requiring the yard test plant air pressure to be 80-psi, and by requiring the retesting of cars that remain disconnected from a source of compressed air for more than four hours.

Paragraph (c) proposes to require that mechanical yard test devices and gauges be calibrated every 92 days and that electronic yard test devices and gauges be calibrated annually. Based on observations made by FRA's field inspectors, FRA has some concerns regarding the condition of many yard test devices and gauges. FRA has found numerous mechanical gauges the condition of which creates serious doubt as to the accuracy of the gauge. Mechanical gauges have been found with broken or missing glass which would allow moisture and other contaminates to be present in the gauge. As many of the yard test plants being used today are portable, they are exposed to a wide array of handling and environmental hazards while being transported from location to location. Therefore, FRA proposes that mechanical devices and gauges be tested and calibrated every 92 days. Whereas, electronic gauges and devices appear to have much less exposure to many of the

hazards encountered by mechanical devices and gauges and tend to be much more reliable and accurate for a longer period of time. Consequently, FRA proposes to only require electronic yard test devices and gauges to be tested and/or calibrated on an annual basis.

Section 232.219 Double Heading and Helper Service

This section proposes the requirements related to double heading and helper service. The provisions proposed in paragraphs (a) and (b) are identical to the provisions currently contained in § 232.15, the only difference being that paragraph (a) has been slightly modified in order to clearly identify that a Class III brake test must be performed when a new locomotive is placed in control of the train. FRA believes these provisions are necessary and have been in place for years in order to ensure that locomotives taking control of a train have the ability to actually control the brakes on the train. Paragraph (c) proposes a new requirement aimed at ensuring that the brake systems on helper locomotives respond as intended to brake commands from the controlling locomotive at the time it is placed in the train. Failure of a helper locomotive to respond to the command of the controlling locomotive could result in a very serious safety hazard in that a helper locomotive may continue to push the rear of the train while the brakes are applied potentially resulting in an incident or derailment. FRA intends to make clear in this paragraph that a helper locomotive found with inoperative or ineffective brakes be repaired prior to use or removed from the train.

FRA also seeks information and comment from interested parties regarding a device being used on locomotives used in helper service on a few railroads. The device is referred to as a ''Helper Link.'' The Helper Link is an electronic device, mounted on the front end of the lead helper locomotive and is used to control the automatic air brakes on helper locomotive consists. When this device is used the train's brake pipe is not connected between the rear car of the train being pushed and the helper locomotives. The end-of-train device, attached to the rear car of the train, sends a radio signal which is received by the Helper Link device. The Helper Link device is connected to the brake pipe of the helper locomotives and an electronic command from the EOT device causes the air pressure in the helper locomotive brake pipe to be reduced or increased, thus, applying or releasing the brakes on the helper locomotives. A signal is transmitted from the EOT device to the Helper Link device at 60 second intervals to ensure communication. The Helper Link is also used to operate the uncoupling lever to detach the helper locomotives from the rear of the train without stopping the train.

Based on information currently available to FRA, it appears that when there is a loss of communication between the EOT device and the Helper Link device, the engineer of the helper locomotive consist is not immediately aware of the failure. If the communication between the EOT device and the Helper Link is not reestablished within the next 60 second communication cycle the Helper Link device will automatically disable itself. Consequently, if the train experiences an emergency application of the air brakes while the Helper Link device is disabled, the brakes on the helper locomotives would not apply and would result in the helper locomotives continuing to push under power. Furthermore, in order for communications to be reestablished between the EOT and Helper Link the engineer must leave the locomotive controls, exit the locomotive cab, and proceed to the front of the locomotive to manually press the reset buttons located on the Helper Link device itself. In addition, there are currently no regulations which address the use, testing, or calibration of these Helper Link devices.

On August 22, 1996, the UTU submitted a Petition for Rulemaking with FRA regarding Helper Link devices raising many of the concerns noted above. *See* Petition for Proposed Rulemaking Docket 96–1. In order to address the UTU petition in this rulemaking and to address the concerns of FRA noted above, FRA seeks information and comment from all interested parties on the following:

1. How many railroads are currently utilizing Helper Link devices in their operations? On how many trains?

2. What has been the operating history of the Helper Link devices on those railroads currently using the devices?

3. Is the discussion of the use and operation of the Helper Link device contained above accurate? Have technological improvements been made to the devices recently?

4. What testing, calibration, or operational procedures have been voluntarily implemented by railroads currently using Helper Link devices?

5. Can or should an audible or visual warning be provided to the engineer in the event that communication is lost between the EOT device and the Helper Link device?

6. What are the recommended testing and calibration requirements for Helper Link devices currently being used in the industry?

7. Is the technology available to permit the resetting of the Helper Link device by the engineer from his or her normal operating position, if communication is lost between the EOT and the Helper Link device?

Subpart D—Periodic Maintenance and Testing Requirements

This proposed subpart provides the proposed periodic brake system maintenance and testing requirements for equipment used in freight and other non-passenger trains. As stated in the 1994 NPRM and in the ''General Discussion of Issues'' portion of the preamble to this NPRM, FRA firmly believes that the new repair track test and single car test, which have been used industry-wide since January of 1992, are a much better and more comprehensive method of detecting and eliminating defective brake equipment and components than the old, time-based COT&S requirements. FRA believes that performance of these tests has significantly reduced the number of defective components found and has dramatically increased the reliability of brake equipment. Through the implementation of the repair track and single car tests, the safety of both railroad employees and the public has greatly improved due to brake equipment being in better and safer condition. At the same time, however, FRA is cognizant that contentions by rail labor regarding the carrier's direct and intentional circumvention of these revised requirements through the elimination of repair tracks, by moving cars to expediter tracks for repair, or simply by making repairs in the field is a legitimate concern that needs to be addressed to ensure the industry fully benefits from the advantages of the improved tests. This subpart proposes to incorporate AAR Interchange Rule 3 and Chart A into this regulation, and codify existing repair track and single car test requirements, while also imposing additional requirements that are intended to eliminate the circumvention of the requirements as discussed above.

Section 232.303 General Requirements

This section contains the general requirements regarding the maintenance, repair, and test of freight cars. Prior to the termination of Working Group deliberations, the periodic maintenance and single car test task force had conducted extensive

discussions regarding the requirements of AAR Rule 3, Chart A, specifically as they relate to the circumstances that trigger the performance of a repair track or single car test. The task force was ultimately unable to provide consensus recommendations to the Working Group on all aspects of periodic maintenance and testing requirements, due to the Working Group's inability to agree on the issues relating to data collection, evaluation, and relevance. However, based on these efforts and the discussions provided above, FRA proposes in paragraph (a) of this section to require that each freight car be maintained, repaired, and tested in accordance with the AAR's Rule 3 ''Testing of Air Brakes'' and accompanying Chart A, contained in the AAR ''Field Manual on Interchange Rules'' (January 1, 1998).

Paragraphs (b)–(d) reiterate existing general requirements currently prescribed at 49 CFR 232.17 with minor revisions for purposes of clarification and standardization. Paragraph (b) clarifies that the air brakes must remain applied until the release signal is initiated to maintain consistency with the proposed requirements stated at § 232.205(b)(4). Paragraph 232.205(b)(4) is an attempt to clarify language contained in the current regulation which require that the brakes ''apply.'' This language has been misinterpreted by some to mean that if the piston applies in response to a command from a controlling locomotive or yard test device, and releases before the release signal is given, the brake system on that car is in compliance with the regulation because the brake simply applied. The intent of the regulation has always been that the brakes apply and remain applied until the release signal is initiated from the controlling locomotive or yard test device. Therefore, clarifying language has been added in this paragraph to eliminate all doubt as to what is required. Consequently, this paragraph makes clear that the brakes on a car must remain applied until the appropriate release signal is given. If it fails to do so, the car must be repaired and retested.

Paragraph (c) proposes to require that if piston travel is found to be less than 7 inches or more than 9 inches, it must be adjusted to nominally 7½ inches, which is a change from the 7 inches as currently required, in order to maintain consistency with the requirement proposed at § 232.205(b)(5). This change is based on a request by AAR to change the adjustment to 7½ inches from 7 inches as its member railroads were finding it extremely difficult to adjust the piston travel to precisely 7 inches and that in some cases the adjustment would be marginally less than 7 inches, thus requiring a readjustment. Therefore, AAR sought the extra ½ inch in order to provide a small measure for error when the piston travel is adjusted. As FRA believes that AAR's concerns are validly placed and would have no impact on safety, FRA has accommodated the request. Paragraph (d)(2) proposes enhanced safety assurances with respect to the proper functioning of angle cocks by additionally requiring that they be inspected to ensure they are properly positioned to allow maximum air flow. This is a clarification regarding the normal functioning of the angle cock, and should pose little, if any, additional inspection burden on the railroads.

FRA recognizes that circumstances arise where required repair track brake tests or single car tests cannot always be performed at the point where repairs can be made. Therefore, in paragraph (e), FRA proposes to allow a car, after repairs are effectuated, to be moved to the next forward location where the test can be performed. FRA intends to make clear that the inability to perform a repair track brake test or a single car test does not constitute an inability to effectuate the necessary repairs. At the same time, however, FRA recognizes rail labor's contention that some carriers often attempt to circumvent the requirements for performing single car and repair track tests by eliminating repair tracks, by moving cars to expediter tracks for repair, or by simply making the repairs in the field. As a means to curtail these practices, FRA proposes to impose extensive tagging requirements on freight cars which, due to the nature of the defective condition(s) detected, require a repair track brake test or single car test but which are moved from the location where repairs are performed prior to receiving the required test. As an alternative to the tagging requirements, FRA proposes to permit a railroad to utilize an automated tracking system to monitor these cars and ensure they receive the requisite tests as prescribed in § 232.303 provided the automated system is approved by FRA.

In paragraph (f) of this section, FRA proposes that cars be stencilled or marked with the location and date of the last repair track or single car test. Alternatively, FRA intends to permit railroads to utilize an electronic record keeping system to accomplish this tracking requirement, provided such a system is approved by FRA. FRA believes these requirements are necessary to ensure the timely performance of these important tests. Without such information, there would be virtually no way for FRA to verify a railroad's compliance with the proposed repair track and single car test requirements.

Section 232.305 Repair Track Brake Tests

This section contains the proposed requirements related to the performance of repair track brake tests. Paragraph (a) of this section proposes to require that repair track brake tests be performed in accordance with AAR Standard S–486, ''Code of Air Brake System Tests for Freight Equipment,'' Section 3.0, contained in AAR's ''Manual of Standards and Recommended Practices'' as revised in November of 1992. This standard delineates the procedural requirements for performing the repair track brake tests, and is directly incorporated into AAR's Interchange Rule 3, Chart A. Repair track tests are currently performed to these specifications, and FRA sees no reason to alter the requirements at this time.

Paragraphs (b) (1)–(6) require that a railroad perform a repair track brake test on freight cars when: (i) A freight car is removed from a train due to an air brake related defect; (ii) a freight car has its brakes cut-out when removed from a train or when placed on a shop or repair track; (iii) a freight car is on a repair or shop track for any reason and has not received a repair track brake test within the previous 12 month period; (iv) a freight car is found with missing or incomplete repair track brake test information; (v) one or more of the brake reservoir, the control valve mounting gasket, and the pipe bracket stud is removed, repaired, or replaced; or (vi) a freight car is found with a wheel with built-up tread, slid flat, or thermally cracked. The specific conditions identified above are generally based on the discussions and positions presented by representatives of rail labor, rail management, and FRA during task force deliberations that were part of the RSAC process.

Paragraphs (c) and (d) of this section propose to require that each freight car receive a repair track air test no less frequently than every 5 years, and not less than 8 years from the date the car was built or rebuilt. FRA strongly believes that these minimum attention periods are sufficient to ensure the safety of the freight car fleet when considered in conjunction with the increased attention that freight cars receive when these types of tests are performed. FRA is confident that this, together with the implementation of the stringent proposed tagging requirements

detailed above, will prevent many of the perceived abuses of these test requirements cited by some commenters.

Section 232.307 Single Car Tests

This section contains the proposed requirements related to the performance of single car tests on freight and other non-passenger equipment. Paragraph (a) of this section proposes to require that freight single car tests to be performed in accordance with AAR Standard S–486, ''Code of Air Brake System Tests for Freight Equipment,'' Section 4.0, contained in AAR's ''Manual of Standards and Recommended Practices'' as revised in November of 1992. This standard delineates the procedural requirements for performing single car air brake tests, and is directly referenced in AAR's Interchange Rule 3, Chart A. Specifically, paragraphs (b)(1)–(3) of this section incorporates the single car test requirements of Chart A by requiring a railroad to perform a single car test on a freight car whenever the service portion, the emergency portion, or the pipe bracket is removed, repaired, or replaced.

Paragraph (c) specifically requires that a single car test be conducted by a qualified person prior to a new or rebuilt car being placed in or returned to revenue service. FRA believes that it is essential for new and rebuilt cars receive this test prior to being placed in revenue service in order to ensure the proper operation of the brake system on the vehicle. Most railroads already require this attention to be given to new and rebuilt cars; thus, the cost of this requirement is minimal and merely incorporates the best practices currently in place in the industry.

Section 232.309 Repair Track Test and Single Car Test Equipment and Devices

This section contains the proposed requirements for maintaining the equipment and devices used in performing repair track and single car air brake tests. The devices and equipment used to perform these tests are safety-critical items. FRA believes that these devices must be kept accurate and functioning properly in order to ensure that repair track and single car tests are properly performed. The calibration and test requirements proposed in this section are based on past experience with test equipment used in the railroad operating environment. FRA believes that the requirements contained in this section are the minimum necessary to keep the equipment in good working order.

Section 232.311 Process for Changing Maintenance Requirements

This section contains the proposed procedural requirements relating to the ability of outside parties to change the proposed maintenance requirements contained in this subpart. FRA acknowledges, and agrees with concerns raised by the RLEA, which contended that FRA's acceptance of AAR's unilateral change in the maintenance requirements allows the AAR to unilaterally establish regulations without public comment. Labor representatives forwarded similar recommendations, stating that any changes made by the AAR in their recommended maintenance practices should be reviewed and approved by the FRA. Prior actions by the AAR led to excessive extension of COT&S intervals without compensating action. This resulted in the need for the current repair and single car test program, which initially led to many failures of brake valves during testing. Repetition of this kind of cycle should not be permitted. Accordingly, paragraph (a) of this section proposes to restrict AAR changes to the maintenance standards referenced in this subpart by requiring such proposed changes to be submitted and reviewed in accordance with the requirements outlined in paragraphs (b)–(d) of this section. Specifically, FRA intends to review any proposed change to determine whether the change is ''safety-critical,'' which includes but is not limited to (i) changes to Chart A, (ii) changes to established maintenance intervals, and (iii) changes to UMLER reporting requirements. If the proposed change is deemed ''safety-critical,'' FRA proposes to address the change pursuant to the Special Approval process proposed in § 232.17, which involves the publishing of a **Federal Register** Notice, conducting a Public Hearing if necessary, and acting based on the information developed and submitted in regard to these proceedings. Whereas, if the proposed change is determined by FRA to be ''non safety-critical,'' FRA will permit the change to be implemented immediately. FRA proposes the process contained in this section in order to respond to the concerns raised by AAR and its' member railroads that FRA devise some sort of quick approval process in order to permit the industry to make minor modifications to existing standards. Thus, FRA has attempted to propose a process it believes should speed the process for making both safety-critical and nonsafety-critical changes.

Subpart E—End-of-Train Devices

This subpart incorporates the design, performance, and testing requirements relating to end-of-train devices (EOTs) that were issued on January 2, 1997, which became effective for all railroads on July 1, 1997, except for those for which the effective date was extended to December 1, 1997 by notice issued on June 4, 1997. *See* 62 FR 278 and 62 FR 30461. This subpart also incorporates the recent modifications made to the two-way EOT requirements to clarify the applicability of the requirements to certain passenger train operations where multiple units of freight-type equipment, material handling cars, or express cars are part of a passenger train's consist. *See* 63 FR 24130.

As noted in the discussion of the applicability provisions contained in § 232.3 of this proposal, this subpart applies to all trains unless specifically excepted by the provisions contained in this subpart. As the provisions contained in this subpart were just recently issued, there is little need to discuss these requirements in detail as they were fully discussed in the publications noted above. However, since their issuance, FRA has discovered that a few of the provisions are in need of minor modification for clarification purposes and to address some valid concerns that have been raised both internally by FRA inspectors and by outside parties. Consequently, in this discussion FRA intends to address only the specific modifications that are being made to the currently effective requirements.

Section 232.405(d) contains a proposed modification of the requirement relating to the diameter of the valve opening and hose on two-way EOTs, which is currently contained in § 232.21(d). The current regulation requires that the valve opening and hose have a minimum diameter of ¾ inch to effect an emergency application. FRA has discovered that sometime prior to the issuance of the final rule on two-way EOTs, Pulse Electronics began manufacturing their two-way EOT with the internal diameter of the hose being ⅝ inch. Testing of the devices manufactured with these smaller diameter hoses showed that they met all criteria for emergency application capability based on standards and guidelines set forth by the AAR. Furthermore, testing of the devices at the Westinghouse facility in Wilmerding, Pennsylvania, demonstrated that the ⅝ inch diameter hose permitted 14 consecutive 50 foot cars with cut-out control valves or 750 feet of brake pipe to be jumped. This is

more than double the AAR standard for control valve requirements. Consequently, FRA proposes to modify § 232.405(d) to permit the use of a ⅝ inch internal diameter hose in the design of the devices.

Based on concerns raised by FRA inspectors and after consideration of the data related to the braking ability of locomotives. FRA proposes to modify the exception currently contained in § 232.23(e)(1) which grants an exception from the two-way EOT requirements to trains operating with a locomotive capable of effectuating an emergency application, located in the rear third of the train. In § 232.407(e)(1), FRA proposes to modify this exception so that it is only applicable to trains operating with a locomotive on the rear of the train. Data supplied by VOLPE demonstrates that stopping distances are greatly increased, and could potentially result in a runaway train or derailment depending on the length of the train, if an obstruction of the brake pipe were to occur directly behind a locomotive located in the rear third of the train. Therefore, FRA proposes that trains with a locomotive located in the rear third of the train no longer be excepted from the two-way EOT requirements, unless the train qualifies for relief under one of the other specific exceptions contained in § 232.407(e). FRA believes that this modification will pose little burden on the railroads since virtually all trains currently operating with a locomotive located in the rear third of the train are equipped with a two-way EOT anyway due to the operational benefits gained from the devices as well as its usefulness in conducting required brake inspection en route.

Based on the above discussion, FRA also proposes to modify the requirements for operating a train that experiences an en route failure of the two-way EOT over a section of track with an average grade of two percent or greater over a distance of two continuous miles. FRA proposes to modify the alternative measure currently contained at § 232.23(g)(1)(iii) which permits the operation over such a grade if a radio-controlled locomotive is placed in the rear third of the train consist and under the continuous of the engineer in the head end of the train. In § 232.407(g)(1)(iii), FRA proposes to modify this alternative measure to permit such operation only if the radio-controlled locomotive is placed at the rear of the train consist. This modification is proposed in order that the alternative methods of operation over a heavy grade remains consistent with the exception from the two-way EOT requirements contained in § 232.407(e) as discussed in the preceding paragraph.

In § 232.407(f)(3), FRA proposes to require that if a train is required to use a two-way EOT, the device shall be activated to effectuate an emergency brake application either by using the manual toggle switch or through automatic activation, whenever it becomes necessary for the locomotive engineer to place the train air brakes in emergency using either the automatic brake valve or the conductor's emergency brake valve or whenever an undesired emergency application of the train air brakes occurs. On June 1, 1998, FRA issued Safety Advisory 98–2 which recommended that railroads adopt the procedure being proposed in this paragraph. *See* 63 FR 30808. FRA issued Safety Advisory 98–2 in response to several recent freight train incidents potentially involving the improper use of a train's air brakes which caused FRA to focus on railroad air brake and train handling procedures related to the initiation of an emergency air brake application, particularly as they pertain to the activation of the two-way EOT from the locomotive. Based on FRA's review of the incidents noted below, and its awareness of other incidents involving non-use of two-way EOTs under similar circumstances, FRA believes that the guidance contained in Safety Advisory 98–2 must be incorporated into the regulations to ensure that the safety benefits of two-way EOTs are fully realized.

FRA and the National Transportation Safety Board (NTSB) are currently investigating four incidents in which a train was placed into emergency braking by use of the normal emergency brake valve handles on the locomotive, and although the train in each instance was equipped with an armed and operable two-way EOT, the device was not activated by the locomotive engineer. These incidents include:

- A March 30, 1997 incident occurring near Ridgecrest, North Carolina, involving Norfolk Southern train No. P32, resulting in 42 cars derailed and two crewmembers injured;
- An October 25, 1997 incident occurring in Houston, Texas, involving Union Pacific train Nos. IHOLB–25 and MTUHO–21, resulting in five locomotives derailed and totally destroyed, and two crewmembers injured;
- A November 3, 1997 incident occurring near Alvord, Texas, involving Burlington Northern Santa Fe train Nos. HALTBAR 1–03 and ESLPCAM 3–11, resulting in three locomotives and seven cars derailed, and two crewmembers injured;
- A March 23, 1998 incident occurring near Herington, Kansas, involving Union Pacific train Nos. MKSTUX–23 and IESLB–21, resulting in one locomotive and 6 cars derailed, and one crewmember injured.

FRA's preliminary findings indicate that in all of the incidents noted above, there was evidence of an obstruction somewhere in the train line, caused by either a closed or partially closed angle cock or a kinked air hose. This obstruction prevented an emergency brake application from being propagated throughout the entire train, front to rear, after such an application was initiated from the locomotive using either the engineer's automatic brake valve handle or the conductor's emergency brake valve. Furthermore, the locomotive engineers in each of the incidents stated that they did not think to use the two-way EOT, when asked why they failed to activate the device.

FRA believes that the operational requirement proposed in this section must be stressed by the railroads when conducting the two-way EOT training proposed in § 232.203. FRA believes that the likelihood of future incidents, such as the ones described above, would be greatly reduced if the proposed train handling procedure is made part of a train crew's training and followed by members of the crew in emergency situations. FRA believes that this additional procedure, together with the proposed training, will not only ensure that an emergency brake application is commenced from both the front and rear of the train in emergency situations, but will familiarize the engineer with the activation and operation of the devices and will educate the engineer to react in the safest possible manner whenever circumstances require the initiation of an emergency brake application.

FRA recognizes that a number of railroads have already adopted procedures similar to that proposed in this section and commends such actions. Although FRA proposes that the device to be activated either manually or automatically, FRA intends to make clear that the front unit of the device is still required to be equipped with a manually operated switch. *See* § 232.405(e). FRA recognizes that some railroads have developed a means in which the rear unit is automatically activated when an engineer makes an emergency application with the brake handle and FRA endorses such innovation. However, FRA believes that an engineer should also be provided a separate, manually operated switch which is independent of any automatic system in order to ensure the activation

of the rear unit in the event that the automatic system fails.

In section 232.409(c), FRA proposes to modify the requirement regarding notification to the locomotive engineer when the device is tested by someone other than a train crew member currently contained at § 232.25(c). Since the rule has been in effect, numerous locomotive engineers have informed FRA that they are not being properly notified when successful completion of the testing and inspection requirements contained in this section are performed by other than train crew members. Many engineers claim that they are not confident that the proper tests and inspections have been conducted on the devices, or that the devices will even operate, when they get verbal confirmation of the test from a dispatcher, especially when the dispatcher does not know who performed the test or when it was performed. Consequently, in order to ensure that the proper tests and inspections are being performed on the devices and to provide locomotive engineers with a measure of confidence that the devices will work as intended, FRA proposes to require that written notification be provided to the engineer when the required tests and inspections are performed by a person other than a train crew member. FRA proposes that the written notification include the date and time of the test, the location where the test was performed, and the name of the person performing the test.

In section 232.409(d), FRA proposes to modify the language related to the annual calibration and testing of EOT devices currently contained at § 232.25(d). The regulation currently states that the devices shall be ''calibrated'' annually. FRA intends to make clear that it intended for railroads' to perform whatever tests or checks are necessary to ensure that the devices are operating within the parameters established by the manufacturers of the devices. Several railroads have attempted to sharp shoot the language currently contained in the regulation, claiming that the manufacturer states that front units do not need to be calibrated on an annual basis, in order to avoid doing any testing of the devices. Although FRA agrees that the front units may not have to be calibrated every year, the devices must be tested in some fashion to verify that they are operating within the manufacturer's specification with regard to radio frequency, signal strength, and modulation and do not require recalibration. FRA has been provided written instructions from the manufacturers' of the devices which contain procedures for testing of both the front and rear units. Furthermore, railroads using the devices in Canada acknowledge that the radio functions of the front and rear units are tested periodically. Consequently, in this paragraph FRA proposes clarifying language in order to avoid any misconceptions as to what actions are required to be performed on these devices on an annual basis.

One issue which has recently arisen, which FRA believes must be addressed, relates to the ability of a railroad to dispatch a train with an inoperative two-way EOT. FRA believes that some clarification is necessary with regard to this issue. The issue has arisen in circumstances where a railroad is aware that a certain location experiences communication problems, and thus, permits trains to depart limiting their speed to 30 mph until communication between the front and rear unit is established. Section 232.23(f)(1) of the current regulations, § 232.407(f)(1) of this proposal, requires that; ''the device shall be armed and operable from the time the train departs from the point where the device is installed until the train reaches its destination.'' Therefore, FRA intends to make clear that a train required to be equipped with a two-way EOT may not be dispatched from a location where a device is installed unless the device is armed and operable. Consequently, railroads may have to install repeater stations at locations where communication problems are prevalent.

Although FRA is not proposing any other specific changes to the requirements incorporated into this subpart, FRA has provided a detailed discussion of several issues that have arisen since the issuance of the final rule on two-way EOTs. This detail discussion is contained in the ''Discussion of Issues and General FRA Conclusions'' portion of this preamble under the heading ''Two-way End-of-Train Devices.'' FRA seeks comment and information from all interested parties related to the issues contained in that discussion in order to potentially take appropriate action at the final rule stage of this proceeding to address those issues.

Subpart F—Introduction of New Brake System Technology

This proposed subpart contains the tests and procedures required to introduce new train brake system technology into revenue service. Several parties commented that the technology necessary for the introduction of advanced braking systems is quickly developing. These new technologies include various forms of electronic braking systems, a variety of braking sensors, and computer-controlled braking systems. In order to allow for and encourage the development of new technology, FRA proposes guidelines regarding the tests and procedures required for introducing new brake system technology. These proposed guidelines require the submission to FRA of a pre-revenue service acceptance testing plan.

FRA intends to make clear that this proposed subpart would only be applicable to new train brake system technology that comply with the statutory mandates contained in 49 U.S.C. 20102, 20301–20304, 20701–20703, 21302, and 21304, but which are not specifically covered by these proposed regulations. Any type of new train brake system which requires an exemption from the Federal railroad safety laws in order to be operated in revenue service cannot be introduced into service pursuant to this section. In order to grant a waiver of the Federal railroad safety laws, FRA is limited by the specific statutory provisions contained in 49 U.S.C. 20306 as well as any FRA procedural requirements contained in this chapter.

Section 232.503 Process To Introduce New Brake System Technology

This section contains the proposed procedural requirements which must be met when a railroad intends to introduce new brake system technology into its system. This section makes clear that the approval of FRA's Associate Administrator for Safety must be obtained by a railroad prior to the railroad's implementation of a pre-revenue service acceptance test plan and before introduction of new brake system technology into revenue service. This section requires that such approval be obtained pursuant to the Special Approval process proposed in § 232.17. Several railroads and manufacturers contended, both in response to the 1994 NPRM and at the RSAC Working Group meetings, that FRA needed to devise some sort of quick approval process in order to permit the industry to rapidly introduce new brake system technologies into revenue service. Thus, FRA has attempted to propose an approval process it believes should speed the process for taking advantage of new technologies over that which is currently available under the waiver process. However, in order to provide an opportunity for all interested parties to provide input for use by FRA in its decision making process, as required by the Administrative Procedure Act, FRA believes that any special approval

provision must, at a minimum, provide proper notice to the public of any significant change or action being considered by the agency with regard to existing regulations.

Section 232.505 Pre-revenue Service Acceptance Testing Plan

This section provides the proposed requirements for pre-revenue service testing of new brake system technology. These tests are extremely important in that they intended to prove that the new brake system can be operated safely in its intended environment. For equipment that has not previously been used in revenue service in the United States, paragraph (a) requires the operating railroad to develop a pre-revenue service acceptance testing plan and obtain FRA approval of the plan under the procedures stated in § 238.17 before beginning testing. Previous testing of the equipment at the Transportation Test Center, on another railroad, or elsewhere will be considered by FRA in approving the test plan. Paragraph (b) requires the railroad to fully execute the tests required by the plan, to correct any safety deficiencies identified by FRA, and to obtain FRA's approval to place the equipment in revenue service prior to introducing the equipment in revenue service. Paragraph (c) requires the railroad to comply with any operational limitations imposed by FRA. Paragraph (d) requires the railroad to make the plan available to FRA for inspection and copying. Paragraph (e) enumerates the elements that must be included in the plan. FRA believes this set of steps and the documentation required by this section are necessary to ensure that all safety risks have been reduced to a level that permits the new brake system technology to be used in revenue service.

In lieu of the requirements of paragraphs (a) through (e), paragraph (f) provides for an abbreviated testing procedure for new brake system technology that has previously been used in revenue service in the United States. The railroad need not submit a test plan to FRA; however, a description of the testing shall be maintained by the railroad and made available to FRA for inspection and copying.

Regulatory Impact

Executive Order 12866 and DOT Regulatory Policies and Procedures

This proposed rule has been evaluated in accordance with existing policies and procedures and is considered to be significant under both Executive Order 12866 and DOT policies and procedures (44 FR 11034, Feb. 26, 1979). FRA has prepared and placed in the docket a regulatory evaluation of the proposed rule. This evaluation estimates the costs and consequences of the proposed rule as well as its anticipated economic and safety benefits. It may be inspected and photocopied during normal business hours by visiting the FRA Docket Clerk at the Office of Chief Counsel, FRA, Seventh Floor, 1120 Vermont Avenue, N.W., in Washington, D.C. Photocopies may also be obtained by submitting a written request by mail to the FRA Docket Clerk at the Office of Chief Counsel, Federal Railroad Administration, 400 Seventh Street, S.W., Washington, D.C. 20590.

The estimated benefits of this proposed rule exceed the estimated costs over a 20-year period at a 7% discount rate. The estimated Net Present Value (NPV) of the total 20-year costs associated with the proposed rule is approximately $98 million; whereas the total 20-year benefits (safety and economic) have been estimated at approximately $106 million. For some freight rail operations the total costs incurred will exceed the benefit savings. For others, the benefit savings will outweigh the costs. The following tables contains the estimated 20-year costs and benefits associated with the proposed rule.

TABLE 3.—ESTIMATED COSTS

Category	NPV costs
Training	$76,929,903
Two-way EOT Training	1,421,731
Retest	4,385,922
Piston Travel Stickers	1,163,062
Air Quality	3,219,072
Dynamic Brake	1,757,621
Cycle Trains	3,972,596
Written Procedures	4,938,929
Total	97,787,837

TABLE 4.—ESTIMATED BENEFITS

Category	NPV benefits
Extended Haul	$66,389,112
Safety Improvements	31,585,909
Two-way EOT Training	5,270,840
Bottom Rod Safety Supports	3,239,650
Total	106,485,510

The estimates contained in the tables above are somewhat preliminary as FRA does not have detailed data relating to the costs of some of the dynamic brake or dry air requirements. FRA seeks comment and additional information from railroads, contractors, and other interested parties regarding choices they may have to make so that a more complete estimate of the costs and benefits of this rule may be made prior to the issuance of the final rule. For purposes of the regulatory impact analysis, FRA has made certain assumptions pertinent to cost elements when it lacked specific data and asks for comments and information on those assumptions from all interested parties.

The estimated benefits are derived primarily through the extended haul provision and a reduction in brake related incidents. FRA has proposed extremely restrictive requirements related to the inspection and movement of trains which will be permitted to travel in excess of 1,000 miles between brake inspections. FRA also anticipates that enhancements to safety will be obtained through the proposed training requirements and through the proposed requirements relating to the retesting of cars failing to apply during a brake inspection. The estimated safety benefits of this proposed rule are derived from the prevention of accidents and the resulting fatalities, injuries, and property damage. FRA has employed an effectiveness rate of 20 percent in an effort to measure the anticipated improvements in safety. Benefits also exist for railroads in terms of reduced train delay, debris removal and repairs which are not estimated. Benefits are also not estimated for the operational benefits which may be derived from permitting the use of a two-way EOT during the performance of a Class I brake test; such as, the time that may be saved when an en route pick-up is made and a Class I brake test is performed. FRA does not currently have an estimate of how many en route pick-ups take place annually.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires an assessment of the impacts of proposed rules on small entities. FRA has conducted a regulatory flexibility assessment of this rule's impact on small entities, and the assessment has been placed in the public docket for this rulemaking.

1. Why Action by the Agency is Being Considered

In 1992, Congress amended the Federal rail safety laws by adding certain statutory mandates related to power brake safety. *See* 49 U.S.C. 20141. These amendments specifically address the revision of the power brake regulations by adding a new subsection which states:

(r) POWER BRAKE SAFETY.—(1) The Secretary shall conduct a review of the Department of Transportation's rules with respect to railroad power brakes, and not later than December 31, 1993, shall revise such rules based on such safety data as may be presented during that review.

(2) In carrying out paragraph (1), the Secretary shall, where applicable, prescribe standards regarding dynamic brake equipment. * * *

Pub. L. No. 102–365, § 7; codified at 49 U.S.C. 20141, superseding 45 U.S.C. 431(r).

In addition to this statutory mandate, FRA received various recommendations and petitions for rulemaking, and determined on its own that the power brake regulations were in need of revision. FRA has been in the process of revising the power brake regulations since 1992. An ANPRM and an NPRM revising the power brake regulations were previously issued on December 31, 1992 and September 16, 1994, respectively. *See* 57 FR 62546 and 59 FR 47676. A detailed discussion of the history leading up to this NPRM is contained in the preamble. The reasons for the actual provisions of the action considered by the agency are explained in the body of the preamble and the section-by-section analysis.

2. The Objectives and Legal Basis for The Rule

The objective of the rule is to enhance the safety of rail transportation, protecting both those people traveling and working on the system, and those people off the system who might be affected by a rail incident by revising the regulations related to the braking systems used and operated in freight and other non-passenger trains to address potential deficiencies in the existing regulations, better address the needs of contemporary railroad operations, and facilitate the use of advanced technologies. The legal basis for this action is reflected in the response to 1. above and in the preamble.

3. A Description of and an Estimate of the Number of Small Entities to Which the Proposed Rule Would Apply

The Small Business Administration (SBA) uses an industry wide definition of ''small entity'' based on employment. Railroads are considered small by SBA definition if they employ fewer than 1,500 people. An agency may establish one or more other definitions of this term, in consultation with the SBA and after an opportunity for public comment, that are appropriate to the agency's activities.

The classification system used in this analysis is that of the FRA. Prior to the SBA regulations establishing size categories, the Interstate Commerce Commission (ICC) developed a classification system for freight railroads as Class I, II, or III, based on annual operating revenue. A Class II railroad has operating revenue greater or equal to $40 million dollars but less than $253.7 million and a Class III railroad has operating revenue below $39 million. The Department of Transportation's Surface Transportation Board, which succeeded the ICC, has not changed these classifications. The ICC classification system has been used pervasively by FRA and the railroad industry to identify entities by size. After consultation with the Office of Advocacy of the SBA and as explained in detail in the ''Interim Policy Statement Concerning Small Entities Subject to the Railroad Safety Laws,'' published August 11, 1997 at 62 Fed. Reg. 43024, FRA has decided to define ''small entity,'' on an interim basis, to include only those entities whose revenues would bring them within the Class III definition. As this is an alternative definition, FRA requests comment from interested parties on its use.

All of the small entities directly affected by this rule are Class III railroads. FRA certifies that this proposed rule is expected to have a significant impact on a substantial number of Class III railroads. FRA did not quantify the estimated annual cost or benefit to the average Class III railroad, annual costs for all non-Class I railroads are shown in Appendix A of the Regulatory Impact Analysis. Class III railroads have about 15 percent of the employees of all Class II and III railroads. As most the costs of this proposed rule on Class III railroads are related to the number and types of employees (training, refresher training, qualification, and internal audit plans) a rough estimate of the costs to Class III railroads is taken as about 15 percent of the training related costs or about $2.1 million discounted at 7 percent over 20 years. It should be noted that this cost figure is a very rough estimate and includes only an estimate of the costs related to training as noted above. Consequently, FRA is seeking comment and information from all interested parties on the costs to these small entities so this estimate can be further refined and developed for the final rule.

4. A Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirements and the Type of Professional Skills Necessary for Preparation of the Report or Record

See the Paperwork Reduction Act analysis.

5. Federal Rules Which May Duplicate, Overlap, or Conflict With the Rule

None.

Significant Alternatives

1. Differing compliance or reporting requirements or timetables which take into account the resources available to small entities:

2. Clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities:

3. Exemption from coverage of the rule, or any part thereof, for such small entities:

FRA considered the role that shortline railroads (Class II and III railroads) have in today's freight industry. FRA believes that the current marketplace requires Class I railroads and shortline railroads to operate as an integrated system. Many of today's shortlines rely on Class I railroads for the training of their employees and the maintenance of their equipment. In addition, many shortline railroads and Class I railroads interchange and operate each others equipment. Therefore, except in limited circumstances, it is impossible, from a regulatory standpoint, to separate shortline railroads from Class I railroads. Therefore, in order to ensure the safety and quality of train and locomotive power braking systems throughout the entire freight industry, this proposal generally imposes a consistent set of requirements on shortline and Class I railroads as a group. Although FRA recognizes that many of the operational benefits created by this proposal are not available to most shortline operations, FRA feels that the integrated nature of the freight industry requires that universally consistent requirements be imposed on both shortline and Class I railroads.

Where possible, efforts were taken in this proposal to minimize the impact on shortline railroads. The proposed requirements related to dynamic brakes provide shortline railroads with the option of declaring the dynamic brake portion of a locomotive disabled, so that they will not needlessly incur the cost of maintaining equipment that they do not choose to employ. FRA also

proposes to permit railroads to perform Class II brake tests on cars added to a train received in interchange, if the train will travel a distance not to exceed 20 miles from the point at which it was received in interchange. The current regulations require the performance of at least a transfer train brake test on the entire train, rather than testing only those cars added. FRA believes this will provide a cost savings to short line railroads and seeks comment from interested parties on the number of transfer train brake tests and initial terminal brake tests that are conducted when trains are received in interchange. FRA also seeks comments and suggestions from all interested parties with regard to any requirement proposed as to alternative approaches that might reduce the impact of the proposal on shortlines, particularly Class III railroads.

4. Use of Performance, Rather Than Design Standards

Where possible, especially with regard to advanced technologies and certain brake system components, an attempt was made to tie the proposed requirements to performance.

Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections that contain the new information collection requirements and the estimated time to fulfill each requirement are as follows:

49 CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden cost
229.27—Annual tests	20,000 locomotives	18,000 tests	15 minutes	4,500 hours	$157,500
232.7—Waivers	545 railroads	10 petitions	40 hours	400 hours	18,000
232.15—Movement of Defective Equipment:					
Tags	1,220,000 cars	48,200 tags	5 minutes	4,017 hours	140,595
Written Notification	1,220,000 cars	16,000 notices	3 minutes	800 hours	28,000
232.17—Special Approval Procedure:					
Petitions for special approval of safety-critical revision.	545 railroads	1 petition	100 hours	100 hours	4,500
Petitions for special approval of pre-revenue service acceptance plan.	545 railroads	2 petitions	100 hours	200 hours	9,000
Service of petitions	545 railroads	3 petitions	40 hours	120 hours	5,400
Statement of interest	Public/railroads	15 comments	4 hours	60 hours	2,700
CommentPublic/railroads	15 comments	4 hours	60 hours	2,700.	
232.103—Gen'l requirements—all train brake systems.	1,200,000 cars	140,000 stickers	10 minutes	23,333 hours	816,655
Locomotives—1st Year	545 railroads	50 procedures	4 hours	200 hours	9,000
Locomotives—Subquent Years.	25 new railroads	1 procedure	4 hours	4 hours	180
232.105—Gen'l requirements for locomotives.	545 railroads	20,000 inspections	5 minutes	1,667 hours	58,345
232.107—Air source requirements—1st Year.	545 railroads	50 plans	40 hours	2,000 hours	90,000
Subsequent Years	25 new railroads	1 plan	40 hours	40 hours	1,800
Amendments to Plan	50 existing plans	10 amendments	20 hours	200 hours	9,000
Recordkeeping	50 existing plans	2,000 records	20 hours	40,000 hours	1,800,000
Cold weather situations	545 railroads	37 plans	20 hours	740 hours	33,300
232.109—Dynamic brake requirements—status.	545 railroads	1,656,000	5 minutes	138,000 hours	4,830,000
Inoperative dynamic brakes.	8,000 locomotives	records	4 minutes	27 hours	945
Permanently disabled dynamic brakes—1st Year.	8,000 locomotives	400 tags	5 minutes	233 hours	8,155
Subsequent Years	8,000 locomotives	2,800 stencilings	5 minutes	2 hours	70
Operating rules—1st Year	545 railroads	20 stencilings	4 hours	1,200 hours	54,000
Subsequent Years	5 new railroads	300 oper. rules	4 hours	20 hours	900
Amendments	545 railroads	5 operating rules	1 hour	15 hours	675
Knowledge criteria—locomotive engineers—1st Year.	545 railroads	15 amendments	16 hours	4,800 hours	216,000
	5 new railroads	300 amendments	16 hours	80 hours	3,600
232.111—Train information handling—1st Year.	545 railroads	545 procedures	50 hours	27,250 hours	1,226,250
Subsequent Years	10 new railroads	10 procedures	40 hours	400 hours	18,000
Amendments	100 railroads	100 amendments	20 hours	2,000 hours	90,000
Report requirements to train crew.	545 railroads	2,112,000 reports	10 minutes	352,000 hours	12,320,000
232.203—Training requirements—Tr. Prog.—1st Year.	545 railroads	300 programs	80 hours	24,000 hours	1,080,000
Subsequent Years	15 railroads	1 program	100 hours	100 hours	4,500
Amendments to written program.	545 railroads	545 amendments	8 hours	4,360 hours	196,200

49 CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden cost
Training records	545 railroads	67,000 records	10 minutes	11,167 hours	390,845
Training modifications	545 railroads	67,000 notific.	3 minutes	3,350 hours	117,250
Audit program	545 railroads	545 programs	40 hours	21,800 hours	981,000
Amendments to audit program.	545 railroads	50 amendments	20 hours	1,000 hours	45,000
232.205—Class 1 brake test	545 railroads	1,656,000 notices	45 seconds	20,700 hours	724,500
232.207—Class 1A brake tests—1st Year.	545 railroads	15 lists	30 minutes	8 hours	360
Subsequent Years	545 railroads	1 list	1 hour	1 hour	45
Notification	545 railroads	5 amendments	1 hour	5 hours	225
232.209—Class II brake tests-intermediate inspection.	545 railroads	1,920,000 comnts	3 seconds	1,600 hours	56,000
Operator of train	545 railroads	comnts	2 seconds	1,067 hours	37,345
Electronic communication link.	545 railroads	1,920,000 comm 32,000 messages	2 seconds	18 hours	630
232.211—Class II brake test-trainline continuity insp.	545 railroads	500,000	5 seconds	694 hours	24,290
Electronic communication link.	545 railroads	commun 5,000 messages	5 seconds	7 hours	245
232.213—Extended haul trains	84,000 long dist. mvmts	70 letters	15 minutes	18 hours	810
Record of all defective/inoperative brakes.	84,000 long dist. mvmts	25,200 records	30 minutes	12,600 hours	441,000
232.303—Gen'l requirements—single car test.	1,200,000 frgt. cars	24,000 tags	10 minutes	4,000 hours	140,000
Last repair track brake test/single car test.	1,200,000 frgt. cars	240,000 stncl	5 minutes	20,000 hours	700,000
232.309—Repair track brake test	640 shops	960 tests	30 minutes	480 hours	16,800
232.311—Process for changing maintenance reqmnts.	Assoc. Am. Railroads	1 revision	100 hours	100 hours	4,500
232.403—Design stds—1-way end-of-train (EOTs) dev.	545 railroads	4 billion mess	1/186,000 sec.	6 hours	0
Unique Code	545 railroads	12 requests	5 minutes	1 hour	35
232.405—Design + Performance stds.—2-way EOTs.	545 railroads	8 billion mess	1/186,000 sec.	12 hours	0
232.407—Operations requiring 2-way EOTs.	545 railroads	50,000 comm	30 seconds	417 hours	14,595
232.409—Insp. and Testing of EOTs.	245 railroads	450,000 comm.	30 seconds	3,750 hours	168,750
Telemetry Equipment—Testing and Calibration.	245 railroads	32,708 units	1 minute	545 hours	24,525
232.503—Process to introduce new brake technology.	545 railroads	1 letter	1 hour	1 hour	45
Special approval	545 railroads	1 request	2 hours	2 hours	90
232.505—Pre-revenue service accept. test plan—1st Yr.	545 railroads	1 main	160 hours	160 hours	7,200
Subsequent Years	545 railroads	1 main procedure	160 hours	160 hours	7,200
Amendments	545 railroads	1 main procedure	40 hours	40 hours	1,800
Design description	545 railroads	1 petition	40 hours	40 hours	1,800
Report to FRA Assoc. Admin. for Safety.	545 railroads	1 report	8 hours	8 hours	360 hours
Brake system technology testing.	545 railroads	5 descriptions	40 hours	200 hours	9,000

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: whether these information collection requirements are necessary for the proper performance of the function of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB, contact Robert Brogan at 202–493–6292.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Robert Brogan, Federal Railroad Administration, RRS–21, Mail Stop 25, 400 7th Street, S.W., Washington. D.C. 20590. An advance copy of the information collection package for this proposed rule has been forwarded to the Office of Management and Budget for review and approval.

OMB is required to make a decision concerning the collection of information requirements contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. The final rule will respond to any OMB or public

comments on the information collection requirements contained in this proposal.

FRA is not authorized to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of a final rule. The valid OMB control number for this information collection is 2130–0008.

Environmental Impact

FRA has evaluated these proposed regulations in accordance with its procedures for ensuring full consideration of the environmental impact of FRA actions, as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), and related directives. This notice meets the criteria that establish this as a non-major action for environmental purposes.

Federalism Implications

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

Request for Public Comments

FRA proposes to adopt a new part 232 and amend parts 229 and 231 of title 49, Code of Federal Regulations, as set forth below. FRA solicits comments on all aspects of the proposed rules whether through written submissions, or participation in the public hearings, or both. FRA may make changes in the final rules based on comments received in response to this notice.

List of Subjects

49 CFR Part 229

Penalties, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Part 231

Penalties, Railroad safety.

49 CFR Part 232

Penalties, Railroad safety.

The Proposal

In consideration of the following, FRA proposes to amend chapter II, subtitle B of title 49, Code of Federal Regulations as follows:

PART 229—[AMENDED]

1. The authority citation for part 229 is revised to read as follows:

Authority: 49 U.S.C. 20102–20103, 20133, 20137–20138, 20143, 20701–20703, 21301–21302, 21304; 49 CFR 1.49(c), (m).

2. Section 229.5 is amended by adding a new paragraph (p) to read as follows:

§ 229.5 Definitions.

* * * * *

(p) *Electronic air brake* means a computer based system which provides the means for control of the locomotive brakes or train brakes or both.

3. Section 229.25 is amended by revising paragraph (a) to read as follows:

§ 229.25 Tests: Every periodic inspection.

* * * * *

(a) All mechanical gauges used by the engineer for braking the train or locomotive, except load meters used in conjunction with an auxiliary brake system, shall be tested by comparison with a dead-weight tester or a test gauge designed for this purpose.

* * * * *

4. Section 229.27 is amended by redesignating paragraphs (a)(3) and (a)(4) as paragraphs (a)(4) and (a)(5), by adding a new paragraph (a)(3), and by revising paragraph (b) to read as follows:

§ 229.27 Annual tests.

* * * * *

(a) * * *

(3) The compressor or compressors shall be tested for capacity by orifice test.

* * * * *

(b) The load meter shall be tested. Each device used by the engineer for braking the train or locomotive that provides an indication of air pressure electronically shall be tested by comparison with a test gauge or self-test designed for this purpose. Errors of greater than five percent or three pounds per square inch, whichever is less, shall be corrected. The date and place of the test shall be recorded on Form FRA F 6180–49A, and the person conducting the test and that person's supervisor shall sign the form.

* * * * *

5. Section 229.53 is revised to read as follows:

§ 229.53 Brake gauges.

All mechanical gauges and all devices providing indication of air pressure electronically that are used by the engineer for braking the train or locomotive shall be located so that they may be conveniently read from the engineer's usual position during operation. A gauge or device shall not be more than three pounds per square inch in error.

PART 231—[AMENDED]

6. The authority citation for part 231 is revised to read as follows:

Authority: 49 U.S.C. 20102–20103, 20131, 20301–20303, 21301–21302, 21304; 49 CFR 1.49(c), (m).

7. Section 231.0 is amended by adding paragraphs (b)(3) through (5) and paragraph (f) to read as follows:

§ 231.0 Applicability and penalties.

* * * * *

(b) * * *

(3) A freight train of four-wheel coal cars.

(4) A freight train of eight-wheel standard logging cars if the height of each car from the top of the rail to the center of the coupling is not more than 25 inches.

(5) A locomotive used in hauling a train referred to in paragraph (b)(4) of this section when the locomotive and cars of the train are used only to transport logs.

* * * * *

(f) Except as provided in paragraph (b) of this section, § 231.31 also applies to an operation on a 24-inch, 36-inch, or other narrow gage railroad.

8. Part 231 is further amended by adding § 231.31 to read as follows:

§ 231.31 Drawbars for freight cars; standard height.

(a) Except on cars specified in paragraph (b) of this section—

(1) On standard gage (56½-inch gage) railroads, the maximum height of drawbars for freight cars (measured perpendicularly from the level of the tops of the rails to the centers of the drawbars) shall be 34½ inches, and the minimum height of drawbars for freight cars on such standard gage railroads (measured in the same manner) shall be 31½ inches.

(2) On 36-inch gage railroads, the maximum height of drawbars for freight cars (measured from the level of the tops of rails to the centers of the drawbars) shall be 26 inches, and the minimum height of drawbars for freight cars on such 36-inch gage railroads (measured in the same manner) shall be 23 inches.

(3) On 24-inch gage railroads, the maximum height of drawbars for freight cars (measured from the level of the tops of rails to the centers of drawbars) shall be 17½ inches, and the minimum height of drawbars for freight cars on 24-inch gage railroads (measured in the same manner) shall be 14½ inches.

(4) On railroads operating on track with a gage other than those contained in paragraphs (a)(1) through (a)(3), the maximum and minimum height of drawbars for freight cars operating on

those railroads shall be established upon written approval of FRA.

(b) This section shall not apply to a railroad all of whose track is less than 24 inches in gage.

9. Appendix A of Part 231 is amended by adding an entry for § 231.31 to the end of the Schedule of Civil Penalties to read as follows:

APPENDIX A TO PART 231—SCHEDULE OF CIVIL PENALTIES

	FRA safety appliance defect code section	Violation	Willful violation
*	* *	*	*
231.31	Drawbars, standard height.	2,500	5,000
*	* *	*	*

10. Part 232 is revised to read as follows:

PART 232—BRAKE SYSTEM SAFETY STANDARDS FOR FREIGHT AND OTHER NON-PASSENGER TRAINS AND EQUIPMENT

Subpart A—General

Sec.
232.1 Purpose and scope.
232.3 Applicability.
232.5 Definitions.
232.7 Waivers.
232.9 Responsibility for compliance.
232.11 Penalties.
232.13 Preemptive effect.
232.15 Movement defective equipment.
232.17 Special approval procedure.

Subpart B—General Requirements

232.101 Scope.
232.103 General requirements for all train brake systems.
232.105 General requirements for locomotives.
232.107 Air source requirements and cold weather operations.
232.109 Dynamic brake requirements.
232.111 Train handling information.

Subpart C—Inspection and Testing Requirements

232.201 Scope.
232.203 Training requirements.
232.205 Class I brake tests—Initial terminal inspection.
232.207 Class IA brake tests—1,000-mile inspection.
232.209 Class II brake tests—Intermediate inspection.
232.211 Class III brake tests—Trainline continuity inspection.
232.213 Extended haul trains.
232.215 Transfer train brake test.
232.217 Train brake system tests conducted using yard air.
232.219 Double heading, helper service, and distributed power.

Subpart D—Periodic Maintenance and Testing Requirements

232.301 Scope.
232.303 General requirements.
232.305 Repair track brake tests.
232.307 Single car tests.
232.309 Repair track brake test and single car test equipment and devices.
232.311 Process for changing maintenance requirements.

Subpart E—End-of-Train Devices

232.401 Scope.
232.403 Design standards for one-way end-of-train devices.
232.405 Design and performance standards for two-way end-of-train devices.
232.407 Operations requiring use of two-way end-of-train devices; prohibition on purchase of nonconforming devices.
232.409 Inspection and testing of end-of-train devices.

Subpart F—Introduction of New Brake System Technology

232.501 Scope.
232.503 Process to introduce new brake system technology.
232.505 Pre-revenue service acceptance testing plan.

Appendix A—Schedule of Civil Penalties [Reserved]

Authority: 49 U.S.C. 20102–20103, 20133, 20141, 20301–20303, 20306, 21301–21302, 21304; 49 CFR 1.49 (c), (m).

Subpart A—General

§ 232.1 Purpose and scope.

This part prescribes the minimum Federal safety standards for all freight and other non-passenger train brake systems and equipment. This part does not restrict a railroad from adopting or enforcing additional or more stringent requirements not inconsistent with this part.

§ 232.3 Applicability.

(a) Except as provided in paragraphs (b) and (c) of this section, this part applies to all railroads that operate freight or other non-passenger train service on standard gage track which is part of the general railroad system of transportation.

(b) Subpart E of this part applies to all trains operating on track which is part of the general railroad system of transportation unless specifically excepted in that subpart.

(c) Except as provided in paragraph (b) of this section, this part does not apply to:

(1) A railroad that operates only on track inside an installation that is not part of the general railroad system of transportation.

(2) Intercity or commuter passenger train operations on standard gage track which is part of the general railroad system of transportation;

(3) Commuter or other short-haul rail passenger train operations in a metropolitan or suburban area (as described by 49 U.S.C. 20102(1)), including public authorities operating passenger train service;

(4) Rapid transit operations in an urban area that are not connected with the general railroad system of transportation;

(5) Tourist, scenic, historic, or excursion operations, whether on or off the general railroad system;

(6) A freight train of four-wheel coal cars;

(7) A freight train of eight-wheel standard logging cars if the height of each car from the top of the rail to the center of the coupling is not more than 25 inches; or

(8) A locomotive used in hauling a train referred to in paragraph (b)(6) of this section when the locomotive and cars of the train are used only to transport logs.

(d) The provisions formerly contained in Interstate Commerce Commission Order 13528, of May 30, 1945, as amended, now revoked, are codified in this paragraph. This part is not applicable to the following equipment:

(1) Scale test weight cars;

(2) Locomotive cranes, steam shovels, pile drivers, and machines of similar construction, and maintenance machines built prior to September 21, 1945;

(3) Export, industrial, and other cars not owned by a railroad which are not to be used in service, except for movement as shipments on their own wheels to given destinations. Such cars shall be properly identified by a card attached to each side of the car, signed by the shipper, stating that such movement is being made under the authority of this paragraph.

(4) Industrial and other than railroad-owned cars which are not to be used in service except for movement within the limits of a single switching district (i.e., within the limits of an industrial facility);

(5) Narrow-gage cars; and

(6) Cars used exclusively in switching operations and not used in train movements within the meaning of the Federal safety appliance laws (49 U.S.C. 20301–20306).

§ 232.5 Definitions.

For purposes of this part—

AAR means the Association of American Railroads.

Air brake means a combination of devices operated by compressed air, arranged in a system, and controlled manually, electrically, electronically, or pneumatically, by means of which the

motion of a railroad car or locomotive is retarded or arrested.

Air Flow Indicator, AFM means a specific air flow indicator required by the air flow method of qualifying train air brakes (AFM). The AFM Air Flow Indicator is a calibrated air flow measuring device which is clearly visible and legible in daylight and darkness from the engineer's normal operating position. The indicator face displays

(1) Markings from 10 cubic feet per minute (CFM) to 80 CFM, in increments of 10 CFM or less, and

(2) Numerals indicating 20, 40, 60, and 80 CFM for continuous monitoring of air flow.

Bind means restrict the intended movement of one or more brake system components by reduced clearance, by obstruction, or by increased friction.

Brake, dynamic means a train braking system whereby the kinetic energy of a moving train is used to generate electric current at the locomotive traction motors, which is then dissipated through resistor grids or into the catenary or third rail system.

Brake, effective means a brake that is capable of producing its required designed retarding force on the train. A car's air brake is not considered effective if its piston travel exceeds:

(1) 10½ inches for cars equipped with nominal 12-inch stroke brake cylinders; or

(2) The piston travel limits indicated on the stencil, sticker, or badge plate for that brake cylinder.

Brake, hand means a brake that can be applied and released by hand to prevent or retard the movement of a locomotive.

Brake indicator means a device which indicates the brake application range and indicates whether brakes are applied and released.

Brake, inoperative means a primary brake that, for any reason, no longer applies or releases as intended.

Brake, parking means a brake that can be applied by means other than by hand, such as spring, hydraulic, or air pressure when the brake pipe air is depleted, or by an electrical motor.

Brake pipe means the system of piping (including branch pipes, angle cocks, cutout cocks, dirt collectors, hoses, and hose couplings) used for connecting locomotives and all railroad cars for the passage of compressed air.

Brake, primary means those components of the train brake system necessary to stop the train within the signal spacing distance without thermal damage to friction braking surfaces.

Brake, secondary means those components of the train brake system which develop supplemental brake retarding force that is not needed to stop the train within signal spacing distances or to prevent thermal damage to wheels.

Emergency application means an irretrievable brake application resulting in the maximum retarding force available from the train brake system.

End-of-train device, one-way means two pieces of equipment linked by radio that meet the requirements of § 232.403.

End-of-train device, two-way means two pieces of equipment linked by radio that meet the requirements of §§ 232.403 and 232.405.

Foul means any condition which restricts the intended movement of one or more brake system components because the component is snagged, entangled, or twisted.

Freight car means a vehicle designed to carry freight, or railroad personnel, by rail and a car designed for use in a work or wreck train or other non-passenger train.

Locomotive means a piece of railroad on-track equipment, other than hi-rail, specialized maintenance, or other similar equipment, which may consist of one or more units operated from a single control stand—

(1) With one or more propelling motors designed for moving other railroad equipment;

(2) With one or more propelling motors designed to transport freight or passenger traffic or both; or

(3) Without propelling motors but with one or more control stands.

Locomotive cab means that portion of the superstructure designed to be occupied by the crew operating the locomotive.

Locomotive, controlling means the locomotive from which the engineer exercises control over the train.

Off air means equipment that is not connected to a continuous source of compressed air of at least 60 pounds per square inch (psi).

Ordered or date ordered means the date on which notice to proceed is given by a procuring railroad to a contractor or supplier for new equipment.

Piston travel means the amount of linear movement of the air brake hollow rod (or equivalent) or piston rod when forced outward by movement of the piston in the brake cylinder or actuator and limited by the brake shoes being forced against the wheel or disc.

Point of origin means the location where a train is originally assembled; it is also referred to as the initial terminal.

Pre-revenue service acceptance testing plan means a document, as further specified in § 232.505, prepared by a railroad that explains in detail how pre-revenue service tests of certain equipment demonstrate that the equipment meets Federal safety standards and the railroad's own safety design requirements.

Previously tested equipment means equipment that has received a Class I brake test pursuant to § 232.205 and has not been off air for more than four hours.

Qualified mechanical inspector means a qualified person who has received, as a part of the training, qualification, and designation program required under § 232.203, instruction and training that includes ''hands-on'' experience (under appropriate supervision or apprenticeship) in one or more of the following functions: troubleshooting, inspection, testing, maintenance or repair of the specific train brake and other components and systems for which the inspector is assigned responsibility. Further, the mechanical inspector shall be a person whose primary responsibility includes work generally consistent with the functions referenced in this definition.

Qualified person means a person determined by a railroad to have the knowledge and skills necessary to perform one or more functions required under this part. The railroad determines the qualifications and competencies for employees designated to perform various functions in the manner set forth in this part.

Railroad means any form of non-highway ground transportation that runs on rails or electromagnetic guideways, including:

(1) Commuter or short-haul rail passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and

(2) High speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads. The term ''railroad'' is also intended to mean a person that provides railroad transportation, whether directly or by contracting out operation of the railroad to another person. The term does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

Rebuilt equipment means equipment that has undergone overhaul identified by the railroad as a capital expense under the Surface Transportation Board's accounting standards.

Refresher training means periodic retraining required for employees or contractors to remain qualified to perform specific equipment

troubleshooting, inspection, testing, maintenance, or repair functions.

Respond as intended means to produce the result that a device or system is designed to produce.

Service application means a brake application that results from one or more service reductions or the equivalent.

Service reduction means a decrease in brake pipe pressure, usually from 5 to 25 psi at a rate sufficiently rapid to move the operating valve to service position, but at a rate not rapid enough to move the operating valve to emergency position.

Solid block of cars means two or more freight cars continuously and consecutively coupled together in a train which, when removed from the train, remain intact and coupled together with the train line remaining connected and open within the block.

State inspector means an inspector of a participating State rail safety program under part 212 of this chapter.

Switching service means the classification of freight cars according to commodity or destination; assembling of cars for train movements; changing the position of cars for purposes of loading, unloading, or weighing; placing of locomotives and cars for repair or storage; or moving of rail equipment in connection with work service that does not constitute a train movement.

Tourist, scenic, historic, or excursion operations are railroad operations that carry passengers, often using antiquated equipment, with the conveyance of the passengers to a particular destination not being the principal purpose.

Train means one or more locomotives coupled with one or more freight cars, except during switching service.

Train line means the brake pipe or any other non-pneumatic system used to transmit the signal that controls the locomotive and freight car brakes.

Transfer train means a train that travels between a point of origin and a point of final destination not exceeding 20 miles and is not performing switching service.

Yard air means a source of compressed air other than from a locomotive.

Yard train means a train used only to perform switching service within a single yard.

§ 232.7 Waivers.

(a) Any person subject to a requirement of this part may petition the Administrator for a waiver of compliance with such requirement. The filing of such a petition does not affect that person's responsibility for compliance with that requirement while the petition is being considered.

(b) Each petition for waiver must be filed in the manner and contain the information required by part 211 of this chapter.

(c) If the Administrator finds that a waiver of compliance is in the public interest and is consistent with railroad safety, the Administrator may grant the waiver subject to any conditions the Administrator deems necessary. Where a waiver is granted, the Administrator publishes a notice in the **Federal Register** containing the reasons for granting the waiver.

§ 232.9 Responsibility for compliance.

(a) A railroad subject to this part shall not use, haul, permit to be used or hauled on its line, offer in interchange, or accept in interchange any train, railroad car, or locomotive with one or more conditions not in compliance with this part; however, a railroad shall not be liable for a civil penalty for such action if such action is in accordance with § 232.15. For purposes of this part, a train, railroad car, or locomotive will be considered in use prior to departure but after it has received, or should have received, the inspection required for movement and is deemed ready for service.

(b) Although many of the requirements of this part are stated in terms of the duties of a railroad, when any person performs any function required by this part, that person (whether or not a railroad) is required to perform that function in accordance with this part.

(c) Any person performing any function or task required by this part will be deemed to have consented to FRA inspection of their operation to the extent necessary to ensure that the function or task is being performed in accordance with the requirements of this part.

§ 232.11 Penalties.

(a) Any person (including but not limited to a railroad; any manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any employee of such owner, manufacturer, lessor, lessee, or independent contractor) who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least $500, but not more than $11,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed $22,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. Appendix A contains a schedule of civil penalty amounts used in connection with this part.

(b) Any person who knowingly and willfully falsifies a record or report required by this part may be subject to criminal penalties under 49 U.S.C. 21311.

§ 232.13 Preemptive effect.

(a) Under 49 U.S.C. 20106, issuance of the regulations in this part preempts any State law, rule, regulation, order, or standard covering the same subject matter, except for a provision directed at an essentially local safety hazard if that provision is consistent with this part and does not impose an undue burden on interstate commerce.

(b) FRA does not intend by issuance of the regulations in this part to preempt provisions of State criminal law that impose sanctions for reckless conduct that leads to actual loss of life, injury, or damage to property, whether such provisions apply specifically to railroad employees or generally to the public at large.

§ 232.15 Movement of defective equipment.

(a) *General provision*. Except as provided in paragraph (c) of this section, a railroad car or locomotive with one or more conditions not in compliance with this part may be used or hauled without civil penalty liability under this part only if all of the following conditions are met:

(1) The defective car or locomotive is properly equipped in accordance with the applicable provisions of 49 U.S.C. chapter 203 and the requirements of this part.

(2) The car or locomotive becomes defective while it is being used by the railroad on its line or becomes defective on the line of a connecting railroad and is properly accepted in interchange for repairs in accordance with paragraph (a)(7) of this section.

(3) The railroad first discovers the defective condition of the car or locomotive prior to moving it for repairs.

(4) The movement of the defective car or locomotive for repairs is from the location where the car or locomotive is first discovered defective by the railroad.

(5) The defective car or locomotive could not be repaired at the place where the railroad first discovers it to be defective.

(6) The movement of the car or locomotive is necessary to make repairs to the defective condition.

(7) The repair location to which the car or locomotive is being taken is the nearest available repair location on the line of the railroad where the car or locomotive was first found to be defective or is the nearest available repair location on the line of a connecting railroad if:

(i) The connecting railroad elects to accept the defective car or locomotive for such repair; and

(ii) The nearest available repair location on the line of the connecting railroad is no farther than the nearest available repair location on the line of the railroad where the car or locomotive was found defective.

(8) The movement of the defective car or locomotive for repairs is not by a train required to receive a Class I brake test at that location pursuant to § 232.205.

(9) The movement of the defective car or locomotive for repairs is not in a train in which more than 15 percent of the cars have inoperative brakes.

(10) The defective car or locomotive is tagged, or information is recorded, as prescribed in paragraph (b) of this section.

(11) Except for cars or locomotives with brakes cut out en route, the following additional requirements are met:

(i) A qualified inspector shall determine—

(A) That it is safe to move the car or locomotive; and

(B) The maximum safe speed and other restrictions necessary for safely conducting the movement.

(ii) The person in charge of the train in which the car or locomotive is to be moved shall be notified in writing and inform all other crew members of the presence of the defective car or locomotive and the maximum speed and other restrictions determined under paragraph (a)(11)(i)(B) of this section. A copy of the tag or card described in paragraph (b) of this section may be used to provide the notification required by this paragraph.

(12) The defective car or locomotive is not subject to a Special Notice for Repair under part 216 of this chapter, unless the movement of the defective car is made in accordance with the restrictions contained in the Special Notice.

(b) *Tagging of defective equipment.* (1) At the place where the railroad first discovers the defect, a tag or card shall be placed on both sides of the defective equipment or locomotive and in the cab of the locomotive, or an automated tracking system approved for use by FRA shall be provided with the following information about the defective equipment:

(i) The reporting mark and car or locomotive number;

(ii) The name of the inspecting railroad;

(iii) The name and job title of the inspector;

(iv) The inspection location and date;

(v) The nature of each defect;

(vi) A description of any movement restrictions;

(vii) The destination of the equipment where it will be repaired; and

(viii) The signature, if possible, of the person reporting the defective condition.

(2) The tag or card required by paragraph (b)(1) of this section shall remain affixed to the defective equipment until the necessary repairs have been performed.

(3) A record or copy of each tag or card attached to or removed from a car or locomotive shall be retained for 90 days and, upon request, shall be made available within 15 calendar days for inspection by FRA or State inspectors.

(4) Each tag or card removed from a car or locomotive shall contain the date, location, reason for its removal, and the signature of the person who removed it from the piece of equipment.

(c) *Movement for unloading or purging of defective cars.* If the defective freight car is loaded with a hazardous material or contains residue of a hazardous material, the car may not be placed for unloading or purging unless unloading or purging is consistent with determinations made and restrictions imposed under paragraph (a)(11)(i) of this section and the unloading or purging is necessary for the safe repair of the car.

(d) *Computation of percent operative power brakes.* (1) The percentage of operative power brakes in a train shall be based on the number of control valves in the train. The percentage shall be determined by dividing the number of control valves that are cut-in by the total number of control valves in the train.

(2) The following brake conditions not in compliance with this part are not considered inoperative power brakes for purposes of this section:

(i) Failure or cutting out of secondary brake systems;

(ii) Inoperative or otherwise defective handbrakes or parking brakes;

(iii) Piston travel that is in excess of the Class I brake test limits required in § 232.205 but that does not exceed the outside limits contained on the stencil, sticker, or badge plate required by § 232.103(g) for considering the power brakes to be effective; and

(iv) Power brakes overdue for inspection, testing, maintenance, or stenciling under this part.

(e) *Placement of equipment with inoperative brakes.* (1) A freight car or locomotive with inoperative brakes shall not be placed as the rear car of the train.

(2) No more than two freight cars with inoperative brakes shall be consecutively placed in a train.

(3) Multi-unit articulated equipment shall not be placed in a train if the equipment has consecutive individual control valves cut-out or inoperative.

§ 232.17 Special approval procedure.

(a) *General.* The following procedures govern consideration and action upon requests for special approval of safety-critical revisions to the maintenance standards contained in subpart D of this part and for special approval of pre-revenue service acceptance testing plans under subpart F of this part.

(b) *Petitions for special approval of safety-critical revision.* Each petition for special approval of a safety-critical revision to the periodic maintenance standards contained in subpart D shall contain—

(1) The name, title, address, and telephone number of the primary person to be contacted with regard to review of the petition;

(2) The alternative proposed, in detail, to be substituted for the particular requirements of this part;

(3) Appropriate data or analysis, or both, for FRA to consider in determining whether the alternative will provide an equivalent level of safety; and

(4) A statement affirming that the railroad has served a copy of the petition on designated representatives of its employees, together with a list of the names and addresses of the persons served.

(c) *Petitions for special approval of pre-revenue service acceptance testing plan.* Each petition for special approval of a pre-revenue service acceptance testing plan shall contain—

(1) The name, title, address, and telephone number of the primary person to be contacted with regard to review of the petition; and

(2) The elements prescribed in § 232.505.

(d) *Service.* (1) Each petition for special approval under paragraph (b) or (c) of this section shall be submitted in triplicate to the Associate Administrator for Safety, Federal Railroad Administration, 400 7th Street, S.W., Washington, D.C. 20590.

(2) (i) Service of each petition for special approval of a safety-critical revision to the maintenance standards under paragraph (b) of this section shall be made on the following:

(A) Designated employee representatives responsible for the equipment's operation, inspection, testing, and maintenance under this part;

(B) Any organizations or bodies that either issued the standard incorporated in the section(s) of the rule to which the special approval pertains or issued the alternative standard that is proposed in the petition; and

(C) Any other person who has filed with FRA a current statement of interest in reviewing special approvals under the particular requirement of this part at least 30 days but not more than 5 years prior to the filing of the petition.

(ii) If filed, a statement of interest shall be filed with FRA's Associate Administrator for Safety and shall reference the specific section(s) of this part in which the person has an interest.

(e) Federal Register notice. FRA will publish a notice in the **Federal Register** concerning each petition under paragraph (b) of this section.

(f) *Comment.* Not later than 30 days from the date of publication of the notice in the **Federal Register** concerning a petition under paragraph (b) of this section, any person may comment on the petition.

(1) A comment shall set forth specifically the basis upon which it is made, and contain a concise statement of the interest of the commenter in the proceeding.

(2) The comment shall be submitted in triplicate to the Associate Administrator for Safety, Federal Railroad Administration, 400 7th Street, S.W., Washington, D. C. 20590.

(3) The commenter shall certify that a copy of the comment was served on each petitioner.

(g) *Disposition of petitions.* (1) If FRA finds that the petition complies with the requirements of this section and that the proposed safety-critical revision or pre-revenue service plan is acceptable and justified, the petition will be granted, normally within 90 days of its receipt. If the petition is neither granted nor denied within 90 days, the petition remains pending for decision. FRA may attach special conditions to the approval of any petition. Following the approval of a petition, FRA may reopen consideration of the petition for cause.

(2) If FRA finds that the petition does not comply with the requirements of this section and that the proposed safety-critical revision or pre-revenue service plan is not acceptable or justified, the petition will be denied, normally within 90 days of its receipt.

(3) When FRA grants or denies a petition, or reopens consideration of the petition, written notice is sent to the petitioner and other interested parties.

Subpart B—General Requirements

§ 232.101 Scope.

This subpart contains general operating, performance, and design requirements for each railroad that operates freight or other non-passenger trains and for specific equipment used in those operations.

§ 232.103 General requirements for all train brake systems.

(a) A train's primary brake system shall be capable of stopping the train with a service application from its maximum operating speed within the signal spacing existing on the track over which the train is operating.

(b) If the integrity of the pneumatic communication line of a train brake system is broken, the train shall be stopped. If a train brake communication line uses other than solely pneumatic technology, the integrity of the train line shall be monitored by the brake control system.

(c) A train brake system shall respond as intended to signals from the train line.

(d) A train shall have 100-percent effective and operative brakes prior to departure from its point of origin (initial terminal).

(e) From points other than those described in paragraph (d) of this section, a train shall not move if more than 15 percent of the cars in that train have inoperative or ineffective brakes.

(f) Each car in a train shall have its air brakes in effective operating condition unless the car is being moved for repairs in accordance with § 232.15. A car's air brakes are not in effective operating condition if its brakes are cut-out or otherwise inoperative or if the piston travel exceeds:

(1) 10½ inches for cars equipped with nominal 12-inch stroke brake cylinders; or

(2) The piston travel limits indicated on the stencil, sticker, or badge plate for that brake cylinder.

(g) Except for cars equipped with nominal 12-inch stroke (8½ and 10-inch diameters) brake cylinders, all cars shall have a legible stencil or sticker affixed to the car or shall be equipped with a badge plate displaying the permissible brake cylinder piston travel range for the car at Class I brake tests and the length at which the piston travel renders the brake ineffective. The stencil, sticker, or badge plate shall be located so that it may be easily read and understood by a person positioned safely beside the car.

(h) All equipment ordered on or after January 1, 1999, or placed in service for the first time on or after January 1, 2001, shall have train brake systems designed so that an inspector can observe from a safe position the piston travel, an accurate indicator which shows piston travel, or any other means by which the brake system is actuated. The design shall not require the inspector to place himself/herself on, under, or between components of the equipment to observe brake actuation or release.

(i) All trains shall be equipped with an emergency application feature that produces an irretrievable stop, using a brake rate consistent with prevailing adhesion, train safety, and brake system thermal capacity. An emergency application shall be available at all times, and shall be initiated by an unintentional parting of the train or loss of train brake communication.

(j) The air brake system components that control brake application and release shall be adequately sealed to prevent contamination by foreign material.

(k) A railroad shall set the maximum main reservoir working pressure.

(l) The maximum brake pipe pressure shall not be greater than 15 psi less than the air compressor governor starting or loading pressure.

(m) Except as otherwise provided in this part, all equipment used in freight or other non-passenger trains shall, at a minimum, meet the performance specification for freight brakes in Association of American Railroads standard S–469–47 contained in the AAR ''Manual of Standards and Recommended Practices'' (revised 1947).

(n) If a train qualified by the Air Flow Method as provided for in subpart C of this part experiences a brake pipe air flow of greater than 60 CFM or brake pipe gradient of greater than 15 psi while en route and the movable pointer does not return to those limits within a reasonable time, the train shall be stopped at the next available location and be inspected for leaks in the brake system.

(o) *Securement of standing equipment.* A train's air brake shall not be depended upon to hold equipment standing on a grade (including a locomotive, a car, or a train whether or not locomotive is attached). Trains and other railroad equipment shall be secured in accordance with the following requirements:

(1) Consistent with the railroad's rules and procedures, place each locomotive, car, or train on a track that is protected by a permanent derail or apply a portable derail, if available.

(2) *Freight and other non-powered rail cars.* (i) A sufficient number of hand brakes shall be applied to hold such equipment before the air brakes are released. Railroads shall develop and implement a process or procedure, such as a matrix, that would provide specific guidance in determining the appropriate number of hand brakes to apply, considering grade, tonnage, and other local conditions prevalent at the time of securement;

(ii) Where appropriate, slack shall be removed from the train, or as commonly referred to in the industry, ''bunch the slack''; and

(iii) Locomotives shall be detached from the cars to allow an emergency brake application.

(3) *Locomotives.* (i) All hand brakes shall be fully applied on all unattended locomotives in the consist;

(ii) If the grade on which the locomotives are left standing exceeds one percent, or whenever it is otherwise required by railroad rules, the front and back of at least one pair of wheels in the locomotive consist shall be chocked or chained; and

(iii) Railroads shall adopt and comply with a process or procedures to verify that the available hand brakes will sufficiently hold the locomotive consist. Railroads shall also develop and implement instructions to address throttle position, status of the reverse lever, position of the generator field switch, status of the independent brakes, position of the isolation switch, and position of the automatic brake valve on all locomotives. The procedures in this paragraph shall take into account winter weather conditions as they relate to throttle position and reverser handle.

(4) Any hand brakes applied to hold the equipment shall not be released until it is known that the air brake system is properly charged.

(p) Air pressure regulating devices shall be adjusted for the following pressures:

	PSI
LOCOMOTIVES	
(1) Minimum brake pipe air pressure:	
Road Service	9060
Switch Service	.....
(2) Minimum differential between brake pipe and main reservoir air pressures, with brake valve in running position	15
(3) Safety valve for straight air brake	30–55
(4) Safety valve for LT, ET, No. 8–EL, No. 14 El, No. 6–DS, No. 6–BL and No. 6–SL equipment	30–68
(5) Safety valve for HSC and No. 24–RL equipment	30–75
(6) Reducing valve for independent or straight air brake	30–50
(7) Self-lapping portion for electro-pneumatic brake (minimum full application pressure)	50
(8) Self-lapping portion for independent air brake (full application pressure)	30–72
(9) Reducing valve for air signal	40–60
(10) Reducing valve for high-speed brake (minimum)	50
CARS	
(11) Reducing valve for high-speed brake	58–62
(12) Safety valve for PS, LN, UC, AML, AMU and AB–1–B air brakes	58–62
(13) Safety valve for HSC air brake	58–77
(14) Governor valve for water raising system	60
(15) Reducing valve for water raising system	20–30

§ 232.105 General requirements for locomotives.

(a) The air brake equipment on locomotives shall be in safe and suitable condition for service.

(b) Except for locomotives ordered before January 1, 1999, or placed in service for the first time before January 1, 2001, all locomotives shall be equipped with a hand or parking brake that shall be:

(1) Capable of application or activation by hand;

(2) Capable of release by hand; and

(3) Capable of holding the loaded unit on the maximum grade anticipated by the operating railroad.

(c) On locomotives so equipped, the hand or parking brake as well as its parts and connections shall be inspected, and necessary repairs made as often as service requires but no less frequently than every 368 days. The locomotive shall be suitably stenciled or tagged with the date of the last inspection.

(d) The equalizing reservoir on locomotives and related piping leakage shall be zero. If such leakage occurs en route, the train may be moved only to the nearest forward location where the equalizing reservoir leakage can be corrected.

(e) Use of the feed or regulating valve to control braking is prohibited.

(f) The passenger position on the locomotive brake control stand shall only be used if the trailing equipment is designed for graduated brake release or if equalizing reservoir leakage occurs en route and its use is necessary to safely control the movement of the train until the next forward location where the reservoir leakage can be corrected.

§ 232.107 Air source requirements and cold weather operations.

(a) *Monitoring plans for yard air sources.* (1) Each railroad shall adopt, comply with, and make available to FRA upon request a plan to monitor all yard air sources, other than locomotives, to ensure that they operate as intended and do not introduce contaminants into the brake system of freight equipment.

(2) This plan shall require the railroad to:

(i) Routinely inspect each yard air source to ensure it operates as intended and does not introduce contaminants into the brake system of the equipment it services.

(ii) Identify yard air sources found not to be operating as intended or found to have the potential of introducing contaminants into the brake system of the equipment it services.

(iii) Repair or take other remedial action regarding any yard air source identified under paragraph (a)(2)(ii) of this section.

(iv) Assess the effectiveness of the remedial action described in paragraph (a)(2)(iii) of this section.

(v) Record detailed information about the actions required by paragraphs (a)(2)(i) through (a)(2)(iv) of this section.

(3) The records required by paragraph (a)(2) shall be maintained for a period of at least one year from the date of creation.

(b) Condensation and other contaminants shall be blown from the pipe or hose from which compressed air is taken prior to connecting the yard air line or motive power to the train.

(c) No chemicals shall be placed in the train air brake system.

(d) Yard air reservoirs shall either be equipped with an operable automatic drain system or shall be manually drained at least once each day that the devices are used or more often if moisture is detected in the system.

(e) A railroad shall adopt, comply with, and make available to FRA upon request detailed written operating procedures tailored to the equipment and territory of that railroad to cover safe train operations during cold weather situations. For purposes of this provision cold weather means when the ambient temperature drops below 10 degrees Fahrenheit (F)(minus 12.2 degrees Celsius).

§ 232.109 Dynamic brake requirements.

(a) A locomotive engineer shall be informed in writing of the operational status of the dynamic brakes on all locomotive units in the consist at the initial terminal or point of origin for a train and at other locations where a locomotive engineer first takes charge of a train.

(b) Except as provided in paragraph (d) of this section, all inoperative or ineffective dynamic brakes shall be repaired within 30 calendar days of becoming inoperative or at the locomotive's next periodic inspection pursuant to § 229.23 of this chapter, whichever occurs first.

(c) Except as provided in paragraph (d) of this section, a locomotive discovered with inoperative dynamic brakes shall have a tag bearing the words ''inoperative dynamic brake'' securely attached and displayed in a conspicuous location in the cab of the locomotive. This tag shall contain the following information:

(1) The locomotive number;

(2) The name of the discovering carrier;

(3) The location and date where condition was discovered; and

(4) The signature of the person discovering the condition.

(d) A railroad may elect to declare the dynamic brakes on a locomotive deactivated without removing the dynamic brake components from the locomotive, only if all of the following conditions are met:

(1) The locomotive is clearly stenciled with the words ''dynamic brake deactivated'' in a conspicuous location on the outside of the locomotive and in the cab of the locomotive;

(2) The railroad has taken appropriate action to ensure that the deactivated locomotive is incapable of utilizing dynamic brake effort to retard or control train speed; however, if the subject locomotive is placed in the controlling (lead) position of the consist, that locomotive must be capable of controlling dynamic braking effort in trailing locomotives in the consist that are so equipped.

(e) Each railroad operating a train with a brake system that includes dynamic brakes shall adopt, comply with, and make available to FRA upon request written operating rules governing safe train handling procedures using these dynamic brakes under all operating conditions, which shall be tailored to the specific equipment and territory of the railroad. The railroad's operating rules shall be based on the premise that the friction brakes are sufficient by themselves, without the aid of dynamic brakes, to stop the train safely under all operating conditions.

(f) Each railroad operating a train with a brake system that includes dynamic brakes shall adopt, comply with, and incorporate into its locomotive engineer certification program pursuant to part 240 of this chapter, specific knowledge, skill, and ability criteria to ensure that its locomotive engineers are fully trained in the operating rules prescribed by paragraph (e) of this section.

§ 232.111 Train information handling.

(a) Each railroad shall adopt, comply with, and make available to FRA upon request written procedures to ensure that a train crew employed by the railroad is given accurate information on the condition of the train brake system and train factors affecting brake system performance and testing when the crew takes over responsibility for the train.

(b) The procedures shall provide that each train crew coming on duty be informed of:

(1) The total weight and length of the train;

(2) Any special weight distribution that would require special train handling procedures;

(3) The number and location of cars with cut-out or otherwise ineffective brakes and the location where they will be repaired;

(4) If a Class I or Class IA brake test is required prior to the next crew change point, the location at which that test shall be performed;

(5) A record of train configuration changes since the last Class I brake test; and

(6) Any train brake system problems encountered by the previous crew of the train.

Subpart C—Inspection and Testing Requirements

§ 232.201 Scope.

This subpart contains the inspection and testing requirements for brake systems used in freight and other non-passenger trains. This subpart also contains general training requirements for railroad and contract personnel used to perform the required inspections and tests.

§ 232.203 Training requirements.

(a) Each railroad shall adopt, comply with, and make available to FRA upon request a training, qualification, and designation program for employees and contractors that perform brake system inspections, tests, or maintenance. For purposes of this section, a ''contractor'' is defined as a person under contract with the railroad or car owner or an employee of a person under contract with the railroad or car owner.

(b) As part of this program, the railroad shall:

(1) Identify the tasks related to the inspection, testing, and maintenance of the brake system required by this part that must be performed on each type of equipment that the railroad operates;

(2) Develop written procedures for the performance of the tasks identified;

(3) Identify the skills and knowledge necessary to perform each task;

(4) Develop or incorporate a training curriculum that includes both classroom and ''hands-on'' lessons designed to impart the skills and knowledge identified as necessary to perform each task. The developed or incorporated training curriculum shall specifically address the Federal regulatory requirements contained in this part that are related to the performance of the tasks identified;

(5) Require all employees and contractors to successfully complete the training course that covers the equipment and tasks for which they are responsible as well as the specific Federal regulatory requirements contained in this part related to equipment and tasks for which they are responsible;

(6) Require all employees and contractors to pass a written or oral

examination covering the equipment and tasks for which they are responsible as well as the specific Federal regulatory requirements contained in this part related to equipment and tasks for which they are responsible;

(7) Require all employees and contractors to individually demonstrate ''hands-on'' capability by successfully performing all of the tasks required to be performed as part of their duties on the type equipment to which they are assigned to the satisfaction of their supervisor or designated instructor;

(8) Require supervisors to exercise oversight to ensure that all the identified tasks are performed in accordance with the railroad's written procedures;

(9) Require periodic refresher training at an interval not to exceed three years that includes classroom and ''hands-on'' training, as well as testing; and (10) Add new equipment to the training, qualification and designation program prior to its introduction to revenue service.

(c) Each railroad that operates trains required to be equipped with a two-way end-of-train telemetry device pursuant to subpart E of this part, shall adopt, comply with, and make available to FRA upon request a training program which specifically addresses the testing, operation, and maintenance of two-way end-of-train devices for employees and contractors that are responsible for the testing, operation, and maintenance of the devices.

(d) A railroad shall maintain adequate records to demonstrate the current qualification status of all of its personnel—including contract personnel—assigned to inspect, test, or maintain a train brake system. These records shall include the following information concerning each such employee of the railroad or of a contractor for the railroad:

(1) The name of the railroad employee or contractor employee;

(2) The dates that each training course was completed;

(3) The content of each training course successfully completed;

(4) The scores on each test taken to demonstrate proficiency;

(5) A description of the employees ''hands-on'' performance of the tasks for which the employee is assigned and the basis for finding that the tasks were successfully completed.

(6) A record that the railroad employee or contractor employee was notified of his or her current qualification status and of any subsequent changes to that status;

(7) The type of equipment the person is qualified to inspect, test, or maintain;

(8) A statement signed by the railroad's chief mechanical officer, chief operating officer, or their designee, that the person meets the minimum qualification standards as set forth in this subpart; and

(9) The date that the person's status as qualified expires due to the need for refresher training.

(e) Each railroad shall adopt, comply with, and make available to FRA upon request an internal audit process to periodically review and evaluate the effectiveness of the training, qualification, and designation program required by this section.

(f) Railroad or contract supervisors shall be held jointly responsible with inspectors and train crew members for the condition and proper functioning of train brake systems.

§ 232.205 Class I brake test—Initial terminal inspection.

(a) Each train and each car in the train shall receive a Class I brake test as described in paragraph (b) of this section by a qualified person, as defined in § 232.5, at the following points:

(1) The location where the train is originally assembled ''initial terminal'' or ''point of origin';

(2) A location where the train consist is changed other than by:

(i) Adding a single car or a solid block of cars;

(ii) Removing a single car or a solid block of cars; or (iii) A combination of the changes listed in paragraphs (a)(2)(i) and (a)(2)(ii) (See §§ 232.209 and 232.211 for requirements related to the pick-up of cars en route.)

(3) A location where the train is off air for a period of more than four hours;

(4) A point where a train has traveled 3,000 miles since its last Class I brake test; and (5) A location where the train is received in interchange if the train consist is changed other than by:

(i) Removing a car or a solid block of cars from the train;

(ii) Adding a previously tested car or a previously tested solid block of cars to the train;

(iii) Changing motive power;

(iv) Removing or changing the caboose; or

(v) Any combination of the changes listed in paragraph (a)(5).

(A) If changes other than those contained in paragraph (a)(5) are made to the train consist when it is received in interchange and the train will move 20 miles or less, then the railroad may conduct a brake test pursuant to § 232.209 on those cars added to the train.

(B) [Reserved]

(b) A Class I brake test shall consist of the following tasks and requirements:

(1) Brake pipe leakage shall not exceed 5 psi per minute or air flow shall not exceed 60 cubic feet per minute (CFM).

(i) *Leakage Test.* The brake pipe leakage test shall be conducted as follows:

(A) Charge the air brake system to within 15 psi of the setting of the feed or regulating valve on the locomotive, but to not less than 75 psi, as indicated by an accurate gauge or end-of-train device at the rear end of train;

(B) Upon receiving the signal to apply brakes for test, make a 20-psi brake pipe service reduction;

(C) If the locomotive used to perform the brake test is equipped with a means for maintaining brake pipe pressure at a constant level during a 20-psi brake pipe service reduction, this feature shall be cut out during the brake test; and

(D) With the brake valve lapped and the pressure maintaining feature cut out (if so equipped) and after waiting 45–60 seconds, note the brake pipe leakage as indicated by the brake-pipe gauge in the locomotive, which shall not exceed 5 psi per minute.

(ii) *Air Flow Method Test.* When locomotives are equipped with a 26–L brake valve or equivalent, a railroad may use the Air Flow Method Test as an alternate to the brake pipe leakage test. The Air Flow Method (AFM) Test shall be performed as follows:

(A) Charge the air brake system to within 15 psi of the setting of the feed or regulating valve, but to not less than 75 psi, as indicated by an accurate gauge or end-of-train device at rear end of train; and

(B) Measure air flow as indicated by a calibrated AFM indicator, which shall not exceed 60 cubic feet per minute (CFM).

(iii) The AFM indicator shall be calibrated for accuracy at periodic intervals not to exceed 92 days. The AFM indicator calibration test orifices shall be calibrated at temperatures of not less than 20 degrees Fahrenheit. AFM indicators shall be accurate to within ±3 standard cubic feet per minute (cfm).

(2) The inspector shall position himself/herself, taking positions on each side of each car sometime during the inspection process, so as to be able to examine and observe the functioning of all moving parts of the brake system on each car in order to make the determinations and inspections required by this section. A ''roll-by'' inspection of the brake release as provided for in paragraph (b)(8) of this section shall not constitute an inspection of that side of the train for purposes of this requirement.

(3) The train brake system shall be charged to within 15 psi of the setting of the feed-regulating valve, but to not less than 75 psi, angle cocks and cutout cocks shall be properly positioned, air hoses shall be properly coupled and shall not kink, bind, or foul or be in any other condition that restricts air flow. An examination must be made for leaks and necessary repairs made to reduce leakage to a minimum. Retaining valves and retaining valve pipes shall be inspected and known to be in condition for service.

(4) The brakes on each car shall apply in response to a 20-psi brake pipe service reduction and shall remain applied until a release of the air brakes has been initiated by the controlling locomotive or yard test device. The brakes shall not be applied or released until the proper signal is given. Freight cars found with brakes that fail to remain applied due to a readily identifiable condition or problem may be retested and remain in the train if the retest is conducted from the controlling locomotive or head end of the consist and the brakes remain applied for a period of at least five minutes.

(5) Piston travel shall be within 7 to 9 inches for 8½-inch and 10-inch diameter brake cylinders or within the piston travel stenciled or marked on car or badge plate for other types. If piston travel is found to be less than 7 inches or more than 9 inches, it must be adjusted to nominally 7½ inches. Minimum brake cylinder piston travel of truck-mounted brake cylinders must be sufficient to provide proper brake shoe clearance when the brakes are released. Piston travel must be inspected on each freight car while the brakes are applied.

(6) Brake rigging shall be properly secured and shall not bind or foul or otherwise adversely affect the operation of the brake system.

(7) All parts of the brake equipment shall be properly secured. On freight cars where the bottom rod passes through the truck bolster or is secured with cotter keys equipped with a locking device to prevent their accidental removal, bottom rod safety supports are not required.

(8) When the release is initiated by the controlling locomotive or yard test device, the brakes on each freight car shall be inspected to verify that it did release; this may be performed by a ''roll-by'' inspection. If a ''roll-by'' inspection of the brake release is performed, train speed shall not exceed 10 MPH and the qualified person performing the ''roll-by'' inspection shall communicate the results of the inspection to the operator of the train. The operator of the train will note successful completion of the release portion of the inspection on the written notification required in paragraph (c) of this section.

(c) Where a railroad's collective bargaining agreement provides that only a carman is to perform the inspections and tests required by this section, a carman alone will be considered a qualified person. In these circumstances, the railroad shall ensure that the carman is properly trained and designated as a qualified person or qualified mechanical inspector pursuant to the requirements of this part.

(d) A qualified person participating in the test and inspection required by this section shall notify the locomotive engineer in writing or place such notification in the cab of the controlling locomotive that the Class I brake test has been satisfactorily performed. The written or electronic notification shall be retained in the cab of the controlling locomotive until the train until reaches its destination and shall contain the date, time, number of freight cars inspected, and location where the Class I brake test was performed.

(e) Before adjusting piston travel or working on brake rigging, cutout cock in brake pipe branch must be closed and air reservoirs must be voided of all air. When cutout cocks are provided in brake cylinder pipes, these cutout cocks only may be closed and air reservoirs need not be voided of all air.

(f) Except as provided in § 232.209, each car or solid block of cars, as defined in § 232.5, that has not received a Class I brake test or that has been off air for more than four hours and that is added to a train shall receive a Class I test when added to a train. A Class III brake test as described in § 232.211 shall then be performed on the entire new train.

§ 232.207 Class IA brake tests—1,000-mile inspection.

(a) Except as provided in § 232.213, each train shall receive a Class IA brake test performed by a qualified person, as defined in § 232.5, at a location that is not more than 1,000 miles from the point where any freight car in the train last received a Class I or Class IA brake test. The most restrictive car or block of cars in the train shall determine the location of this test.

(b) A Class IA brake test shall consist of the following tasks and requirements:

(1) Brake pipe leakage shall not exceed 5 psi per minute or air flow shall not exceed 60 cubic feet per minute (CFM). The brake pipe leakage test or air flow method test shall be conducted pursuant to the requirements contained in § 232.205(b)(1);

(2) The inspector shall position himself/herself, taking positions on each side of each car sometime during the inspection process, so as to be able to examine and observe the functioning of all moving parts of the brake system on each car in order to make the determinations and inspections required by this section;

(3) The air brake system shall be charged to within 15 psi of the setting of the feed or regulating valve, but to not less than 75 psi, as indicated by an accurate gauge or end-of-train device at rear end of train.

(4) The brakes on each car shall apply in response to a 20-psi brake pipe service reduction and shall remain applied until the release is initiated by the controlling locomotive. Cars found with brakes that fail to remain applied due to a readily identifiable condition or problem may be retested and remain in the train if the retest is conducted from the controlling locomotive or head end of the consist and the brakes remain applied for a period of at least five minutes; otherwise, the defective equipment may only be moved pursuant to the provisions contained in § 232.15, if applicable;

(5) Brake rigging shall be properly secured and shall not bind or foul or otherwise adversely affect the operation of the brake system; and

(6) All parts of the brake equipment shall be properly secured.

(c) Each railroad shall designate the locations where Class IA brake tests will be performed and the carrier shall furnish to the Federal Railroad Administration upon request a description of each location designed, and shall notify in writing FRA's Associate Administrator for Safety 30 days prior to any change in the locations designated for such tests and inspections.

(1) Failure to perform a Class IA brake test at a location designated pursuant to this paragraph will constitute a failure to perform a proper Class IA brake test.

(2) In the event of an emergency that alters normal train operations such as a derailment or other unusual circumstance that reflects on the safe operation of the train, the railroad would not be required to provide prior written notification of a change in the location where a Class IA brake test is performed, provided; that the railroad notifies FRA's Associate Administrator for Safety and the pertinent FRA Regional Administrator within 24 hours after the designation has been changed and the reason for that change.

§ 232.209 Class II brake tests—Intermediate inspection.

(a) At a location other than the point of origin (initial terminal) of a train, each car or solid block of cars, as defined in § 232.5, that has not received a Class I brake test or that has been off air for more than four hours and that is added to a train shall receive a Class II brake test when added to the train.

(b) A Class II brake test shall consist of the following tasks and requirements:

(1) Brake pipe leakage shall not exceed 5 psi per minute or air flow shall not exceed 60 cubic feet per minute (CFM). The brake pipe leakage test or air flow method test shall be conducted pursuant to the requirements contained in § 232.205(b)(1);

(2) The air brake system shall be charged to within 15 psi of the setting of the feed or regulating valve, but to not less than 75 psi, as indicated by an accurate gauge or end-of-train device at rear end of train.

(3) The brakes on each car added to the train and on the rear car of the train shall apply in response to a 20-psi brake pipe service reduction and shall remain applied until the release is initiated from the controlling locomotive. Cars found with brakes that fail to remain applied due to a readily identifiable condition or problem may be retested and remain in the train if the retest is conducted from the controlling locomotive or head end of the consist and the brakes remain applied for a period of at least five minutes; otherwise, the defective equipment may only be moved pursuant to the provisions contained in § 232.15, if applicable;

(4) When the release is initiated, the brakes on each car added to the train and on the rear car of the train shall be inspected to verify that it did release; this may be performed by a ''roll-by'' inspection. If a ''roll-by'' inspection of the brake release is performed, train speed shall not exceed 10 MPH and the qualified person performing the ''roll-by'' inspection shall communicate the results of the inspection to the operator of the train.

(5) Before the train proceeds the operator of the train shall know that the brake pipe pressure at the rear of the train is being restored.

(c) As an alternative to the rear car brake application and release portion of the test, the operator of the train shall determine that brake pipe pressure of the train is being reduced as indicated by a rear car gauge or end-of-train telemetry device and then that brake pipe pressure of the train is being restored as indicated by a rear car gauge or end-of-train telemetry device. (When an end-of-train telemetry device is used to comply with any test requirement in this part, the phrase ''brake pipe pressure of the train is being reduced'' means a pressure reduction of at least 5 psi, and the phrase ''brake pipe pressure of the train is being restored'' means a pressure increase of at least 5 psi). If an electronic communication link between a controlling locomotive and a remotely controlled locomotive attached to the rear end of a train is utilized to determine that brake pipe pressure is being restored, the operator of the train shall know that the air brakes function as intended on the remotely controlled locomotive.

(d) Each car or solid block of cars, as defined in § 232.5, that has not received a Class I brake test or that has been off air for more than four hours that receives a Class II brake test when added to the train shall receive a Class I brake test at the next forward location where facilities are available for performing such a test. A Class III brake test as described in § 232.211 shall then be performed on the entire train.

§ 232.211 Class III brake tests—Trainline continuity inspection.

(a) A Class III brake test shall be performed on a train to test the train brake system when a train has changed configuration. A Class III brake test shall be performed when any of the following occur:

(1) Where a locomotive or a caboose is changed;

(2) Where a car or a block of cars is removed from the train with the consist otherwise remaining intact;

(3) At a point other than the point of origin (initial terminal) for a train, where a car or a solid block of cars that has received a Class I brake test and that has not been off air for more than four hours is added to a train; or

(4) Whenever the continuity of the brake pipe is broken or interrupted.

(b) A Class III brake test shall consist of the following tasks and requirements:

(1) The train brake system shall be charged to within 15 psi of the feed-valve setting on the locomotive, but not less than 75 psi, as indicated at the rear of the train by an accurate gauge or end-of-train device;

(2) The brakes on the rear car of the train shall apply in response to a 20-psi brake pipe service reduction and shall remain applied until the release is initiated by the controlling locomotive;

(3) When the release is initiated, the brakes on the rear car of the train shall be inspected to verify that it did release;

(4) Before proceeding the operator of the train shall know that the brake pipe pressure at the rear of freight train is being restored.

(c) As an alternative to the rear car brake application and release portion of the test, it shall be determined that brake pipe pressure of the train is being reduced as indicated by a rear car gauge or end-of-train telemetry device and then that brake pipe pressure of the train is being restored as indicated by a rear car gauge or end-of-train telemetry device. If an electronic or radio communication link between a controlling locomotive and a remotely controlled locomotive attached to the rear end of a train is utilized to determine that brake pipe pressure is being restored, the operator of the train shall know that the air brakes function as intended on the remotely controlled locomotive.

§ 232.213 Extended haul trains.

(a) A railroad may be permitted to move a train up to, but not exceeding, 1,500 miles between brake tests and inspections if the railroad designates a train as a priority train. In order for a railroad to designate a train as an extended haul train, all of the following requirements must be met:

(1) The railroad must designate the train in writing to FRA's Associate Administrator for Safety. This designation must include the following:

(i) The train identification symbol;

(ii) The origination and destination points for the train;

(iii) The type or types of equipment the train will haul; and

(iv) The locations where all train brake and mechanical inspections and tests will be performed.

(2) A Class I brake test pursuant to § 232.205 shall be performed at the train's point of origin by a qualified mechanical inspector as defined in § 232.5.

(3) A freight car inspection pursuant to part 215 of this chapter shall be performed at the train's point of origin and shall be performed by an inspector designated under § 215.11 of this chapter.

(4) All cars containing non-complying conditions under part 215 of this chapter at the train's point of origin shall either be repaired or removed from the train. Except for cars developing conditions en route, no car shall be moved pursuant to the provisions of § 215.9 of this chapter in the train.

(5) The train shall have no pick-ups or set-outs en route, except for the set-out of defective equipment pursuant to the requirements of this chapter.

(6) At the point of destination, if less than 1,500 miles, or at the point designated by the railroad pursuant to

paragraph (a)(1)(iv) of this section, not to exceed 1,500 miles, an inbound inspection of the train shall be conducted by a qualified mechanical inspector to identify any defective, inoperative, or ineffective brakes or any other condition not in compliance with this part as well as any conditions not in compliance with part 215 and part 231 of this chapter.

(7) The railroad shall maintain a record of all defective, inoperative, or ineffective brakes as well as any conditions not in compliance with part 215 and part 231 of this chapter discovered at anytime during the movement of the train. These records shall be retained for a period of one year and made available to FRA upon request.

(8) In order for an extended haul train to proceed beyond 1,500 miles, the following requirements shall be met:

(i) If the train will move 1,000 miles or less from that location before receiving a Class IA brake test or reaching destination, a Class I brake test shall be conducted pursuant to § 232.205 to ensure 100 percent effective and operative brakes. The inbound inspection required by paragraph (a)(6) of this section may be used to meet this requirement provided it encompasses all the inspection elements contained in § 232.205.

(ii) If the train will move greater than 1,000 miles from that location without another brake inspection, the train must be identified as an extended haul train for that movement and shall meet all the requirements contained in paragraphs (a)(1) through (a)(7) of this section. Such trains shall receive a Class I brake test pursuant to § 232.205 by a qualified mechanical inspector to ensure 100 percent effective and operative brakes, a freight car inspection pursuant to part 215 of this chapter by an inspector designated under § 215.11 of this chapter, and all cars containing non-complying conditions under part 215 of this chapter shall either be repaired or removed from the train. The inbound inspection required by paragraph (a)(6) of this section may be used to meet these inspection requirements provided it encompasses all the inspection elements contained in paragraphs (a)(2) through (a)(4) of this section.

(9) FRA inspectors shall have physical access to visually observe all brake and freight car inspections and tests required by this section.

(b) Failure to comply with any of the requirements contained in paragraph (a) of this section will be considered an improper movement of a designated priority train for which appropriate civil penalties may be assessed as outlined in Appendix A to this part. Furthermore, FRA's Associate Administrator for Safety may revoke a railroad's ability to designate any or all trains as extended haul trains for repeated or willful noncompliance with any of the requirements contained in this section. Such a determination will be made in writing and will state the basis for such action.

§ 232.215 Transfer train brake tests.

(a) A transfer train, as defined in § 232.5, shall receive a test that includes the following:

(1) The air brake hoses shall be coupled between all freight cars.

(2) After the brake system is charged to not less than 60 psi as indicated by an accurate gauge or end-of-train device at the rear of the train, a 15-psi service brake pipe reduction shall be made.

(3) An inspection shall be made to determine that the brakes on each car apply and remain applied until the release is initiated by the controlling locomotive. Cars found with brakes that fail to remain applied due to a readily identifiable condition or problem may be retested and remain in the train if the retest is conducted from the controlling locomotive or head end of the consist and the brakes remain applied for a period of at least five minutes; otherwise, the defective equipment may only be moved pursuant to the provisions contained in § 232.15, if applicable;

(b) If a train's movement will exceed 20 miles or is not a transfer train as defined in § 232.5, the train shall receive a Class I brake test in accordance with § 232.205 prior to departure.

§ 232.217 Train brake system tests conducted using yard air.

(a) When a train air brake system is tested from a yard air, an engineer's brake valve or a suitable test device shall be used to provide any increase or reduction of brake pipe air pressure at the same, or slower, rate as an engineer's brake valve, and the yard air must be connected to the end of the train or cut of cars that will be nearest to the controlling locomotive.

(b) When a yard air is used, the train air brake system must be charged and tested as prescribed by § 232.205(b) and when practicable should be kept charged until road motive power is coupled to train, after which, a Class III brake test shall be performed as prescribed by § 232.211.

(1) If the cars are off air for more than four hours, these cars shall be retested in accordance with § 232.205 (b) through (e).

(2) Yard air pressure shall be 80 psi.

(c) Mechanical yard air test devices and gauges shall be calibrated every 92 days. Electronic yard test devices and gauges shall be calibrated annually. Gauges or other devices providing air-pressure control shall be accurate to within ± 3 psi.

(d) If used to test a train, a yard air test device and any yard air test equipment shall be accurate and function as intended.

§ 232.219 Double heading, helper service, and distributed power.

(a) When more than one locomotive is attached to a train, the engineer of the controlling locomotive shall operate the brakes. On all other motive power units in the train the brake pipe cutout cock to the brake valve must be closed, the maximum main reservoir pressure maintained and brake valve handles kept in the prescribed position. In case it becomes necessary for the controlling locomotive to give up control of the train short of the destination of the train, a Class III brake test pursuant to § 232.211 shall be made to ensure that the brakes are operative from the automatic brake valve of the locomotive taking control of the train.

(b) The electro-pneumatic brake valve on all motive power units other than that which is handling the train shall be cut out, the handle of brake valve kept in the prescribed position, and the air compressors kept running if practicable.

(c) When one or more helper locomotives are placed in a train, a visual inspection shall be made of each helper locomotive brake system to determine that the brake system operates as intended in response to a 20-psi reduction initiated from the controlling locomotive of the train. A helper locomotive with inoperative or ineffective brakes shall be repaired prior to use or removed from the train.

Subpart D—Periodic Maintenance and Testing Requirements

§ 232.301 Scope.

This subpart contains the periodic brake system maintenance and testing requirements for equipment used in freight and other non-passenger trains.

§ 232.303 General requirements.

(a) Except as provided in paragraphs (b) through (d) of this section, § 232.305, and § 232.307, each car shall be maintained, repaired, and tested in accordance with Association of American Railroads Rule 3 ''Testing of Air Brakes'' and accompanying Chart A, contained in the AAR ''Field Manual on Interchange Rules'' (January 1, 1998).

(b) All cars on a shop or repair track shall be tested to determine that the air

brakes apply and remain apply applied until a release is initiated.

(c) All cars on a shop or repair track shall have piston travel inspected to ensure it is within 7 to 9 inches for 8–½-inch and 10-inch diameter brake cylinders or within the piston travel stenciled or marked on car or badge plate for other types. If piston travel is found to be less than 7 inches or more than 9 inches it must be adjusted to nominally 7½ inches. Piston travel for cars equipped with other than 8–½-inch and 10-inch diameter brake cylinders shall be adjusted as indicated on the badge plate, stencil, or sticker on the car.

(d) Before a car is released from a shop or repair track, a qualified person shall know:

(1) The brake pipe is securely clamped;

(2) Angle cocks are properly located with suitable clearance and properly positioned to allow maximum air flow; and (3) Valves, reservoirs, and cylinders are tight on supports and the supports are securely attached to the car.

(e) If the repair track brake test or single car test required in §§ 232.305 and 232.307 cannot be conducted at the point where repairs can be made to the car, the car may be moved after the repairs are effectuated to the next forward location where the test can be performed. Inability to perform a repair track brake test or single car test does not constitute an inability to effectuate the necessary repairs.

(1) If it is necessary to move a car from the location where the repairs are performed in order to perform a repair track brake test or a single car test required by this part, a tag or card shall be placed on both sides of the equipment, or an automated tracking system approved for use by FRA, with the following information about the equipment:

(i) The reporting mark and car number;

(ii) The name of the inspecting railroad;

(iii) The location where repairs were performed and date;

(iv) Indication whether the car requires a repair track brake test or single car test;

(v) The location where the appropriate test is to be performed; and (vi) The name, signature, if possible, and job title of the qualified person approving the move.

(2) The tag or card required by paragraph (e)(1) of this section shall remain affixed to the equipment until the necessary test has been performed.

(3) A record or copy of each tag or card attached to or removed from a car or locomotive shall be retained for 90 days and, upon request, shall be made available within 15 calendar days for inspection by FRA or State inspectors.

(4) Each tag or card removed from a car or locomotive shall contain the date, location, and the signature of the person who removed it from the piece of equipment.

(f) The location and date of the last repair track brake test or single car test required by §§ 232.305 and 232.307 shall be clearly stenciled, marked, or labeled in two-inch high letters or numerals on the side of the equipment. Alternatively, the railroad may use an electronic record keeping system approved for use by FRA's Associate Administrator for Safety in writing.

§ 232.305 Repair track brake tests.

(a) Repair track brake tests shall be performed by a qualified person in accordance with the Association of American Railroads standard S–486, Section 3.0, contained in the AAR ''Manual of Standards and Recommended Practices, Section E, Part II'' (November 1992).

(b) Except as provided in § 232.303 (e), a railroad shall perform a repair track brake test on a car when:

(1) A car is removed from a train due to an air brake related defect;

(2) A car has its brakes cut-out when removed from a train or when placed on a shop or repair track;

(3) A car is on a repair or shop track for any reason and has not received a repair track brake test within the previous 12 month period;

(4) A car is found with missing or incomplete repair track brake test information;

(5) One or more of the following conventional air brake equipment items is removed, repaired, or replaced:

(i) Brake reservoir;

(ii) Control valve mounting gasket; or

(iii) Pipe bracket stud.

(6) A car is found with one or more of the following wheel defects:

(i) Built-up tread;

(ii) Slid flat wheel; or

(iii) Thermal cracks.

(c) Except as provided in paragraph (d) of this section each car shall receive a repair track brake test no less than every 5 years.

(d) Each car shall receive a repair track brake test no less than 8 years from the date the car was built or rebuilt.

§ 232.307 Single car tests.

(a) Single car tests shall be performed by a qualified person in accordance with the Association of American Railroads standard S–486, Section 4.0, contained in the AAR ''Manual of Standards and Recommended Practices, Section E, Part II'' (November 1992).

(b) Except as provided in § 232.303(e), a railroad shall perform a single car test on a car when one or more of the following conventional air brake equipment items is removed, repaired or replaced:

(1) Service portion;

(2) Emergency portion; or

(3) Pipe bracket.

(c) A single car test pursuant to paragraph (a) of this section shall be performed on a new or rebuilt car prior to placing or using the car in revenue service.

§ 232.309 Repair track brake test and single car test equipment and devices.

(a) All test equipment and devices used to perform repair track brake tests or single car tests shall be tested for correct operation at least once each calendar day of use.

(b) Mechanical test devices such as pressure gauges, flow meters, orifices, etc. shall be calibrated once every 92 days.

(c) Electronic test devices shall be calibrated at least once every 365 days.

(d) All test equipment and devices shall be tagged or labeled with the date its next calibration is due.

(e) The single car test device must be tested not less frequently than every 92 days.

(f) The single car test device must be disassembled and cleaned not less frequently than every 365 days.

§ 232.311 Process for changing maintenance requirements.

(a) The Association of American Railroads standards incorporated by reference in subpart D of this part may only be changed if the provisions contained in this section are followed.

(b) The AAR shall submit a petition for proposed revision of the standards and any supporting documentation to FRA's Associate Administrator for Safety.

(c) The petition for proposed revision submitted by AAR shall contain a recommendation as to whether the proposed revision should be considered ''safety-critical'' or nonsafety-critical.

(1) For purposes of this section, safety-critical revisions include but are not limited to the following:

(i) Changes to Chart A contained in Rule 3 of AAR ''Field Manual on Interchange Rules'' (January 1, 1998);

(ii) Changes that extend the intervals for performing specified maintenance or repair; and

(iii) Changes that reduce the quality or quantity of maintenance provided.

(2) For purposes of this section, nonsafety-critical revisions include but are not limited to the following:

(i) Clarifying amendments;

(ii) Changes that shorten the intervals at which maintenance or repairs are performed; and

(iii) Procedural changes that do not reduce the quality or quantity of the maintenance provided.

(d) Within 30 days after the submission of a petition for proposed revision, FRA's Associate Administrator for Safety will issue a determination in writing as to whether the proposed change is ''safety critical'' or ''non-safety critical.''

(1) If FRA's Associate Administrator for Safety determines that the proposed change is ''safety critical,'' the petition for proposed revision will be treated as a ''petition for special approval'' pursuant to § 232.17.

(2) If FRA's Associate Administrator for Safety determines that the proposed change is ''nonsafety-critical,'' the petition for proposed revision may be incorporated by AAR immediately.

Subpart E—End-of-Train Devices

§ 232.401 Scope.

This subpart contains the requirements related to the performance, operation, and testing of end-of-train devices. Unless expressly excepted in this subpart, the requirements of this subpart apply to all trains operating on track which is part of the general railroad system of transportation.

§ 232.403 Design standards for one-way end-of-train devices.

(a) A one-way end-of-train device shall be comprised of a rear-of-train unit (rear unit) located on the last car of a train and a front-of-train unit (front unit) located in the cab of the locomotive controlling the train.

(b) *Rear unit.* The rear unit shall be capable of determining the rear car brake pipe pressure and transmitting that information to the front unit for display to the locomotive engineer. The rear unit shall be—

(1) Capable of measuring the rear car brake pipe pressure with an accuracy of ±3 psig and brake pipe pressure variations of ±1 psig;

(2) Equipped with a ''bleeder valve'' that permits the release of any air under pressure from the rear of train unit or the associated air hoses prior to detaching the rear unit from the brake pipe;

(3) Designed so that an internal failure will not cause an undesired emergency brake application;

(4) Equipped with either an air gauge or a means of visually displaying the rear unit's brake pipe pressure measurement; and

(5) Equipped with a pressure relief safety valve to prevent explosion from a high pressure air leak inside the rear unit.

(c) *Reporting rate.* Multiple data transmissions from the rear unit shall occur immediately after a variation in the rear car brake pipe pressure of ±2 psig and at intervals of not greater than 70 seconds when the rear car brake pipe pressure variation over the 70-second interval is less than ±2 psig.

(d) *Operating environment.* The rear unit shall be designed to meet the performance requirements of paragraphs (b) and (c) of this section under the following environmental conditions:

(1) At temperatures from −40 °C to 60 °C;

(2) At a relative humidity of 95% noncondensing at 50 °C;

(3) At altitudes of zero to 12,000 feet mean sea level;

(4) During vertical and lateral vibrations of 1 to 15 Hz., with 0.5 g. peak to peak, and 15 to 500 Hz., with 5 g. peak to peak;

(5) During the longitudinal vibrations of 1 to 15 Hz., with 3 g. peak to peak, and 15 to 500 Hz., with 5 g. peak to peak; and (6) During a shock of 10 g. peak for 0.1 second in any axis.

(e) *Unique code.* Each rear unit shall have a unique and permanent identification code that is transmitted along with the pressure message to the front-of-train unit. A code obtained from the Association of American Railroads, 50 F Street, NW., Washington, DC 20036 shall be deemed to be a unique code for purposes of this section. A unique code also may be obtained from the Office of Safety Assurance and Compliance (RRS–10), Federal Railroad Administration, Washington, DC 20590.

(f) *Front unit.* (1) The front unit shall be designed to receive data messages from the rear unit and shall be capable of displaying the rear car brake pipe pressure in not more than one-pound increments.

(2) The display shall be clearly visible and legible in daylight and darkness from the engineer's normal operating position.

(3) The front device shall have a means for entry of the unique identification code of the rear unit being used. The front unit shall be designed so that it will display a message only from the rear unit with the same code as entered into the front unit.

(4) The front unit shall be designed to meet the requirements of paragraphs (d) (2), (3), (4), and (5) of this section. It shall also be designed to meet the performance requirements in this paragraph—

(i) At temperatures from 0 °C to 60 °C;

(ii) During a vertical or lateral shock of 2 g. peak for 0.1 second; and

(iii) During a longitudinal shock of 5 g. peak for 0.1 second.

(g) *Radio equipment.* (1) The radio transmitter in the rear unit and the radio receiver in the front unit shall comply with the applicable regulatory requirements of the FCC and use of a transmission format acceptable to the FCC.

(2) If power is supplied by one or more batteries, the operating life shall be a minimum of 36 hours at 0 °C.

§ 232.405 Design and performance standards for two-way-end-of-train devices.

Two-way end-of-train devices shall be designed and perform with the features applicable to one-way end-of-train devices described in § 232.403, except those included in § 232.403(b)(3). In addition, a two-way end-of-train device shall be designed and perform with the following features:

(a) An emergency brake application command from the front unit of the device shall activate the emergency air valve at the rear of the train within one second.

(b) The rear unit of the device shall send an acknowledgment message to the front unit immediately upon receipt of an emergency brake application command. The front unit shall listen for this acknowledgment and repeat the brake application command if the acknowledgment is not correctly received.

(c) The rear unit, on receipt of a properly coded command, shall open a valve in the brake line and hold it open for a minimum of 15 seconds. This opening of the valve shall cause the brake line to vent to the exterior.

(d) The valve opening shall have a minimum diameter of ¾ inch and the internal diameter of the hose shall be ⅝ inch to effect an emergency brake application.

(e) The front unit shall have a manually operated switch which, when activated, shall initiate an emergency brake transmission command to the rear unit. The switch shall be labeled ''Emergency'' and shall be protected so that there will exist no possibility of accidental activation.

(f) The availability of the front-to-rear communications link shall be checked automatically at least every 10 minutes.

(g) Means shall be provided to confirm the availability and proper functioning of the emergency valve.

(h) Means shall be provided to arm the front and rear units to ensure the

rear unit responds to an emergency command only from a properly associated front unit.

§ 232.407 Operations requiring use of two-way end-of-train devices; prohibition on purchase of nonconforming devices.

(a) The following definitions are intended solely for the purpose of identifying those operations subject to the requirements for the use of two-way end-of-train devices.

(1) *Heavy grade* means:

(i) For a train operating with 4,000 trailing tons or less, a section of track with an average grade of two percent or greater over a distance of two continuous miles; and

(ii) For a train operating with greater than 4,000 trailing tons, a section of track with an average grade of one percent or greater over a distance of three continuous miles.

(2) *Train* means one or more locomotives coupled with one or more rail cars, except during switching operations or where the operation is that of classifying cars within a railroad yard for the purpose of making or breaking up trains.

(3) *Local train* means a train assigned to perform switching en route which operates with 4,000 trailing tons or less and travels between a point of origin and a point of final destination, for a distance that is no greater than that which can normally be operated by a single crew in a single tour of duty.

(4) *Work train* means a non-revenue service train of 4,000 trailing tons or less used for the administration and upkeep service of the railroad.

(5) *Trailing tons* means the sum of the gross weights—expressed in tons—of the cars and the locomotives in a train that are not providing propelling power to the train.

(b) All trains not specifically excepted in paragraph (e) of this section shall be equipped with and shall use either a two-way end-of-train device meeting the design and performance requirements contained in § 232.405 or a device using an alternative technology to perform the same function.

(c) Each newly manufactured end-of-train device purchased by a railroad after January 2, 1998 shall be a two-way end-of-train device meeting the design and performance requirements contained in § 232.405 or a device using an alternative technology to perform the same function.

(d) Each two-way end-of-train device purchased by any person prior to July 1, 1997 shall be deemed to meet the design and performance requirements contained in § 232.405.

(e) *Exceptions.* The following types of trains are excepted from the requirement for the use of a two-way end-of-train device:

(1) Trains with a locomotive located at the rear of the train that is capable of making an emergency brake application, through a command effected by telemetry or by a crew member in radio contact with the lead (controlling) locomotive;

(2) Trains operating in the push mode with the ability to effectuate an emergency brake application from the rear of the train;

(3) Trains with an operational caboose placed at the rear of the train, carrying one or more crew members, that is equipped with an emergency brake valve;

(4) Trains operating with a secondary, fully independent braking system capable of safely stopping the train in the event of failure of the primary system;

(5) Trains that do not operate over heavy grades and do not exceed 30 mph;

(6) Local trains as defined in paragraph (a)(3) of this section that do not operate over heavy grades;

(7) Work trains as defined in paragraph (a)(4) of this section that do not operate over heavy grades;

(8) Trains that operate exclusively on track that is not part of the general railroad system;

(9) Passenger trains in which all of the cars in the train are equipped with an emergency brake valve readily accessible to a crew member;

(10) Passenger trains that have a car at the rear of the train, readily accessible to one or more crew members in radio contact with the engineer, that is equipped with an emergency brake valve readily accessible to such a crew member; and

(11) Passenger trains that have twenty-four (24) or fewer cars (not including locomotives) in the consist and that are equipped and operated in accordance with the following train-configuration and operating requirements:

(i) If the total number of cars in a passenger train consist is twelve (12) or fewer, a car located no less than halfway through the consist (counting from the first car in the train) must be equipped with an emergency brake valve readily accessible to a crew member;

(ii) If the total number of cars in a passenger train consist is thirteen (13) to twenty-four (24), a car located no less than two-thirds (⅔) of the way through the consist (counting from the first car in the train) must be equipped with an emergency brake valve readily accessible to a crew member;

(iii) Prior to descending a section of track with an average grade of two percent or greater over a distance of two continuous miles, the engineer of the train shall communicate with the conductor, to ensure that a member of the crew with a working two-way radio is stationed in the car with the rearmost readily accessible emergency brake valve on the train when the train begins its descent; and

(iv) While the train is descending a section of track with an average grade of two percent or greater over a distance of two continuous miles, a member of the train crew shall occupy the car that contains the rearmost readily accessible emergency brake valve on the train and be in constant radio communication with the locomotive engineer. The crew member shall remain in this car until the train has completely traversed the heavy grade.

(f) If a train is required to use a two-way end-of-train device:

(1) That device shall be armed and operable from the time a train departs from the point where the device is installed until the train reaches its destination.

(2) The rear unit batteries shall be sufficiently charged at the initial terminal or other point where the device is installed and throughout the train's trip to ensure that the end-of train-device will remain operative until the train reaches its destination.

(3) The device shall be activated to effectuate an emergency brake application either by using the manual toggle switch or through automatic activation, whenever it becomes necessary for the locomotive engineer to place the train air brakes in emergency using either the automatic brake valve or the conductor's emergency brake valve or whenever an undesired emergency application of the train air brakes occurs.

(g) *En route failure of device on a freight or other non-passenger train.* Except on passenger trains required to be equipped with a two-way end-of-train device (which are provided for in paragraph (h) of this section), en route failures of a two-way end-of-train device shall be handled in accordance with this paragraph. If a two-way end-of-train device or equivalent device fails en route (i.e., is unable to initiate an emergency brake application from the rear of the train due to certain losses of communication (front to rear) or due to other reasons), the speed of the train on which it is installed shall be limited to 30 mph until the ability of the device to initiate an emergency brake application from the rear of the train is restored. This limitation shall apply to a train using any device that uses an alternative technology to serve the purpose of a

two-way end-of-train device. With regard to two-way end-of-train devices, a loss of communication between the front and rear units will be considered an en route failure only if the loss of communication is for a period greater than 16 minutes and 30 seconds.

(1) If a two-way end-of-train device fails en route, the train on which it is installed, in addition to observing the 30-mph speed limitation, shall not operate over a section of track with an average grade of two percent or greater over a distance of two continuous miles, unless one of the following alternative measures is provided:

(i) Use of an occupied helper locomotive at the end of the train. This alternative may be used only if the following requirements are met:

(A) The helper locomotive engineer will initiate and maintain two-way voice radio communication with the engineer on the head end of the train; this contact shall be verified just prior to passing the crest the grade.

(B) If there is a loss of communication prior to passing the crest of the grade, the helper locomotive engineer and the head-end engineer shall act immediately to stop the train until voice communication is resumed, if this can be done safely.

(C) If there is a loss of communication once the descent has begun, the helper locomotive engineer and the head-end engineer shall act to stop the train if the train has reached a predetermined rate of speed that indicates the need for emergency braking.

(D) The brake pipe of the helper locomotive shall be connected and cut into the train line and tested to ensure operation.

(ii) Use of an occupied caboose at the end of the train with a tested, functioning brake valve capable of initiating an emergency brake application from the caboose. This alternative may be used only if the train service employee in the caboose and the engineer on the head end of the train establish and maintain two-way voice radio communication and respond appropriately to the loss of such communication in the same manner as prescribed for helper locomotives in paragraph (g)(1)(i).

(iii) Use of a radio-controlled locomotive at the rear of the train under continuous control of the engineer in the head end by means of telemetry, but only if such radio-controlled locomotive is capable of initiating an emergency application on command from the lead (controlling) locomotive.

(2) [Reserved]

(h) *En route failure of device on a passenger train.* (1) A passenger train required to be equipped with a two-way end-of-train device that develops an en route failure of the device (as explained in paragraph (g) of this section) shall not operate over a section of track with an average grade of two percent or greater over a distance of two continuous miles until an operable two-way end-of-train device is installed on the train or an alternative method of initiating an emergency brake application from the rear of the train is achieved.

(2) Except as provided in paragraph (h)(1) of this section, a passenger train required to be equipped with a two-way end-of-train device that develops an en route failure of the device (as explained in paragraph (g) of this section) shall be operated in accordance with the following:

(i) A member of the train crew shall be immediately positioned in the car which contains the rearmost readily accessible emergency brake valve on the train and shall be equipped with an operable two-way radio that communicates with the locomotive engineer; and

(ii) The locomotive engineer shall periodically make running tests of the train's air brakes until the failure is corrected; and

(3) Each en route failure shall be corrected at the next location where the necessary repairs can be conducted or at the next location where a required brake test is to be performed, whichever is reached first.

§ 232.409 Inspection and testing of end-of-train devices.

(a) After each installation of either the front or rear unit of an end-of-train device, or both, on a train and before the train departs, the railroad shall determine that the identification code entered into the front unit is identical to the unique identification code on the rear-of-train unit.

(b) After each installation of either the front or rear unit of an end-of-train device, or both, the functional capability of the device shall be determined, after charging the train, by comparing the quantitative value displayed on the front unit with the quantitative value displayed on the rear unit or on a properly calibrated air gauge. The end-of-train device shall not be used if the difference between the two readings exceeds three pounds per square inch.

(c) A two-way end-of-train device shall be tested at the initial terminal or other point of installation to ensure that the device is capable of initiating an emergency power brake application from the rear of the train. If this test is conducted by a person other than a member of the train crew, the locomotive engineer shall be notified in writing that a successful test was performed. The written notification shall include the date and time of the test, the location where the test was performed, and the name of person conducting the test.

(d) The telemetry equipment shall be tested for accuracy and calibrated if necessary according to the manufacturer's specifications and procedures at least every 365 days. This shall include testing radio frequencies and modulation of the device. The date and location of the last calibration or test as well as the name of the person performing the calibration or test shall be legibly displayed on a weather-resistant sticker or other marking device affixed to the outside of both the front unit and the rear unit. If the front unit is an integral part of the locomotive, then the information may be recorded on Form FRA F6180–49A.

Subpart F—Introduction of New Brake System Technology

§ 232.501 Scope.

(a) This subpart contains general requirements for introducing new brake system technologies. This subpart is intended to facilitate the introduction of new complete brake system technologies or major up-grades to existing systems which the current regulations do not adequately address (i.e., electronic brake systems). This subpart is not intended for use in the introduction of a new brake component or material.

§ 232.503 Process to introduce new brake system technology.

(a) Pursuant to the procedures contained in § 232.17, each railroad shall obtain special approval from the FRA Associate Administrator for Safety of a pre-revenue service acceptance testing plan, developed pursuant to § 232.505, for the new brake system technology, prior to implementing the plan.

(b) Each railroad shall complete a pre-revenue service demonstration of the new brake system technology in accordance with the approved plan, shall fulfill all of the other requirements prescribed in § 232.505, and shall obtain special approval from the FRA Associate Administrator for Safety under the procedures of § 232.17 prior to using such brake system technology in revenue service.

§ 232.505 Pre-revenue service acceptance testing plan.

(a) Except as provided in paragraph (f) of this section, before using a new brake system technology for the first time on

its system the operating railroad or railroads shall submit a pre-revenue service acceptance testing plan containing the information required by paragraph (e) of this section and obtain the approval of the FRA Associate Administrator for Safety, under the procedures specified in § 232.17.

(b) After receiving FRA approval of the pre-revenue service testing plan and before introducing the new brake system technology into revenue service, the operating railroad or railroads shall:

(1) Adopt and comply with such FRA-approved plan, including fully executing the tests required by the plan;

(2) Report to the FRA Associate Administrator for Safety the results of the pre-revenue service acceptance tests;

(3) Correct any safety deficiencies identified by FRA in the design of the equipment or in the inspection, testing, and maintenance procedures or, if safety deficiencies cannot be corrected by design changes, agree to comply with any operational limitations that may be imposed by the Associate Administrator for Safety on the revenue service operation of the equipment; and

(4) Obtain FRA approval to place the new brake system technology in revenue service.

(c) The operating railroad shall comply with any such operational limitations imposed by the Associate Administrator for Safety.

(d) The plan shall be made available to FRA for inspection and copying upon request.

(e) The plan shall include all of the following elements:

(1) An identification of any waivers of FRA or other Federal safety regulations required for the tests or for revenue service operation of the equipment.

(2) A clear statement of the test objectives. One of the principal test objectives shall be to demonstrate that the equipment meets the safety design and performance requirements specified in this part when operated in the environment in which it is to be used.

(3) A planned schedule for conducting the tests.

(4) A description of the railroad property or facilities to be used to conduct the tests.

(5) A detailed description of how the tests are to be conducted. This description shall include:

(i) An identification of the equipment to be tested;

(ii) The method by which the equipment is to be tested;

(iii) The criteria to be used to evaluate the equipment's performance; and

(iv) The means by which the test results are to be reported to FRA.

(6) A description of any special instrumentation to be used during the tests.

(7) A description of the information or data to be obtained.

(8) A description of how the information or data obtained is to be analyzed or used.

(9) A clear description of any criteria to be used as safety limits during the testing.

(10) A description of the criteria to be used to measure or determine the success or failure of the tests. If acceptance is to be based on extrapolation of less than full level testing results, the analysis to be done to justify the validity of the extrapolation shall be described.

(11) A description of any special safety precautions to be observed during the testing.

(12) A written set of standard operating procedures to be used to ensure that the testing is done safely.

(13) Quality control procedures to ensure that the inspection, testing, and maintenance procedures are followed.

(14) Criteria to be used for the revenue service operation of the equipment.

(15) A description of any testing of the equipment that has previously been performed.

(f) For brake system technologies that have previously been used in revenue service in the United States, the railroad shall test the equipment on its system, prior to placing it in revenue service, to ensure the compatibility of the equipment with the operating system (track, signals, etc.) of the railroad. A description of such testing shall be retained by the railroad and made available to FRA for inspection and copying upon request.

Appendix A—Schedule of Civil Penalties [Reserved]

Issued in Washington, D.C., on August 27, 1998.

Jolene M. Molitoris,

Federal Railroad Administrator.

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Part III

Department of Labor

Pension and Welfare Benefits Administration

29 CFR Part 2520

Interim Rule Amending Summary Plan Description Regulation; Proposed Amendments to Summary Plan Description Regulations; Final Rule and Proposed Rule

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

29 CFR Part 2520

RIN 1210–AA55

Interim Rule Amending Summary Plan Description Regulation

AGENCY: Pension and Welfare Benefits Administration, Department of Labor.

ACTION: Interim Rule with request for comments.

SUMMARY: This document contains an interim rule amending the information required to be contained in the Summary Plan Description (SPD) required to be furnished to employee benefit plan participants and beneficiaries under the Employee Retirement Income Security Act of 1974, as amended (ERISA). Specifically, this rule amends the information required to be disclosed in the SPD with respect to the Newborns' and Mothers' Health Protection Act of 1996. The amendment contained in this document will affect group health plan sponsors, administrators, fiduciaries, participants and beneficiaries.

DATES: *Effective date:* This amendment is effective November 9, 1998.

Applicability date: Administrators will be required to comply with this amendment no later than the date on which the first summary of material modification (or updated SPD) is required to be furnished participants and beneficiaries following the effective date of this amendment.

Comments: Written comments on this interim rule must be received by November 9, 1998.

ADDRESSES: Interested persons are invited to submit written comments (preferably three copies) concerning this amendment to: Office of Regulations and Interpretations, Room N–5669, Pension and Welfare Benefits Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, ATTENTION: SPD Content Interim Rule. All submissions will be open to public inspection in the Public Disclosure Room, Pension and Welfare Benefits Administration, Room N–5638, 200 Constitution Avenue, N.W. Washington, D.C.

FOR FURTHER INFORMATION CONTACT: June Solonsky, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, (202) 219–8521. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

The Newborns' and Mothers' Health Protection Act of 1996 (NMHPA) amended ERISA by adding a section 711.[1] ERISA section 711 establishes restrictions on the extent which group health plans and health insurance issuers may limit hospital lengths of stay for mothers and newborn children following childbirth. In an effort to ensure that participants and beneficiaries are apprised of the limitations established under NMHPA, paragraph (d) of section 711 provides that ''[t]he imposition of the requirements of this section shall be treated as a material modification in the terms of the plan * * * except that the summary description required to be provided * * * with respect to such modification shall be provided by not later than 60 days after the first day of the first plan year in which such requirements apply.''

On April 8, 1997, the Department published interim rules implementing the provisions of section 711(d) by amending the SPD content regulation, at 29 CFR 2520.102–3, to add a new paragraph (u).[2] Paragraph (u) requires that group health plan SPDs provide a statement indicating that ''group health plans and health insurance issuers offering group insurance coverage generally may not, under Federal law, restrict benefits for any hospital length of stay in connection with childbirth for the mother or newborn child to less than 48 hours following a normal vaginal delivery, or less than 96 hours following a caesarean section, or require that a provider obtain authorization from the plan or insurance issuer for prescribing a length of stay not in excess of the above periods.'' In the preamble to the interim rule, the Department explained that the statement included in paragraph (u) may be used as sample language by plan administrators to satisfy the content requirement of paragraph (u) and section 711(d).

B. Amendment to Interim Rule

Since the publication of that interim rule, concerns have been raised whether the specific information delineated in paragraph (u) of § 2520.102–3 adequately informs participants and beneficiaries of the exception to the Federal law's general rule. In particular, concerns have been expressed about the absence of any indication that the 48 hour/96 hour minimum stay provisions do not apply in any case in which the decision to discharge the mother or newborn prior to the minimum length of stay otherwise required is made by the attending provider in consultation with the mother. Given the significance of this exception, the Department has determined that these concerns have merit, that the current rule governing the disclosure of NMHPA provisions should be amended, and that such amendment should be effective on an interim basis, consistent with the current disclosure requirement. In this regard, the Department is amending the language in paragraph (u) of § 2520.102–3 to clarify that the attending provider, after consulting with the mother, may discharge the mother and newborn earlier than 48 hours following a vaginal delivery[3] or 96 hours following a cesarean section. It is the Department's view that this language is more consistent with the language in section 711(a) of ERISA.[4] The statement included in this amended paragraph (u) of the regulation may be used by administrators as sample language to satisfy the requirements of that paragraph.

C. Effective Date

The interim rule contained in this document is effective November 9, 1998. Administrators will be required to comply with this amendment no later than the date on which the first summary of material modification (or updated SPD) is required to be furnished participants and beneficiaries following the effective date of this amendment.

Consistent with the implementation of the NMHPA amendments through the adoption of interim rules,[5] the Department has determined that there is need to ensure that participants and beneficiaries are, consistent with Congressional intent,[6] apprised of the NMHPA provision as soon as practical, and that the current language governing the disclosure of such provisions, at paragraph (u) of § 2520.102–3, does not, in the Department's view, adequately accomplish the statutory mandate for such disclosure. Given the nature of the amendment and the need to ensure that participants and beneficiaries are adequately apprised of the NMHPA

[1] Pub. L. 104–204, enacted on September 26, 1996.

[2] 62 FR 16979, April 8, 1997.

[3] A separate interim rule being issued by the Department addressing the substantive requirements under the NMHPA makes clear that the reference to ''normal'' vaginal delivery is merely intended to distinguish vaginal deliveries from cesarean section deliveries. All vaginal deliveries, whether with complications or without complications, are subject to the 48-hour length-of-stay requirement.

[4] The amendment also reflects editorial changes intended to improve the clarity of the statement.

[5] *Id.* at 16982–83.

[6] *See* ERISA section 711(d).

provisions, the Department believes that issuance of a notice of proposed rulemaking with a period for comments prior to issuing a final rule would unnecessarily delay the implementation of this essential guidance. In this regard, the Department notes that pursuant to ERISA section 734, the Department has the authority to promulgate any interim rules the Secretary deems are appropriate to carry out this part. For the reasons discussed herein, the Department is adopting this amendment on an interim basis.

D. Request for Comments

While the amendment contained herein is being adopted on an interim basis, the Department is inviting interested persons to submit written comments on the amendment for consideration in the development of a final rule. Written comments (preferably three copies) must be submitted to: the Office of Regulations and Interpretations, Room N–5669, Pension and Welfare Benefits Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, ATTENTION: SPD Content Interim Rule. All submissions will be open to public inspection in the Public Disclosure Room, Pension and Welfare Benefits Administration, Room N–5638, 200 Constitution Avenue, N.W. Washington, D.C. Written comments on this interim rule must be received by November 9, 1998.

E. Other Amendments to the SPD Content Requirements

In addition to the amendment contained herein, the Department is publishing in the ''proposed rules'' section of today's **Federal Register** a number of proposed amendments to the regulations governing the content of SPDs. These amendments, upon adoption, will clarify the information required to be disclosed by group health plans and update other information required to be set forth in employee benefit plan SPDs.

Economic Analysis Under Executive Order 12866

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

Pursuant to the terms of the Executive Order, it has been determined that this action is consistent with the President's priorities with respect to ensuring that all participants in group health plans receive understandable information about their plans, as described in the Consumer Bill of Rights and Responsibilities issued by the President's Advisory Commission on Consumer Protection and Quality in the Health Care Industry. Therefore, this notice is ''significant'' and subject to OMB review under section 3(f)(4) of the Executive Order.

The cost of compliance with this interim rule is expected to total $250,949 in 1999, and $387,708 in the year 2000. These costs are expected to be incurred in connection with other changes to the required content of SPDs. A detailed discussion of the basis for these cost estimates, as well as the nature and costs of other changes being proposed, may be found in the Notice of Proposed Rulemaking with respect to Proposed Amendments to Summary Plan Description Regulations, which is also published in today's **Federal Register**.

Although the effective date of this interim rule differs from the effective date that may apply for the proposed rulemaking with respect to SPDs, the Department believes that a meaningful economic analysis should contemplate as a whole the nature and timing of all changes to existing SPDs expected to be made by plan administrators due to regulatory amendments. As a result, the economic analysis of the Proposed Amendments to Summary Plan Description Regulations addresses the impact of this interim rule, as well as the changes proposed in the separate rulemaking action.

To avoid unnecessary duplication of economic analysis, or of public comment thereon, comments received on the methodology and assumptions used in estimating the consolidated economic impact of both the proposed rule and this interim rule, and on the resulting estimates, will be treated as comments on this interim rule.

The benefits of this interim rule, as yet unquantified, will arise as participants and beneficiaries receive clearer and more accurate communications concerning their group health plan benefits. The Department is publishing this interim rule, in part, to address public concerns about existing disclosures with respect to exceptions to the minimum hospital stay provisions of NMHPA.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and which are likely to have a significant economic impact on a substantial number of small entities. If an agency determines that a proposed rule is likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires that the agency present an initial regulatory flexibility analysis at the time of the publication of the notice of proposed rulemaking describing the impact of the rule on small entities and seeking public comment on such impact. Small entities include small businesses, organizations, and governmental jurisdictions.

Because these rules are issued as interim final rules, and not as a notice of proposed rulemaking, a formal regulatory flexibility analysis has not been prepared. Nonetheless, in its analysis of economic impact of both this interim rule and the Notice of Proposed Rulemaking with respect to Proposed Amendments to Summary Plan Description Regulations, which is also published in today's **Federal Register**, the Department presents an analysis addressing many of the same issues otherwise required to be addressed under the RFA.

The Department invites interested persons to submit comments regarding its preliminary discussion of potential impacts on small entities. The Department also requests comments from small entities regarding what, if any, special problems they might encounter under these interim rules, or if the separate proposal concerning amendments to the SPD content rules were to be adopted as final, and what changes, if any, could be made to minimize those problems.

Paperwork Reduction Act

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, the Pension and Welfare Benefits Administration is soliciting comments concerning the revision of the information collection request (ICR) included in this Interim Rule Amending Summary Plan Description Regulation. A copy of the existing ICR may be obtained by contacting the office listed in the addressee section of this notice.

The Department of Labor (Department) has submitted a copy of the existing information collection, as revised by both the Interim Rule Amending Summary Plan Description Regulation and the Proposed Amendments to Summary Plan Description Regulations, to the Office of Management and Budget (OMB) in accordance with 44 U.S.C. 3507(d) for review of its information collection provisions. The Department has requested emergency clearance for that portion of the ICR that is changed by this interim rule, specifically, the SPD disclosure provision concerning hospital lengths of stay in connection with childbirth for the mother or newborn child, by November 9, 1998.

The Department and OMB are particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Comments should be sent to the individual identified in the Addressee section of this notice, and to Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, D.C. 20503; Attention: Desk Officer for the Pension and Welfare Benefits Administration. Although comments may be submitted through November 9, 1998, in light of the request for emergency clearance by November 9, 1998, submission of comments within the first 30 days is encouraged to ensure their consideration.

ADDRESSES (PRA 95): Gerald B. Lindrew, Office of Policy and Research, U.S. Department of Labor, Pension and Welfare Benefits Administration, 200 Constitution Avenue, NW, Room N–5647, Washington, D.C. 20210. Telephone: (202) 219–4782; Fax: (202) 219–4745. These are not toll-free numbers.

I. Background

Pursuant to ERISA section 101(a)(1), the administrator of an employee benefit plan is required to furnish an SPD to each participant covered under the plan and each beneficiary who is receiving benefits under the plan. The SPD is required to be written in a manner calculated to be understood by the average plan participant and must be sufficiently comprehensive to apprise the plan's participants and beneficiaries of their rights and obligations under the plan. To the extent that there is a material modification in the terms of the plan or a change in the information required to be included in the SPD, ERISA requires that the administrator furnish participants covered under the plan and beneficiaries receiving benefits with a summary of such changes.

ERISA section 102(b) describes the types of information specifically required to be included in the plan description and SPD. The Department has previously issued guidance concerning the required contents of SPDs in regulations published at 29 CFR 2520.102–3.

II. Current Actions

As described in this preamble, the interim rule amending § 2520.102–3 modifies the required content of group health plan SPDs to clarify the applicability of minimum hospital lengths of stay for mothers and newborn children following childbirth under NMHPA. This modification to disclosure requirements implemented by the previous publication of the Interim Rules Amending ERISA Disclosure Requirements for Group Health Plans (62 FR 16979, April 8, 1997) is intended to clarify that the attending provider, after consulting with the mother, may discharge the mother or newborn child earlier than 48 hours following a vaginal delivery or 96 hours following a cesarean section.

The total additional hour burden estimated to result from this interim rule is 821 hours in 1999 and 2,219 hours in 2000. This interim rule is expected to result in operating and maintenance cost increases of $209,907 in 1999 and $276,741 in 2000. These estimates are based upon the Department's assumptions concerning the number of affected plans and participants, the time required to make the modification, and the percentage of plans that perform the required tasks in-house as compared with those that purchase services from outside parties. This accounting for the purchase of services in burden estimates results in the differences in costs developed for purposes of PRA 95 and those developed for purposes of Executive Order 12866.

These burden estimates also rely on assumptions made about the distribution of other disclosure materials required as a result of proposed regulatory changes. This is because it is assumed that plans will prepare and distribute revised disclosure materials in the most cost-efficient way, which would likely involve incorporating as many changes as possible in a single distribution. A detailed discussion of the basis for these estimates, as well as the nature and burden associated with the other changes being proposed to the content of SPDs, may be found in the Notice of Proposed Rulemaking with respect to Proposed Amendments to Summary Plan Description Regulations, which is also published in today's **Federal Register**.

Because this single ICR is currently the subject of two separate regulatory actions, the Department believes that a meaningful burden analysis should contemplate as a whole the nature and timing of all changes to existing SPDs expected to be made by plan administrators due to regulatory amendments. As a result, the burden analysis included in the Proposed Amendments to Summary Plan Description Regulations addresses the impact of this interim rule, as well as the changes proposed in the separate rulemaking action. Both the total burden of the ICR and the burden specifically

associated with this interim rule are displayed in this notice.

To avoid unnecessary duplication of analysis, or of public comment thereon, comments received on the methodology and assumptions used in estimating the consolidated cost and hour burden of the proposed rule and this interim rule, and on the resulting burden estimates, will be treated as comments on this interim rule.

Type of Review: Revision of a currently approved collection.

Agency: Pension and Welfare Benefits Administration.

Title: Regulations Regarding Required Contents of Summary Plan Descriptions for Employee Benefit Plans (Interim Rule Amending Summary Plan Description Regulation).

OMB Number: 1210–0039.

Affected Public: Individuals or households; business or other for-profit; not-for-profit institutions.

Frequency of Response: On occasion.

Total Respondents: 2,027,293 (1998); 888,393 (1999); 2,641,818 (2000).

Total Responses: 83,332,000 (1998); 52,115,000 (1999); 160,703,000 (2000).

Estimated Burden Hours: 842,586 (1998); 815,850 total, including 821 for this Interim Rule (1999): 2,101,624 total, including 2,219 for this Interim Rule (2000).

Estimated Annual Costs (Operating and Maintenance): $95,265,366 (1998); $101,465,306 total, including $209,907 for this Interim Rule (1999); $218,395,191 total, including $276,741 for this Interim Rule (2000).

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the information collection request; they will also become a matter of public record.

Unfunded Mandates Reform Act

These rules are not subject to the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) because they are interim rules. However, for purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this interim rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, or the private sector, of $100 million or more. The basis for this statement is described in the analysis of costs for purposes of Executive Order 12866 and the Regulatory Flexibility Act.

Small Business Regulatory Enforcement Fairness Act

This interim rule is subject to the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) (SBREFA), and has been transmitted to Congress and the Comptroller General for review. The Department has determined that this is not a ''major rule'' as that term is defined in 5 U.S.C. 804, because it is not likely to result in: (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Statutory Authority

This interim regulation is adopted pursuant to authority contained in section 505 of ERISA (Pub. L. 93–406, 88 Stat. 894, 29 U.S.C. 1135) and sections 104(b) and 734 of ERISA, as amended, (Pub. L. 104–191, 110 Stat.1936 and Pub. L. 104–204, 110 Stat. 2935, 29 U.S.C. 1024 and 1191c) and under Secretary of Labor's Order No. 1–87, 52 FR 13139, April 21, 1987.

List of Subjects in 29 CFR Part 2520

Employee benefit plans, Employee Retirement Income Security Act, Group health plans, Pension plans, Welfare benefit plans.

For the reasons set forth above, Part 2520 of Title 29 of the Code of Federal Regulations is amended as follows:

PART 2520—[AMENDED]

1. The authority for Part 2520 continues to read as follows:

Authority: Secs. 101, 102, 103, 104, 105, 109, 110, 111(b)(2), 111(c), and 505, Pub. L. 93–406, 88 Stat. 840–52 and 894 (29 U.S.C. 1021–1025, 1029–31, and 1135); Secretary of Labor's Order No. 27–74, 13–76, 1–87, and Labor Management Services Administration Order 2–6.

Sections 2520.102–3, 2520.104b–1 and 2520.104b–3 also are issued under section 101(a) of Pub. L. 104–191, 110 Stat. 1936 and 1939, sec. 603 of Pub. L. 104–204, 110 Stat. 2935 (29 U.S.C. 1185 and 1191c).

2. Section 2520.102–3 is amended by revising paragraph (u) to read as follows:

§ 2520.102–3 Contents of summary plan description.

* * * * *

(u) In the case of a group health plan, as defined in section 733(a)(1) of the Act, that provides maternity or newborn infant coverage, a statement indicating the following: Group health plans and health insurance issuers generally may not, under Federal law, restrict benefits for any hospital length of stay in connection with childbirth for the mother or newborn child to less than 48 hours following a vaginal delivery, or less than 96 hours following a cesarean section. However, Federal law generally does not prohibit the mother's or newborn's attending provider, after consulting with the mother, from discharging the mother or her newborn earlier than 48 hours (or 96 hours as applicable). In any case, plans and issuers may not, under Federal law, require that a provider obtain authorization from the plan or the issuer for prescribing a length of stay not in excess of 48 hours (or 96 hours).

* * * * *

Signed at Washington, D.C., this 28th day of August, 1998.

Meredith Miller,

Deputy Assistant Secretary for Policy, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 98–24066 Filed 9–4–98; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

29 CFR Part 2520

RIN 1210–AA69

Proposed Amendments to Summary Plan Description Regulations

AGENCY: Pension and Welfare Benefits Administration, Department of Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed amendments to the regulations governing the content of the Summary Plan Description (SPD) required to be furnished to employee benefit plan participants and beneficiaries under the Employee Retirement Income Security Act of 1974, as amended, (ERISA). These amendments are being proposed to implement information disclosure recommendations of the President's Advisory Commission on Consumer Protection and Quality in the Health Care Industry, as set forth in their November 20, 1997 report ''Consumer Bill of Rights and Responsibilities,'' by clarifying benefit, medical provider and other information required to be disclosed in, or as part of, the SPD of a group health plan and for other reasons as well. This document also contains a proposed amendment to repeal the limited exemption with respect to SPDs of welfare plans providing benefits through qualified health maintenance organizations (HMOs). In addition, the Department is proposing a number of amendments to the SPD content regulation that are intended to update and clarify the application of provisions affecting both pension and welfare benefit plans. The amendments contained in this document will affect employee pension and welfare benefit plans, including group health plans, as well as administrators, fiduciaries, participants and beneficiaries of such plans.

DATES: Comments: Written comments concerning the proposed amendments must be received by November 9, 1998.

ADDRESSES: Interested persons are invited to submit written comments (preferably three copies) concerning the proposals herein to: Office of Regulations and Interpretations, Room N–5669, Pension and Welfare Benefits Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, Attention: Proposed SPD Content Regulations. All written comments should clearly reference the relevant proposed amendment(s). All submissions will be open to public inspection in the Public Disclosure Room, Pension and Welfare Benefits Administration, Room N–5638, 200 Constitution Avenue, N.W. Washington, D.C.

FOR FURTHER INFORMATION CONTACT: June Solonsky, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, (202) 219–8521. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

Pursuant to ERISA section 101(a)(1), the administrator of an employee benefit plan is required to furnish a summary plan description (SPD) to each participant covered under the plan and each beneficiary who is receiving benefits under the plan. Section 102(b) and the Department's regulation issued thereunder, 29 CFR 2520.102–3, describe the information required to be included in the SPD. The SPD is the primary vehicle under ERISA for communicating information to participants and beneficiaries about their rights, benefits, and obligations under their employee benefit plans.[1]

The Regulation governing the content of the SPD was first adopted in 1977.[2] While this regulation was later amended to implement changes to ERISA's disclosure provisions enacted as part of the Health Insurance Portability and Accountability Act of 1996 and the Newborns' and Mothers' Health Protection Act of 1996,[3] most of the SPD content provisions have not been modified, updated or otherwise changed since adoption of the 1977 regulation. Since that time there have been a number of legislative and other changes affecting plans and plan practices that, in turn, affect the information necessary for participants and beneficiaries to understand and exercise their rights under their plans and under ERISA. Taking into account the continuation coverage provisions enacted under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) and subsequent amendments, the portability, access and renewability requirements enacted as part of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the mental health parity provisions enacted as part of the Mental Health Parity Act of 1996, the requirements of the Newborns' and Mothers' Health Protection Act of 1996, and the growth of managed care programs and practices, some of the most significant changes have taken place with respect to group health plans.

In addition, the President's Advisory Commission on Consumer Protection and Quality in the Health Care Industry (the Commission), in its November 20, 1997 report entitled ''Consumer Bill of Rights and Responsibilities,'' made a number of recommendations intended to enhance disclosure of health care plan and other information. In response to the Commission's report, the Department of Labor identified various regulatory actions that could be taken to implement the Commission's recommendation in the area of information disclosure. Following the Department's response, the President issued a memorandum to the Department, directing it to ''propose regulations that require ERISA health plans to ensure the information they provide to plan participants is consistent with the Patient Bill of Rights.''[4]

As discussed below, this document contains a number of proposed amendments to the regulations governing the content of summary plan descriptions, specifically, 29 CFR 2520.102–3 and 2520.102–5, that, consistent with the Department's commitment are intended to implement the Commission's recommendations for improved information disclosure by group health plans, as well as generally update the SPD disclosure requirements for both welfare and pension plans.

B. Amendments Relating to the ''Consumer Bill of Rights and Responsibilities''

One of the eight principles set forth in the ''Consumer Bill of Rights and Responsibilities'' is the right of individuals to receive accurate, easily understood information about their health plans, professionals and facilities. While the Department does not have the authority under ERISA to mandate disclosure of all of the information identified by the Commission in their report, the Department does have the authority to establish standards governing the style, format and content of the SPD, which is the primary vehicle through which plan

[1] Publication of this regulation is not intended to address any disclosure issues arising under Part 4 of Subtitle B of Title I.

[2] 42 FR 37178, July 19, 1977.

[3] 62 FR 16979, April 8, 1997.

[4] The President further directed the Department to ''propose regulations to strengthen the internal appeals process for all Employee Retirement Income Security Act (ERISA) health plans to ensure that decisions regarding urgent care are resolved within not more than 72 hours and generally resolved within 15 days for non-urgent care.'' The Department is publishing today in the **Federal Register** a proposal that would revise the Department's regulation at 29 CFR 2560.503–1 to accomplish this goal.

benefit and other information is communicated to participants and beneficiaries. Consistent with the Commission's recommendation that health care information be communicated in an easily understood manner, both ERISA and the Department's regulations currently require that SPD information be communicated in a manner calculated to be understood by the average plan participant and sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan.[5] The Department believes these standards serve to further the Commission's recommendations without modification or amendment at this time. The Department, however, has concluded that the SPD regulations should be amended to clarify the required disclosure by group health plans in their SPDs of various categories of information identified by the Commission and to ensure that all participants and beneficiaries, without regard to whether they are covered by a Federally qualified HMO, are provided health plan information consistent with the SPD requirements.

In responding to the Commission's recommendations, the Department indicated that it could propose amendments to the SPD regulations to ensure that all participants and beneficiaries in group health plans are provided, consistent with the Commission's recommendations, clear and understandable information concerning: benefits and limits on coverage; the extent to which preventive services are covered; whether, and under what circumstances, coverage is provided for existing and new drugs; whether, and under what circumstances, coverage is provided for tests, devices, and procedures; provider network composition; coverage of out-of-network services; conditions, if any, for access to speciality medical care; conditions, if any, applicable to urgent care; and preauthorization and utilization review procedures. The Department also indicated that it could amend the special rules, at § 2520.102–5, governing the disclosure of plan information by certain health maintenance organizations (HMOs) to improve the information furnished participants and beneficiaries.

1. Changes to the SPD Content Requirements

In order to implement the Department's response to the Commission's recommendations, the Department is proposing to amend paragraph (j) of § 2520.102–3 to add a new subparagraph (3) clarifying the information that must be included in the SPD of a group health plan, as defined in section 733(a).[6] Paragraph (j) generally provides that the SPD of an employee benefit plan must describe ''[t]he plan's requirements respecting eligibility for participation and for benefits.'' Subparagraph (2) of paragraph (j) provides, in the case of welfare benefit plans, the SPD must also include a ''statement of the conditions pertaining to eligibility to receive benefits, and a description or summary of the benefits.'' That subparagraph also provides that where a plan provides an extensive schedule of benefits, only a general description is required if reference is made to detailed schedules of benefits which are available without costs to any participant or beneficiary who so requests.

It is the view of the Department that the information described in the new paragraph (j)(3) is currently required to be disclosed through the SPD under paragraph (j)(2), and that most group health plans in fact disclose such information to participants and beneficiaries in, or as part of, the plan's SPD. Nonetheless, the Department believes that, in view of the Commission's report and recommendations, the amendment proposed herein adding a new paragraph (j)(3) is necessary to remove any ambiguity as to the required disclosure of such information. Specifically, paragraph (j)(3) provides that the SPD of a group health plan shall describe: Any cost-sharing provisions, including premiums, deductibles, coinsurance, and copayment amounts for which the participant or beneficiary will be responsible; any annual or lifetime caps or other limits on benefits under the plan; the extent to which preventive services are covered under the plan; whether, and under what circumstances, existing and new drugs are covered under the plan; whether, and under what circumstances, coverage is provided for medical tests, devices and procedures; provisions governing the use of network providers, the composition of the provider network and whether, and under what circumstances, coverage is provided for out-of-network services; any conditions or limits on the selection of primary care providers or providers of speciality medical care; any conditions or limits applicable to obtaining emergency medical care; and any provisions requiring preauthorizations or utilization review as a condition to obtaining a benefit or service under the plan.

Paragraph (j)(3) further provides that, in the case of plans with provider networks, the listing of providers may be furnished to participants and beneficiaries as a separate document, provided that the SPD contains a general description of the provider network and indicates that provider lists are furnished, without charge, in a separate document.

With regard to the disclosure of preauthorization and utilization review procedures, the Department is proposing to amend paragraph (s) of § 2520.102–3, that currently requires a description of the plan's claims procedures, to clarify that the required description of procedures governing claims for benefits includes, in the case of a group health plan, any procedures for preauthorizations, approvals, or utilization review. It is the view of the Department that a plan is not precluded from furnishing a description of the plan's claims procedures as a separate document that accompanies the plan's SPD, provided that the description otherwise satisfies the style and format requirements of § 2520.102–2.

2. Repealing the Limited Exception for SPDs of Plans Providing Benefits Through a Federally Qualified HMO

The Department is proposing to repeal § 2520.102–5, which provides that SPDs of welfare benefit plans which provide benefits through a qualified HMO, as defined in section 1310(d) of the Public Health Act, 42 U.S.C. 300e–9(d), are not required to include the information described in §§ 2520.102–3(j)(2), (l), (q) and (s) provided certain conditions are met. The Department believes that, in view of the legislative and other changes affecting the operation of group health plans since the adoption of § 2520.102–5 in 1981,[7] the information required to be disclosed through the SPD and summaries of changes thereto are as important to participants and beneficiaries electing coverage through a qualified HMO, as defined in § 1310(d) of the Public Health Act, 42 U.S.C. 300e–9(d), as any other employee benefit plan participant or beneficiary.

[5] *See* ERISA § 102(a)(1), 29 U.S.C. 1022(a)(1), and 29 CFR 2520.102–2.

[6] ERISA § 733(a)(1), defines the term ''group health plan'' to mean ''an employee welfare benefit plan to the extent that the plan provides medical care (as defined in paragraph (2) and including items and services paid for as medical care) to employees or their dependents (as defined under the terms of the plan) directly or through insurance reimbursement, or otherwise.''

[7] *See* 46 FR 5884, January 21, 1981.

C. Other Amendments Relating to the SPD Content Requirements

The following amendments are intended to update the SPD content regulations, § 2520.102–3, to reflect legislative and other changes that have taken place since adoption of the regulations. The amendments are discussed below paragraph-by-paragraph in the order in which they appear in the regulation.

1. § 2520.102–3(d)—Type of Pension and Welfare Plan

Paragraph (d) of § 2520.102–3 requires plan administrators to specify in the summary plan description the type of welfare or pension plan they administer. The regulation provides examples of types of pension and welfare plans. Due to the fact that participant and beneficiary rights and obligations may be substantially affected, in the case of pension plans, by whether their defined contribution pension plan is intended to comply with ERISA section 404(c) and, in the case of welfare plans, by whether the plan is a group health plan subject to HIPAA, in an effort to update the regulation, the proposal would amend paragraph (d) to include references to ERISA section 404(c) plans and group health plans as defined in ERISA section 733(a). While the Department's regulation at § 2550.404c–1(b)(2)(i)(B)(*1*)(*i*) already requires participants and beneficiaries to be provided with an explanation that the plan is intended to constitute a plan described in ERISA section 404(c), the Department intends to emphasize plan administrators' notification responsibilities by including the reference to ERISA section 404(c) plans in paragraph (d) of § 2520.102–3.

2. § 2520.102–3(j)—Eligibility for Participation and Benefits

In addition to the above discussed amendment of paragraph (j) of § 2520.102–3 relating to group health plans, the Department is proposing to amend paragraph (j)(1) to require that the SPD of a pension plan include either a description of the plan's procedures governing qualified domestic relations order (QDRO) determinations or a statement indicating that participants and beneficiaries can obtain, without charge, a copy of such procedures from the plan administrator. Similarly, the Department is proposing to amend paragraph (j)(2) to require that the SPD of group health plans include either a description of the plan's procedures governing qualified medical child support order (QMCSO) determinations or a statement indicating that participants and beneficiaries can obtain, without charge, a copy of such procedures from the plan.[8] If an SPD contains a description of the procedures governing QDRO determinations, in the case of a pension plan, or QMCSO determinations, in the case of a group health plan, the description should include information sufficient to enable prospective alternate payees and alternate recipients to exercise their rights. The Department believes that participants and beneficiaries should be aware that procedures exist for making such determinations and that the most appropriate vehicle for communicating information about the procedures is through the SPD.

3. § 2520.102–3(l)—Plan Terminations and Authority To Eliminate Benefits

Paragraph (l) of § 2520.102–3 requires pension and welfare benefit plan administrators to include in their SPDs a statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture or suspension of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits required by the SPD regulations. In 1984, the Department issued ERISA Technical Release 84–1 setting forth the Department's view that a plan termination is a circumstance which may result in the denial or loss of benefits that a participant or beneficiary might otherwise reasonably expect to receive under a plan such that plan administrators, pursuant to § 2520.102–2 and § 2520.102-3(l), must include in their SPD information concerning the provisions of the plan which relate to the termination of the plan.

It is the Department's view that paragraph (l) currently requires the disclosure of information concerning the circumstances under which the plan can be amended to reduce or eliminate benefits. To eliminate uncertainty, however, the Department is proposing to amend paragraph (l) in order to incorporate the principles of Technical Release 84–1 in the SPD content regulation, as well as clarify the application of those principles to the plan amendments. These changes serve to codify the principles of Technical Release 84–1, thereby, providing more effective notice to plan administrators, participants and beneficiaries, and others regarding the information required to be included in the SPD.[9]

Specifically, the Department proposes to add to the end of paragraph (l) the requirement that plan administrators include the following: (1) A summary of any plan provisions governing the authority of the plan sponsor or others to terminate the plan or eliminate, in whole or in part, benefits under the plan and the circumstances, if any, under which the plan may be terminated and under which benefits under the plan may be amended or eliminated; (2) a summary of any plan provisions governing the benefits, rights and obligations of participants and beneficiaries under the plan on termination of the plan or amendment or elimination of benefits under the plan, including in the case of an employee pension benefit plan, a summary of any provisions relating to the accrual and the vesting of pension benefits under the plan upon termination of the plan; and (3) a summary of any plan provisions governing the allocation and disposition of assets of the plan upon termination of the plan.

The Department notes that, in accordance with the general SPD format requirements of § 2520.102–2(b), any description of an exception, limitations, reductions or other restrictions—which, in the Department's view includes plan amendment and termination provisions—must not be minimized, rendered obscure, or otherwise made to appear unimportant.

4. § 2520.102–3(m)—PBGC Coverage

Under § 2520.102–3(m)(2), plans with benefits insured under Title IV are required to indicate that fact in their SPD along with a summary of the pension benefit guaranty provisions of Title IV and a statement indicating that further information on the provisions can be obtained from the plan administrator or the Pension Benefit Guaranty Corporation (PBGC). An SPD is deemed to meet the requirements of paragraph (m)(2) if it includes the model

[8] The Department notes that the procedures governing qualified domestic relations order determinations under ERISA § 206(d)(3) and the procedures governing qualified medical child support order determinations under ERISA § 609 would constitute an instrument under which a plan is operated for purposes of ERISA § 104(b)(4), and, thereby, would be required to be furnished to participants and beneficiaries upon request. A failure or refusal to furnish a copy of such instrument in response to a request from a participant or beneficiary (including prospective alternate payees and alternate recipients), therefore, may subject the administrator to a penalty of up to $110 a day from the date of such failure or refusal (See ERISA § 502(c)(1)).

[9] At least one federal court has interpreted the Department's regulations as not requiring administrators of ERISA plans to disclose in their SPDs that the plans are subject to amendment or termination. *See Sprague* v. **GENERAL MOTORS CORP.,** 133 F.3d 388 (6th Cir. 1997), *cert. denied,* 66 U.S.L.W. 3779 (1998).

statement set forth in paragraph (m)(3). The Department is proposing to amend the model statement contained in paragraph (m)(3), in accordance with changes provided by the PBGC, to more accurately reflect the benefits guaranteed under Title IV, as well as update the information relating to the PBGC.

5. § 2520.102–3(o)—''Cutback'' Provisions/COBRA

Paragraph (o) of § 2520.102–3 requires that certain pension plans electing use of the ''cutback'' rule of Internal Revenue Code Revenue Ruling 76–378 include information concerning the application of such election in the SPD. The Department understands that the referenced ''cutback'' rule has little, if any, current application. Accordingly, the Department is proposing to amend paragraph (o) to eliminate the discussion of the ''cutback'' rule.

The Department is further proposing to address in a new paragraph (o) the requirement that participants and beneficiaries in group health plans subject to the continuation coverage provisions of COBRA be provided information concerning their rights and obligations under those provisions. It is the view of the Department that the SPD of group health plans, within the meaning of section 607(1), subject to the continuation coverage provisions of COBRA, must describe the rights and responsibilities of participants and other ''qualified beneficiaries'' (as defined in ERISA section 607(3)) under such provisions. ERISA section 606(a)(1) also requires that group health plans, within the meaning of section 607(1) of ERISA, provide, at the time of commencement of coverage under the plan, a notice to each covered employee and his or her spouse informing them of their rights under the COBRA continuation coverage provisions. It is the view of the Department that the disclosure obligation under section 606(a)(1) will be satisfied by furnishing to the covered employee and spouse, at the time of commencement of coverage, an SPD that includes the required COBRA continuation coverage description.[10]

Specifically, paragraph (o), as amended, would require group health plans subject to the COBRA continuation coverage provisions to describe the rights and obligations of participants and beneficiaries with respect to continuation coverage, providing, among other things, information concerning qualifying events, premiums, notice and election requirements and procedures, and duration of coverage.

6. § 2520.102–3(q)—Identity of Funding Medium/Interim Amendment

On April 8, 1997, the Department published an amendment to paragraph (q) of § 2520.102–3 , implementing statutory changes to SPD disclosure requirements enacted as part of the Health Insurance Portability and Accountability Act of 1996.[11] This amendment is intended to ensure that SPDs clearly inform participants and beneficiaries about the role of insurance issuers with respect to their group health plan, particularly in those cases where the plan is self-funded and an insurer is serving as a contract administrator or claim payer, rather than an insurer. Although this notice of proposed rulemaking does not propose any change to paragraph (q), the Department intends to publish one consolidated final rule covering the proposals published in this document and the portions of the April 1997 interim rule that address SPD content requirements.

7. § 2520.102–3(t)—Statement of ERISA Rights

Under paragraph (t) of § 2520.102–3(t), the requirement to furnish participants and beneficiaries with the statement of ERISA rights described in section 104(c) of the Act is satisfied by providing the model statement set forth in paragraph (t)(2) or a statement prepared by the plan containing the information in the model statement. The Department is proposing to amend paragraph (t)(2) to improve and update the model statement. Specifically, the Department is proposing to amend the model statement to incorporate references to participant rights under the COBRA continuation coverage and the portability provisions of Parts 6 and 7, respectively, of ERISA, added to ERISA since the publication of the statement of ERISA rights in 1977. The Department also is proposing to extend to all employee benefit plans the model statement changes applicable to group health plans as a result of amendments enacted as part of the Health Insurance Portability and Accountability Act of 1996. In general, these changes to the statement of ERISA rights resulted in the addition of a sentence directing participants and beneficiaries who have questions about the statement of rights or their rights under ERISA to the nearest office of the Pension and Welfare Benefits Administration, U.S. Department of Labor, or the Division of Technical Assistance and Inquiries, Pension and Welfare Benefits Administration, in Washington, D.C.[12] The Department believes the information included in the revised statement will benefit participants and beneficiaries of both pension and welfare plans generally, as well as group health plans. Other changes to the statement include: modifying the reference of ''up to $100 a day'' to ''up to $110 a day'', reflecting the fact the civil monetary amount under ERISA section 502(c)(1) has been increased to take inflation into account, as required by the Debt Collection Improvement Act of 1996,[13] clarifications to the language discussing the types of documents participants and beneficiaries have the right to examine and receive copies upon request, and the addition of a sentence indicating that issues involving the qualified status of domestic relations orders and medical child support orders may be pursued in Federal court.

8. § 2520.102–3(u)—Newborns' and Mothers' Health Protection Act Disclosure

On April 8, 1997, the Department published, in the **Federal Register** (62 FR 16979) an interim rule setting forth information required to be disclosed in the SPD concerning the provisions of the Newborns' and Mothers' Health Protection Act of 1996 (NMHPA). The Department, in response to concerns about the adequacy of the information currently required to be disclosed pursuant to paragraph (u) of § 2520.102–3, is publishing in the ''rules and regulations'' section of today's **Federal Register** an interim rule expanding the information required to be disclosed in the SPD concerning the NMHPA provisions.

D. Effective Dates

The Department is proposing to make the amendments contained herein effective 60 days after publication of the final rule in the **Federal Register**. In general, the Department believes that the information delineated in paragraphs (j)(3), applicable to group health plans, and (l) of § 2520.102–3 is currently required to be disclosed under the current disclosure framework of ERISA. Accordingly, the Department views the proposed addition of the new

[10] The Department has taken the position that, where a spouse's last known address is the same as the covered employee's, a single mailing of the required COBRA disclosure addressed to both the employee and spouse will constitute good faith compliance with the general COBRA disclosure requirement. See ERISA Technical Release No. 86–2.

[11] 62 FR 16979, April 8, 1997.

[12] 62 FR 16979, April 8, 1997.

[13] *See* 62 FR 40696.

paragraph (j)(3) and the amendment of paragraph (l) as clarifications of existing law, rather than new disclosure requirements. Other amendments proposed herein may result in new disclosure obligations. With regard to these amendments, the Department is proposing to require plans to comply with the new requirements no later than the earlier of: (1) the date on which the first summary of material modification (or updated SPD) is required to be furnished participants and beneficiaries following the effective date of the amendments or (2) the first day of the second plan year beginning after the effective date of the final rule.

E. Request for Comments

The Department invites interested persons to submit written comments on the amendments contained herein. Comments (preferably three copies) should be submitted to: the Office of Regulations and Interpretations, Room N–5669, Pension and Welfare Benefits Administration, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington D.C. 20210, Attention: Proposed SPD Content Regulations. Comments must be submitted no later than November 9, 1998. All submissions will be open to public inspection in the Public Disclosure Room, Pension and Welfare Benefits Administration, Room N–5638, 200 Constitution Avenue, N.W., Washington, D.C.

Economic Analysis Under Executive Order 12866

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

Pursuant to the terms of the Executive Order, it has been determined that this action is consistent with the President's priorities with respect to ensuring that all participants in group health plans receive understandable information about their plans, as described in the Commission's Consumer Bill of Rights and Responsibilities. To avoid underestimating of the burdens attributable to this regulation, and as more fully explained below, the Department used assumptions designed to result in cost estimates that represent the maximum potential impact of the proposal. This regulatory action, as a result, is being treated as having an economic effect exceeding $100 million in the year 2000. Therefore, this notice is ''significant'' and subject to OMB review under Sections 3(f)(1) and 3(f)(4) of the Executive Order.

Therefore, consistent with the Executive Order, the Department has undertaken to assess the costs and benefits of this regulatory action. The Department's assessment, and the analysis underlying that assessment, is detailed following the discussions of the Regulatory Flexibility Act and the Paperwork Reduction Act.

Although the requirements of the proposal are generally clarifications of rather than additions to the requirements of the existing regulation, it is believed that the variety of clarifications in the proposal will cause many plan administrators to reevaluate and revise existing SPDs. For purposes of this analysis, it has been assumed that all plans will add to or otherwise modify the content of their SPDs and distribute them to participants by the end of calendar year 2000 as a result of this proposal. Expenses associated with the preparation and distribution of these additions and revisions substantially constitute the estimated cost of the proposal.

The Department estimates the cost of the revisions implemented by this proposal to be $37 million in 1999, $176 million in 2000, falling to $15 million in 2001, and thereafter increasing or decreasing only in proportion to participation. The peak costs in 2000 reflect the preparation of 535,000 different SPDs describing 2.4 million pension and welfare plans and the distribution of those SPDs to 107 million participants. As noted above, the Department believes that these estimates are conservatively high.[14]

The proposed regulation will assist plan administrators to meet their statutory disclosure obligations. The proposed regulation will also assure that participants have better access to more complete information on their benefit plans. Such information is important to participants' ability to understand and secure their rights under their plans. Better information will also enable participants to derive more value from their benefit plans, and will lead both participants and plan sponsors to make more economically efficient decisions regarding benefit plans. This enhanced value and efficiency from better information, along with the clarified guidance to plan administrators, constitute the benefits of the regulation.

There is wide-spread agreement that the market for health care can be improved if purchasers, consumers, and patients are provided with better information. In an analysis of the Consumer Bill of Rights conducted for the Commission, The Lewin Group [15] notes that there is currently considerable information being collected which is not routinely passed on to consumers. For instance, information reported through a private-accreditation survey or collected by a large purchaser may not be available to individuals to help them make decisions. The proposed SPD regulations would clarify the requirement that certain types of information, such as provider network composition and utilization review procedures, be provided in the SPD.

According to Lewin, the collection and dissemination of this type of information will foster value-based purchasing. The information disclosure requirements contained in the revised SPD regulations will also assist employees in choosing health plan options that best meet their needs. According to Lewin, such empowerment ''may lead to increased satisfaction'' and may ''improve consumer confidence in the health care system.''

Lewin and others assert that information disclosure will aid in the development of an efficient, competitive market. While some have argued that the lack of ''perfect'' information will hamper the usefulness of information to consumers, there is strong evidence

[14] In fact, many plans already provide much of this information to participants and beneficiaries in SPDs and other materials. For example, many managed care organizations routinely disclose information to enrollees either as a condition of private accreditation or in response to plan sponsors, government program requirements, and other competitive pressures. Also, approximately 27% of plans are already known to amend and reissue their SPDs each year to account for routine changes in plan terms.

[15] *Consumer Bill of Rights and Responsibilities Cost and Benefits: Information Disclosure and External Appeals,* The Lewin Group, November 15, 1997.

from other markets (e.g., the securities and investment industry) that indicates basic information disclosure requirements such as the one contained in the revised SPD regulation will help to improve the quality of information available to consumers over time.

Equally important, information disclosure under the proposed SPD regulation, if combined with additional disclosures pertaining to plan and provider performance, and with other health system reforms that promote efficient, competitive choices in the health care market, could yield redoubled benefits. Lewin points out that such reformed systems, as exemplified by CalPERS and other examples of privately sponsored ''managed competition,'' have successfully reduced health care inflation, producing savings that dwarf the cost of this proposed SPD regulation and other pro-competitive reforms.

The Department believes, therefore, that the benefits of this proposed regulation will substantially outweigh its costs. The disclosures it describes are a component of evolving legislative, regulatory, and voluntary private reforms that together are already improving health care market efficiency.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and which are likely to have a significant economic impact on a substantial number of small entities. If an agency determines that a proposed rule is likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires that the agency present an initial regulatory flexibility analysis at the time of the publication of the notice of proposed rulemaking describing the impact of the rule on small entities, and seeking public comment on such impact. Small entities include small businesses, organizations, and governmental jurisdictions.

For purposes of analysis under the RFA, PWBA proposes to continue to consider a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for pension plans which cover fewer than 100 participants. Under section 104(a)(3), the Secretary may also provide for simplified annual reporting and disclosure if the statutory requirements of part 1 of Title I of ERISA would otherwise be inappropriate for welfare benefit plans. Pursuant to the authority of section 104(a)(3), the Department has previously issued at §§ 2520.104–20, 2520.104–21, 2520.104–41, 2520.104–46 and 2520.104b–10 certain simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans, including unfunded or insured welfare plans covering fewer than 100 participants and which satisfy certain other requirements.

Further, while some large employers may have small plans, in general, most small plans are maintained by small employers. Thus, PWBA believes that assessing the impact of this proposed rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business which is based on size standards promulgated by the Small Business Administration (SBA) (13 CFR 121.201) pursuant to the Small Business Act (5 U.S.C. 631 *et seq.*). PWBA therefore requests comments on the appropriateness of the size standard used in evaluating the impact of this proposed rule on small entities.

On this basis, however, PWBA has preliminarily determined that this rule will not have a significant economic impact on a substantial number of small entities. In support of this determination, and in an effort to provide a sound basis for this conclusion, PWBA has considered the elements of an initial regulatory flexibility analysis in the discussion which follows.

This regulation applies to all small employee benefit plans covered by ERISA. Employee benefit plans with fewer than 100 participants include 629,000 pension plans, 2.6 million health plans, and 3.4 million non-health welfare plans (mainly life and disability insurance plans).

The proposed regulation amends the Department's existing SPD regulation, which implements ERISA's statutory SPD requirements. Both ERISA and the existing regulation require plans to provide SPDs that include certain information and adhere to certain formats to participants according to statutory schedules. The compliance requirements assumed for purposes of this proposed regulation consist of revising SPDs consistent with the proposed regulation's requirements and distributing them to participants consistent with the proposed regulation's assumed effective date.

The Department believes that revising an SPD requires a combination of professional and clerical skills. Professional skills pertaining to employee benefits law and plan design and administration are needed to draft language for inclusion in an SPD, while clerical skills are needed to type, assemble and format SPD materials. Distributing SPDs requires clerical skills to reproduce the materials and to mail or electronically transmit materials to participants.

The Department estimates that the cost to small plans of complying with the proposed regulation will amount to $16 million in 1999, $42 million in 2000, and $3 million in 2001 and subsequent years, changing thereafter only in proportion to plan participation.

The peak year cost of $42 million in 2000 consists of $13 million to prepare 460,000 unique SPDs describing 2.3 million plans, and $29 million to distribute these SPDs to 23 million participants. These costs amount to $18 per affected small plan and $1.81 per affected small plan participant. By contrast, the total cost to large plans in 2000 is estimated at $134 million, or $1,803 per affected large plan and $1.61 per affected large plan participant.

The costs are modest in large part because the features of the large majority of small health and other welfare plans are chosen from a finite menu of products offered by insurers and HMOs. The insurers and HMOs prepare the large majority of SPD material, describing their small plan products, and provide that material to their small plan customers. Thus, the cost of preparing a relatively small number of unique SPDs is spread thinly over a far larger number of small plans.

The basis of these estimates is explained below, following the discussion of the Paperwork Reduction Act.

Paperwork Reduction Act

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and

the impact of collection requirements on respondents can be properly assessed.

Currently, the Pension and Welfare Benefits Administration is soliciting comments concerning the proposed revision of the information collection request (ICR) included in the Proposed Amendments to Summary Plan Description Regulations. A copy of the existing ICR may be obtained by contacting the office listed in the addressee section of this notice. This proposal would modify the existing ICR, which is also revised pursuant to the Interim Rule Amending Summary Plan Description Regulation (Interim Rule),[16] also published in today's **Federal Register**.

The Department has submitted a copy of the proposed information collection, as modified by the Interim Rule Amending Summary Plan Description, to OMB in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department has requested emergency clearance for that portion of the ICR which is changed by the Interim Rule, specifically, the SPD disclosure provision concerning hospital lengths of stay in connection with childbirth for a mother or newborn child. The Department and OMB are particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, D.C. 20503; Attention: Desk Officer for the Pension and Welfare Benefits Administration. Although comments may be submitted through November 9, 1998, OMB requests that comments be received within 30 days of publication of the Notice of Proposed Rulemaking to ensure their consideration.

ADDRESSES (PRA 95): Gerald B. Lindrew, Office of Policy and Research, U.S. Department of Labor, Pension and Welfare Benefits Administration, 200 Constitution Avenue, NW, Room N–5647, Washington, D.C. 20210. Telephone: (202) 219–4782; Fax: (202) 219–4745. These are not toll-free numbers.

I. Background

Pursuant to ERISA section 101(a)(1), the administrator of an employee benefit plan is required to furnish a Summary Plan Description (SPD) to each participant covered under the plan and each beneficiary who is receiving benefits under the plan. The SPD is required to be written in a manner calculated to be understood by the average plan participant, and must be sufficiently comprehensive to apprise the plan's participants and beneficiaries of their rights and obligations under the plan. To the extent that there is a material modification in the terms of the plan or a change in the information required to be included in the SPD, ERISA requires that the administrator furnish participants covered under the plan and beneficiaries receiving benefits with a summary of such changes.

ERISA section 102(b) describes the types of information specifically required to be included in the SPD. The Department has previously issued guidance concerning the required contents of summary plan descriptions in regulations at 29 CFR 2520.102–3.

II. Current Actions

As described in this preamble, the proposed revisions to § 2520.102–3 would modify the required contents of summary plan descriptions in a number of ways that may be expected to affect the nature and burden of the information collection under PRA 95. The proposal includes amendments to §§ 2520.102–3(j) and (s) and § 2520.102–5 that are designed to implement with respect to ERISA covered group health plans the Commission's recommendations as incorporated in the Consumer Bill of Rights. Specifically, the proposal provides that group health plans will not be deemed to have satisfied content requirements unless they have provided understandable information in their SPDs concerning any cost-sharing provisions, including premiums, deductibles, coinsurance, and copayment amounts for which the participant or beneficiary will be responsible; any annual or lifetime caps or other limits on benefits under the plan; the extent to which preventive services are covered under the plan; whether, and under what circumstances, existing and new drugs are covered under the plan; whether, and under what circumstances, coverage is provided for medical tests, devices and procedures; provisions governing the use of network providers, the composition of the provider network and whether, and under what circumstances, coverage is provided for out-of-network services; any conditions or limits on the selection of primary care providers or providers of speciality medical care; any conditions or limits applicable to obtaining emergency medical care; and any provisions requiring preauthorizations or utilization review as a condition to obtaining a benefit or service under the plan.

In the Department's view, these proposed changes clarify existing rules in light of changes in group health plan practices in recent years. Although the Department believes that most ERISA covered group health plans currently provide this information, many plan sponsors may take the opportunity to address ambiguities and update their SPDs following adoption of final amendments. Because the number of plans that fully comply with the clarifications set forth in the proposal is unknown, a conservatively high assumption as to the number of plans that will consider SPD revisions necessary has been made for purposes of this analysis.

For purposes of this analysis, it is estimated that the Consumer Bill of Rights disclosures, including the proposal with respect to disclosure of procedures governing claims for benefits, will require approximately 17 additional hours of preparation time for group health plans with over 100 participants and for the estimated 8,600 small group products utilized by approximately 2.6 million group health plans with fewer than 100 participants. It is also estimated that the additional time necessary to ensure that this material is included in the mailings that are otherwise necessary will add approximately an additional minute to the time spent in accumulating and mailing information to participants, and an additional $0.50 in materials and mailing costs. These incremental increases have been incorporated in both the preparation and distribution burden estimates.

[16] The Interim Rule modifies the required content to group health plan SPDs to clarify the applicability under the Newborns' and Mothers' Health Protection Act of minimum hospital lengths of stay for mothers and newborn children following childbirth.

Additional burden has also been computed in connection with the proposed elimination of the limited exemption with respect to SPDs of welfare plans providing benefits through a federally qualified HMO. Under the proposal to eliminate the limited exemption, disclosures of rules for eligibility and participation, circumstances which may result in loss of or disqualification from eligibility, plan funding medium, and claim and appeal procedures, would be required to be included in an SPD, and all other generally applicable provisions as to SPD style, content, and format would apply for SPDs provided to participants and beneficiaries covered by a federally qualified HMO. Based upon available information as to the number of federally qualified HMOs and the numbers of ERISA covered plans offering HMOs, it has been estimated that approximately 153,000 plans will be required to implement SPD content and format changes that will eliminate the existing 50 percent savings in preparation time for these plans.

Clarifications proposed with respect to procedures governing qualified domestic relations orders (QDRO) and qualified medical child support orders (QMCSO), disclosures concerning plan type, updating of the model statement of ERISA rights, disclosures with respect to the circumstances under which the plan can be amended to reduce or eliminate benefits and plan's provisions and participants' rights and obligations upon termination of the plan, and disclosure of participant rights under the Consolidated Omnibus Budget Reconciliation Act (COBRA) have also been taken into account in estimating the total burden expected to be imposed by the proposed changes to SPD content requirements. While the clarifications with respect to QDRO, QMCSO, amendment/termination provision disclosures, and COBRA disclosures are expected to result in some increase in preparation burden, as a group these clarifications are estimated to represent only a slight burden increase.

As to the distribution burden for SPDs that the Department is assuming for purposes of this analysis will be revised as a result of the proposed content requirements, ERISA section 104(b)(1) and regulations published at §§ 2520.104b–2 and 2520.104b–3, describe the obligation of an employee benefit plan administrator to furnish the SPD and the summary of material modifications (SMM) to participants and the time frames within which this distribution is required to be made. In general, a plan administrator must furnish an updated SPD every five years, unless no amendments have been made to the plan within that five-year period. In that event, the updated SPD must be furnished only every ten years. A plan administrator is also required to furnish each participant with a summary description of any material change made to the plan or SPD content during a period prior to preparation of an updated SPD, which may be appended to the participant's SPD.

For purposes of this analysis under PRA 95, the Department has treated the change to the NMHPA disclosure provision included in the Interim Rule as a change implemented by this proposal. This is because the distribution burden associated with revision of an SPD represents the greater portion of total burden, and it is assumed that plans will prepare and distribute revised disclosure materials in the most cost-efficient way, which would likely involve incorporating as many changes as possible in a single distribution.

Because this single ICR is currently the subject of two separate regulatory actions, the Department believes that a meaningful burden analysis should contemplate as a whole the nature and timing of all changes to existing Summary Plan Descriptions that might be made by plan administrators due to regulatory amendments. As a result, the burden analysis included in this proposal addresses the impact of the Interim Rule in addition to the changes that might be made as a result of this proposal. The methodology and assumptions used in estimating burden are applicable to both the proposed amendments and the interim final regulation. Both the total burden of the ICR and the burden specifically associated with this proposal are displayed in this notice.

As a consequence of SPD distribution requirements, and the fact that the majority of plans have either chosen to or have been required to make material changes to plan provisions in recent years, about 27 percent of plans routinely update and distribute an SPD each year. The methodology for estimating burden associated with the proposed clarifications to the SPD content rules must, therefore, integrate the recurring baseline burden with the projected incremental preparation and distribution burden in the years in which those increases are expected to be incurred.

For purposes of the burden estimates for these proposed clarifications, and based on the expected applicability dates for the clarifications, it has been assumed that no incremental increases will be experienced by plans until 1999.[17] It is further assumed that plans that would ordinarily be preparing and distributing SPDs in 1999 will elect to incorporate the revisions in SPD content they consider necessary as a result of the proposal as part of the updated SPDs they would otherwise be preparing. Finally, it has been assumed for this analysis that all plans will have prepared and distributed a revised SPD by the end of the year 2000, whether or not an SPD would ordinarily have been prepared during this period. It is anticipated that these proposed rules will be applicable generally by the end of 2000.

The recurring baseline burden is estimated on the basis of several assumptions. It is assumed that routine preparation of an updated SPD requires 4 hours. Routine distribution is estimated to require two minutes and $0.50 in materials and postage per participant. It is further assumed that 100 percent of small, fully insured welfare plans and, on average, 75 percent of other plans hire outside parties to prepare and distribute the SPD. These preparation services are assumed to be purchased at a rate of $50 per hour, which is a blend of both professional and clerical rates. The clerical rate incorporated in estimates of distribution burden is $11 per hour. The assumptions with respect to the rates of use of purchased services affect the distribution of burden between hours and costs for purposes of PRA 95.

Type of Review: Revision of a currently approved collection.

Agency: Pension and Welfare Benefits Administration.

Title: Regulations Regarding Required Contents of Summary Plan Descriptions for Employee Benefit Plans (Proposed Amendments to Summary Plan Description Regulations).

OMB Number: 1210–0039.

Affected Public: Individuals or households; Business or other for-profit; Not-for-profit institutions.

Frequency of Response: On occasion.

Total Respondents: 2,027,293 (1998); 888,393 (1999); 2,641,818 (2000).

Total Responses: 83,332,000 (1998); 52,115,000 (1999); 160,703,000 (2000).

Estimated Burden Hours: 842,586 (1998); 815,850 total, 815,029 for existing ICR and Proposed Amendments (1999); 2,101,624 total, 2,099,405 for

[17] It should be noted that while no incremental increase is incorporated in 1998 estimates for the proposed clarifications of the SPD content regulations, the 1998 burden hour and cost estimates do include increments previously computed in connection with amendments to the disclosure provisions of ERISA enacted as part of HIPAA, the NMHPA, and the interim disclosure rules issued on April 8, 1997 (62 FR 16979).

existing ICR and Proposed Amendments (2000).

Estimated Annual Costs (Operating and Maintenance): $95,265,366 (1998); $101,465,306 total, $101,255,399 for existing ICR and Proposed Amendments (1999); $218,395,191 total, $218,118,450 for existing ICR and Proposed Amendments (2000).

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the information collection request; they will also become a matter of public record.

Analysis of Cost

The Department performed a comprehensive, unified analysis to estimate the costs of the proposed regulation for purposes of compliance with Executive Order 12866, the Regulatory Flexibility Act, and the Paperwork Reduction Act. The methods and results of that analysis are summarized below.

To estimate the cost of the proposed regulation, it was necessary to estimate the number of SPDs in the ERISA-covered employee benefit plan universe, the frequency with which those SPDs are updated and distributed, and the number of participants to whom they must be distributed. It was also necessary to make certain assumptions about the cost of preparing and distributing SPDs, in particular the cost of bringing SPDs into compliance with the proposed regulation's provisions. The Department separately estimated the baseline cost of its current SPD regulation and the incremental cost of the proposed regulation. As noted earlier, the incremental cost is based on a conservative assumption, which results in an estimate of the maximum impact the proposal may be expected to have.

The Department estimated the number of SPDs and the number of participants based on Form 5500 Series data and other sources. Each pension plan is estimated to maintain one SPD. With respect to welfare plans, the number of SPDs is estimated to be smaller than the number of plans because small plans typically buy standard products from vendors.

In addition, individual plan sponsors often sponsor more than one plan and/or offer more then one kind of benefit (such as retirement and disability) under a single plan, but describe two or more of their plans or benefit types in a single SPD. The Department assumes that pension plans and health plans (or products) maintain separate SPDs, but that non-health welfare benefits are either offered together with health benefits as part of unified welfare plans or are maintained as separate plans but described along with accompanying health plans in a single combined SPD.

Pursuant to these assumptions, the Department estimates that the universe includes a total of 690,000 unique pension plan SPDs and 51,000 unique health plan SPDs, which together encompass all other welfare plan SPDs.

With respect to the frequency of updating and distributing SPDs, plans filing the Form 5500 indicate whether they amended and distributed their SPDs in the preceding year. About 27 percent of plans so report. This figure is interpreted to represent a baseline level of SPD modification and distribution activity. In an exception to this general assumption, the Department estimates that a larger proportion of health plans have modified or will modify their SPDs in 1998 in order to comply with the Department's interim final regulation implementing the disclosure provisions of HIPAA and the NMHPA.

The Department generally assumes that preparing a revised SPD requires four hours of combined professional and clerical time, priced at $50 per hour (a blended professional and clerical rate). In connection with the interim final regulation implementing the disclosure provisions of HIPAA and the NMHPA, the Department assumed a burden of one hour at $50. The time required was assumed to be less than for a typical SPD revision because HIPAA requires only that certain brief and specific disclosures be added to SPDs or provided in SMMs. The Department assumes that distributing an SPD consumes two minutes of clerical labor at $11 per hour, plus $0.50 for materials and mailing or electronic dissemination. This amounts to $0.87 per SPD distributed.

The Department estimates the baseline cost to prepare and distribute SPDs under the current regulation at $113 million in 1998, falling to $86 million in 1999, and thereafter growing in tandem with plan participation to reach $89 million in 2001. The higher cost in 1998 reflects HIPAA requirements that health plans revise and distribute their SPDs or prepare and distribute SMMs by the end of that year. Focusing on 1999, a more typical baseline year, the $86 million total cost includes $41 million to prepare 206,000 unique SPDs, and $45 million to distribute copies to 52 million participants.

The Department separately estimated the cost of revisions to SPDs that plan administrators may undertake to address ambiguities and update their SPDs following adoption of final amendments of the SPD content requirements. This cost is separate from the baseline cost attributable to normal SPD revisions, such as those made pursuant to plan amendments. Plans preparing SPDs solely to comply with the clarifications of the proposed regulation would incur only the costs attributable to those revisions deemed necessary to comply with the clarifications, while plans simultaneously revising their SPDs for other reasons would incur this additional cost plus the baseline unit cost.

With respect to pension plans, the Department assumes that preparing an SPD to comply with the proposal requires 30 minutes of combined professional and clerical labor, at a blended rate of $50 per hour. The time and expense associated with distributing each SPD is assumed to be unchanged from the baseline.

To estimate the per-unit cost to prepare revised health plan SPDs, the Department drew on two studies of the cost to health plans to comply with the Consumer Bill of Rights, one by The Lewin Group for the President's Commission, and one by Coopers and Lybrand for the Kaiser Family Foundation.[18] Excerpting and adjusting these studies' estimates to reflect proposed regulation's provisions, the Department essentially adopted the midpoint of these two studies' findings. With the addition of the small burden attributable to other provisions, the cost to prepare a health plan SPD to bring it into conformity with the clarifications of the proposed regulation amounts to approximately 18 hours at $50 per hour.

The Department assumed that the cost to distribute a health plan SPD will rise, consuming an additional one minute of clerical time at $11 per hour and an additional $0.50 for materials and mailing or electronic distribution, for a total for $1.55 per SPD.

The Department estimates the added cost attributable to this proposed regulation to be $37 million in 1999 and $176 million in 2000, falling to $15 million in 2001 and subsequent years, growing only in proportion to plan participation. The peak costs in 2000 reflect $41 million to prepare 535,000 different SPDs describing 2.4 million pension and welfare plans, and $135 million to distribute those SPDs to 107 million participants.

[18] *Estimated Costs of Selected Consumer Protection Proposals—A Cost Analysis of the President's Advisory Commission's Consumer Bill of Rights and Responsibilities and the Patient Access to Responsible Care Act,* Coopers & Lybrand, LLP for the Kaiser Family Foundation, April, 1998.

Combining this added cost with the baseline cost attributable to the current regulation, the total cost to prepare and distribute SPDs under the proposed regulation amounts to $123 million in 1999, $264 million in 2000, and $104 million in 2001 and beyond. The peak costs in 2000 include $82 million to prepare 597,000 SPDs describing 2.6 million plans, and $182 million to distribute those SPDs to 161 million participants.

The baseline, additional, and total costs associated with this proposed SPD regulation are summarized in the table below.

COST OF THE PROPOSED SPD REGULATION

[$ millions]

Year	Baseline	Additional	Total
1998*	$113	$0	$113
1999	86	37	123
2000	88	176	264
2001	89	15	104

* Includes the cost of certain SPD revisions necessitated by HIPAA.

Plans that are assumed for purposes of this analysis to prepare and distribute SPDs in 2000 for the sole purpose of complying with the proposed regulation would have the option of complying by preparing and distributing SMMs instead. The content of such SMMs would essentially duplicate the content that would otherwise be added to or substituted into SPDs. Plans presumably would elect to prepare and distribute SMMs only if doing so lessened their overall cost to comply. Therefore, as a means to comply with the proposed regulation, preparing and distributing SMMs should be no more costly than revising and distributing SPDs. The Department's estimates of the costs to revise and distribute SPDs in response to this proposed regulation can therefore be interpreted to account for the likelihood that some plans will elect to prepare and distribute SMMs instead.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), as well as Executive Order 12875, this proposed rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, but does include mandates which may impose an annual burden of $100 million or more on the private sector. The basis for this statement is described in the analysis of costs for purposes of Executive Order 12866 and the Regulatory Flexibility Act.

Small Business Regulatory Enforcement Fairness Act

The rule proposed in this action is subject to the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) (SBREFA) and is a major rule under SBREFA. The rule, if finalized, will be transmitted to Congress and the Comptroller General for review.

Statutory Authority

These regulations are proposed pursuant to authority contained in section 505 of ERISA (Pub. L. 93–406, 88 Stat. 894, 29 U.S.C. 1135) and sections 104(b) of ERISA, as amended, and under Secretary of Labor's Order No. 1–87, 52 FR 13139, April 21, 1987.

List of Subjects in 29 CFR Part 2520

Employee benefit plans, Employee Retirement Income Security Act, Group health plans, Pension plans, Welfare benefit plans.

For the reasons set forth above, Part 2520 of Title 29 of the Code of Federal Regulations is amended as follows:

PART 2520—[AMENDED]

1. The authority for Part 2520 continues to read as follows:

Authority: Secs. 101, 102, 103, 104, 105, 109, 110, 111(b)(2), 111(c), and 505, Pub. L. 93–406, 88 Stat. 840–52 and 894 (29 U.S.C. 1021–1025, 1029–31, and 1135); Secretary of Labor's Order No. 27–74, 13–76, 1–87, and Labor Management Services Administration Order 2–6.

2. Section 2520.102–3 is amended by revising paragraphs (d), (j), (l), (m)(3), (o), (S), and (t)(2) to read as follows:

§ 2520.102–3 Contents of summary plan description.

* * * * *

(d) The type of pension or welfare plan, e.g., for pension plans—defined benefit, money purchase, profit sharing, ERISA section 404(c) plans, etc., and for welfare plans—group health plans, disability, pre-paid legal services, etc.,

* * * * *

(j) The plan's requirements respecting eligibility for participation and for benefits. The summary plan description shall describe the plan's provisions relating to eligibility to participate in the plan and the information identified in paragraphs (j)(1), (2) and (3), as appropriate.

(1) For employee pension benefit plans, it shall also include a statement describing the plan's normal retirement age, as that term is defined in sec. 3(24) of the Act, and a statement describing any other conditions which must be met before a participant will be eligible to receive benefits. Such plan benefits shall be described or summarized. In addition, the summary plan description shall include a description of the procedures governing qualified domestic relations order (QDRO) determinations or a statement indicating that participants and beneficiaries can obtain, without charge, a copy of such procedures from the plan administrator.

(2) For employee welfare benefit plans, it shall also include a statement of the conditions pertaining to eligibility to receive benefits, and a description or summary of the benefits. In the case of a welfare plan providing extensive schedules of benefits (a group health plan, for example) only a general description of such benefits is required if reference is made to detailed schedules of benefits which are available, without cost to any participant or beneficiary who so requests. In addition, the summary plan description shall include a description of the procedures governing qualified medical child support order (QMCSO) determinations or a statement indicating that participants and beneficiaries can obtain, without charge, a copy of such procedures from the plan administrator.

(3) For employee welfare benefit plans that are group health plans, as defined in section 733(a)(1) of the Act, the summary plan description shall include a description of: any cost-sharing provisions, including premiums, deductibles, coinsurance, and copayment amounts for which the participant or beneficiary will be responsible; any annual or lifetime caps or other limits on benefits under the plan; the extent to which preventive

services are covered under the plan; whether, and under what circumstances, existing and new drugs are covered under the plan; whether, and under what circumstances, coverage is provided for medical tests, devices and procedures; provisions governing the use of network providers, the composition of the provider network and whether, and under what circumstances, coverage is provided for out-of-network services; any conditions or limits on the selection of primary care providers or providers of speciality medical care; any conditions or limits applicable to obtaining emergency medical care; and any provisions requiring preauthorizations or utilization review as a condition to obtaining a benefit or service under the plan. In the case of plans with provider networks, the listing of providers may be furnished as a separate document, provided that the summary plan description contains a general description of the provider network and indicates that provider lists are furnished automatically, without charge, as a separate document.

* * * * *

(l) For both pension and welfare benefit plans, a statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture or suspension of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits required by paragraphs (j) and (k) of this section. In addition to other required information, plans must include a summary of any plan provisions governing the authority of the plan sponsors or others to terminate the plan or amend or eliminate benefits under the plan and the circumstances, if any, under which the plan may be terminated or benefits may be amended or eliminated; a summary of any plan provisions governing the benefits, rights and obligations of participants and beneficiaries under the plan on termination of the plan or amendment or elimination of benefits under the plan, including, in the case of an employee pension benefit plan, a summary of any provisions relating to the accrual and the vesting of pension benefits under the plan upon termination; and a summary of any plan provisions governing the allocation and disposition of assets of the plan upon termination. Such summaries shall be disclosed in accordance with the requirements under 29 CFR 2520.102–2(b).

(m) * * *

(3) A summary plan description will be deemed to comply with paragraph (m)(2) of this section if it includes the following statement:

Your pension benefits under this plan are insured by the Pension Benefit Guaranty Corporation (PBGC), a federal insurance agency. If the plan terminates (ends) without enough money to pay all benefits, the PBGC will step in to pay pension benefits. Most people receive all of the pension benefits they would have received under their plan, but some people may lose certain benefits.

The PBGC guarantee generally covers: (1) normal and early retirement benefits; (2) disability benefits if you become disabled before the plan terminates; and (3) certain benefits for your survivors.

The PBGC guarantee generally does not cover: (1) Benefits greater than the maximum guaranteed amount set by law for the year in which the plan terminates; (2) some or all of benefit increases and new benefits based on plan provisions that have been in place for fewer than 5 years at the time the plan terminates; (3) benefits that are not vested because you have not worked long enough for the company; (4) benefits for which you have not met all of the requirements at the time the plan terminates; (5) certain early retirement payments (such as supplemental benefits that stop when you become eligible for Social Security) that result in an early retirement monthly benefit greater than your monthly benefit at the plan's normal retirement age; and (6) non-pension benefits, such as health insurance, life insurance, certain death benefits, vacation pay, and severance pay.

Even if certain of your benefits are not guaranteed, you still may receive some of those benefits from the PBGC depending on how much money your plan has and on how much the PBGC collects from employers.

For more information about the PBGC and the benefits it guarantees, ask your plan administrator or contact the PBGC's Technical Assistance Division, 1200 K Street N.W., Suite 930, Washington, D.C. 20005–4026 or call 202–326–4000 (not a toll-free number). TTY/TDD users may call the federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4000. Additional information about the PBGC's pension insurance program is available through the PBGC's website on the Internet at http://www.pbgc.gov

* * * * *

(o) In the case of a group health plan, within the meaning of section 607(1), subject to the continuation coverage provisions of Part 6 of Title I of ERISA, a description of the rights and obligations of participants and beneficiaries with respect to continuation coverage, including, among other things, information concerning qualifying events, premiums, notice and election requirements and procedures, and duration of coverage.

* * * * *

(s) The procedures governing claims for benefits (including procedures for obtaining preauthorizations, approvals, or utilization review decisions in the case of group health plan services or benefits, filing claim forms, notifications of benefit determinations, and review of denied claims in the case of any plan), applicable time limits, and remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 503 of Title I of the Act). The plan's claims procedures may be furnished as a separate document that accompanies the plan's SPD provided that the document satisfies the style and format requirements of § 2520.102–2, and, provided further, that the summary plan description contains a statement that the plan's claims procedures are furnished, without charge, as a separate document.

(t) * * *

(2) A summary plan description will be deemed to comply with the requirements of paragraph (t)(1) of the section if it includes the following statement; items of information which are not applicable to a particular plan should be deleted:

As a participant in (name of plan) you are entitled to certain rights and protections under the Employee Retirement Income Security Act of 1974 (ERISA). ERISA provides that all plan participants shall be entitled to:

Examine, without charge, at the plan administrator's office and at other specified locations, such as worksites and union halls, all documents governing the plan, including insurance contracts and collective bargaining agreements, and a copy of the latest annual report (Form 5500 Series) filed by the plan with the U.S. Department of Labor.

Obtain, upon written request to the plan administrator, copies of documents governing the operation of the plan, including insurance contracts and collective bargaining agreements, and copies of the latest annual report (Form 5500 Series) and updated summary plan description. The administrator may make a reasonable charge for the copies.

Receive a summary of the plan's annual financial report. The plan administrator is required by law to furnish each participant with a copy of this summary annual report.

Obtain a statement telling you whether you have a right to receive a pension at normal retirement age (age * * *) and if so, what your benefits would be at normal retirement age if you stop working under the plan now. If you do not have a right to a pension, the statement will tell you how many more years you have to work to get a right to a pension. This statement must be requested in writing and is not required to be given more than once every twelve (12) months. The plan must provide the statement free of charge.

Continue health care coverage for yourself, spouse or dependents if there is a loss of coverage under the plan as a result of a qualifying event. You or your dependents may have to pay for such coverage. Review

this summary plan description and the documents governing the plan on the rules governing your COBRA continuation coverage rights.

Reduction or elimination of exclusionary periods of coverage for preexisting conditions under your group health plan, if you have creditable coverage from another plan. You should be provided a certificate of creditable coverage, free of charge, from your group health plan or health insurance issuer when you lose coverage under the plan, when you become entitled to elect COBRA continuation coverage, when your COBRA continuation coverage ceases, if you request it before losing coverage, or if you request it up to 24 months after losing coverage. Without evidence of creditable coverage, you may be subject to a preexisting condition exclusion for 12 months (18 months for late enrollees) after your enrollment date in your coverage.

In addition to creating rights for plan participants ERISA imposes duties upon the people who are responsible for the operation of the employee benefit plan. The people who operate your plan, called ''fiduciaries'' of the plan, have a duty to do so prudently and in the interest of you and other plan participants and beneficiaries. No one, including your employer, your union, or any other person, may fire you or otherwise discriminate against you in any way to prevent you from obtaining a (pension, welfare) benefit or exercising your rights under ERISA. If your claim for a (pension, welfare) benefit is denied in whole or in part you must receive a written explanation of the reason for the denial. You have the right to have the plan review and reconsider your claim. Under ERISA, there are steps you can take to enforce the above rights. For instance, if you request materials from the plan and do not receive them within 30 days, you may file suit in a Federal court. In such a case, the court may require the plan administrator to provide the materials and pay you up to $110 a day until you receive the materials, unless the materials were not sent because of reasons beyond the control of the administrator. If you have a claim for benefits which is denied or ignored, in whole or in part, you may file suit in a state or Federal court. In addition, if you disagree with the plan's decision or lack thereof concerning the qualified status of a domestic relations order or a medical child support order, you may file suit in Federal court. If it should happen that plan fiduciaries misuse the plan's money, or if you are discriminated against for asserting your rights, you may seek assistance from the U.S. Department of Labor, or you may file suit in a Federal court. The court will decide who should pay court costs and legal fees. If you are successful the court may order the person you have sued to pay these costs and fees. If you lose, the court may order you to pay these costs and fees, for example, if it finds your claim is frivolous.

If you have any questions about your plan, you should contact the plan administrator. If you have any questions about this statement or about your rights under ERISA, you should contact the nearest office of the Pension and Welfare Benefits Administration, U.S. Department of Labor, listed in your telephone directory or the Division of Technical Assistance and Inquiries, Pension and Welfare Benefits Administration, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210.

* * * * *

§ 2520.102–5 [Removed]

3. Section 2520.102–5 is removed.

Signed at Washington, DC, this 28th day of August, 1998.

Meredith Miller,

Deputy Assistant Secretary for Policy, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 98–24067 Filed 9–4–98; 8:45 am]

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Wednesday
September 9, 1998

Part IV

Department of Labor

Pension and Welfare Benefits Administration

29 CFR Part 2560

Employee Retirement Income Security Act of 1974; Rules and Regulations for Administration and Enforcement; Claims Procedure; Proposed Rule

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

29 CFR Part 2560

RIN 1210—AA61

Employee Retirement Income Security Act of 1974; Rules and Regulations for Administration and Enforcement; Claims Procedure

AGENCY: Pension and Welfare Benefits Administration, Department of Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains a proposed regulation revising the minimum requirements for benefit claims procedures of employee benefit plans covered by Title I of the Employee Retirement Income Security Act of 1974 (ERISA or the Act). This proposed regulation would establish new standards for the processing of group health disability, pension, and other employee benefit plan claims filed by participants and beneficiaries. In the case of group health plans, as well as certain plans providing disability benefits, the new standards are intended to ensure more timely benefit determinations, improved access to information on which a benefit determination is made, and greater assurance that participants and beneficiaries will be afforded a full and fair review of denied claims. If adopted as final, the proposed regulation would affect participants and beneficiaries of employee benefit plans, plan fiduciaries, and others who assist in the provision of plan benefits, such as third-party benefits administrators and health service providers or health maintenance organizations that provide benefits to participants and beneficiaries of employee benefit plans.

DATES: Written comments (preferably at least three copies) concerning the proposed regulation must be received by the Department of Labor on or before November 9, 1998.

ADDRESSES: Interested persons are invited to submit written comments (preferably at least three copies) concerning the proposed rule to: Pension and Welfare Benefits Administration, Office of Regulations and Interpretations, Room N–5669, 200 Constitution Ave., N.W., Washington, DC 20210. Attention: ''Benefit Claims Regulation.''

All submissions to the Department of Labor will be open to public inspection and copying in the Public Documents Room, Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–5638, 200 Constitution Avenue, NW, Washington, DC from 8:30 a.m. to 5:30 p.m.

FOR FURTHER INFORMATION CONTACT: Jeffrey J. Turner or Susan G. Lahne, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210, telephone (202) 219–7461. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

Section 503 of Employee Retirement Income Security Act of 1974 (ERISA or the Act), 29 U.S.C. 1133, provides that every employee benefit plan shall, in accordance with regulations of the Department of Labor (the Department) ''provide adequate notice in writing to every participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant'' and shall also ''afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.'' In 1977, the Department published a regulation pursuant to section 503, establishing minimum requirements for benefit claims procedures for employee benefit plans. That regulation, 29 CFR 2560.503–1 (the current regulation) sets procedural standards that apply without distinction to all employee benefit plans covered under Title I of ERISA, including employee pension benefit plans and employee welfare benefit plans. The current regulation was drafted in response to concerns that predated enactment of ERISA, in particular the lack of any uniform procedural standards for benefit claims resolution and participants' lack of information about claims procedures generally. In order to establish procedural safeguards for individuals promised benefits under ERISA, the current regulation set minimum requirements for the procedures that plans must provide regarding the treatment of benefit claims. The standards applicable under the current regulation are described below.

On September 8, 1997, the Department published in the **Federal Register** (62 FR 47262) a Request for Information (RFI), seeking the views of the public on the advisability of amending the current regulation. The reasons prompting issuance of the RFI were set forth in that document. The RFI articulated a series of questions focusing principally on standards and practices for benefit claim procedures utilized with respect to group health plans, although the RFI also requested information and views on claims procedures more generally. The Department received over 90 comment letters in response to the RFI. The comment letters came from several distinct groups of interested parties: (1) Plan sponsors (employers) and law firms or interest groups representing plan sponsors; (2) plan administrators and benefit provider networks (including insurance companies, ''managed care'' (health benefit provider) networks, third-party administrators, and claim processors) and interest groups representing those parties; (3) benefit claimants and law firms or interest groups representing benefit claimants; and (4) health services providers and interest groups representing them. The National Association of Insurance Commissioners (NAIC) also submitted a comment referring to the model acts that the NAIC has developed for use by states in setting procedural standards for claims and grievances under ''managed care'' arrangements. These comments presented a broad spectrum of opinion on the diverse questions posed in the RFI. The majority of commenters representing employers and benefit administrators argued that no change in the current regulation is needed, especially as the procedural practices currently in use provide substantial protections to claimants in excess of what the current regulation requires. The majority of commenters representing claimants, however, strongly supported procedural reforms that would bring the current regulation more in line with the standards set by the NAIC model acts and by the Health Care Financing Administration (HCFA) with respect to Medicare beneficiaries who receive managed care benefits. The Department believes that the responses represent a fair cross-section of public opinion on the issues of whether and in what fashion the current regulation should be amended. The Department has carefully considered these comments in formulating the proposal. The substance of the comments is summarized below as relevant to specific changes contained in the proposed regulation.

The Department's review of the comments received in response to the RFI has led the Department to conclude that the procedural standards set in the current regulation are no longer adequate to protect participants and

beneficiaries of employee benefit plans. As the Department noted in the RFI, dramatic changes in the more than 20 years since adoption of the current regulation have altered the systems by which employee benefits are delivered and the nature of the benefits themselves. Technological advances have revolutionized systems of communications. Business relationships, including those involving pension and welfare benefits, have become more complex and sophisticated.

The most dramatic changes have occurred in the health industry. The current regulation was adopted at a time when access to health services was controlled principally by the independent judgments of physicians and other health care professionals. Disputes over health benefits almost always took place after the health care services had been provided and concerned whether the group health plan or the individual patient would pay retrospectively for the care, not whether the plan would prospectively authorize coverage for the patient's care. Since that time, the growth of managed care delivery systems [1] has largely transformed the relationship between patient and health care provider. Employee benefit plans that provide health benefits are no longer predominantly indemnity-based, and even those that are indemnity-based generally require preapproval for expensive procedures or hospital admissions. While managed care delivery systems have been instrumental in controlling the rapid rise of health care costs and may, in many instances, provide valuable services in monitoring the quality of health care services provided within a managed care delivery system, they also heighten concern about the fair and expeditious resolution of benefit disputes. Within managed care delivery systems, the separation between medical decision making and decisions on coverage under health benefit plans has been substantially eroded, particularly since a decision to deny coverage for an expensive medical procedure in effect denies that procedure to a participant who cannot afford to pay for the procedure on their own. Access to health care services may be directly ''managed'' (and thereby controlled) by those in charge of coverage under a health benefit plan, rather than by the health care professional with whom an individual consults.

In addition to considering the comments received in response to the RFI, the Department also took into account, in developing this proposal, the recommendations of the President's Advisory Commission on Consumer Protection and Quality in the Health Care Industry (the Commission), as set forth in its November 20, 1997, report entitled ''Consumer Bill of Rights and Responsibilities'' (the Consumer Bill of Rights). Among other things, the Consumer Bill of Rights articulates the right of all ''health care consumers'' (including participants and beneficiaries in group health plans covered by ERISA) ''to a fair and efficient process for resolving differences with their health plans, health care providers, and the institutions that serve them, including a rigorous system of internal review and an independent system of external review.'' In its Report to the President on February 19, 1998 (the February 19 Report), the Department set forth specific steps that it had determined it could take towards implementation of the Commission's recommendations. The following describes the specific commitments with regard to health benefits that the Department made in the February 19 Report, together with references to the specific provisions in the proposal that carry out those commitments:

- The Report indicated that the Department could make clear that a denial includes adverse determinations under a utilization review program; denials of access to (or reimbursement for) medical services; denials of access to (or reimbursement for) specialists; and any decision that a service, treatment, drug, or other benefit is not medically necessary. The proposal provides at paragraph (j)(2) for a definition of ''adverse benefit determination'' that specifically includes these denials.[2]
- The Report indicated that the Department could require that benefit claims and appeals involving urgent care be processed within a time frame appropriate to the medical emergency, but not to exceed 72 hours. The proposal creates expedited time frames for ''claims involving urgent care'' at paragraphs (d)(2)(i) and (g)(2)(ii).
- With respect to non-urgent benefit claims, the Report indicated that the Department could require that the plan either decide the claim or notify the claimant that the claim is incomplete within 15 days of receipt of the claim; claimants would then be afforded not less than 45 days to provide any information that the plan has indicated is necessary to complete the claim; once the claim was complete, it would have to be decided within 15 days. The proposal so provides at paragraph (d)(2)(iii).
- The Report indicated that the Department could make clear that benefit denials must be accompanied by a clear statement of the claimant's right to appeal and of the appeal process. The proposal mandates this specific disclosure at paragraph (e)(1)(iv).
- The Report indicated that the Department could require that, if a non-urgent claim is denied in whole or in part, the claimant must be afforded at least 180 days to appeal the claim and a decision on the appealed claim must be made within 30 days of receipt of the appeal by the plan. The proposal establishes these requirements at paragraphs (f)(2)(i)(A) and (g)(2)(i).
- The Report indicated that the Department could require consultation with qualified medical professionals in deciding appeals involving medical judgments. The proposal imposes this obligation at paragraph (f)(2)(ii)(A).
- The Report indicated that the Department could require that appealed claims be reviewed *de novo* (that is, review may not be limited to information and documents considered in the initial claims denial) and be decided by a party other than the party who made the original claims determination. The proposal incorporates these requirements in paragraphs (f)(2)(i)(D) and (E).

Following the Department's submission of its February 19 Report, the President issued a memorandum dated February 20, 1998, directing the Secretary of Labor to ''propose regulations to strengthen the internal appeals process for all Employee Retirement Income Security Act (ERISA) health plans to ensure that decisions regarding urgent care are resolved within not more than 72 hours and generally resolved within 15 days for

[1] The term ''managed care delivery systems,'' as used here, is intended to include any measures taken by medical practitioners, groups of which medical practitioners are part, insurers, or group health plans to control costs by limiting access to medical services.

[2] The proposal adopts the concept of ''adverse benefit determination'' as a substitute for the less precise concept of ''denial'' under the current regulation. This term is defined to include not only refusals to provide or make payment (in whole or in part) for a benefit, but also any terminations or reductions in providing or paying benefits. The term also expressly includes any such refusal that results from the application of a utilization review directed at cost containment, such as the common current requirement in ''managed care'' and many fee-for-service health arrangements for ''pre-certification'' or ''pre-authorization'' of coverage, and any failure to cover an item of service for which benefits are otherwise available on the basis that the item is ''experimental,'' ''investigational,'' or ''not medically necessary or appropriate.'' Prop. Reg. § 2560.503–1(j)(2). The Department solicits comments on this definition.

non-urgent care.''[3] The proposal incorporates the ameliorative steps outlined in the Department's February 19 Report to the President and takes into account the President's directive. Consistent with the Department's commitment, the adoption of the amendments contained in the proposal will strengthen the internal claims and appeals process for all ERISA plans.

The proposal also builds upon the commitments made to the President, addressing several additional issues not dealt with in the February 19 Report. In particular, the proposal clarifies who is a ''claimant'' and when the time limits begin to apply to a claim. With respect to the concept of a ''claimant,'' the proposal explicitly provides that a claimant is the participant or beneficiary to whom the benefit may be due. The proposal also clarifies the right of claimants to have individuals act on their behalf by eliminating the requirement in the current regulation that claimant representatives be ''duly authorized.'' Prop. Reg. §§ 2560.503–1(a), (b)(5). In this respect, it is the Department's view that an individual's attending physician would generally be treated as a representative of the claimant. The proposal further clarifies that, whether or not a representative is acting for a claimant, notices must, at a minimum, be provided to the claimant. This clarification is provided to reduce any confusion that may result from providing notice only to a representative.

Because the proposal would replace the current regulation in its entirety, much of the proposed regulation is not limited to group health plans. Much of it changes the claim and appeal procedures of employee benefit plans generally, including pension plans, disability plans, and other benefit plans. (Apprenticeship plans are excluded from the proposed regulation, however.) The Department believes that the proposed changes that apply to non-health plans will be beneficial and that it is desirable, as appropriate, to have uniform claim and appeal procedures for different types of employee benefits. The Department solicits comments on the application of the changed claim and appeal procedures to non-health benefit plans.

It is the Department's view that the administrator of a plan has the responsibility to ensure that procedures consistent with section 503 and the Department's regulation are established and maintained. The plan can only act through its trustees, administrators, or others to whom specific responsibilities have been assigned by those trustees and administrators. The proposal therefore clarifies the plan administrator's responsibility with respect to each of the procedural steps delineated in the proposal. The Department understands, however, that plan administrators may contract with third-party administrators or others to carry out aspects of the plan administrator's responsibilities, and this proposal is not intended to preclude such contracts. While the plan administrator may designate another individual or entity to carry out the responsibilities assigned to it under the proposal, the plan administrator would remain responsible for ensuring the required responsibility is discharged in a manner consistent with the Act and regulations.

With respect to the application of time limits, the proposal clarifies that those limits begin to run at such time as a claim is first filed[4] with the plan or a party (including an insurance company or claims adjudicator) acting on behalf of the plan who has the authority to decide the claim. This clarification responds to comments suggesting that there is considerable uncertainty in the public view of the current regulation concerning the standards that should apply to third-party administrators and claims adjudicators hired by a plan to make benefit claims decisions. Many comments suggested that there is a prevalent view that the time limits do not apply to claims reviews conducted by a third party, such as an insurance company or claims adjudicator, that is hired by the plan to conduct an initial claims processing. The proposal articulates the Department's view of the current regulation on this issue and clarifies its application by eliminating the provisions in the current regulation that provide specific treatment for insured welfare or pension plans. *See* Reg. § 2560.503–1(c), (g)(2). It is the view of the Department that these provisions were included in the current regulation to make clear that plans could employ the services of insurance companies and other similar organizations as third-party administrators to make claims decisions, but not to imply that such plans are subject to different standards than other plans that do not employ the services of third-party administrators with respect to the obligations and duties of their administrators.[5] The Department considers that these provisions have become confusing in light of current practices and are no longer necessary to clarify what is permissible procedure.

The proposal also amplifies the provision in the current regulation prohibiting the use of procedures that unduly inhibit or hamper the initiation or processing of plan claims by adding specific examples of prohibited practices. *See* Reg. § 2560.503–1(b)(1)(iii); Prop. Reg. §§ 2560.503–1(b)(3), (b)(4). In this regard, the proposal retains the principle that any provision or practice that requires claimants to pay a fee or costs in order to make or appeal a claim would be considered unduly inhibiting. The proposal also makes clear that practices like the use of ''preauthorization'' requirements as a basis for denying a claim under circumstances in which obtaining the preauthorization is impossible, such as where the claimant is unconscious and in need of immediate medical care, but unable to secure the plan's authorization to obtain the necessary emergency services, are prohibited.

The proposal also clarifies the methods and means that are deemed appropriate for the plan administrator's delivery of the required notifications. The proposal provides that ''notice'' or ''notification'' under the proposal generally should be provided in a manner that satisfies the standards of 29 CFR 2520.104b–1(b) with reference to materials furnished or made available to individuals. Prop. Reg. § 2560.503–1(j)(3).[6] The proposal further specifies that the notices may be provided through electronic means that satisfy the standards of 29 CFR 2520.104b–1(c)(1)(i), (iii), and (iv). Those standards provide assurance that the claimant will know in advance that electronic means will be used for notification, that the

[3] The President further directed the Department to ''propose regulations that require ERISA health plans to ensure the information they provide to plan participants is consistent with the Patient Bill of Rights.'' The Department is publishing today in the **Federal Register** a proposal that would revise the Department's regulation at 29 CFR 2520.102–3 to accomplish, *inter alia,* this goal.

[4] Reference should be made to paragraph (d) of the current regulation for guidance on when a claim is deemed to have been filed.

[5] Whether a party with authority to make claims decisions is acting as a fiduciary depends on the extent to which the party ''exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of it assets, * * * or * * * has any discretionary authority or discretionary responsibility in the administration of such plan.'' ERISA § 3(21)(A).

[6] That regulation provides that plan administrators should use means ''reasonably calculated to ensure actual receipt,'' which include mailing to an address provided by the participant or beneficiary, personal delivery, and disclosure through electronic media provided certain specific standards for electronic distribution are met.

claimant will actually receive the notification, and that a paper copy of any electronically distributed notification will be provided upon request free of charge.

The changes to the minimum procedural standards applicable to claims decisions currently being proposed are intended to update the procedural standards generally applicable to all employee benefit plans and to provide specific, more tailored rules applicable to health care claims and disability claims.[7] It is the view of the Department that the proposed changes in minimum procedural standards for employee benefit plans would substantially improve the administration of employee benefit plans, provide benefit claimants with better understanding of their procedural rights, and ensure that benefit claims are expeditiously and fairly resolved.

This regulation is proposed to be effective 180 days after the date of adoption of a final rule. The Department proposes that the regulation would not be applicable to plans until the later of the effective date or the first day of the first plan year beginning after the effective date. A special applicability date for collectively bargained plans not subject to section 302(c)(5) of the Labor-Management Relations Act (29 U.S.C. 186(c)(5)) is also proposed.

The following discussion addresses other major procedural reforms adopted in the proposal.

1. New Time Frames for Decision-Making

The current regulation provides that all benefit claimants must be informed in writing ''within a reasonable period of time'' if a claim is partially or wholly denied. 29 CFR 2560.503–1(e)(1). The regulation defines any period in excess of 90 days as unreasonable for this purpose, unless ''special circumstances'' require an extension of time for processing, in which case an extension of an additional 90 days is available, provided the claimant is given notice describing the special circumstances prior to expiration of the original 90-day period.

The current regulation also provides that a plan may establish a limited period within which a claimant may seek review of a denial, but such period must be ''reasonable and related to the nature of the benefit which is the subject of the claim and to other attendant circumstances'' and may not be less than 60 days. 29 CFR 2560.503–1(g)(3). A decision on review must be made ''promptly,'' ''ordinarily'' not later than 60 days after request, unless ''special circumstances'' require an extension of time, in which case the decision must be made ''as soon as possible, but not later than 120 days after receipt.'' Special rules are provided for plans operated by committees or boards of trustees that regularly hold meetings at least quarterly. Such plans generally may decide reviews of denials by the date of the next scheduled meeting, unless the request is filed within 30 days preceding the next meeting, in which case the decision may be delayed until the next scheduled meeting. If ''special circumstances'' warrant further delay, the review decision may be delayed until the *third* scheduled meeting of the committee or board.

The proposed regulation retains the current time frames, with minor modifications, for claims under most pension plans and many welfare plans.[8] Prop. Reg. § 2560.503–1(d)(1), (g)(1). Claims involving group health benefits[9] would be governed by new, shorter time frames that are more appropriate to health care decisions. *Id.* at (d)(2), (g)(2). Disability benefit claims would also be subject to new, shorter time frames that, while not as short as the time limits imposed on health care decisions, would ensure more expeditious resolution of these types of claims. *Id.* at (d)(3), (g)(3). The Department solicits comments on the proposed shorter time frames pertinent to disability plans. For group health plans and for disability plans, the proposal also increases to 180 days the period of time during which plans must permit claimants under any plan to appeal an adverse benefit determination.[10] *Id.* at (f)(2)(i)(A). The Department solicits comments on the additional time for claimants to appeal disability determinations. For plans other than group health plans and disability plans, the proposal does not change the current 60 day period during which plans must permit claimants to appeal. The Department however is considering making the proposed 180-day period applicable to all plans. The Department solicits comments on whether the final regulation should provide that all plans must allow claimants at least 180 days to file an appeal from an adverse benefit determination.

With respect to group health claims, the proposal provides a time frame for deciding non-urgent health care benefit claims and a special expedited time frame for deciding health care claims involving urgent care. The proposal requires that notification of initial decisions on non-urgent health care benefit claims generally be provided by the plan administrator within a reasonable period, appropriate to the circumstances, taking into account any medical circumstances, but not later than 15 days after filing. If a claim that is filed is determined to be incomplete, however, for example because it does not contain sufficient factual information, the proposal requires the plan administrator to notify the claimant, within 5 days of receipt, of that fact and of the information necessary to complete the claim. The plan is then required to provide the claimant a period of not less than 45 days within which to provide the missing information. Notification of the decision on that claim would have to be provided within 15 days of the earlier of the date the claimant provides the additional information or the end of the additional period. With respect to decisions on review, the proposal requires plans to provide notifications of decisions on non-urgent health care claims not later than 30 days after receipt of the request for review. The

[7] The current regulation and this proposal pertain to procedures governing claims for benefits. The Department notes that section 206(d)(3) of the Act mandates certain plan procedures for determining the qualified status of domestic relations orders and administering qualified domestic relations orders. It is the view of the Department that issues pertaining to such domestic relations orders must be resolved pursuant to the procedures described in section 206(d)(3) of the Act and not the claims procedures governed by section 503 of the Act and the current regulation.

[8] Under the proposal, the current time frames would continue to apply to benefit determinations on pension benefit claims and welfare benefit claims other than those for group health and disability benefits. The proposal would modify those time frames, however, to require that plan administrators notify claimants, within 45 days of receipt, of any claim that is incomplete when filed and of the information necessary to complete the claim. A plan that provided notice that a claim was incomplete would be required to provide claimants a period of not less than 180 days within which to supplement the claim and would be required to resolve the claim within 45 days of the earlier of the date on which the claimant supplied the requested information or the end of the 180-day period. Prop. Reg. § 2560.503–1(d)(1).

[9] For purposes of the proposal, a ''group health plan'' is a plan within the meaning of section 733(a) of the Act. Prop. Reg. § 2560.503–1(j)(4).

[10] In this regard, the proposal responds to the numerous comments from claimants and their representatives that asserted that the current regulation's minimum standard of 60 days within which a claimant must be permitted to appeal a denial is inadequate. The Department believes, in light of these comments, that providing a longer minimum period of 180 days would ensure that claimants have an adequate period within which to consider whether appeal is warranted and to gather additional evidence to support their claims. The longer period would be unlikely, in the Department's view, to cause plans any additional costs or burdens. Comments are solicited on whether any additional costs or burdens would be imposed by this regulatory change.

Department solicits comment on this aspect of the proposed regulation.

The proposal does not provide for any extension of the time period for deciding non-urgent group health claims. The Department is concerned that providing for such an extension of time would create an opportunity for delay in resolving health care claims and could be subject to substantial abuse that could nullify the intended reform. The Department notes that nothing in the proposed regulation would preclude a claimant from agreeing to an extension of time sought by the plan, inasmuch as the claimant would be entitled, under the proposal, to decide whether to proceed to court in the event that the plan did not comply with the time limits mandated by the proposal.

In the case of group health plans and plans providing disability benefits, the Department is proposing to eliminate the special timing rules for appealed decisions by plans operated by committees or boards of trustees that regularly hold meetings on a quarterly basis. Under the current regulation, such plans are permitted to defer a decision on review until the meeting of the committee or board that immediately follows the plan's receipt of the request for review, unless the request for review is filed within 30 days preceding the date of such meeting, in which case the plan's review may be deferred until the second meeting following receipt of the claim. While elimination of the special rule may require changes in the operation of some group health and disability benefit plans, the Department believes that such changes are necessary and appropriate to ensure timely benefit determinations for participants and beneficiaries covered by such plans.

The proposal requires quicker resolution of health care claims involving urgent care. For purposes of the proposal, a ''claim involving urgent care'' is defined as any claim with respect to which the application of the non-urgent care time frames could seriously jeopardize the life or health of the claimant or the ability of the claimant to regain maximum function, or, in the judgment of a physician with knowledge of the claimant's condition, would subject the claimant to severe pain that cannot be adequately managed without the care or treatment that is the subject of the claim. Prop. Reg. § 2560.503–1(j)(1). The decision whether a claim involves urgent care would generally be made by an individual acting on behalf of the plan and applying the standard of a reasonable individual who is not a trained health professional; however, any claim that a physician with knowledge of a claimant's medical condition determines to be a claim involving urgent care would be treated as such for purposes of the proposal. Under the proposal, thus, only those claims for which the delay resulting from application of the non-urgent 15-day schedule would carry a risk to the claimant are required to be resolved under the expedited time frame.[11] The Department solicits comment on the proposed definition of a ''claim involving urgent care.''

Under the proposal, claims involving urgent care must be decided as soon as possible after receipt of the claim, taking into account the medical exigencies of the case, but not later than 72 hours after receipt.[12] Prop. Reg. § 2560.503–1(d)(2)(i). Appeals of adverse determinations on urgent care claims also would be required to be decided, and communicated to the claimant, as soon as possible, taking into account the medical exigencies of the case, but not later than 72 hours after receipt of the request for review. *Id.* at (g)(2)(ii).

The Department's view that these shorter time limits are necessary to ensure the timely resolution of group health claims is based in part on the comments received from interested parties in response to the RFI. The majority of commenters who spoke for health plan administrators and health plan sponsors asserted that their routine claims administration practices provide resolution of claims within periods far shorter than the 60 or 90 days referred to in the current regulation. The Department notes that several commenters representing plans indicated that health benefit claims are normally resolved within 5 to 7 days. The consensus of the comments appeared to be that health care claimants need prompt response to their benefit claims and that the health care delivery systems in place today are well-equipped to provide that response. The Department therefore believes that the proposed standards for determining when expedited handling of urgent care claims is necessary and for the timeliness of resolving such claims are both appropriate and feasible.

The proposal also adopts shorter, specific time limits for resolving disability claims. Prop. Reg. § 2560.503–1(d)(3), (g)(3). Under the proposal, those claims must be resolved initially within 30 days (with a further requirement that notification as to incomplete claims be made within 15 days), and appeals of adverse determinations on disability claims must be resolved within 45 days. This proposal is made in response to issues raised by commenters to questions in the RFI on timeliness of resolution of long-term disability claims. Most commenters representing claimants asserted that many disability plans take the maximum amount of time available under the current regulation to resolve disability claims, unnecessarily delaying decisions on benefit payments. Because many claimants are dependent upon these payments for general support, the Department believes that shorter periods for benefit determination are appropriate for these claims. The Department solicits comment on the shorter time limits to resolve disability claims.

2. New Disclosure Requirements

The proposal contains several new disclosure-type requirements that would be applicable to all plans. The Department solicits comment on the burden to plans of the new requirements for disclosure, including the effects on group health, pension, disability, and other benefit plans. First, the proposal reinforces the current requirement that a claims procedure will be considered ''reasonable'' only if it is described in the summary plan description (SPD) of the plan as required by 29 CFR 2520.102–3. Prop. Reg. § 2560.503–1(b)(2). The proposal clarifies that descriptions of all benefit claims procedures of the plan and the time limits applicable to the procedures must be disclosed as part of the SPD. The proposed regulation further clarifies that the plan's benefit claims procedures include all procedures for filing claim forms, providing notification of benefit determinations, reviewing denied claims, and, for group health plans, for obtaining preauthorizations, approvals, or utilization review decisions. It is the Department's intention in proposing this clarification to remove any uncertainty regarding whether

[11] It is anticipated that ''claims involving urgent care'' would largely involve claims for access to care, rather than claims respecting payment for care because, under the proposed definition, a claim would not involve urgent care unless failure to decide the claim on an expedited basis would create a risk to the claimant's health or cause unmanageable pain. This would not ordinarily be the case with claims where services have already been provided and only the question of payment remains unresolved.

[12] If the plan determines that an urgent care claim is incomplete, the plan administrator would be required under the proposal to notify the claimant of that fact, and of the missing information, within 24 hours of receipt of the claim, and the claimant would be permitted not less than 48 hours to provide the specified information. The decision on the claim would then be required to be provided to the claimant not later than 48 hours after the earlier of the plan's receipt of the specified information or the end of the additional period of time.

''managed care'' arrangements that involve pre-approval or pre-certification of eligibility for benefits are considered part of the plan's benefit claims procedures and therefore subject to disclosure. The Department considers this enhanced description of the mandated disclosure an important reform because of the apparent confusion about the treatment of such procedures demonstrated by the comments received in response to the RFI and because of the emphasis placed by the Commission on the need for increasing health consumers' awareness of the limits placed on benefit eligibility through such ''managed care'' measures.

The proposal also clarifies the current regulation's requirement that the written notification of an initial adverse benefit determination must include a reference to the plan provisions on which the determination is based. Prop. Reg. § 2560.503–1(e)(1)(ii). The proposal states that this reference must identify specifically any internal rules, guidelines, protocols, etc. that have been used by the initial decision-maker as a basis for denying the claim. The Department intends by this clarification to emphasize that such internal rules are ''instruments under which the plan is established or operated'' and, as such, cannot be concealed from claimants, who have a legitimate right to understand the rules that govern benefit claims decisions.[13]

Under the proposal, the notification is required to include a full description of the plan's review processes, including a statement of the claimant's right to bring a civil action under section 502(a) of the Act following an adverse determination on review. Prop. Reg. § 2560.503–1(e)(1)(iv). Many of the comments received from employers, plan representatives, and claimants alike requested that the disclosure be amplified to include fuller descriptions of the administrative review process and the possibility of court review. The comments indicate widespread misunderstanding among benefit claimants of their rights to appeal adverse benefit determinations, and this problem is confirmed by the Commission's findings. The Department agrees that claimants whose benefit claims are denied need to understand fully the basis for the denial and their avenues of appeal. While inclusion of a description of the benefit claims procedures in the SPD provides some basic level of information, claimants whose claims are denied have a more immediate need and will be provided more helpful guidance if this information is included directly in the notification of an adverse benefit determination. Better understanding by claimants of the plan's terms and the claimants' rights will, in the Department's view, serve to both expedite reviews and reduce unwarranted appeals.

Thirdly, the proposal clarifies the current regulation's requirement that claimants must be provided, upon receiving an adverse benefit determination, with access to ''pertinent documents.'' The comments received in response to the RFI support a need to clarify this requirement because they demonstrate substantial confusion about its scope. The proposal makes clear that claimants are entitled to review all documents, records, and information relevant to their claims for benefits, whether or not such documents, records, and information were in fact relied upon by the plan in making the adverse benefit determination. Prop. Reg. § 2560.503–1(f)(2)(i)(C). Such information would include internal rules, guidelines, protocols, and criteria under which the plan is operated and any documents or records that may be favorable to the claimant's position. In the Department's view, permitting the claimant access to relevant documents, records, and information would generally satisfy the claimant's need to understand the evidentiary basis for the decision and therefore to determine whether an appeal is justified and how such an appeal might best be pursued.

The proposal further provides claimants whose appeals on review are denied with access, upon request, to relevant documents, records, and information, to the extent not previously provided to the claimant. Prop. Reg. § 2560.503–1(h)(3). In particular, the proposal requires disclosure of any documents that were created or received during the review process, including, specifically, the reports and identities of any experts consulted by the plan during the review. In the view of the Department, allowing this further access would advance the same goals articulated above with respect to the request for review. In particular, claimants would be better equipped to determine whether to pursue their claims further by filing a civil action under section 502(a) of the Act.

The Department is concerned that claimants who have filed a civil action following an adverse benefit determination on review do not have sufficient access to information that will aid them in determining whether the plan and insurance issuer have acted fairly and consistently in denying their claims, in light of the plan's practices in deciding other claims that involve the same plan or contract language, the same diagnosis, and the same treatment. Such information may be important to claimants who file suit to recover benefits because courts have frequently held that, where plan fiduciaries have discretionary authority to determine eligibility for benefits, benefit claims decisions may be overturned only if the claimant demonstrates that the decision was unreasonable or arbitrary and capricious. *See, e.g., Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989). Although evidence regarding plan decisions on other, similar claims may be necessary to support a case of unreasonable or arbitrary and capricious treatment, it is not clear that courts would allow a claimant access to such evidence as part of the discovery process. *See, e.g., Chambers* v. *Family Health Plan Corp.*, 100 F. 3d 818, 821 (10th Cir. 1996) (review of benefit denial limited to evidence before plan at time of denial, although court of appeals noted that ''magistrate judge stated that if she had been able to conduct a de novo review of all the evidence, she would have found that [plan's] denial of coverage was erroneous''). As a result, the Department is considering adding to the final regulation a requirement that the plan administrator provide each claimant who receives an adverse benefit determination on review with respect to a health benefit claim with a statement that, in the event of litigation challenging the benefit determination, he or she will be entitled to receive, upon request, reasonable access to and copies of all documents and records relating to previous claims involving the same diagnosis and treatment that were decided by the plan within the five years prior to the adverse benefit determination. If the claim involved benefits that were provided through insurance, the health insurance issuer would also be subject to this disclosure requirement with respect to previous claims involving the same diagnosis and proposed treatment and the same plan or insurance contract language. The plan and issuer would be required to provide information on claims decided in the previous five years, up to a

[13] In Advisory Opinion 96–14A (July 31, 1996), the Department stated its opinion that ''usual and customary'' fee schedules used as a basis for determining the dollar amount that would be paid for health claims are ''instruments under which the plan is established or operated'' within the meaning of section 104(b) of the Act and therefore must be furnished to participants and beneficiaries upon written request. The Department emphasized that under ERISA participants and beneficiaries should have access to documents that directly affect their benefit entitlements. This principle takes on an enhanced importance when such documents are directly relevant to the denial of a specific benefit claim.

maximum of 50 of the most recent such claims, and the claims records would have to be redacted or otherwise screened as necessary to protect the privacy of the claimants involved in the previous claims.

The Department solicits comments on the advisability of the proposed policy. Furthermore, the Department recognizes that there may be other ways to address the problem described above, and is open to consideration of whether such additional disclosure is necessary or sufficiently beneficial to justify any burdens or cost it may impose on plans. The Department solicits comment on the contemplated requirement and, in particular, about the burden on group health plans of this provision, including whether there should be a charge for redacting the records or providing such copies, as well as how the charge should be determined.

3. New Notice Requirements

The proposal contains new notice requirements that are intended to ensure that participants and beneficiaries are afforded fair and timely consideration of their claims and appeals of those claims as mandated by section 503 of the Act. In every instance, the plan administrator is responsible for providing claimants with the required notification at each level of the claims process. While the plan administrator may designate another individual or entity to generate and deliver the notices to claimants, in the Department's view, it is the plan administrator's responsibility to ensure that the required notification is provided.

First, the proposal requires notification to participants and beneficiaries where the participant or beneficiary makes a request for benefits, but fails to follow the plan's claim filing procedures. Prop. Reg. § 2560.503–1(b)(6). In such circumstances, the plan would have to provide the participant or beneficiary, within 5 days (24 hours in the case of an urgent care request), with a notice explaining that the participant's or beneficiary's request does not constitute a claim because it fails to satisfy the plan's filing procedures. The notice would also have to describe those filing procedures. This requirement would ensure that no reasonable attempt to file a claim could be ignored by a plan for failure to meet some aspect of the filing process set up by the plan, but would also preserve the integrity of those procedures.[14]

Second, as mentioned above in connection with the proposed new time frames, the proposal imposes an obligation on plan administrators to inform claimants promptly of any claims that, while properly filed, are found to be incomplete. Prop. Reg. § 2560.503–1(d)(1), (2). For each type of plan subject to a specific time frame, the proposal establishes an earlier time at which notification of an incomplete claim must be given. The notice would include a description of the information necessary to complete the claim. The comments submitted in response to the RFI suggested that in many instances plans delay in informing claimants of obvious deficiencies in their claim filings until the end of the maximum time period for making a decision, resulting in successive periods of delay. It is the view of the Department therefore that specification of this additional procedural step would significantly reduce unnecessary delay in resolving claims by focusing early attention on the completeness of any filing. Moreover, because, as discussed below, appealed claims must be reviewed by a party different from the initial claims reviewer, the Department believes that a mechanism is necessary to enable and encourage initial claims reviewers to compile complete files on a claim prior to a determination. This will reduce the number of claims denials that are likely to be reversed on appeal and increase the number of correct initial decisions.

Third, the proposal requires notice to claimants in some instances in which health care benefits that are being provided over a period of time are subsequently terminated or reduced. The proposal provides that if a plan has granted a health care benefit that is to be provided over a period of time, whether for a specific time period or an unlimited period, and the plan later determines to reduce or terminate the benefit (before the end of a specified period for benefits of specific duration), the reduction or termination is deemed to be an adverse determination of a benefit claim.[15] Moreover, if the termination or reduction would create a situation meeting the proposal's definition of a ''claim involving urgent care,'' the plan administrator would be required to give notice of that decision at a time sufficiently in advance of the termination or reduction to provide the claimant with the opportunity to appeal before the termination or reduction takes effect.[16] Prop. Reg. § 2560.503–1(d)(2)(ii). The Department believes that, in circumstances where the denial of continuation of a benefit may create a health risk to the claimant, advance notice of the denial is necessary in order to ensure a timely full and fair review. Requiring advance resolution of any dispute over the denial of health benefits of a continuing nature, where serious harm to the claimant may be involved, will also reduce the possibility of unintended harm to the claimant.

4. New Standards of Review on Appeal

The proposal adopts new standards for what constitutes a full and fair appeal of an adverse benefit determination. In this respect, the proposal responds to comments that allege bias on the part of claims reviewers and a need for more independent decision-making. Under the current regulation, claimants whose claims have been denied must be provided an opportunity to request review and to submit issues and comments in writing. The proposal supplements these minimums by requiring that the review of an adverse benefit determination be conducted by an appropriate named fiduciary who is neither the party who made the initial adverse determination, nor the subordinate of such party; that the review not afford deference to the initial adverse benefit determination; and that the review take into account all comments, documents, records, and other information submitted by the claimant, without regard to whether such information was previously submitted or relied upon in the initial determination. Prop. Reg. § 2560.503–1(f)(2)(i)(D), (E). It is the Department's intention in making this proposal that a claimant be permitted upon appeal to raise, and have considered, additional issues and evidence beyond those presented at the initial determination.

With respect to adverse benefit determinations involving health care

[14] In this regard, the proposal eliminates the provision in the current regulation that deems a claim to be filed, with respect to a plan that does not have reasonable filing procedures, when it is brought to the attention of an appropriate person responsible for benefit claims decisions. This ''deeming'' provision is unnecessary and would be counterproductive in the context of the proposal because the proposal provides that, in any case in which a plan fails to provide reasonable procedures, a claimant is entitled to treat the procedures as having been exhausted and to immediately pursue the claim in court pursuant to section 502(a) of the Act. *See* Prop. Reg. § 2560.503–1(i).

[15] The proposal is not intended, however, to require settlor decisions to amend or terminate a plan to be treated as adverse benefit determinations, even if such decisions result in the termination or reduction of a benefit being provided over a period of time.

[16] The termination or reduction would have to cause a risk to the claimant's health of sufficient degree to make application of the standard time frames for deciding health care claims inappropriate. *See* Prop. Reg. § 2560.503–1(j)(1).

claims, the proposal requires that the review of any determination based on a medical judgment be conducted through consultation with a health care professional who is independent of any health care professional involved in the initial decision and who has appropriate training and experience in the field of medicine involved in the medical judgment.[17] Prop. Reg. § 2560.503–1(f)(2)(ii)(A). In addition, the proposal provides that any appeal of a claim involving urgent care must be conducted on an expedited basis in which the review may be requested orally or in writing and necessary information, including the decision on review, may be transmitted by telephone, facsimile, or other similarly expeditious means. Prop. Reg. § 2560.503–1(f)(ii)(C).

The Department believes that these minimum requirements are essential to affording participants and beneficiaries a full and fair review of their benefit claims. In the case of group health plans, the Department believes that the requirement to consult with an appropriately qualified health professional is consistent with the obligation of plan fiduciaries to discharge their duties ''with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.'' ERISA § 404(a)(1)(B). To the extent that the review of group health claims implicates medical judgments, a fiduciary would be constrained to consult an appropriate medical advisor to ensure that any such decisions comport with the standards of section 404(a)(1)(B) of the Act.

The comments indicate that, at least in some percentage of claims reviews, the same decision-maker (or a subordinate of such decision-maker) conducts both the initial processing of a claim and the review of a denial. The comments also assert instances in which decision-makers have refused to permit expansion of the evidentiary record on review or have ignored additional submissions in making decisions on review. The Department believes that the proposal would prevent these practices, consistent with the recommendations of the Commission, and would ensure full and fair review of adverse benefit determinations.

[17] Nothing in this proposal is intended to limit the extent to which a plan fiduciary may consult with others as appropriate under the circumstances in reaching a decision on appeal.

In proposing this regulation, one of the Department's primary concerns is to prevent unnecessary delays in resolving claims disputes, especially in situations where the dispute must be resolved before the plan will provide the requested benefit. The Department considers it essential that claimants be free to decide, after having completed the minimum number of administrative appeals necessary to allow for a full and fair review of the claim, whether to continue to pursue a claim through a plan's additional procedures, if any, or to file suit under section 502(a) of the Act. Thus, the proposed regulation provides that benefit claim procedures may not include more than one level of mandatory appeal and that plans are precluded from requiring claimants to submit to binding arbitration either subsequently or as part of that single level of appeal. In making this proposal, it is not the Department's intention to require plans to dismantle effective and fair claims procedures that they have already put in place. As a result, the Department is willing to consider whether procedures that require more than one appeal would be reasonable. The Department also notes that there is nothing in the proposal that would preclude a plan from establishing a second level review or appeal process following a determination on review in accordance with this regulation, or from offering to submit a determination to arbitration, provided that such review or arbitration is voluntary on the part of the claimant and does not otherwise serve to foreclose a claimant from pursuing his or her claim in court. The Department is particularly interested in receiving comments on whether limiting the number of appeals or precluding mandatory arbitration before filing suit is necessary or sufficiently beneficial to prevent delays or unfairness in making and reviewing benefit claims. The Department also solicits comments on the appropriate number of appeals at which such limit should be set.

5. Consequences of Failure to Establish and Follow Reasonable Claims Procedures

Many of the comments that the Department received in response to the RFI asserted that plans often fail to follow the minimum standards for procedural fairness set by the current regulation. The Department believes it is important to make clear that the claims procedure regulation prescribes the minimum standards for an administrative claims review process consistent with ERISA. Accordingly, a failure to provide the procedures mandated by the regulations effectively denies participants and beneficiaries access to the administrative review process mandated by the Act. It is the view of the Department that claimants should not be required to continue to pursue claims through an administrative process that fails to meet the minimum standards of the regulation. At a minimum, claimants denied access to the statutory administrative review process should be entitled to pursue claims under section 502(a) of the Act. In addition, such claimants should be entitled to a full and fair review of their claims in the forum in which they are first provided adequate procedural safeguards. The proposal therefore incorporates a new paragraph (i) that would specify more clearly the consequences that the Department believes flow from a failure to provide procedures that meet the minimum regulatory standards. Under the proposed paragraph (i), a claimant who attempts to pursue a claim is deemed to have exhausted the administrative remedies available to him or her if the plan fails to provide or to abide by procedures that meet the regulatory minimum standards required under the proposal. Such a claimant is entitled to pursue any remedies he or she may have under section 502(a) of the Act on the basis that the plan has failed to provide a reasonable claims procedure that would yield a full and fair decision on the merits of the claim. Prop. Reg. § 2560.503–1(i). It is the Department's view that, in such a case, any decision that may have been made by the plan with respect to the claim is not entitled to the deference that would be accorded to a decision based upon a full and fair review that comports with the requirements of section 503 of the Act.

In addition to the above, the failure to establish or maintain claims procedures in accordance with regulations issued by the Secretary pursuant to section 503 of ERISA, would be a violation of section 503 which could give rise to a cause of action under sections 502(a)(3) or (a)(5) of ERISA for appropriate equitable relief. It is also possible, depending on the circumstances, that an action or omission by a plan fiduciary which does not comply with the requirements of such regulations would also constitute a fiduciary breach in violation of ERISA sections 404(a)(1)(A), (B), or (D). Such potential consequences are beyond the scope of this rulemaking.

6. Other Changes

The Department is proposing to eliminate two provisions in the current regulation that provide special treatment for two classes of plans. First, the proposal eliminates the special

treatment afforded by paragraph (b)(2) of the current regulation for plans established and maintained pursuant to a collective bargaining agreement (other than plans subject to section 302(c)(5) of the Labor Management Relations Act of 1947, 29 U.S.C. 186 (c)(5)) (non-Taft-Hartley plans). The current regulation provides that such a collectively-bargained plan is deemed to satisfy the standards for claims filing procedures, procedures for initial decisions, and procedures for review if the collective bargaining agreement incorporates (by reference or directly) provisions for the filing and initial disposition of claims and for a grievance and arbitration procedure to which denied claims are subject.[18] Second, the Department is proposing to eliminate the special treatment afforded under paragraph (j) of the current regulation to certain plans that provide benefits through membership in a qualified health maintenance organization (HMO), as defined in section 1310(d) of the Public Health Service Act, 42 U.S.C. 300(e)-9(d) (the PHSA). The current regulation provides that such plans are deemed to satisfy the standards of the regulation with respect to such benefits if the claims procedures provided by the qualified health maintenance organization meet the requirements of section 1301 of the PHSA. Under the proposal, both of these types of plan would be fully subject to the new procedural standards applicable based on the type of benefit provided.

This approach is in accord with the majority of the comments received in response to the RFI. Several of the questions posed by the RFI focused on whether there is a perceived need for greater uniformity in the procedural standards applicable to employee benefit plans. A majority of the comments asserted that such a need exists and argued that the lack of uniformity, and specifically the special rules applicable to group health plans offering HMO-type benefits, has led to confusion among benefit claimants as their rights and their avenues of appeal. On this basis, the Department has determined to propose eliminating the special treatments provided under the current regulation. Elimination of these special provisions will help ensure that participants and beneficiaries will be provided timely benefit determinations and full and fair reviews of denied claims without regard to whether they participate in an HMO-type or collectively bargained plan. The Department solicits comment on these changes for greater uniformity in the standards for benefit plans.

[18] Alternatively, a non-Taft-Hartley collectively-bargained plan may comply with the initial filing and decision standards of the current regulation and be exempted from complying with its review standards if its collective bargaining agreement incorporates the grievance and arbitration procedure as the avenue for denied claims.

B. Economic Analysis Under Executive Order 12866

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

Pursuant to the terms of the Executive Order, it has been determined that this action is consistent with the President's priorities as articulated in the President's February 20, 1998, directive to the Secretary of Labor to issue proposed rules implementing the recommendations of the President's Advisory Commission on Consumer Protection and Quality in the Health Care Industry. In addition, the Department estimates that this regulatory action will have an economic effect exceeding $100 million in the year 2000. Therefore, this notice is ''significant'' and subject to OMB review under sections 3(f)(1) and 3(f)(4) of the Executive Order.

Therefore, consistent with the Executive Order, the Department has undertaken to assess the costs and benefits of this regulatory action. The Department's assessment, and the analysis underlying that assessment, is detailed below.

The Department projects that the proposed regulation will prompt all ERISA-covered employee benefit plans to revise their claims and appeals procedures by the end of calendar year 2000. The new procedures will better ensure the timeliness, fairness, and accuracy of claims and appeals determinations, but will also be somewhat more costly to administer. Therefore, the proposed regulation is expected both to yield benefits and to impose costs. Expected improvements in the timeliness, accuracy, and fairness of determinations will be of benefit to plan participants and beneficiaries. Costs will be incurred in connection with the implementation and administration of improved claims and appeals procedures.

The Department estimates the proposed regulation will add $30 million to annual claims and appeals processing costs in 2000, reflecting the processing of 806 million claims. This amounts to $0.04 per claim or $0.09 per participant. This ongoing cost will change each year as claims volume increases or decreases or as the actual proportions of claims by type (*e.g.*, pension, health, long-term disability) differ from the proportions assumed for purposes of this analysis. The proposed regulation will also impose a one-time start-up cost of $125 million in 2000 to design and implement the new procedures. This amounts to $0.35 per participant.

The data, assumptions, and analysis underlying this assessment of costs are summarized following the discussions of the Regulatory Flexibility Act and the Paperwork Reduction Act.

These estimates are for administrative costs associated with processing claims and appeals. A separate question involves how many claims determinations might be changed as a result of this proposed regulation, and what the costs and benefits of those changed determinations might be.

The Department was unable to develop quantitative estimates of changes in determinations or of the associated costs and benefits, and solicits comments on the expected nature and magnitude of these changes, costs, and benefits. What follows is a qualitative discussion of these issues.

The Department expects that the proposed regulation will reduce the number of inaccurate claims determinations, especially following appeal. It will also accelerate any health and disability claims determinations that would otherwise have been delayed longer than permitted under the proposed regulation. The regulation is further likely to influence some claimants' decisions as to whether and how to appeal denied claims. Finally, if the proposed regulation increases the likelihood that some accurate and previously undisputed claim denials will now be appealed, and if the

expected cost of such appeals exceeds the cost of paying these claims, plans might elect to pay rather than deny them. The costs and benefits of each of these effects is considered below.

The proposed regulation's provisions requiring fuller review of denied claims aim to reduce the number of inaccurate claims determinations. In particular, the Department expects that some claims which otherwise would have been denied on appeal, but which in fact should have been paid under plans' terms, will now be paid. The Department has no data on how many denied appeals should have been approved. Economic theory suggests, however, that all else equal, improving adherence to private voluntary agreements such as plans' terms tends to increase economic efficiency by reducing losses of social welfare. Therefore, the Department believes that the benefits associated with this effect of the proposed regulation are likely to outweigh the costs. The Department also notes that plans' obligations to pay covered benefits arise from plans' terms and from ERISA's statutory provisions and are not modified by this proposed regulation.

Accelerating the processing of some claims and appeals may also change some claims determinations. For example, delays in processing health benefit claims can result in delays in medical treatment. Those delays in turn can result in the deterioration of claimants' medical condition to the point that the treatment is no longer medically safe or effective. Thus, accelerating the processing of medical claims may result in payment for some treatments that otherwise would not have been provided. On the other hand, deterioration in claimants' medical condition may result in additional claims for additional treatment. Thus, accelerating health benefit claims processing may eliminate some claims. The Department is uncertain of the magnitude of these two offsetting effects, but notes that both are associated with the potential for better medical outcomes and are therefore are likely to be of substantial economic benefit.

The Department also expects that the proposed regulation may influence denied claimants' decisions about whether to appeal. Providing claimants with fuller information on their appeal rights, with an opportunity for fuller and more timely review of their denied claims, and with a longer period of time in which to prepare and submit an appeal might prompt more claimants to appeal more denied claims. Providing claimants with fuller information on the reasons for claims denials might facilitate and prompt some appeals, but might discourage others. To the extent that additional appeals result in the reversal of inaccurate claims denials that would otherwise have been sustained, this would represent an improvement in the accuracy of claims determinations, as discussed above. Additional appeals that are denied would increase administrative cost, and reductions in appeals that would have been denied would reduce administrative cost. Discouraging appeals of inaccurate claims determinations, which would have been reversed on appeal, could reduce social welfare, but the Department believes providing fuller information to denied claimants will rarely discourage them from appealing inaccurate determinations. In summary, the main effects of any change in denied claimants' appeals decisions are likely to be some improvement in the accuracy of determinations and an increase or decrease in administrative costs.

Finally, the Department considered whether the proposed regulation might prompt plans to approve some claims that are not truly covered under plans' terms in order to avoid the higher expected cost of processing associated appeals. ERISA obligates plan fiduciaries to administer plans in accordance with the plans' terms. Nonetheless, it is possible that plans may engage in at least some such inaccurate claims approvals under the current regulation. Such inaccurate claims approvals might increase if the proposed regulation increases the likelihood that some accurate and previously undisputed claim denials will be appealed, and/or if it increases the expected cost of some appeals of accurate claims denials to an amount greater than the cost of paying these claims. Increasing inaccurate claims approvals could reduce overall social welfare. However, such losses might sometimes be accompanied by improved medical outcomes and associated economic benefits, and might be offset by potential welfare gains from discouraging appeals of accurate claims denials, which are noted above. The Department lacks data to estimate the potential increase in inaccurate claims approvals and associated costs and benefits, and solicits comments on this question.

The Department also considered potential indirect effects of the proposed regulation on plans sponsors' decisions regarding plan sponsorship, design, and benefit levels. Provisions that increase plans' administrative costs or that result in net increases in plans' claims payments might prompt plan sponsors to reduce benefits, to alter plan designs so as to offset or eliminate additional claims payments (for example by clarifying or expanding exclusions from coverage in a health benefit plan document), to fail to adopt or enrich benefit plans, or even to drop benefit plans entirely. Because the estimated cost of this proposed regulation is exceptionally small relative to the total cost of benefit plans, the Department expects that these effects will be equally small. However, the Department lacks the data to validate this expectation, and solicits comments on whether such effects might be more substantial.

1. Benefits of the Proposed Regulation

The Department believes that the benefits of this proposed regulation, although unquantified, will outweigh its potential costs. In particular, updating the regulation to address recent, dramatic changes in the delivery and financing of health care services can improve health care quality by preventing harmful, inappropriate delays and denials of health benefits, thereby yielding substantial social benefits. This conclusion is supported by the findings of the Commission, The Lewin Group,[19] and the U.S. General Accounting Office (GAO), and by responses to the Department's RFI.

The evidence of changes in the health care system is compelling. In a 1995 survey of 2,000 physicians, 59 percent said their decisions regarding hospital length of stay were subject to review. Forty-five percent were subject to review in connection with site-of-care decisions, as were 39 percent in connection with treatment appropriateness. On average for various types of treatment, plans initially denied between 1.8 percent (for cardiac catheterizations) and 5.8 percent (for mental health referrals) of physician-recommended actions. Average denial rates following appeal ranged from 0.7 percent (for cardiac catheterizations) to 3.0 percent (for mental health referrals). (Dahlia K. Remler *et al.*, ''What do Managed Care Plans Do to Affect Care?

[19] Two different reports prepared by The Lewin Group serve as sources of information for this analysis. In 1997, the Commission contracted with The Lewin Group to analyze the benefits and costs of the information disclosure and external appeals provisions of the Consumer Bill of Rights. The resulting report, dated November 15, 1997, is entitled ''Consumer Bill of Rights and Responsibilities: Information Disclosure and External Appeals.'' The Lewin Group also prepared a report dated May 21, 1998, for the Kaiser Family Foundation, Sierra Health Foundation, and California Wellness Foundation, entitled *Analysis of the Survey of Consumer Experiences in Managed Care, Summary of the Findings.*

Results from a Survey of Physicians,'' *Inquiry* 34: 196–204 (Fall 1997).)

The Department believes that excessive delays and inappropriate denials of health benefits are relatively rare. Most claims are approved in a timely fashion. Many claim denials and delays are appropriate given the plan's terms and the circumstances at hand. Nonetheless, a substantial number of excessive delays and inappropriate denials do occur. When they do, participants and beneficiaries can suffer grievous, avoidable harm.

The proposed regulation's new standards for processing health benefit claims will reduce the incidence of excessive delays and inappropriate denials, preventing serious, avoidable lapses in health care quality and resultant injuries and losses to participants and beneficiaries. It will raise participants' and beneficiaries' level of confidence in and satisfaction with their health care benefits, thereby enhancing the value of those benefits. It will improve plans' awareness of participant, beneficiary, and provider concerns, prompting plan responses that improve health care quality. Finally, by helping assure prompt and precise adherence to contract terms and by improving the flow of information between plans and enrollees, the proposed regulation will bolster the efficiency of health care insurance markets.

2. Preventing Harmful Errors

The 1997 survey of Sacramento-area managed care enrollees conducted by the The Lewin Group identified delay or denial of coverage as the single most prevalent difficulty, reported by 42 percent of enrollees with difficulty. Among those experiencing delays or denials, 41 percent suffered resultant financial losses, while 8 percent lost more than $1,000. Twenty-seven percent lost time from school or work, and 9 percent lost more than 10 days. Eleven percent reported worsened health; 3 percent were permanently disabled. It is likely that many of the reported coverage delays and denials were appropriate, but it is also likely that at least some were not. The proposed regulation will help reduce the number of managed care enrollees harmed by delay or denial of health coverage.

The report prepared for the Commission by the The Lewin Group documents the potential benefits of improved health benefits appeals processes. The report focuses on external appeals, but the Department believes that, by improving plans' internal appeals processes, the proposed regulation will yield at least some of these same benefits. According to Lewin, both consumers and plans can benefit from improved appeals processes. Effective appeals procedures can prevent claims disputes from escalating into costly litigation, thereby saving money for both plans and consumers. Such procedures can also improve consumer confidence and may elevate health care quality, Lewin says.

The Commission's Consumer Bill of Rights notes that improved claims and appeals procedures serve many purposes. It notes that ''first and foremost, enhanced internal and external review processes will assist consumers in obtaining access to appropriate services in a timely fashion, thus maximizing the likelihood of positive health outcomes.''

The Commission's final report to the President, entitled ''Quality First: Better Health Care for All Americans,'' also documents the expected benefits of improving claims and appeals procedures. Chapter 10, ''Reducing Errors and Increasing Safety in Health Care,'' points out that some patients suffer harm when ''inappropriate benefit coverage decisions * * * impinge on or limit the delivery of necessary care.'' A wrongful denial of coverage ''can lead to a delay in care or to a decision to forego care entirely.'' The report points out that ''even a small number of mistakes * * * can have serious, costly, or fatal consequences,'' such as ''additional health expenses, increased disability, lost wages, and lost productivity.''

3. Improving Consumer Confidence

With respect to consumer confidence, the Consumer Bill of Rights concludes that shorter time frames for claims and appeals handling will improve participants' and beneficiaries' confidence in their health plans. It states that ''the opportunity for consumers to be heard by people whose decisions significantly touch their lives evidences respect for the dignity of consumers as individuals and engenders their respect for the integrity of the institutions that serve them.''

The proposed regulation will do much to improve the public's general perception of managed care. In various surveys, consumers have expressed concern that plans sometimes withhold care or benefits. The ability to get a promised benefit, particularly when sick or disabled, is at the heart of these consumer concerns. A Kaiser Family Foundation/Harvard University survey [20] found that a majority of Americans say managed care plans have made it harder for people who are sick to see medical specialists and have decreased the quality of health care for the sick. A majority of those in managed care plans are very or somewhat worried that their health plan would be more concerned about saving money than about what is the best treatment for them if they are sick. Improved confidence may in itself represent derivation of greater value from health care coverage.

4. Signaling Consumer and Provider Concerns

Effective claims procedures can also improve health care and health plan quality by serving as a communication channel, providing feedback from participants, beneficiaries, and providers to plans about quality issues.

The Consumer Bill of Rights asserts that enhanced appeals procedures ''can be used to bridge communication gaps between consumers and their health plans and providers, and to provide useful information to all parties regarding effective treatment.''

GAO [21] points out that plan participants and beneficiaries who have a choice of coverage options and who experience difficulty with their health plan may respond by simply moving to a different coverage option. This response is especially likely if participants and beneficiaries believe that their plans' claims and appeals procedures will not effectively resolve their difficulty. Unlike initiating an appeal, however, this response may fail to alert plans to the difficulty that prompted it if plans do not inquire into their loss of members. More effective appeals procedures can give participants and beneficiaries an alternative way to respond to difficulties with their plans. Plans in turn can use the information gleaned from the appeals process to improve services.

By providing an alternative to disenrollment, improved claims and appeals procedures may also reduce disenrollment rates. Although such disenrollments may serve to lower expenses for managed care organizations (MCOs) in the short term, lowering disenrollment rates may offer MCOs additional incentives to keep enrollees healthy over the long term, prompting efforts to promote preventive

[20] ''Kaiser/Harvard National Survey of Americans' Views on Consumer Protection in Managed Care,'' Kaiser Family Foundation, January 1998.

[21] *HMO Complaints and Appeals: Most Key Procedures in Place, but Others Valued by Consumers Largely Absent* (GAO/HEHS–98–119, May 12, 1998)

care and healthy lifestyles. In contrast, the high disenrollment rates associated with ineffective claims and appeals procedures discourage MCOs from investing in such efforts. Such efforts by MCOs may yield long term improvements in population health and reductions in national health care costs.

5. Improving Health Market Efficiency

Finally, clarification of existing requirements for information disclosure with respect to claims and appeals procedures may have significant benefits for participants and beneficiaries, according to GAO and others. Several studies have found that participants and beneficiaries generally do not understand procedures or their rights with respect to claims and appeals. GAO contends that effective communication with plan participants is one of the most important elements of a claims and appeals procedure, and that improved understanding of these procedures is likely to result in expedited claims and a reduction of unwarranted appeals.

6. Beneficial Improvements

The proposed regulation includes elements of effective claims and appeals procedures that are highly likely to yield substantial benefits. These elements have been identified and endorsed by several respondents to the Department's RFI, GAO, and/or the Commission.

The Department's RFI elicited a number of responses highlighting serious weak points in current health benefits claims and appeals procedure standards. Several respondents cited instances of delays of 120 days or even 6 or 7 months in deciding claims and appeals, and a lack of objectivity in some decisions. They characterized as inadequate the information plans provide to participants and beneficiaries when denying claims and appeals. (Some similar responses were received in connection with non-health welfare and pension benefit claims.) Several respondents specifically recommended requiring fuller disclosure of information on claims and appeal procedures and decisions, and faster and fuller reviews of disputed claims, including review by medical professionals where appropriate.

GAO interviewed organizations representing a range of interests, including private accreditation agencies, consumer advocates, regulators, and the health industry. Through these interviews, GAO heard consistently that there are three essential elements to any complaint and appeal system. These elements are timeliness, integrity in the decision making process, and effective communications. The Department supports the view that improved requirements regarding these features of a claims and appeals process will be beneficial to participants and beneficiaries and has addressed each of these areas in the proposed regulation.

Based on its interviews, GAO further found that timeliness generally consists of two key elements—explicit time periods and expedited review. Although the organizations varied as to the exact length of time that they considered appropriate, all agreed that expedited procedures are critical. The Department supports the view that procedures that are responsive to the clinical urgency of a situation can prevent harm to a patient's health or life and thus have a positive impact on health outcomes.

All the organizations interviewed by GAO agreed that integrity of the decision making process is a critical component of an appeals procedure. GAO concluded that procedures consisting of certain key elements can empower participants and enhance the perception of fairness regarding a plan's procedures. The proposed regulation incorporates many of these factors, including requiring that certain decisions be made with the assistance of a medical professional with appropriate expertise, and that certain decisions be made by individuals not involved in previous denials.

The Commission's final report placed ''highest priority'' on ''creating systems that minimize errors and correct them in a timely fashion,'' concluding that ''one way to reduce the number of injuries related to inappropriate decisions to deny insurance coverage for services that ultimately are determined to be medically necessary and covered by the plan is to establish more timely systems to allow consumers to appeal plan decisions. Establishment of such systems can go a long way toward reducing the number of injuries caused by inappropriate decisions to deny coverage.'' The proposed regulation will help ensure the establishment of such systems.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and likely to have a significant economic impact on a substantial number of small entities. If an agency determines that a proposed rule is likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires that the agency present an initial regulatory flexibility analysis at the time of the publication of the notice of proposed rulemaking describing the impact of the rule on small entities and seeking public comment on such impact. Small entities include small businesses, organizations, and governmental jurisdictions.

For purposes of analysis under the RFA, the Pension and Welfare Benefits Administration (PWBA) proposes to continue to consider a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for pension plans which cover fewer than 100 participants. Under section 104(a)(3), the Secretary may also provide for simplified annual reporting and disclosure if the statutory requirements of part 1 of Title I of ERISA would otherwise be inappropriate for welfare benefit plans. Pursuant to the authority of section 104(a)(3), the Department has previously issued at 29 CFR 2520.104–20, 2520.104–21, 2520.104–41, 2520.104–46 and 2520.104b-10 certain simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans, including unfunded or insured welfare plans covering fewer than 100 participants and which satisfy certain other requirements.

Further, while some large employers may have small plans, in general most small plans are maintained by small employers. Thus, PWBA believes that assessing the impact of this proposed rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business based on size standards promulgated by the Small Business Administration (SBA) (13 CFR 121.201) pursuant to the Small Business Act (5 U.S.C. 631 *et seq.*). PWBA therefore requests comments on the appropriateness of the size standard used in evaluating the impact of this proposed rule on small entities.

On this basis, however, PWBA has preliminarily determined that this rule will not have a significant economic impact on a substantial number of small entities. In support of this determination, and in an effort to provide a sound basis for this conclusion, PWBA has considered the elements of an initial regulatory flexibility analysis in the discussion that follows.

This regulation applies to all small employee benefit plans covered by ERISA. Employee benefit plans with fewer than 100 participants include 629,000 pension plans, 2.6 million health plans, and 3.4 million non-health welfare plans (mainly life and disability insurance plans).

The proposed regulation amends the Department's current benefit claims regulation, which implements ERISA's statutory claims and appeals requirements. Both the Act and the current regulation require plans to maintain procedures to determine claims and to review disputed claims determinations. The compliance requirements of this proposed regulation consist of new standards for claims and appeals procedures.

The Department believes that revising claims and appeals procedures to meet the new standards and administering those revised procedures requires a combination of professional and clerical skills. Some claims determinations involve unique circumstances or issues and therefore demand professional attention, while others are straightforward or formulaic and can be carried out by clerical personnel. Professional skills pertaining to employee benefits law and plan design and administration are needed to design new procedures, to weigh facts and circumstances against plan provisions in order to reach decisions on unique claims, and to prepare forms to be used in providing notice of claims and appeals determinations. Clerical skills are needed to make formulaic determinations and to fill in and distribute notice forms.

The Department estimates that the ongoing, annual cost to small plans of complying with the proposed regulation will amount to $6 million on aggregate, which amounts to $0.04 per claim or $0.13 per participant, in 2000. This ongoing cost will change each year as claims volume increases or decreases or as the types, or ''mix,'' of claims that are filed change. The proposed regulation will also impose a one-time start-up cost of $102 million, or $2.16 per participant, in the year 2000 to design and implement the new procedures.

Most of the one-time start-up cost is attributable to small pension plans. The start-up costs for health plans and other welfare plans are modest primarily because the features of a majority of small welfare plans are chosen from a finite menu of products offered by insurers and HMOs. The insurers and HMOs process claims and appeals the same way or in only a few different ways for all of their small plan customers. Thus, the cost of revising and implementing a relatively small number of claims and appeal procedures is spread thinly over a far larger number of small plans.

The basis of these estimates is explained below, following the discussion of the Paperwork Reduction Act.

D. Paperwork Reduction Act

The Department, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, PWBA is soliciting comments concerning the proposed revision of the information collection request (ICR) included in this Notice of Proposed Rulemaking with respect to Rules and Regulations for Administration and Enforcement; Claims Procedure. A copy of the ICR may be obtained by contacting the office listed in the addressee section of this notice.

The Department has submitted a copy of the proposed information collection to OMB in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Pension and Welfare Benefits Administration. Although comments may be submitted through November 9, 1998, OMB requests that comments be received within 30 days of publication of the Notice of Proposed Rulemaking to ensure their consideration.

ADDRESSES (PRA 95): Gerald B. Lindrew, Office of Policy and Research, U.S. Department of Labor, Pension and Welfare Benefits Administration, 200 Constitution Avenue, NW, Room N–5647, Washington, D.C. 20210. Telephone: (202) 219–4782; Fax: (202) 219–4745. These are not toll-free numbers.

Appendix

I. Background

Section 503 of ERISA provides that, pursuant to regulations promulgated by the Secretary of Labor, each employee benefit plan must provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied. This notice must set forth the specific reasons for the denial and must be written in a manner calculated to be understood by the claimant. Each plan must also afford a reasonable opportunity for any participant or beneficiary whose claim has been denied to obtain a full and fair review of the denial by the appropriate named fiduciary of the plan.

The Department previously issued a regulation pursuant to section 503 that establishes certain minimum requirements for employee benefit plan procedures pertaining to claims. The ICR included in the benefit claims regulation generally requires timely written disclosures to participants and beneficiaries of employee benefit plans of information concerning the plan's claims procedures, the basis for the denial of a claim, and time limits for addressing or appealing the denial of a claim. These requirements are intended to ensure that plan administrators provide a full and fair review of claims and that plan participants and beneficiaries have information that is sufficient to allow them to exercise their rights under the plan.

II. Current Actions

As described in detail in this preamble, the Department proposes a number of modifications to the current regulation pursuant to ERISA section

503, which establishes minimum requirements for benefit claims procedures for employee benefit plans. Generally, modifications are proposed for provisions affecting time frames for decision making, disclosure and notice requirements, standards of review on appeal, and consequences of failure to establish and follow reasonable claims procedures. The methodology and assumptions used in estimating the burden hours and costs associated with employee benefit plan claims procedure rules as proposed are described in the analysis of cost, which follows.

Agency: Department of Labor, Pension and Welfare Benefits Administration.

Title: Benefit Claims Procedure Regulation pursuant to 29 CFR 2560.503–1.

Type of Review: Revision of a currently approved collection.

OMB Numbers: 1210–0053.

Affected Public: Individuals or households; Business or other for-profit; Not-for-profit institutions.

Total Respondents: 6,690,345.

Total Responses: 63,317,000.

Frequency of Response: On occasion.

Total Annual Burden: 496,000 (1998); 504,000 (1999); 730,000 (2000).

Estimated Annual Cost (Operating and Maintenance): $53,710,000 (1998); $54,520,000 (1999); $89,520,000 (2000).

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the information collection request; they will also become a matter of public record.

Analysis of Cost

The Department performed a comprehensive, unified analysis to estimate the costs of the proposed regulation for purposes of compliance with Executive Order 12866, the Regulatory Flexibility Act, and the Paperwork Reduction Act. The methods and results of that analysis are summarized below.

To estimate the cost of the proposed regulation, it was necessary to estimate the number of claims procedures and the volume of claims by type in the ERISA-covered employee benefit plan universe and to make certain assumptions about the cost of bringing those procedures and claims and appeals transactions into compliance with the proposed regulation's provisions.

The Department estimated the number of claims procedures based on Form 5500 Series data and other sources. With respect to pension plans, the Department assumes that each plan designs and implements its own procedure. With respect to welfare plans, the number of claims procedures is estimated to be smaller than the number of plans. While large welfare plans are assumed to design and implement their own procedures, small plans are assumed typically to buy a limited number of standard products from vendors.

NUMBER OF CLAIMS AND APPEALS PROCEDURES

	Pension	Health	Non-health welfare
Small Plans	629,000	11,000	14,000
Large Plans	62,000	40,000	41,000
Total	690,000	51,000	55,000

The Department estimated claims and appeals volume based on plan participation and various sources of data indicative of the number of claims and appeals per participant. The number of claims per participant is estimated to be far higher for plans with ongoing claim activity, such as health and dental plans, than for plans with one-time or highly contingent claim activity, such as pension and disability plans. Volume was adjusted to account for expected growth in participation.

Where appropriate, the estimated number of claiming events affected by the proposed regulation was reduced to reflect the generally high levels of compliance with the proposed regulation's provisions represented by plans' current, normal business practices. (Responses to the Department's RFI and numerous other sources indicate that many plans are already largely in compliance with many of the proposed regulation's provisions, either as a result of state law or other requirements, or in response to plan sponsor and participant demands.)

For purposes of the Paperwork Reduction Act, the Department assumes that 100 percent of small, fully insured welfare plans and 75 percent of all other plans use service providers to carry out information collection and disclosure tasks. Based on these assumptions, plan participation and numbers of procedures are distributed as shown in the chart below.

PARTICIPATION AND PROCEDURES BY PLAN TYPE AND USE OF SERVICE PROVIDERS

	Service providers	In-house
Pension Plans:		
Participation	65 MM	22 MM
Procedures	518,000	173,000
Health Plans:		
Participation	56 MM	14 MM
Procedures	39,000	12,000
Other Welfare Plans:		
Participation	131 MM	37 MM
Procedures	44,000	11,000

The Department classified as preparation burden the resources expended on a one-time, start-up basis to revise the forms used for notices required by the proposed regulation and attributed this burden to the year 2000. These costs were estimated as a function of the number of claims and appeals procedures affected. The Department

classified as distribution burden the resources expended to process claims and appeals, including the resources used to fill in and distribute notice forms and provide for any associated disclosures. These costs were estimated as a function of the number of claims and appeals affected.

The Department developed assumptions regarding the burden of complying with the proposed regulation's provisions, attributing for the purpose of this analysis a $11 hourly cost to purely clerical tasks and a $50 hourly rate to combined professional and clerical tasks, along with a $0.50 to $1.00 unit cost for materials and distribution of each claim or appeal decision notice. These assumptions yield the following estimates of the burden of the proposed regulation's notice and disclosure requirements for the year 2000. Recall that the preparation burden is a one-time cost and will be zero in other years, while the distribution burden will vary with claims volume and mix.

SUMMARY OF NOTICE AND DISCLOSURE BURDENS, 2000

	Hours	Dollars
All Plans	3.5 MM	90 MM
Distribution	2.6 MM	55 MM
Preparation	0.9 MM	34 MM
Using Service Providers	2.7 MM	83 MM
Distribution	2.1 MM	49 MM
Preparation	0.7 MM	34 MM
Not Using Service Providers	0.7 MM	6 MM
Distribution	0.5 MM	6 MM
Preparation	0.2 MM	

For purposes of Executive Order 12866 and the Regulatory Flexibility Act, the Department estimated the incremental economic impact of the proposed regulation '' that is, the added cost of the proposed regulation relative to a baseline reflecting no proposed regulation.

Many of the provisions of the proposed regulation represent clarifications rather than changes of the existing regulation. Such provisions will have no economic impact. The Department estimated the impact of changes and additions embodied in the proposed regulation. The Department separately assessed ongoing costs, which will vary over time with claims volume and mix, and one-time, start-up costs, which are assumed to be incurred in 2000.

The Department's estimates of the proposed regulation's ongoing costs reflect provisions requiring notification following the submission of benefit requests that do not follow plan filing rules, limiting to one the appeals required before seeking legal redress, requiring fuller and fairer review of denied claims on appeal, requiring disclosure on request following denied appeals, and establishing longer minimum time allowances for denied health plan claimants to appeal. They also reflect certain provisions directed solely at health plans, including those requiring plans to notify participants in advance of certain terminations of services, consultation with medical professionals in deciding appeals that involve medical issues, and shorter deadlines for making standard and urgent claims and appeals determinations.

The Department developed assumptions regarding the cost of complying with the proposed regulation's provisions, attributing (as was done with respect to the burden analysis) an $11 hourly cost to purely clerical tasks and a $50 hourly rate to combined professional and clerical tasks. The Department further attributed a cost of $350 to professional medical reviews. Using these assumptions, the Department estimates the ongoing cost of the proposed regulation at $30 million in 2000, including $6 million for small plans and $24 million for large plans. This amounts to $0.04 per claim and $0.09 per participant. The aggregate amount will vary over time with claims volume and mix.

The proposed regulation will also prompt all plans to design and implement changes to their claims and appeals procedures, imposing a one-time, start-up cost. Whether changes will be required, and the extent of any required changes, depend not on the difference between the current and proposed regulations' standards, but on the difference between baseline plan practices and the proposed regulation's standards. As noted above, there is reason to believe that many plans are already in compliance or nearly in compliance with the proposed regulation. Health plan practices in particular often exceed the proposed regulation's new, higher standards. Nonetheless, it seems likely that many plans will need to revise at least some aspect of their formal procedures, even if this means little or no change to their actual practices.

The Department assumes an average cost to revise procedures of $100. This yields an estimated $80 million in start-up costs for all plans in 2000, including $65 million for small plans. Most of the small plan costs are attributable to small pension rather than health or other welfare plans, reflecting the Department's understanding that small welfare plans using service providers share a limited menu of common claims procedures and therefore share the cost of revising those relatively few procedures.

The Department also estimated the one-time cost of preparing claims and appeals determination forms as part of its estimates of the proposed regulation's notice and disclosure burdens in connection with the Paperwork Reduction Act, as discussed above. The total cost (including both the dollar burden and the dollar value of the hour burden) amounts to $45 million, including $37 million for small plans and $8 million for large plans. As with the cost to revise procedures, the small plan cost is attributable mostly to small pension plans.

Summing these, the Department estimates the total start-up cost associated with the proposed regulation at $125 million, including $102 million for small plans (most of this being for pension plans) and $22 million for large plans. Given the large volume of claims and number of participants involved, the costs per claim or per participant are small. These costs respectively amount to $0.15 and $0.35 for all plans, $0.65 and $2.16 for small plans, and $0.03 and

$0.07 for large plans. The Department solicits comments on these estimates.

Combining ongoing and start-up costs, the Department's estimates of the total cost of the proposed regulation in 2000 are reported in the table below. The Department solicits comments on these estimates. Recall that the one-time, start-up costs occur only in 2000 and not in other years, and that the ongoing costs will vary over time with claims volume and mix.

ESTIMATED TOTAL COST OF PROPOSED REGULATION, 2000

	All plans	Small plans	Large plans
Total Cost	$155 MM	$108 MM	$46 MM
Per claim	0.19	0.69	0.07
Per participant	0.44	2.29	0.15
Ongoing Cost	30 MM	6 MM	24 MM
Per claim	0.04	0.04	0.04
Per participant	0.09	0.13	0.08
Start-Up Cost	125 MM	102 MM	22 MM
Per claim	0.15	0.65	0.03
Per participant	0.35	2.16	0.07

E. Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), as well as Executive Order 12875, this proposed rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, but does include mandates which may impose an annual burden of $100 million or more on the private sector. The basis for this statement is described in the analysis of costs for purposes of Executive Order 12866 and the Regulatory Flexibility Act.

F. Small Business Regulatory Enforcement Fairness Act

The rule proposed in this action is subject to the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) (SBREFA) and is a major rule under SBREFA. The rule, if finalized, will be transmitted to Congress and the Comptroller General for review.

Statutory Authority

This proposed regulation would be adopted pursuant to the authority contained in sections 503 and 505 of ERISA (Pub. L. 93–406, 88 Stat. 893, 894; 29 U.S.C. 1133, 1135) and under the Secretary of Labor's Order No. 1–87, 52 FR 13139 (April 21, 1987).

List of Subjects in 29 CFR Part 2560

Employee benefit plans, Employee Retirement Income Security Act, Benefit Claims Procedures.

For the reasons set out in the preamble, 29 CFR part 2560 is proposed to be amended as follows:

PART 2560—RULES AND REGULATIONS FOR ADMINISTRATION AND ENFORCEMENT

1. The authority citation for part 2560 continues to read as follows:

Authority: Secs. 502, 505 of ERISA, 29 U.S.C. 1132, 1135, and Secretary's Order 1–87, 52 FR 13139 (April 21, 1987).

Section 2560–502–1 also issued under sec. 502(b)(1), 29 U.S.C. 1132(b)(1).

Section 2560–502i-1 also issued under sec. 502(i), 29 U.S.C. 1132(i).

Section 2560–503–1 also issued under sec. 503, 29 U.S.C. 1133.

2. Section 2560.503–1, is proposed to be revised to read as follows:

§ 2560.503–1 Claims procedure.

(a) Scope and purpose. In accordance with the authority of sections 503 and 505 of the Employee Retirement Income Security Act of 1974 (ERISA or the Act), 29 U.S.C. 1133, 1135, this section sets forth minimum requirements for employee benefit plan procedures pertaining to claims for benefits by participants and beneficiaries (hereinafter referred to as claimants) or their representatives. Except as otherwise specifically provided herein, these requirements apply to every employee benefit plan described in section 4(a) and not exempted under section 4(b) of the Act.

(b) Obligation to establish and maintain reasonable claims procedures. Every employee benefit plan shall establish and maintain reasonable procedures governing the filing of benefit claims, notification of benefit determinations, and appeal of adverse benefit determinations (hereinafter collectively referred to as claims procedures). The claims procedures for a plan will be deemed to be reasonable only if:

(1) The claims procedures comply with the requirements of paragraphs (c), (d), (e), (f), (g), and (h) of this section, as appropriate;

(2) A description of all claims procedures (including, in the case of group health plan services or benefits, procedures for obtaining preauthorizations, approvals, or utilization review decisions) and the applicable time frames is included as part of a summary plan description meeting the requirements of 29 CFR 2520.102–3;

(3) The claims procedures do not contain any provision, and are not administered in a way, that requires a claimant to submit an adverse benefit determination to arbitration or to file more than one appeal of an adverse benefit determination prior to bringing a civil action under section 502(a) of the Act;

(4) The claims procedures do not contain any provision, and are not administered in a way, that unduly inhibits or hampers the initiation or processing of claims for benefits. For example, a provision or practice that requires payment of a fee or costs as a condition to making a claim or to appealing an adverse benefit determination would unduly inhibit the initiation and processing of claims for benefits. Also, the denial of a claim for failure to obtain a preauthorization under circumstances that would make obtaining such preauthorization impossible or where application of the preauthorization process could seriously jeopardize the life or health of the claimant (*e.g.*, the claimant is unconscious and has no representative or is in extremely serious need of immediate care at the time medical treatment is required) would constitute a practice that unduly inhibits the initiation and processing of a claim;

(5) The claims procedures do not foreclose or limit the ability of a representative to act on behalf of the claimant; and

(6) The claims procedures provide that, in the event that a claimant or a representative of a claimant makes a benefit request that fails to comply with the requirements of the plan's procedures for making a claim, the plan administrator shall notify the claimant

of such failure and of the plan's procedures governing the making of a claim. The plan administrator shall provide this notification within a reasonable period of time appropriate to the circumstances, taking into account any pertinent medical exigencies, not to exceed 5 days (24 hours in the case of a benefit request involving urgent care) following receipt of the benefit request by the plan. The benefit request shall be deemed to have been received by the plan when the claimant or representative makes a communication reasonably calculated to bring the request to the attention of persons responsible for benefit claim decisions. Communication with any of the following shall be deemed a communication reasonably calculated to bring the claim to the attention of persons responsible for benefit claim decisions:

(i) In the case of a single employer plan, either the organizational unit customarily in charge of employee benefits matters for the employer or any officer of the employer;

(ii) In the case of a plan to which more than one employer contributes or which is established or maintained by an employee organization, the joint board, association, committee, or similar group (or any member of any such board, association, committee or group) responsible for establishing or maintaining the plan or the person or the organizational unit customarily in charge of employee benefit matters;

(iii) In the case of a plan the benefits of which are provided or administered by an insurance company, insurance service, third-party contract administrator, health maintenance organization, or similar entity, the person or organizational unit with the authority to pre-approve, approve, or deny benefits under the plan or any officer of the insurance company, insurance service, third-party contract administrator, health maintenance organization, or similar entity.

(iv) For purposes of paragraph (b)(6) of this section, a communication shall be deemed to have been brought to the attention of an organizational unit if it is received by any person employed in such unit.

(7) The claims procedures provide that, in the case of a claim involving urgent care within the meaning of paragraph (j)(1), for an expedited process pursuant to which—

(i) A request for an expedited determination may be submitted orally or in writing by the claimant or the claimant's representative; and

(ii) All necessary information, including the plan's benefit determination, shall be transmitted between the plan and the claimant by telephone, facsimile or other similarly expeditious method.

(c) Claim for benefits. For purposes of this section, a claim for benefits is a request for a plan benefit or benefits, made by a claimant or by a representative of a claimant, that complies with a plan's reasonable procedure for making benefit claims. In the case of a group health plan, a claim for benefits includes a request for a coverage determination, for preauthorization or approval of a plan benefit or for a utilization review determination in accordance with the terms of the plan.

(d) Notification of benefit determination. (1) Except as provided in paragraphs (d)(2) and (d)(3) of this section, the plan administrator shall notify a claimant, in accordance with paragraph (e) of this section, of the plan's benefit determination within a reasonable period of time after receipt of the claim, but not later than 90 days after receipt of the claim by the plan, unless the claimant (or the claimant's representative) has failed to submit sufficient information to determine whether, or to what extent, benefits are covered or payable under the plan. In the case of such a failure, the plan administrator shall notify the claimant as soon as possible, but not later than 45 days after receipt of the claim by the plan, of the specific information necessary to complete the claim. The claimant shall then be afforded not less than 180 days after receipt of such notice to furnish the specified information to the plan. The plan administrator shall notify the claimant of the plan's benefit determination within a reasonable period of time, but not later than 45 days after the earlier of: The plan's receipt of the specified additional information, or the end of the period afforded the claimant to submit the specified additional information. If special circumstances require an additional extension of time for processing the claim, the plan administrator shall provide the claimant with notice of the extension prior to the termination of the initial 90-day period. In no event shall such extension exceed a period of 90 days from the end of such initial period. The extension notice shall indicate the special circumstances requiring an extension of time and the date by which the plan expects to make the benefit determination.

(2) In the case of a group health plan, the plan administrator shall notify a claimant of the plan's benefit determination in accordance with paragraph (d)(2)(i), (d)(2)(ii), or (d)(2)(iii) of this section, as appropriate.

(i) In the case of a claim involving urgent care, within the meaning of paragraph (j)(1) of this section, the plan administrator shall notify the claimant, in accordance with paragraph (e) of this section, of the plan's benefit determination as soon as possible, taking into account the medical exigencies of the case, after receipt of the claim by the plan, but not later than 72 hours after receipt of the claim by the plan, unless the claimant (or the representative of the claimant) fails to provide sufficient information to determine whether, or to what extent, benefits are covered or payable under the plan. In the case of such a failure, the plan administrator shall notify the claimant as soon as possible, but not later than 24 hours after receipt of the claim by the plan of the specific information necessary to complete the claim. The claimant shall be afforded a reasonable amount of time, taking into account the circumstances, but not less than 48 hours, to provide the specified information. The plan administrator shall notify the claimant of the plan's benefit determination as soon as possible , but in no case later than 48 hours after the earlier of: The plan's receipt of the specified information, or the end of the period afforded the claimant to provide the specified additional information.

(ii) If a group health plan has approved a benefit or service to be provided for a specified or indefinite period of time, any reduction or termination of such benefit or service (other than by plan amendment or termination) before the end of such period shall constitute an adverse benefit determination within the meaning of paragraph (j)(2) of this section. To the extent that such an adverse benefit determination denies a claim involving urgent care, as defined in paragraph (j)(1) of this section, the plan administrator shall provide notice of the adverse benefit determination, in accordance with paragraph (e) of this section, at a time sufficiently in advance of the reduction or termination to allow the claimant (or a representative of the claimant) to appeal and obtain a determination on review of that adverse benefit determination before the benefit is reduced or terminated.

(iii) In the case of a claim that does not involve urgent care, the plan administrator shall notify the claimant, in accordance with paragraph (e) of this section, of the plan's benefit determination within a reasonable period of time appropriate to the circumstances, taking into account any

pertinent medical circumstances, but not later than 15 days after receipt of the claim by the plan, unless the claimant (or the claimant's representative) has failed to submit sufficient information to determine whether, or to what extent, benefits are covered or payable under the plan. In the case of such a failure, the plan administrator shall notify the claimant of the specific information necessary to complete the claim within a reasonable period of time appropriate to the circumstances, taking into account any pertinent medical circumstances, but not later than 5 days after receipt of the claim by the plan. The claimant shall then be afforded not less than 45 days after receipt of such notice to furnish the specified information to the plan. The plan administrator shall notify the claimant of the plan's benefit determination within a reasonable period of time after the earlier of: The plan's receipt of the specified additional information, or the end of the period afforded the claimant to submit the specified additional information, but in no event later than 15 days after the earlier of those two dates.

(3) In the case of a plan that provides disability benefits, paragraph (d)(1) of this section shall apply to claims involving disability benefits, except that ''30 days'' shall be substituted therein for ''90 days'' and ''15 days'' shall be substituted therein for ''45 days,'' wherever such terms appear in that paragraph.

(e) Manner and content of notification of benefit determination. (1) Except as provided in paragraph (e)(2) of this section, the plan administrator shall provide a claimant with written or electronic notification of the plan's benefit determination. Any electronic notification shall comply with the standards imposed by 29 CFR 2520.104b–1(c)(1)(i), (iii), and (iv). In the case of an adverse benefit determination, within the meaning of paragraph (j)(2) of this section, the notification shall set forth, in a manner calculated to be understood by the claimant:

(i) The specific reasons for the adverse determination;

(ii) Reference to the specific plan provisions (including any internal rules, guidelines, protocols, criteria, etc.) on which the determination is based;

(iii) A description of any additional material or information necessary for the claimant to complete the claim and an explanation of why such material or information is necessary;

(iv) A description of the plan's review procedures and the time limits applicable to such procedures, including a statement of the claimant's right to bring a civil action under section 502(a) of the Act following an adverse benefit determination on review; and

(v) In the case of an adverse benefit determination by a group health plan involving a claim for urgent care, a description of the expedited review process applicable to such claims.

(2) In the case of an adverse benefit determination by a group health plan involving a claim for urgent care, the information described in paragraph (e)(1) of this section, may be provided to the claimant orally within the time frame prescribed in paragraph (d)(2)(i) of this section, provided that a written or electronic notification in accordance with paragraph (e)(1) of this section, is furnished to the claimant not later than 3 days after the oral notification.

(f) *Appeal of adverse benefit determinations.* (1) In general. Every employee benefit plan shall establish and maintain a procedure by which a claimant shall have a reasonable opportunity to appeal an adverse benefit determination, within the meaning of paragraph (j)(2) of this section, to an appropriate named fiduciary of the plan, and under which there will be a full and fair review of the claim and the adverse benefit determination.

(2) *Full and fair review.* A claims procedure will not be deemed to provide a claimant with a reasonable opportunity for a full and fair review of a claim and adverse benefit determination unless:

(i) In the case of all plans, the claims procedure—

(A) Provides claimants a reasonable period of time, related to the nature of the benefit which is the subject of the claim and the attendant circumstances within which to appeal the determination. In the case of a group health plan or a disability plan, such period shall not be less than 180 days following receipt by the claimant of a written notification of the adverse benefit determination. In the case of a plan, other than a group health plan or a disability plan, such period of time shall not be less than 60 days following receipt by the claimant of a written notification of the adverse benefit determination;

(B) Provides claimants the opportunity to submit written comments, documents, records, and other information relating to the claim for benefits;

(C) Provides that a claimant shall be provided, upon request, reasonable access to, and copies of, all documents, records, and other information relevant to the claimant's claim for benefits, without regard to whether such documents, records, and information were considered or relied upon in making the adverse benefit determination that is the subject of the appeal.

(D) Provides for a review that:

(*1*) Does not afford deference to the initial adverse benefit determination, and

(*2*) Takes into account all comments, documents, records, and other information submitted by the claimant (or the claimant's representative) relating to the claim, without regard to whether such information was submitted or considered in the initial benefit determination; and

(E) Provides for review by an appropriate named fiduciary of the plan who is neither:

(*1*) The party who made the adverse benefit determination that is the subject of the appeal, nor

(*2*) The subordinate of such party.

(ii) In the case of a group health plan, the claims procedure—

(A) Provides that, in deciding appeals of any adverse benefit determination involving a medical judgment, including determinations with regard to whether a particular treatment, drug, or other item is experimental, investigational, or not medically necessary or appropriate, the appropriate named fiduciary shall consult with a health care professional, as defined in paragraph (j)(5) of this section, who has appropriate training and experience in the field of medicine involved in the medical judgment;

(B) Provides that the health care professional engaged for purposes of a consultation under paragraph (f)(2)(ii)(A) of this section shall be independent of any health care professional who participated in the initial adverse benefit determination; and

(C) Provides in the case of a claim involving urgent care, within the meaning of paragraph (j)(1) of this section, for an expedited review process pursuant to which—

(*1*) A request for an expedited appeal of an adverse benefit determination may be submitted orally or in writing by the claimant or the claimant's representative; and

(*2*) All necessary information, including the plan's benefit determination on review, shall be transmitted between the plan and the claimant by telephone, facsimile, or other available similarly expeditious method.

(g) Notification of benefit determination on review. (1) Except as

provided in paragraphs (g)(2) and (g)(3) of this section—

(i) The plan administrator shall notify a claimant, in accordance with paragraph (h) of this section, of the plan's benefit determination on review within a reasonable period of time, but not later than 60 days after the plan's receipt of the claimant's request for review of an adverse benefit determination, unless special circumstances (such as the need to hold a hearing, if the plan procedure provides for a hearing) require an extension of time for processing, in which case the claimant shall be notified of the plan's benefit determination on review as soon as possible, but not later than 120 days after receipt of a request for review.

(ii) In the case of a plan with a committee or board of trustees designated as the appropriate named fiduciary that holds regularly scheduled meetings at least quarterly, the appropriate named fiduciary shall make a benefit determination no later than the date of the meeting of the committee or board that immediately follows the plan's receipt of a request for review, unless the request for review is filed within 30 days preceding the date of such meeting. In such case, a benefit determination may be made by no later than the date of the second meeting following the plan's receipt of the request for review. If special circumstances (such as the need to hold a hearing, if the plan procedure provides for a hearing) require a further extension of time for processing, a benefit determination shall be rendered not later than the third meeting of the committee or board following the plan's receipt of the request for review. If such an extension of time for review is required because of special circumstances, the plan administrator shall provide the claimant with written notice of the extension, describing the special circumstances and the date as of which the benefit determination will be made, prior to the commencement of the extension. The plan administrator shall provide the claimant with notification of the benefit determination in accordance with paragraph (h) of this section as soon as possible, but not later than 5 days after the benefit determination is made.

(2) In the case of a group health plan—

(i) The plan administrator shall notify the claimant, in accordance with paragraph (h) of this section, of the plan's benefit determination on review within a reasonable period of time appropriate to the circumstances, taking into account any pertinent medical circumstances, but not later than 30 days after receipt by the plan of the claimant's request for review of an adverse benefit determination, unless the claim involves urgent care.

(ii) If a claim involves urgent care, the plan administrator shall notify the claimant of the plan's benefit determination on review as soon as possible, taking into account the medical exigencies of the case, after receipt by the plan of the request for review, but not later than 72 hours after receipt of the claimant's request for review of an adverse benefit determination.

(3) Claims involving disability benefits shall be governed by paragraph (g)(1)(i) of this section, except that ''45 days'' shall be substituted therein for ''60 days,'' and ''90 days'' shall be substituted therein for ''120 days,'' wherever such terms appear in that paragraph.

(4) The plan administrator shall, in accordance with the statements required by paragraphs (h)(3) and (h)(4) of this section, provide claimants with copies of, or reasonable access to, the documents and records described in paragraph (h)(3) or paragraph (h)(4) of this section, or both, as appropriate.

(h) Manner and content of notification of benefit determination on review. The plan administrator shall provide a claimant with written or electronic notification of a plan's benefit determination on review. Any electronic notification shall comply with the standards imposed by 29 CFR 2520.104b–1(c)(1)(i), (iii), and (iv). In the case of an adverse benefit determination, within the meaning of paragraph (j)(2) of this section, the notification must set forth, in a manner calculated to be understood by the claimant:

(1) The specific reasons for the adverse determination;

(2) Reference to the specific plan provisions (including any internal rules, guidelines, protocols, criteria, etc.) on which the benefit determination is based;

(3) A statement that the claimant is entitled to receive, upon request, reasonable access to, and copies of, all documents and records relevant to the claimant's claim for benefits, without regard to whether such records were considered or relied upon in making the adverse benefit determination on review, including any reports, and the identities, of any experts whose advice was obtained; and

(4) A statement of the claimant's right to bring a civil action under section 502(a) of the Act following an adverse benefit determination on review.

(i) Failure to establish and follow reasonable claims procedures. In the case of the failure of a plan to establish or follow claims procedures consistent with the requirements of this section, a claimant shall be deemed to have exhausted the administrative remedies available under the plan and shall be entitled to pursue any available remedies under section 502(a) of the Act on the basis that the plan has failed to provide a reasonable claims procedure that would yield a decision on the merits of the claim.

(j) Definitions. For purposes of this section—

(1) (i) A *claim involving urgent care* is any claim for medical care or treatment with respect to which the application of the time periods for making non-urgent care determinations—

(A) Could seriously jeopardize the life or health of the claimant or the ability of the claimant to regain maximum function, or,

(B) In the opinion of a physician with knowledge of the claimant's medical condition, would subject the claimant to severe pain that cannot be adequately managed without the care or treatment that is subject of the claim.

(ii) Except as provided in paragraph (j)(1)(iii) of this section, whether a claim is a ''claim involving urgent care'' within the meaning of paragraph (j)(1)(i)(A) of this section is to be determined by an individual acting on behalf of the plan applying the judgment of a reasonable individual who is not a trained health professional.

(iii) Any claim that a physician with knowledge of the claimant's medical condition determines is a ''claim involving urgent care'' within the meaning of paragraph (j)(1)(i) of this section shall be treated as a ''claim involving urgent care'' for purposes of this section.

(2) The term *adverse benefit determination* means any of the following: a denial, reduction, or termination of, or a failure to provide or make payment (in whole or in part) for, a benefit, including a denial, reduction, or termination of, or a failure to provide or make payment (in whole or in part) for, a benefit resulting from the application of any utilization review directed at cost containment, as well as a failure to cover an item of service for which benefits are otherwise provided because it is determined to be experimental or investigational or not medically necessary or appropriate.

(3) The term *notice* or *notification* means the delivery or furnishing of information to an individual in a manner that satisfies the standards of 29

CFR 2520.104b–1(b) as appropriate with respect to material required to be furnished or made available to an individual.

(4) The term *group health plan* has the meaning given that term by section 733(a) of the Act.

(5) The term *health care professional* means a physician or other health care professional licensed, accredited, or certified to perform specified health services consistent with State law.

(k) Apprenticeship plans. This section does not apply to employee benefit plans that provide solely apprenticeship training benefits.

(l) Effective date. This section is effective [180 days after publication of the final regulation].

(m) Applicability Dates. (1) Except as provided in paragraph (m)(2) of this section, this section shall be applicable to plans on the later of the effective date or the first day of the first plan year beginning on or after the effective date.

(2) In the case of a collectively bargained plan that is not subject to section 302(c)(5) of the Labor Management Relations Act, 1947, 29 U.S.C. 186(c)(5), this section is effective as of the first day of the plan year beginning on or after the later of: July 1, 1999, or the date on which the last of the collective bargaining agreements relating to the plan terminates (determined without regard to any extension thereof agreed to after July 1, 1999).

Signed at Washington, D.C., this 28th day of August, 1998.

Meredith Miller,

Deputy Assistant Secretary for Policy, Pension and Welfare Benefits Administration, U.S. Department of Labor.

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federal register

Wednesday
September 9, 1998

Part V

Department of Education

Federal Student Assistance Programs Under Title IV of the Higher Education Act of 1965, as Amended; Notice

DEPARTMENT OF EDUCATION

Federal Student Assistance Programs Under Title IV of the Higher Education Act of 1965, as Amended

AGENCY: Department of Education.

ACTION: Notice inviting applications for participation in the Quality Assurance Program.

SUMMARY: The Secretary invites institutions of higher education that are not currently participating in the Quality Assurance (QA) Program under section 487A of the Higher Education Act of 1965, as amended, to submit a letter of application to participate beginning with the 1998–1999 award year. An institution that wishes to apply may do so by: (1) Mailing a letter of application to Barbara Mroz, U.S. Department of Education, 600 Independence Avenue, SW (Room 3925, ROB–3), Washington, DC 20202–5232; (2) faxing its application to (202) 708–9485; or (3) submitting its application electronically to Mr. Warren Farr at Warren__Farr@Ed.gov or Mr. John Hill at John__Hill@Ed.gov.

DATES: Applications may be submitted any time after September 9, 1998.

FOR FURTHER INFORMATION CONTACT: John Hill, telephone: (202) 260–4788. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday. Individuals with disabilities may obtain this document in an alternate format (*e.g.*, Braille, large print, audio tape or computer diskette) on request to the contract person listed in the preceding paragraph.

SUPPLEMENTARY INFORMATION: The Department of Education is undertaking a series of initiatives to simplify regulations and administrative processes for the Federal student assistance programs authorized by Title IV of the Higher Education Act of 1965, as amended (HEA).

As a part of this student aid reform effort, the Secretary intends to expand the QA Program. Begun on a pilot basis in 1985, the QA Program currently permits participating institutions to develop and implement their own comprehensive systems to verify student financial aid application data. Participation in the program is entirely voluntary. The Secretary is authorized to exempt participating institutions from the reporting and verification requirements that would otherwise apply and to substitute other quality assurance reporting requirements for them.

The Department continues to support expansion of the QA Program to include more comprehensive flexibility in areas such as institutional processing and disbursements of Title IV funds, verification of student financial aid application data, and student services.

Presently, 142 schools participate in the QA program, and the Secretary has exempted these schools from several provisions of the Student Assistance General Provisions regulations relating to verification. Beginning with the 1998–99 award year, the Secretary intends to expand the QA Program by increasing the number of schools that participate in it.

Invitation for Applications

The Secretary invites institutions of higher education that administer one or more Title IV programs to submit applications to participate in the QA Program beginning with the 1998–1999 award year. Institutions that currently participate in the program may continue to do so without submitting new applications. Because training workshops will be scheduled during the fall, institutions are encouraged to apply as soon as possible. The Secretary anticipates that the review of applications will begin within 45 days of the date of this notice. However, applications that are received later will also be considered.

The Secretary will review applications on the basis of demonstrated institutional performance, as indicated by information currently on file that pertains to the institution and information in the letter of application that reflects the institution's commitment to the Secretary's current quality assurance goals. Those goals are the following:

(1) To improve the accuracy of Title IV student aid awards;

(2) To increase institutional flexibility in managing student aid funds while maintain accountability for the proper use of those funds;

(3) To encourage the development of innovative management approaches; and

(4) To place responsibility for quality control and quality improvement at the point where funds and services are delivered—the institution.

Features of the Program

The QA Program is a management tool for the institutions and an alternative oversight strategy for the Federal government. Institutions are given the flexibility to conduct self-assessments to find their strengths and weaknesses. Institutions are also provided with a methodology to measure findings and design corrective measures for quality improvements.

QA is a program that works at large research institutions, as well as 2-year colleges, and at public, private, and proprietary institutions. It provides participants with the tools, techniques, and framework to change and improve the way they work. It is a partnership between the Department and the participating institutions where both parties become engaged in promoting continuous improvement in the administration and delivery of the student financial assistance programs and services.

The Secretary encourages institutions participating in the QA Program to employ a continuous cycle of assessment and improvement as they develop and implement their systems to verify student aid application data. Institutions evaluate their verification procedures, adopt improvements in those procedures, test the effects of those improvements, and adopt further improvements.

Institutions that participate in the QA program will be free to develop and implement their own comprehensive verification systems. It is the Secretary's intention to exempt QA institutions from certain designated requirements in 34 CFR Part 668, Subpart E.

As provided by section 487A(b) of the HEA, the Secretary may substitute other quality assurance reporting requirements that may be necessary to ensure accountability and compliance with Title IV programs.

The Secretary believes that the process of continuous improvement in verification systems fostered by the QA Program has enhanced the integrity of those systems at participating institutions. By expanding the program to include other management areas, the Secretary believes that it can serve to promote improvements, not only in the accuracy of student aid awards and payments, but also in the management of student aid offices and the delivery of services to students.

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Note: The official version of this document is the document published in the **Federal Register**.

Authority: 42 U.S.C. 2753.

Dated: September 1, 1998.

David A. Longanecker,

Assistant Secretary for Postsecondary Education.

[FR Doc. 98–24088 Filed 9–8–98; 8:45 am]

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federal register

Wednesday
September 9, 1998

Part VI

Department of Defense

General Services Administration

National Aeronautics and Space Administration

48 CFR Part 16

Federal Acquisition Regulation; Competition Under Multiple Award Task and Delivery Order Contracts; Proposed Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 16

[FAR Case 98–007]

RIN 9000–AI08

Federal Acquisition Regulation; Competition Under Multiple Award Task and Delivery Order Contracts

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are proposing to amend the Federal Acquisition Regulation (FAR) to clarify the procedures governing placement of orders under multiple award indefinite delivery contracts. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

DATES: Comments should be submitted on or before November 9, 1998 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVR), Attn: Ms. Laurie Duarte, 1800 F Street, NW, Room 4035, Washington, DC 20405.

E-mail comments submitted over Internet should be addressed to: farcase.98–007@gsa.gov.

Please cite FAR case 98–007 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Ralph DeStefano, Procurement Analyst, at (202) 501–1758. Please cite FAR case 98–007.

SUPPLEMENTARY INFORMATION:

A. Background

This proposed rule amends the procedures for placing orders under multiple award contracts at FAR 16.505(b)(1) to emphasize that agencies shall not use any method of placing orders, such as allocation or designation of any preferred awardee(s), that would result in fair consideration not being given to all awardees prior to placing each order. The proposed rule also makes some editorial changes at FAR 16.505(b)(2).

B. Regulatory Flexibility Act

This proposed 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 merely amends the FAR to clarify the existing prohibition against allocation of orders placed under multiple award contracts. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected FAR subpart will be considered in accordance with 5 U.S.C. 610 of the Act. Such comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 98–007), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 16

Government procurement.

Dated: September 2, 1998.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, it is proposed that 48 CFR Part 16 be amended as set forth below:

PART 16—TYPES OF CONTRACTS

1. The authority citation for 48 CFR Part 16 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).

2. Section 16.505 is amended by revising paragraphs (b)(1), (b)(2)(i), and (b)(2)(ii) to read as follows:

16.505 Ordering.

* * * * *

(b) *Orders under multiple award contracts.* (1) Except as provided in paragraph (b)(2) of this section, for orders issued under multiple delivery order contracts or multiple task order contracts, each awardee shall be provided a fair opportunity to be considered for each order in excess of $2,500. In determining the procedures for providing awardees a fair opportunity to be considered for each order, contracting officers shall exercise broad discretion. The contracting officer, in making decisions on the award of any individual task order, should consider factors such as past performance on earlier tasks under the multiple award contract, quality of deliverables, cost control, price, cost, or other factors that the contracting officer believes are relevant. In evaluating past performance on individual orders, the procedural requirements in subpart 42.15 are not mandatory. The procedures and selection criteria that will be used to provide multiple awardees a fair opportunity to be considered for each order must be set forth in the solicitation and contract. The procedures for selecting awardees for the placement of particular orders need not comply with the competition requirements of part 6. However, methods such as allocation, or designation in any way of any preferred awardees, that would result in less than fair consideration being given to all awardees prior to placing each order is prohibited. Formal evaluation plans or scoring of quotes or offers are not required. Agencies may use oral proposals and streamlined procedures when selecting an order awardee. In addition, the contracting officer need not contact each of the multiple awardees under the contract before selecting an order awardee if the contracting officer has information available to ensure that each awardee is provided a fair opportunity to be considered for each order.

(2) * * *

(i) The agency need for the supplies or services is so urgent that providing the opportunity would result in unacceptable delays;

(ii) Only one contractor is capable of providing the supplies or services at the level of quality required because the supplies or services are unique or highly specialized;

* * * * *

[FR Doc. 98–24140 Filed 9–8–98; 8:45 am]

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