12–1–98
Vol. 63 No. 230
Pages 65995–66404

federal register

Tuesday
December 1, 1998

Now Available Online via

GPO Access

Free online access to the official editions of the *Federal Register, the Code of Federal Regulations* and other Federal Register publications is available on *GPO Access*, a service of the U.S. Government Printing Office at:

http://www.access.gpo.gov/nara/index.html

For additional information on ***GPO Access*** products, services and access methods, see page II or contact the *GPO Access* User Support Team via:

★ Phone: toll-free: 1-888-293-6498

★ Email: gpoaccess@gpo.gov

Attention: Federal Agencies

Plain Language Tools Are Now Available

The Office of the Federal Register offers Plain Language Tools on its Website to help you comply with the President's Memorandum of June 1, 1998—Plain Language in Government Writing (63 FR 31883, June 10, 1998). Our address is: http://www.nara.gov/fedreg

For more in-depth guidance on the elements of plain language, read ''Writing User-Friendly Documents'' on the National Partnership for Reinventing Government (NPR) Website at: http://www.plainlanguage.gov

The **FEDERAL REGISTER** is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 is the exclusive distributor of the official edition.

The **Federal Register** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see http://www.nara.gov/fedreg.

The seal of the National Archives and Records Administration authenticates the Federal Register as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge as one of the databases on GPO Access, a service of the U.S. Government Printing Office.

The online edition of the **Federal Register** is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6 a.m. each day the **Federal Register** is published and it includes both text and graphics from Volume 59, Number 1 (January 2, 1994) forward.

GPO Access users can choose to retrieve online **Federal Register** documents as TEXT (ASCII text, graphics omitted), PDF (Adobe Portable Document Format, including full text and all graphics), or SUMMARY (abbreviated text) files. Users should carefully check retrieved material to ensure that documents were properly downloaded.

On the World Wide Web, connect to the **Federal Register** at http://www.access.gpo.gov/nara. Those without World Wide Web access can also connect with a local WAIS client, by Telnet to swais.access.gpo.gov, or by dialing (202) 512-1661 with a computer and modem. When using Telnet or modem, type swais, then log in as guest with no password.

For more information about GPO Access, contact the GPO Access User Support Team by E-mail at gpoaccess@gpo.gov; by fax at (202) 512–1262; or call (202) 512–1530 or 1–888–293–6498 (toll free) between 7 a.m. and 5 p.m. Eastern time, Monday–Friday, except Federal holidays.

The annual subscription price for the **Federal Register** paper edition is $555, or $607 for a combined **Federal Register,** Federal Register Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the Federal Register Index and LSA is $220. Six month subscriptions are available for one-half the annual rate. The charge for individual copies in paper form is $8.00 for each issue, or $8.00 for each group of pages as actually bound; or $1.50 for each issue in microfiche form. All prices include regular domestic postage and handling. International customers please add 25% for foreign handling. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard or Discover. Mail to: New Orders, Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250–7954.

There are no restrictions on the republication of material appearing in the **Federal Register.**

How To Cite This Publication: Use the volume number and the page number. Example: 63 FR 12345.

SUBSCRIPTIONS AND COPIES

PUBLIC	
Subscriptions:	
Paper or fiche	**202–512–1800**
Assistance with public subscriptions	**512–1806**
General online information	**202–512–1530; 1–888–293–6498**
Single copies/back copies:	
Paper or fiche	**512–1800**
Assistance with public single copies	**512–1803**
FEDERAL AGENCIES	
Subscriptions:	
Paper or fiche	**523–5243**
Assistance with Federal agency subscriptions	**523–5243**

NOW AVAILABLE ONLINE

The October 1998 Office of the Federal Register Document Drafting Handbook

Free, easy online access to the newly revised October 1998 Office of the Federal Register Document Drafting Handbook (DDH) is now available at:

http://www.nara.gov/fedreg/draftres.html

This handbook helps Federal agencies to prepare documents for publication in the **Federal Register.**

For additional information on access, contact the Office of the Federal Register's Technical Support Staff.

Phone: 202–523–3447

E-mail: info@fedreg.nara.gov

Printed on recycled paper.

Contents

Federal Register

Vol. 63, No. 230

Tuesday, December 1, 1998

Agriculture Department
See Animal and Plant Health Inspection Service
See Forest Service
See Grain Inspection, Packers and Stockyards Administration

Animal and Plant Health Inspection Service
RULES
Plant-related quarantine, domestic:
Mediterranean fruit fly, 65999–66001

Army Department
NOTICES
Meetings:
Reserve officers' Training Corps (ROTC) Program Subcommittee, 66129
Military traffic management:
Defense table of official distances; implementation:
Personal property shipments; distance calculation, 66129–66131
Defense table of official distances, implementation—
Passenger transportation and travel services; distance calculation, 66131–66132

Arts and Humanities, National Foundation
See National Foundation on the Arts and the Humanities

Centers for Disease Control and Prevention
NOTICES
Meetings:
National Center for Environmental Health, 66188

Commerce Department
See Foreign-Trade Zones Board
See International Trade Administration
See National Oceanic and Atmospheric Administration
See Patent and Trademark Office

Consumer Product Safety Commission
RULES
Poison prevention packaging:
Sucraid; exemption, 66001–66003
NOTICES
Agency information collection activities:
Submission for OMB review; comment request, 66126

Copyright Office, Library of Congress
RULES
Copyright abritration royalty panel rules and procedures:
Performance of musical compositions by colleges and universities; cost of living adjustment, 66042
Copyright office and procedure:
Supplementary registration applications; corrections and amplifications
Correction, 66041–66042

Corporation for National and Community Service
RULES
National and Community Service Commission regulations; CFR Parts removed, 66063
NOTICES
Agency information collection activities:
Proposed colletion; comment request, 66126–66127

Customs Service
NOTICES
Privacy Act:
Systems of records, 66232–66234

Defense Department
See Army Department
See Defense Logistics Agency
See Navy Department
NOTICES
Agency information collection activities:
Proposed collection; comment request, 66127–66128
Meetings:
Science and Technology Advisory Board
Correction, 66235
Privacy Act:
Systems of records, 66128–66129

Defense Logistics Agency
NOTICES
Privacy Act:
Computer matching programs, 66132–66133

Drug Enforcement Administration
NOTICES
Comprehensive Methamphetamine Control Act of 1996; implementation:
Chemicals, products, materials, and equipment used in production of controlled substances or listed chemicals; special surveillance list, 66199–66201
Applications, hearings, determinations, etc.:
American Radiolabeled Chemical, Inc., 66198–66199
Celgene Corp., 66199
Inhalon Pharmaceuticals, Inc., 66199

Education Department
NOTICES
Agency information collection activities:
Proposed collection; comment request, 66134–66135
Submission for OMB review; comment request, 66135–66136
Approved ability-to-benefit tests and passing scores; list
Correction, 66401–66403

Energy Department
See Energy Efficiency and Renewable Energy Office
See Energy Information Administration
See Federal Energy Regulatory Commission
See Western Area Power Administration
NOTICES
Environmental statements; availability, etc.:
Rocky Flats Environmental Technology Site, CO; plutonium residues and scrub alloy storage management, 66136–66146

Energy Efficiency and Renewable Energy Office
PROPOSED RULES
Energy conservation:
Distribution transformers; test procedures
Correction, 66235
NOTICES
Consumer product test procedures; waiver petitions:
Sanyo Electric Co., Ltd., 66146–66147

Energy Information Administration
NOTICES
Agency information collection activities:
Submission for OMB review; comment request, 66147–66148

Environmental Protection Agency
RULES
Air programs; State authority delegations:
Washington, 66054–66062
PROPOSED RULES
Air pollutants; hazardous; national emission standards:
Publicly owned treatment works; 188 HAP; list, 66084–66101
Air pollution control; new motor vehicles and engines:
New nonroad spark-ignition engines at or below 19 kilowatts; phase 2 emission standards, 66081–66083
Air programs; State authority delegations:
Washington, 66083–66084
Hazardous waste:
Hazardous contaminated media management requirements (HWIR-media); partial withdrawal, 66101–66102
NOTICES
Meetings:
Drinking water; consumer confidence reports; stakeholder meeting, 66167–66168
National Drinking Water Advisory Council, 66168
Science Advisory Board, 66168–66170

Equal Employment Opportunity Commission
NOTICES
Meetings; Sunshine Act, 66170

Executive Office of the President
See Presidential Documents

Export-Import Bank
NOTICES
Meetings:
Advisory Committee, 66170

Federal Aviation Administration
RULES
Class E airspace; correction, 66235
PROPOSED RULES
Airworthiness directives:
MT-Propeller Entwicklung GmbH, 66078–66079
NOTICES
Airport noise compatibility program:
Amarillo International Airport, TX, 66223–66224
Passenger facility charges; applications, etc.:
San Luis Obispo County Airport-McChesney Field, CA, 66224

Federal Communications Commission
PROPOSED RULES
Radio and television broadcasting:
Broadcast and cable EEO rules and policies, 66104–66110
NOTICES
Agency information collection activities:
Proposed collection; comment request, 66170–66172
Meetings:
North American Numbering Council, 66172
Personal communications services:
C block PCS spectrum auction; procedural issues; comment request, 66172–66176
D block, E block and F block broadband PCS spectrum auction; procedural issues; comment request, 66176–66177

Federal Deposit Insurance Corporation
RULES
Insured State banks and savings associations; activities, 66275–66338
PROPOSED RULES
Insured State banks and savings associations; activities, 66339–66346
NOTICES
Federal Deposit Insurance Act:
Banking participation by persons convicted of crimes, money laundering. or who have entered pretrial diversion or similar programs; policy statement, 66177–66185

Federal Energy Regulatory Commission
RULES
Electric utilities (Federal Power Act):
Fuel purchases from company-owned or controlled source; fuel cost adjustment clause, 66011–66013
Rate schedules filing—
Government land use; annual (1999 FY) fee schedule charges, 66003–66011
NOTICES
Electric utilities (Federal Power Act):
Regional transmission organizations; consultation with State commissions, 66158–66165
Privacy Act:
Systems of records, 66165–66166
Applications, hearings, determinations, etc.:
CNG Transmission Corp., 66148–66149
Columbia Gas Transmission Corp., 66149
Columbia Gulf Transmission Co., 66149
El Paso Natural Gas Co., 66149–66150
Equitrans, L.P., 66150
Gas Transport, Inc., 66150
High Island Offshore System, 66150–66151
KO Transmission Co., 66151
Natural Gas Pipeline Co. of America, 66151
NorAm Gas Transmission Co., 66151–66152
Northern Natural Gas Co., 66152–66153
Panhandle Eastern Pipe Line, Co., 66153
Texas Gas Transmission Corp., 66153
Texas-Ohio Pipeline, Inc., 66153
Transcontinental Gas Pipe Line Corp., 66154–66155
Transwestern Pipeline Co., 66155
TriState Pipeline, L.L.C., 66155–66157
Williams Gas Pipelines Central, Inc., 66157
Young Gas Storage Company, Ltd., 66158

Federal Highway Administration
NOTICES
Environmental statements; notice of intent:
Caldwell and Guadalupe Counties, TX, 66225
Motor carrier safety standards:
Driver qualification—
Andersen, Gary R., et al., 66226–66230

Federal Reserve System
RULES
Federal Reserve banks:
Extensions of credit (Regulation A); discount rate change, 66001
NOTICES
Banks and bank holding companies:
Change in bank control, 66186

Formations, acquisitions, and mergers, 66186
Formations, acquistions, and mergers, 66186–66187
Permissible nonbanking activities, 66187
Meetings; Sunshine Act, 66187

Financial Management Service
See Fiscal Service

Fiscal Service
NOTICES
Surety companies acceptable on Federal bonds:
Worcester Insurance Co., 66234

Food and Drug Administration
RULES
Animal drugs, feeds, and related products:
New drug applications—
Melengestrol acetate and lasalocid, 66018
Food additives:
White Mineral Oil, USP, 66013–66014
Food for human consumption:
Natamycin (Pimaricin), 66014–66015
Human drugs:
Internal analgesic, antipyretic, and antrheumatic products (OTC)—
Professional labeling of aspirin, buffered aspirin, and aspirin in combination with antacid products; correction, 66015–66017
Prescription drug product labeling; medication guide requirements, 66377–66400
NOTICES
GRAS or prior-sanctioned ingredients:
American Feed Industry Association, 66188

Foreign-Trade Zones Board
NOTICES
Applications, hearings, determinations, etc.:
New York
Pfizer, Inc.; pharmaceutical manufacturing plant; correction, 66235

Forest Service
NOTICES
Environmental statements; availability, etc.:
Mt. Baker-Snoqualmie National Forest, WA, 66116–66117
Environmental statements; notice of intent:
Nez Perce National Forest, ID, 66117–66118
Meetings:
Committee of Scientists, 66118

General Services Administration
PROPOSED RULES
Federal property management:
Telecommunications resources management and use—
Network registration services; user fees, 66102–66104

Grain Inspection, Packers and Stockyards Administration
NOTICES
Agency designation actions:
Illinois, 66118
Pilot programs allowing multiple agencies to provide official services within single geographic area
Correction, 66119

Health and Human Services Department
See Centers for Disease Control and Prevention
See Food and Drug Administration
See National Institutes of Health
See Substance Abuse and Mental Health Services Administration
RULES
Grants:
Departmental appeal procedures simplification, 66062–66063
NOTICES
Agency information collection activities:
Proposed collection; comment request, 66187–66188

Housing and Urban Development Department
NOTICES
Organization, functions, and authority delegations:
Deputy Secretary, 66193
Privacy Act:
Computer matching program, 66193–66195

Interior Department
See Land Management Bureau
See National Park Service
See Surface Mining Reclamation and Enforcement Office
NOTICES
Grants and cooperative agreements; availability, etc.:
Tribal self-governance program—
Participation applications deadline (2000 FY or CY), 66195

International Development Cooperation Agency
See Overseas Private Investment Corporation

International Trade Administration
NOTICES
Antidumping:
Chrome-plated lug nuts from—
China, 66119–66120
Welded carbon steel pipes and tubes from—
India, 66120–66121
Countervailing duties:
Pasta from—
Italy, 66121–66123

Justice Department
See Drug Enforcement Administration
See Justice Programs Office
See Victims of Crime Office

Justice Programs Office
NOTICES
Agency information collection activities:
Submitted for OMB approval; comment request, 66201–66202

Labor Department
See Occupational Safety and Health Administration

Land Management Bureau
NOTICES
Meetings:
Resource advisory councils—
Northeast California, 66195–66196
Opening of public lands:
Wyoming; correction, 66196

Library of Congress
See Copyright Office, Library of Congress

National Aeronautics and Space Administration
NOTICES
Patent licenses; non-exclusive, exclusive, or partially exclusive:
Eclypse international Corp., 66203
Goldhar, Joel D., and Jonathan E. Jaffe, 66203
Poloroid Corp., 66203–66204

National Archives and Records Administration
NOTICES
Agency records schedules; avialability, 66204–66205

National Foundation on the Arts and the Humanities
NOTICES
Meetings:
Humanities Panel, 66205–66206

National Highway Traffic Safety Administration
RULES
Fuel economy standards:
Dual fueled electric passenger automobiles; minimum driving range, 66064–66069
NOTICES
Motor vehicle safety standards:
Nonconforming vehicles—
Importation eligibility; determinations, 66230–66232
Motor vehicle safety standards; exemption petitions, etc.:
Western Star Trucks, Inc., 66232

National Institutes of Health
NOTICES
Committees; establishment, renewal, termination, etc.:
Director's Council of Public Representatives, 66190
Grants and cooperative agreements; availability, etc.:
Eosinophil-derived neutralizing agent to treat infections in children and elderly caused by respiratory syncytial virus and parainfluenza virus; development, 66190–66191
Meetings:
Center for Scientific Review, 66191
National Institute of Child Health and Human Development, 66192
National Institute of Mental Health, 66191–66192
National Institute on Aging, 66191

National Oceanic and Atmospheric Administration
RULES
Marine mammals:
Incidental taking—
Naval activities; USS Seawolf submarine shock testing, 66069–66077
PROPOSED RULES
Fishery conservation and management:
Alaska fisheries of Exclusive Economic Zone—
Crab and scallop fisheries; maximum sustainable and optimum yield, 66112–66115
Northeastern United States fisheries—
Atlantic sea scallop, 66110–66111
West Coast States and Western Pacific fisheries—
Pacific groundfish, 66111–66112
NOTICES
Fishery conservation and management:
Alaska; fisheries of Exclusive Economic Zone—
Bering Sea and Aleutian Islands pollock, 66123–66125
Meetings:
Mid-Atlantic Fishery Management Council, 66125
Permits:
Endangered and threatened species, 66125–66126

National Park Service
NOTICES
Concession contract negotiations:
National Park Concession Policy Act; repeal, 66196
Environmental statements; availability, etc.:
Death Valley National Park, CA, 66196
Mojave National Preserve, CA, 66196–66197
Meetings:
Boston Harbor Islands Advisory Council, 66197
National Register of Historic Places:
Pending nominations, 66197–66198

Navy Department
NOTICES
Privacy Act:
Systems of records, 66133–66134

Nuclear Regulatory Commission
NOTICES
Agency information collection activities:
Proposed collection; comment request, 66206–66207
Meetings; Sunshine Act, 66209
Applications, hearings, determinations, etc.:
Duquesne Light Co., 66207–66208
Florida Power Corp., 66208
Transnuclear, Inc., 66208
Virginia Electric & Power Co., 66208–66209

Occupational Safety and Health Administration
RULES
Safety and health standards:
Powered industrial truck operator training requirements, 66237–66274
Safety and health standards, etc.:
Permit-required confined spaces, 66018–66040
NOTICES
Meetings:
Maritime Advisory Committee for Occupational Safety and Health, 66202–66203

Overseas Private Investment Corporation
NOTICES
Hearings, 66198

Patent and Trademark Office
RULES
Patent cases:
Patent Cooperation Treaty application procedures; revisions, 66040–66041

Personnel Management Office
NOTICES
Meetings:
Federal Prevailing Rate Advisory Committee, 66209–66210

Postal Service
RULES
International Mail Manual:
Global package link (GPL) service—
Argentina, 66043–66049
Practice and procedure:
Rules of procedure before judicial officer; address, titles and references, and technical and grammatical changes, 66049–66053

Presidential Documents
ADMINISTRATIVE ORDERS
Anti-Bribery and Fair Competition Act of 1998, International; delegation of authority to Secretary of State (Memorandum of November 16, 1998), 65997
El Salvador, Guatemala, Honduras, and Nicaragua; emergency disaster relief assistance (Presidential Determination No. 99-04 of November 14, 1998), 65995

Public Debt Bureau
See Fiscal Service

Public Health Service
See Centers for Disease Control and Prevention
See Food and Drug Administration
See National Institutes of Health
See Substance Abuse and Mental Health Services Administration

Securities and Exchange Commission
NOTICES
Applications, hearings, determinations, etc.:
Aetna Variable Fund et al., 66210–66215
Baker, Fentress & Company, et al., 66215–66219
Bankers Trust Co., et al., 66219–66221
MFS Institutional Trust, 66221–66222

Small Business Administration
NOTICES
Agency information collection activities:
Submission for OMB review; comment request, 66222

Social Security Administration
NOTICES
Agency information collection activities:
Submitted for OMB approval; comment request, 66222–66223

Substance Abuse and Mental Health Services Administration
NOTICES
Meetings:
SAMHSA special emphasis panels, 66192–66193

Surface Mining Reclamation and Enforcement Office
PROPOSED RULES
Permanent program and abandoned mine land reclamation plan submissions:
Montana, 66079–66081

Thrift Supervision Office
RULES
Operations:
Financial management policies; financial derivatives, 66347–66350
NOTICES
Financial management policies; interest rate risk, investment securities, and derivaties; bulletin, 66351–66375

Transportation Department
See Federal Aviation Administration
See Federal Highway Administration
See National Highway Traffic Safety Administration

Treasury Department
See Customs Service
See Fiscal Service
See Thrift Supervision Office

United States Information Agency
NOTICES
Art objects; importation for exhibition:
Letters in Gold: Ottoman Calligraphy from the Sakib Sabanci Collection
Correction, 66234

Victims of Crime Office
NOTICES
Agency information collection activities:
Submitted for OMB approval; comment request, 66202

Western Area Power Administration
NOTICES
Electric utility industry restructuring; impact on allocation policies, 66166–66167

Separate Parts In This Issue

Part II
Department of Labor, Occupational Safety and Health Administration, 66237–66274

Part III
Federal Deposit Insurance Corporation, 66275–66346

Part IV
Department of Treasury, Office of Thrift Supervision, 66347–66375

Part V
Department of Health and Human Services, Food and Drug Administration, 66377–66400

Part VI
Department of Education, 66401–66403

Reader Aids
Consult the Reader Aids section at the end of this issue for phone numbers, online resources, finding aids, reminders, and notice of recently enacted public laws.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

3 CFR

Administrative Orders:

Presidential Determination No. 99–04 of November 14, 1998 69995

Memorandum of November 16, 1998 65997

7 CFR

301 65999

10 CFR

Proposed Rules:

432 66235

12 CFR

201 66001
303 66276
337 66276
362 66276
563 66348

Proposed Rules:

303 66339
337 66339
362 66339

14 CFR

71 66235

Proposed Rules:

39 66078

16 CFR

1700 66001

18 CFR

11 66003
35 66011

21 CFR

172 (2 documents) 66013, 66014
201 66378
208 66378
314 66378
343 66015
558 66018
601 66378
610 66378

29 CFR

1910 (2 documents) 66018, 66238
1915 66238
1917 66238
1918 66238
1926 66238

30 CFR

Proposed Rules:

926 66079

37 CFR

1 66040
201 66041
253 66042

39 CFR

20 66043
952 66049
953 66049
954 66049
955 66049
956 66049
957 66049
958 66049
959 66049
960 66049
961 66049
962 66049
963 66049
964 66049
965 66049
966 66049

40 CFR

61 66054
63 66054

Proposed Rules:

9 66081
61 66083
63 (2 documents) 66083, 66084
90 66081
260 66101
261 66101
262 66101
264 66101
268 66101
269 66101
271 66101

41 CFR

Proposed Rules:

101-35 66092

42 CFR

50 66062

45 CFR

2500 66063
2501 66063
2502 66063
2503 66063
2504 66063
2505 66063
2506 66063

47 CFR

Proposed Rules:

0 66104
73 66104
76 66104

49 CFR

538 66064

50 CFR

216 66069

Proposed Rules:

648 66110
660 66111
679 66112

Federal Register
Vol. 63, No. 230
Tuesday, December 1, 1998

Presidential Documents

Title 3—

The President

Presidential Determination No. 99–04 of November 14, 1998

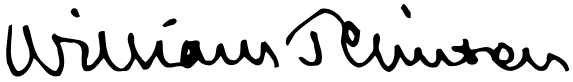
Drawdown Under Section 506(a)(2)(A)(i)(II) of the Foreign Assistance Act To Provide Emergency Disaster Relief Assistance for Honduras, Nicaragua, El Salvador, and Guatemala

Memorandum for the Secretary of State [and] the Secretary of Defense

Pursuant to the authority vested in me by section 506(a)(2)(A)(i)(II) of the Foreign Assistance Act of 1961, as amended (''the Act''), 22 U.S.C. 2318(a)(2), I hereby determine that it is in the national interest of the United States to draw down articles and services from the inventory and resources of the Department of Defense, for the purpose of providing international disaster relief assistance to Honduras, Nicaragua, El Salvador, and Guatemala.

Therefore, I direct the drawdown of up to $45 million of articles and services from the inventory and resources of the Department of Defense for the Governments of Honduras, Nicaragua, El Salvador, and Guatemala for the purposes and under the authorities of chapter 9 of part I of the Act.

The Secretary of State is authorized and directed to report this determination to the Congress immediately and to arrange for its publication in the *Federal Register.*



THE WHITE HOUSE,
Washington, November 14, 1998.

[FR Doc. 98–32142
Filed 11–30–98; 8:45 am]
Billing code 4710–10–M

Presidential Documents

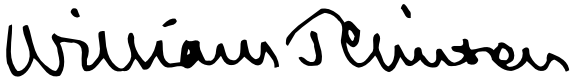
Memorandum of November 16, 1998

Delegation of Authority Under Section 5(d)(2) of the International Anti-Bribery and Fair Competition Act of 1998

Memorandum for the Secretary of State

By virtue of the authority vested in me by the Constitution and laws of the United States of America, including section 301 of title 3 of the United States Code, I hereby delegate to the Secretary of State the functions and authorities vested in the President by section 5(d)(2) of the International Anti-Bribery and Fair Competition Act of 1998 (Public Law 105–366).

You are authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, November 16, 1998.

[FR Doc. 98–32143
Filed 11–30–98; 8:45 am]
Billing code 4710–10–M

Rules and Regulations

Federal Register
Vol. 63, No. 230
Tuesday, December 1, 1998

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

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

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 98–083–3]

Mediterranean Fruit Fly; Addition to Quarantined Areas

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule and request for comments.

SUMMARY: We are amending the Mediterranean fruit fly regulations by adding an area in Riverside and Orange Counties, CA, to the list of quarantined areas and restricting the interstate movement of regulated articles from the quarantined area. This action is necessary on an emergency basis to prevent the spread of the Mediterranean fruit fly into noninfested areas of the United States.

DATES: Interim rule effective November 24, 1998. Consideration will be given only to comments received on or before February 1, 1999.

ADDRESSES: Please send an original and three copies of your comments to Docket No. 98–083–3, Regulatory Analysis and Development, PPD, APHIS, suite 3C03, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comments refer to Docket No. 98–083–3. Comments received may be inspected at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect comments are requested to call ahead on (202) 690–2817 to facilitate entry into the comment reading room.

FOR FURTHER INFORMATION CONTACT: Mr. Michael B. Stefan, Operations Officer, Domestic and Emergency Programs, PPQ, APHIS, 4700 River Road Unit 134, Riverdale, MD 20737–1236, (301) 734–8247; or e-mail: michael.b.stefan@usda.gov.

SUPPLEMENTARY INFORMATION:

Background

The Mediterranean fruit fly, *Ceratitis capitata* (Wiedemann), is one of the world's most destructive pests of numerous fruits and vegetables. The Mediterranean fruit fly (Medfly) can cause serious economic losses. Heavy infestations can cause complete loss of crops, and losses of 25 to 50 percent are not uncommon. The short life cycle of this pest permits the rapid development of serious outbreaks.

The Mediterranean fruit fly regulations (7 CFR 301.78 through 301.78–10; referred to below as the regulations) restrict the interstate movement of regulated articles from quarantined areas to prevent the spread of Medfly to noninfested areas of the United States.

In an interim rule effective on August 13, 1998, and published in the **Federal Register** on August 20, 1998 (63 FR 44539–44541, Docket No. 98–083–1), we added a portion of San Diego County, CA, to the list of quarantined areas. In another interim rule effective on August 14, 1998, and published in the **Federal Register** on August 21, 1998 (63 FR 44774–44776, Docket No. 98–083–2), we added a portion of Orange County, CA, to the list of quarantined areas.

Recent trapping surveys by inspectors of California State and county agencies and by inspectors of the Animal and Plant Health Inspection Service (APHIS) have revealed that an infestation of Medfly has occurred in an area in Riverside and Orange Counties, CA.

The regulations in 301.78–3 provide that the Administrator of APHIS will list as a quarantined area each State, or each portion of a State, in which the Medfly has been found by an inspector, in which the Administrator has reason to believe that the Medfly is present, or that the Administrator considers necessary to regulate because of its inseparability for quarantine enforcement purposes from localities in which the Medfly has been found.

Less than an entire State will be designated as a quarantined area only if the Administrator determines that the State has adopted and is enforcing restrictions on the intrastate movement of the regulated articles that are equivalent to those imposed on the interstate movement of regulated articles, and the designation of less than the entire State as a quarantined area will prevent the interstate spread of the Medfly. The boundary lines for a portion of a State being designated as quarantined are set up approximately four-and-one-half miles from the detection sites. The boundary lines may vary due to factors such as the location of Medfly host material, the location of transportation centers such as bus stations and airports, the patterns of persons moving in that State, the number and patterns of distribution of the Medfly, and the use of clearly identifiable lines for the boundaries.

In accordance with these criteria and the recent Medfly findings described above, we are amending 301.78–3 by adding an area in Riverside and Orange Counties, CA, to the list of quarantined areas. The new quarantined area is described in the rule portion of this document.

Emergency Action

The Administrator of the Animal and Plant Health Inspection Service has determined that an emergency exists that warrants publication of this interim rule without prior opportunity for public comment. Immediate action is necessary to prevent the Medfly from spreading to noninfested areas of the United States.

Because prior notice and other public procedures with respect to this action are impracticable and contrary to the public interest under these conditions, we find good cause under 5 U.S.C. 553 to make this action effective upon signature. We will consider comments that are received within 60 days of publication of this rule in the **Federal Register.** After the comment period closes, we will publish another document in the **Federal Register.** The document will include a discussion of any comments we receive and any amendments we are making to the rule as a result of the comments.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. For this action, the Office of Management and Budget has waived its review process required by Executive Order 12866.

This rule amends the Medfly regulations by adding an area in Riverside and Orange Counties, CA, to the list of quarantined areas. This action is necessary on an emergency basis to prevent the spread of the Medfly into noninfested areas of the United States.

This rule also restricts the interstate movement of regulated articles from the newly quarantined area. We estimate that there are 75 entities in the newly quarantined area that sell, process, handle, or move regulated articles. This estimate includes 26 fruit sellers, 16 nurseries, 26 growers, 4 packinghouses, 2 certified farmer's markets, and 1 swapmeet. The number of these entities that meet the U.S. Small Business Administration's (SBA) definition of a small entity is unknown, since the information needed to make that determination (i.e., each entity's gross receipts or number of employees) is not currently available. However, it is reasonable to assume that most of these entities are small in size, since the overwhelming majority of businesses in California, as well as the rest of the United States, are small entities by SBA standards.

Few, if any, of the 75 entities will be significantly affected by the quarantine action taken in this interim rule because few of those entities move regulated articles outside the State of California during the normal course of their business. Nor do consumers of products purchased from those entities generally move those products interstate. The effect on any small entities that do move regulated articles interstate from the quarantined area will be minimized by the availability of various treatments that, in most cases, will allow those small entities to move regulated articles interstate with very little additional costs. Also, many of those small entities sell other items in addition to regulated articles, so the effect, if any, of the interim rule should be minimal.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

National Environmental Policy Act

An environmental assessment and finding of no significant impact have been prepared for this rule. The site specific environmental assessment and programmatic Medfly environmental impact statement provide a basis for our conclusion that implementation of integrated pest management to achieve eradication of the Medfly would not have a significant impact on human health and the natural environment. Based on the finding of no significant impact, the Administrator of the Animal and Plant Health Inspection Service has determined that an environmental impact statement need not be prepared.

The environmental assessment and finding of no significant impact were prepared in accordance with: (1) The National Environmental Policy Act of 1969, as amended (NEPA)(42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

Copies of the environmental assessment and finding of no significant impact are available for public inspection at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect copies are requested to call ahead on (202) 690–2817 to facilitate entry into the reading room. In addition, copies may be obtained by writing to the individual listed under **FOR FURTHER INFORMATION CONTACT**.

Paperwork Reduction Act

This rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 7 CFR Part 301

Agricultural commodities, Incorporation by reference, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

Accordingly, we are amending 7 CFR part 301 as follows:

PART 301—DOMESTIC QUARANTINE NOTICES

1. The authority citation for part 301 continues to read as follows:

Authority: 7 U.S.C. 147a, 150bb, 150dd, 150ee, 150ff, 161, 162, and 164–167; 7 CFR 2.22, 2.80, and 371.2(c).

2. In 301.78–3, paragraph (c) is amended by adding an entry for Riverside and Orange Counties, CA, in alphabetical order, to read as follows:

§ 301.78–3 Quarantined areas.

* * * * *

(c) * * *

CALIFORNIA

* * * * *

Riverside and Orange Counties. That portion of Riverside County in the Lake Elsinore area bounded by a line beginning at the intersection of State Highway 74 and Margarth Street; then southeast along an imaginary line to the intersection of Juanita Drive and Goetz Road; then southeast along Goetz Road to Newport Road; then southeast along an imaginary line to the intersection of Holland Road and Byers Street; then south along Byers Street to Garboni Road; then east along Garboni Road to Murrieta Road; then south along Murrieta Road to Scott Road; then southeast along an imaginary line to the intersection of Clinton Keith Road and California Oaks Road; then south along California Oaks Road to Kalmia Street; then southwest along Kalmia Street to the boundary line of the Santa Rosa Plateau Ecological Reserve; then northwest, southwest, and northwest along the boundary line of the Santa Rosa Plateau Ecological Reserve to its second intersection with Kalmia Street; then west along an imaginary line to the intersection of Clinton Keith Road and Avenida La Cresta; then west along an imaginary line to the intersection of Valle Vista and Calle De Suenos; then northwest and southwest along Calle De Suenos to Calle Rosita; then south along Calle Rosita to Via Caballos; then west and north along Via Caballos to Avenida Castilla; then west along Avenida Castilla to Avenida La Cresta; then north along Avenida La Cresta to Calle De Companero; then north along Calle De Companero to Vista De Montanas; then southwest along Vista De Montanas to Via Sereno; then northwest along an imaginary line to the intersection of State Highway 74 and Teneja Trucktrail; then northwest along an imaginary line (extending into Orange County) to Los Pinos Peak; then north along an imaginary line to Trabuco Peak; then northeast along an imaginary line (extending into Riverside County) to the

intersection of Estelle Mountain Road and Gavilan Springs Ranch Road; then east along an imaginary line to the intersection of Ellis Avenue and Belita Drive; then southeast along an imaginary line to the point of beginning.

* * * * *

Done in Washington, DC, this 24th day of November 1998.

Craig A. Reed,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 98–32076 Filed 11–30–98; 8:45 am]

BILLING CODE 3410–34–P

FEDERAL RESERVE SYSTEM

12 CFR Part 201

[Regulation A]

Extensions of Credit by Federal Reserve Banks; Change in Discount Rate

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board of Governors has amended its Regulation A on Extensions of Credit by Federal Reserve Banks to reflect its approval of a decrease in the basic discount rate at each Federal Reserve Bank. The Board acted on requests submitted by the Boards of Directors of the twelve Federal Reserve Banks.

EFFECTIVE DATES: The amendments to part 201 (Regulation A) were effective November 17, 1998. The rate changes for adjustment credit were effective on the dates specified in 12 CFR 201.51.

FOR FURTHER INFORMATION CONTACT: Jennifer J. Johnson, Secretary of the Board (202/452–3259); for users of Telecommunications Device for the Deaf (TDD), please contact Diane Jenkins, (202/452–3544), Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551.

SUPPLEMENTARY INFORMATION: Pursuant to the authority of sections 10(b), 13, 14, 19, *et al.*, of the Federal Reserve Act, the Board has amended its Regulation A (12 CFR part 201) to incorporate changes in discount rates on Federal Reserve Bank extensions of credit. The discount rates are the interest rates charged to depository institutions when they borrow from their district Reserve Banks.

The ''basic discount rate'' is a fixed rate charged by Reserve Banks for adjustment credit and, at the Reserve Banks' discretion, for extended credit. In decreasing the basic discount rate, the Board acted on requests submitted by the Boards of Directors of the twelve Federal Reserve Banks. The new rates were effective on the dates specified below. Although conditions in financial markets have settled down materially since mid-October, unusual strains remain. With the 75-basis-point decline in the federal funds rate since September, financial conditions can reasonably be expected to be consistent with fostering sustained economic expansion while keeping inflationary pressures subdued.

Regulatory Flexibility Act Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Board certifies that the change in the basic discount rate will not have a significant adverse economic impact on a substantial number of small entities. The rule does not impose any additional requirements on entities affected by the regulation.

Administrative Procedure Act

The provisions of 5 U.S.C. 553(b) relating to notice and public participation were not followed in connection with the adoption of the amendment because the Board for good cause finds that delaying the change in the basic discount rate in order to allow notice and public comment on the change is impracticable, unnecessary, and contrary to the public interest in fostering sustainable economic growth.

The provisions of 5 U.S.C. 553(d) that prescribe 30 days prior notice of the effective date of a rule have not been followed because section 553(d) provides that such prior notice is not necessary whenever there is good cause for finding that such notice is contrary to the public interest. As previously stated, the Board determined that delaying the changes in the basic discount rate is contrary to the public interest.

List of Subjects in 12 CFR Part 201

Banks, Banking, Credit, Federal Reserve System.

For the reasons set out in the preamble, 12 CFR part 201 is amended as set forth below:

PART 201—EXTENSIONS OF CREDIT BY FEDERAL RESERVE BANKS (REGULATION A)

1. The authority citation for 12 CFR part 201 continues to read as follows:

Authority: 12 U.S.C. 343 *et seq.*, 347a, 347b, 347c, 347d, 348 *et seq.*, 357, 374, 374a and 461.

2. Section 201.51 is revised to read as follows:

§ 201.51 Adjustment credit for depository institutions.

The rates for adjustment credit provided to depository institutions under § 201.3(a) are:

Federal Reserve Bank	Rate	Effective
Boston	4.5	Nov 18, 1998
New York	4.5	Nov 17, 1998
Philadelphia	4.5	Nov 17, 1998
Cleveland	4.5	Nov 19, 1998
Richmond	4.5	Nov 18, 1998
Atlanta	4.5	Nov 18, 1998
Chicago	4.5	Nov 19, 1998
St. Louis	4.5	Nov 19, 1998
Minneapolis	4.5	Nov 19, 1998
Kansas City	4.5	Nov 18, 1998
Dallas	4.5	Nov 17, 1998
San Francisco	4.5	Nov 17, 1998

By order of the Board of Governors of the Federal Reserve System, November 24, 1998.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 98–31976 Filed 11–30–98; 8:45 am]

BILLING CODE 6210–01–P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1700

Poison Prevention Packaging Requirements; Exemption of Sucraid

AGENCY: Consumer Product Safety Commission.

ACTION: Final rule.

SUMMARY: The Commission is issuing a rule to exempt from its child-resistant packaging requirements the oral prescription drug Sucraid. Sucraid is a new liquid formulation of sacrosidase, a yeast derived form of the sucrase enzyme, used for the treatment of congenital sucrase-isomaltase deficiency. It was approved by the Food & Drug Administration on April 10, 1998. The Commission has determined that this product is exempt because human experience has shown no evidence of serious toxicity. The Commission takes this action under the authority of the Poison Prevention Packaging Act of 1970.

DATES: The rule will become effective on December 1, 1998.

FOR FURTHER INFORMATION CONTACT: Laura Washburn, Office of Compliance, Consumer Product Safety Commission, Washington, D.C. 20207; telephone (301) 504–0400 ext. 1452.

SUPPLEMENTARY INFORMATION:

A. Background

1. Relevant Statutory and Regulatory Provisions

The Poison Prevention Packaging Act of 1970 (''PPPA''), 15 U.S.C. 1471–1476, authorizes the Commission to establish standards for the ''special packaging'' (also referred to as child-resistant (CR) packaging) of household substances, such as drugs, when CR packaging is necessary to protect children from serious personal injury or illness due to (1) handling, using, or ingesting such substance and (2) the special packaging is technically feasible, practicable, and appropriate for the substance. Accordingly, the Commission requires that oral prescription drugs be in CR packaging. 16 CFR 1700.14(a)(10).

The Commission's regulations allow companies to petition the Commission for exemption from CR requirements. 16 CFR Part 1702. On July 10, 1997, Orphan Medical, Inc. (''Orphan Medical'') petitioned the Commission to exempt its product, Sucraid, from the special packaging requirements for oral prescription drugs. The petitioner stated that the exemption is justified because of lack of toxicity and lack of adverse human experience with the drug. The petitioner also stated that CR packaging is not technically feasible, practicable and appropriate for Sucraid. Because, as explained below, the Commission concluded that Sucraid lacks sufficient toxicity to justify special packaging, the Commission did not consider the technical feasibility, practicability, and appropriateness of special packaging for Sucraid.

2. The Proposed Rule

On June 12, 1998, the Commission issued a notice of proposed rulemaking (NPR) to exempt Sucraid from CR packaging requirements. 63 FR 32159. The Commission did not receive any comments on the proposed exemption.

3. Sucraid

Sucraid is a liquid formulation of sacrosidase, a yeast derived form of the sucrase enzyme. It is used to treat patients with congenital sucrase-isomaltase deficiency (''CSID''). The petitioner estimated that there are approximately 3,000 to 10,000 cases of CSID in the United States. CSID is a condition characterized by absent or low levels of sucrase and isomaltase, two enzymes in the small intestine. Sucrase breaks down sucrose (table sugar) so that it can be absorbed. Persons with CSID have such symptoms as diarrhea, abdominal pain, bloating, and gas. Patients with severe CSID may require hospitalization for diarrhea, dehydration, malnutrition, weakness and muscle wasting. Sacrosidase is an enzyme replacement therapy that reduces the symptoms of CSID.

B. Toxicity Data

Sacrosidase is derived from bakers yeast. It is Generally Recognized as Safe (''GRAS'') for use in food by the Food and Drug Administration (''FDA''). 21 CFR 170.30. Sucraid contains about 1.5 milligrams per milliliter of the enzyme in a 50:50 solution of glycerol and water.

One bottle of Sucraid contains 150 mg of protein, 59 ml of water and 59 ml of glycerol. Similar to dietary proteins, the protein component of Sucraid is digested to amino acids that are used to make new protein and are not expected to cause toxicity. Glycerol is a sweet liquid used as a solvent, preservative, and moisturizer. FDA recognizes glycerol as GRAS for use as a food. 21 CFR 182.1320. It is also used as a drug, for example, to reduce intraocular and intracranial pressure. It also can be used as a laxative.

Possible adverse effects associated with glycerol include nausea, vomiting, headache, and dehydration. Less commonly reported effects include diarrhea, thirst, dizziness, and mental confusion. Some more serious effects have been reported with intravenous administration of glycerol and with certain high risk patients. However, the Hazardous Chemicals Desk Reference indicates that glycerol is only mildly toxic by ingestion. In addition, the Handbook of Common Poisonings in Children characterizes glycerol as a laxative, stating that ''acute exposure to most laxatives produces nausea, vomiting, and diarrhea, which are usually mild and self-limiting.''

The CPSC staff found three cases in the National Electronic Injury Surveillance System (''NEISS'') of children under five years old ingesting products containing glycerol. The products involved were a glycerol suppository, a baby enema preparation, and an ear solution. In all three cases the child was treated and released or examined and released without treatment.

Thus, based on the information discussed above, the glycerol component of Sucraid is not likely to cause significant toxicity to children.

C. Human Experience Data

Investigators conducting clinical trials of Sucraid did not rate any of the adverse effects encountered as probably or definitely related to the drug. Some effects were considered to be possibly related to the drug.

The investigators considered most of the adverse effects to be unrelated to Sucraid and due to illnesses common to children (e.g., flu, ear infection and strep throat). Unrelated effects included sore throat, fever, cough, runny nose, diarrhea, cramping and abdominal pain.

The clinical investigator rated some adverse events as possibly related to Sucraid. These symptoms included abdominal pain, diarrhea, nausea, vomiting, constipation, dehydration, cramps, headache, insomnia, nervousness, and wheezing. The petitioner noted that many of these were gastrointestinal symptoms typical of CSID. Thus, the dose of Sucraid given may not have been adequate to alleviate all symptoms of the disease. An asthmatic child had an acute hypersensitivity reaction (wheezing) to Sucraid that resolved without sequelae. This patient was withdrawn from the trial.

D. Action on the Petition

After considering the information provided by the petitioner and other available toxicity and human experience data, the Commission concludes that the degree and nature of the hazard to children presented by the availability of Sucraid do not require special packaging to protect children from serious personal injury or serious illness resulting from handling, using, or ingesting the substance. For these reasons, the Commission has decided to issue the proposed exemption on a final basis.

E. Effective Date

Because the rule issued below provides an exemption, the provisions of 5 U.S.C. 553(c) requiring a delay in the effective date is not applicable. Accordingly, the exemption issued below shall become effective on December 1, 1998.

F. Regulatory Flexibility Act Certification

Under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, an agency that engages in rulemaking generally must prepare proposed and final regulatory flexibility analyses describing the impact of the rule on small businesses and other small entities. Section 605 of the Act provides that an agency is not required to prepare a regulatory flexibility analysis if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

In the proposed rule, the Commission's Directorate for Economic Analysis prepared a preliminary assessment of the impact of a rule to

exempt Sucraid from special packaging requirements. The staff reports that because of the small number of cases of CSID (3,000 to 10,000 in the U.S.), the market for Sucraid is expected to be small. The petitioner, Orphan Medical, is a small manufacturer based on its employment and sales. Orphan Medical has marketing exclusivity for Sucraid for seven years. The exemption from special packaging requirements will allow the company to avoid costs associated with providing CR packaging.

Based on this assessment, the Commission concludes that this regulation exempting Sucraid from special packaging requirements would not have a significant impact on a substantial number of small businesses or other small entities.

G. Environmental Considerations

The Commission's regulations governing environmental review procedures state that exemption of products from requirements for CR packaging under the PPPA normally has little or no potential for affecting the environment. (See 16 CFR 1021.5(c)(3).) The Commission does not foresee any special or unusual circumstances surrounding the exemption issued below. For this reason, the Commission concludes that neither an environmental assessment nor an environmental impact statement is required in this proceeding.

H. Executive Orders

According to Executive Order 12988 (February 5, 1996), agencies must state in clear language the preemptive effect, if any, of new regulations.

The PPPA provides generally that when a special packaging standard issued under the PPPA is in effect, ''no State or political subdivision thereof shall have any authority either to establish or continue in effect, with respect to such household substance, any standard for special packaging (and any exemption therefrom and requirement related thereto) which is not identical to the [PPPA] standard.'' 15 U.S.C. 1476(a). Upon application to the Commission, a State or local standard may be excepted from this preemptive effect if the State or local standard (1) provides a higher degree of protection from the risk of injury or illness than the PPPA standard and (2) does not unduly burden interstate commerce. In addition, the Federal government, or a State or local government, may establish and continue in effect a non-identical special packaging requirement that provides a higher degree of protection than the PPPA requirement for a household substance for the Federal, State or local government's own use. 15 U.S.C. 1476(b).

Thus, with the exceptions noted above, the final rule exempting Sucraid from special packaging requirements preempts non-identical state or local special packaging standards for the substance.

In accordance with Executive Order 12612 (October 26, 1987), the Commission certifies that this regulation does not have sufficient implications for federalism to warrant a Federalism Assessment.

List of Subjects in 16 CFR Part 1700

Consumer protection, Drugs, Infants and children, Packaging and containers, Poison prevention, Toxic substances.

For the reasons given above, 16 CFR part 1700 is amended to read as follows:

PART 1700—[AMENDED]

1. The authority citation for part 1700 continues to read as follows:

Authority: Pub. L. 91–601, secs. 1–9, 84 Stat. 1670–74, 15 U.S.C. 1471–76. Secs. 1700.1 and 1700.14 also issued under Pub. L. 92–573, sec. 30(a), 88 Stat. 1231, 15 U.S.C. 2079(a).

2. Section 1700.14 is amended by republishing paragraph (a) introductory text and paragraph (a)(10) introductory text, and by adding new paragraph (a)(10)(xx) to read as follows:

§ 1700.14 Substances requiring special packaging.

(a) *Substances.* The Commission has determined that the degree or nature of the hazard to children in the availability of the following substances, by reason of their packaging, is such that special packaging meeting the requirements of § 1700.20(a) is required to protect children from serious personal injury or serious illness resulting from handling, using, or ingesting such substances, and the special packaging herein required is technically feasible, practicable, and appropriate for these substances:

* * * * *

(10) *Prescription drugs.* Any drug for human use that is in a dosage form intended for oral administration and that is required by Federal law to be dispensed only by or upon an oral or written prescription of a practitioner licensed by law to administer such drug shall be packaged in accordance with the provisions of § 1700.15 (a), (b), and (c), except for the following:

* * * * *

(xx) Sacrosidase (sucrase) preparations in a solution of glycerol and water.

Dated: November 24, 1998.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

List of Relevant Documents

(Note. This list of relevant documents will not be printed in the Code of Federal Regulations.)

1. Briefing memorandum from Jacqueline Ferrante, Ph.D., EH, to the Commission, ''Petition (PP 97–1) to Exempt Sucraid from the Special Packaging Requirements for Oral Prescription Drugs,'' May 20, 1998.
2. Memorandum from Jacqueline Ferrante, Ph.D., EH, to Mary Ann Danello, Ph.D., Associate Executive Director, EH, ''Sucraid Review,'' April 1, 1998.
3. Memorandum from Marcia P. Robins, EC, to Jacqueline Ferrante, Ph.D., EH, ''Economic Considerations: Petition for exemption from PPPA Requirements for Oral Prescription Drug Sucraid,'' April 2, 1998.
4. Briefing memorandum from J. Ferrante to the Commission, ''Final rule to Exempt Sucraid from CRP requirements, November 12, 1998.''
5. Memorandum from Marcie Robins to J. Ferrante, ''Exemption from CRP requirements for Preparations containing sacrosidase (sucrase): Small Business Effects,'' September 15, 1998.

[FR Doc. 98–31998 Filed 11–30–98; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 11

[Docket No. RM86–2–000]

Update of the Federal Energy Regulatory Commission's Fees Schedule for Annual Charges for the Use of Government Lands

November 24, 1998.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule; update of Federal land use fees.

SUMMARY: On May 8, 1987, the Commission issued its final rule amending Part 11 of its regulations (Order No. 469, 52 FR 18201 May 14, 1987). The final rule revised the billing procedures for annual charges for administering Part I of the Federal Power Act, the billing procedures for charges for Federal dam and land use, and the methodology for assessing Federal land use charges.

In accordance with the Commission's regulations, the Commission by its designee, the Chief Financial Officer, is updating its schedule of fees for the use of government lands. The yearly update is based on the most recent schedule of fees for the use of linear rights-of-way prepared by the United States Forest Service. Since the next fiscal year will cover the period from October 1, 1998, through September 30, 1999, the fees in this notice will become effective October 1, 1998. The fees will apply to fiscal year 1999 annual charges for the use of government lands.

The Commission has concluded, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB that this rule is not a ''major rule'' as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804(2).

EFFECTIVE DATE: October 1, 1998.

FOR FURTHER INFORMATION CONTACT: Fannie Kingsberry, Division of Financial Services, Office of Financial, Accounting and Operations, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, (202) 219–2885.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in the Public Reference Room at 888 First Street, N.W., room 2A, Washington, D.C. 20426.

The Commission Issuance Posting System (CIPS) provides access to the texts of formal documents issued by the Commission. CIPS can be accessed via Internet through FERC's Homepage (http://www.ferc.fed.us) using the CIPS Link or the Energy Information Online icon. The full text of this document will be available on CIPS in ASCII and WordPerfect 6.1 format. CIPS is also available through the Commission's electronic bulletin board service at no charge to the user and may be accessed using a personal computer with a modem by dialing 202–208–1397, if dialing locally, or 1–800–856–3920, if dialing long distance. To access CIPS, set your communications software to 19200, 134400, 12000, 96000, 7200, 4800, 2400, or 1200 bps, fullduplex, no parity, 8 data bits and 1 stop bit. User assistance is available at 202–208–2474 or by E-mail to cipsmaster@ferc.fed.us. This document is also available through the Commission's Records and Information Management System (RIMS), an electronic storage and retrieval system of ducments submitted to and issued by the Commission after November 16, 1981. Documents from November 1995 to the present can be viewed and printed. RIMS is available in the Public Reference Room or remotely via Internet through FERC's Homepage using the RIMS link or the Energy Information Online icon. User assistance is available at 202–208–2222, or by E-mail to rimsmaster@ferc.fed.us.

Finally, the complete text on diskette in WordPerfect format may be purchased from the Commission's copy contract, RVJ International, Inc. RVJ International, Inc. is located in the Public Reference Room at 888 First Street, N.W., Washington, D.C. 20426.

List of Subjects in 18 CFR Part 11

Electric power, Reporting and recordkeeping requirements.

Thomas R. Herlihy,

Director and Chief Financial Officer.

Accordingly, the Commission, effective October 1, 1998, amends Part 11 of Chapter I, Title 18 of the Code of Federal Regulations, as set forth below.

PART 11—[AMENDED]

1. The authority citation for Part 11 continues to read as follows:

Authority: 16 U.S.C. 791a–825r; 42 U.S.C. 7101–7352.

2. In Part 11, Appendix A is revised to read as follows:

APPENDIX A TO PART 11—FEE SCHEDULE FOR FY 1999

State	County	Rate per acre
Alabama	All Counties	$24.53
Arkansas	All Counties	18.41
Arizona	Apache	6.12
	Cochise.	
	Gila.	
	Graham.	
	La Paz.	
	Mohave.	
	Navajo.	
	Pima.	
	Yavapai.	
	Yuma.	
	Coconino North of Colorado River.	
	Coconino South of Colorado River	24.53
	Greenlee.	
	Maricopa.	
	Pinal.	
	Santa Cruz.	
California	Imperial	12.27
	Inyo.	
	Lassen.	
	Modoc.	
	Riverside.	
	San Bernardino.	
	Siskiyou	18.41
	Alameda	30.67
	Alpine.	
	Amador.	
	Butte.	
	Calaveras.	
	Colusa.	
	Contra Costa.	

APPENDIX A TO PART 11—FEE SCHEDULE FOR FY 1999—Continued

State	County	Rate per acre
	Del Norte.	
	El Dorado.	
	Fresno.	
	Glenn.	
	Humboldt.	
	Kern.	
	Kings.	
	Lake.	
	Madera.	
	Mariposa.	
	Mendocino.	
	Merced.	
	Mono.	
	Napa.	
	Nevada.	
	Placer.	
	Plumas.	
	Sacramento.	
	San Benito.	
	San Joaquin.	
	Santa Clara.	
	Shasta.	
	Sierra.	
	Solano.	
	Sonoma.	
	Stanislaus.	
	Sutter.	
	Tehama.	
	Trinity.	
	Tulare.	
	Tuolumne.	
	Yolo.	
	Yuba.	
	Los Angeles	36.82
	Marin.	
	Monterey.	
	Orange.	
	San Diego.	
	San Francisco.	
	San Luis Obispo.	
	San Mateo.	
	Santa Barbara.	
	Santa Cruz.	
	Ventura.	
Colorado	Adams	6.12
	Arapahoe.	
	Bent.	
	Cheyenne.	
	Crowley.	
	Elbert.	
	El Paso.	
	Huerfano.	
	Kiowa.	
	Kit Carson.	
	Lincoln.	
	Logan.	
	Moffat.	
	Montezuma.	
	Morgan.	
	Pueblo.	
	Sedgwick.	
	Washington.	
	Weld.	
	Yuma.	
	Baca	12.27
	Dolores.	
	Garfield.	
	Las Animas.	
	Mesa.	
	Montrose	12.27
	Otero.	
	Prowers.	

APPENDIX A TO PART 11—FEE SCHEDULE FOR FY 1999—Continued

State	County	Rate per acre
	Rio Blanco.	
	Routt.	
	San Miguel.	
	Alamosa	24.53
	Archuleta.	
	Boulder.	
	Chaffee.	
	Clear Creek.	
	Conejos.	
	Costilla.	
	Custer.	
	Denver.	
	Delta.	
	Douglas.	
	Eagle.	
	Fremont.	
	Gilpin.	
	Grand.	
	Gunnison.	
	Hinsdale.	
	Jackson.	
	Jefferson.	
	Lake.	
	La Plata.	
	Larimer.	
	Mineral.	
	Ouray.	
	Park.	
	Pitkin.	
	Rio Grande.	
	Saguache.	
	San Juan.	
	Summit.	
	Teller.	
Connecticut	All Counties	6.12
Florida	Baker	36.82
	Bay	
	Bradford	
	Calhoun	
	Clay	
	Columbia	
	Dixie	
	Duval	
	Escambia	
	Franklin	
	Gadsden	
	Gilchrist	
	Gulf	
	Hamilton	
	Holmes	
	Jackson	
	Jefferson	
	Lafayette	
	Leon	
	Liberty	
	Madison	
	Nassau	
	Okaloossa	
	Santa Rosa	
	Suwannee	
	Tayor	
	Union	
	Wakulla	
	Walton	
	Washington	
	All Counties	61.34
Georgia	All Counties	36.82
Idaho	Cassia	6.12
	Gooding	
	Jerome	
	Lincoln	
	Minidoka	

APPENDIX A TO PART 11—FEE SCHEDULE FOR FY 1999—Continued

State	County	Rate per acre
	Oneida	
	Owyhee	
	Power	
	Twin Falls	
	Ada	18.41
	Adams	
	Bannock	
	Bear Lake	
	Benewah	
	Bingham	
	Blaine	
	Boise	
	Bonner	
	Bonneville	
	Boundary	
	Butte	
	Camas	
	Canyon	
	Caribou	
	Clark	
	Clearwater	
	Custer	
	Elmore	
	Franklin	
	Fremont	
	Gem	
	Idaho	
	Jefferson	
	Kootenai	
	Latah	
	Lemhi	
	Lewis	
	Madison	
	Nez Perce	
	Payette	18.41
	Shoshone	
	Teton	
	Valley	
	Washington	
Kansas	All Counties	6.12
	Morton	12.27
Illinois	All counties	18.41
Indiana	All counties	30.67
Kentucky	All counties	18.41
Louisiana	All counties	36.82
Maine	All counties	18.41
Michigan	Alger	18.41
	Baraga	
	Chippewa	
	Dickinson	
	Delta	
	Gogebic	
	Houghton	
	Iron	
	Keweenaw	
	Luce	
	Mackinac	
	Marquette	
	Menominee	
	Ontonagon	
	Schoolcraft	
	All Counties	24.53
Minnesota	All counties	18.41
Mississippi	All counties	24.53
Missouri	All counties	18.41
Montana	Big Horn	6.12
	Blaine	
	Carter	
	Cascade	
	Chouteau	
	Custer	
	Daniels	

APPENDIX A TO PART 11—FEE SCHEDULE FOR FY 1999—Continued

State	County	Rate per acre
	McCone	
	Meagher	
	Dawson	
	Fallon	
	Fergus	
	Garfield	
	Glacier	6.12
	Golden Valley	
	Hill	
	Judith Basin	
	Liberty	
	Musselshell	
	Petroleum	
	Phillips	
	Pondera	
	Powder River	
	Prairie	
	Richland	
	Roosevelt	
	Rosebud	
	Sheridan	
	Teton	
	Toole	
	Treasure	
	Valley	
	Wheatland	
	Wibaux	
	Yellowstone	
	Beaverhead	18.41
	Broadwater	
	Carbon	
	Deer Lodge	
	Flathead	
	Gallatin	
	Granite	
	Jefferson	
	Lake	
	Lewis & Clark	
	Lincoln	
	Madison	
	Mineral	
	Missoula	
	Park	
	Powell	
	Ravalli	
	Sanders	
	Silver Bow	
	Stillwater	18.41
	Sweet Grass	
Nebraska	All Counties	6.12
Nevada	Churchill	3.06
	Clark	
	Elko	
	Esmeralda	
	Eureka	
	Humboldt	
	Lander	
	Lincoln	
	Lyon	
	Mineral	
	Nye	
	Pershing	
	Washoe	
	White Pine	
	Carson City	30.67
	Douglas	
	Storey	
New Hampshire	All Counties	18.41
New Mexico	Chaves	6.12
	Curry	
	De Baca	
	Dona Ana	

APPENDIX A TO PART 11—FEE SCHEDULE FOR FY 1999—Continued

State	County	Rate per acre
	Eddy	
	Grant	
	Guadelupe	
	Harding	6.12
	Hidalgo	
	Lea	
	Luna	
	McKinley	
	Otero	
	Quay	
	Roosevelt	
	San Juan	
	Socorro	
	Torrance	
	Rio Arriba	12.27
	Sandoual	
	Union	
	Bernalillo	24.53
	Catron	
	Cibola	
	Colfax	
	Lincoln	
	Los Alamos	
	Mora	
	San Miguel	
	Santa Fe	
	Sierra	
	Taos	
	Valencia	
New York	All Counties	24.53
North Carolina	All Counties	36.82
North Dakota	All Counties	6.12
Ohio	All Counties	24.53
Oklahoma	All Other Counties	6.12
	Beaver	12.27
	Cimarron.	
	Roger Mills.	
	Texas.	
	Le Flore	18.41
	Mc Curtain.	
Oregon	Harney	6.12
	Lake.	
	Malheur.	
	Baker	12.27
	Crook.	
	Deschutes.	
	Gilliam.	
	Grant.	
	Jefferson.	
	Klamath.	
	Morrow.	
	Sherman.	
	Umatilla.	
	Union.	
	Wallowa.	
	Wasco	12.27
	Wheeler.	
	Coos	18.41
	Curry.	
	Douglas.	
	Jackson.	
	Josephine.	
	Benton	24.53
	Clackamas.	
	Clatsop.	
	Columbia.	
	Hood River.	
	lane.	
	Lincoln.	
	Linn.	
	Marion.	
	Multnomah.	

APPENDIX A TO PART 11—FEE SCHEDULE FOR FY 1999—Continued

State	County	Rate per acre
	Polk.	
	Tillamock.	
	Washington.	
	Yamhill.	
Pennsylvania	All Counties	24.53
Puerto Rico	All	36.82
South Dakota	Butte	18.41
	Custer.	
	Fall River.	
	Lawrence.	
	Mead	18.41
	Pennington.	
	All Other Counties	6.12
South Carolina	All Counties	36.82
Tennessee	All Counties	24.53
Texas	Culberson	6.12
	El Paso.	
	Hudspeth.	
	All Other Counties	36.82
Utah	Beaver	6.12
	Box Elder.	
	Carbon.	
	Duchesne.	
	Emery.	
	Garfield.	
	Grand.	
	Iron.	
	Jaub.	
	Kane.	
	Millard.	
	San Juan.	
	Tooele.	
	Uintah.	
	Wayne.	
	Washington	12.27
	Cache	18.41
	Daggett.	
	Davis.	
	Morgan.	
	Piute.	
	Rich.	
	Salt Lake.	
	Sanpete.	
	Sevier.	
	Summit.	
	Utah.	
	Wasatch.	
	Weber.	
Vermont	All Counties	24.53
Virginia	All Counties	24.53
Washington	Adams	12.27
	Asotin.	
	Benton.	
	Chelan.	
	Columbia.	
	Douglas.	
	Franklin.	
	Garfield.	
	Grant.	
	Kittitas.	
	Klickitat.	
	Lincoln.	
	Okanagan.	
	Spokane.	
	Walla Walla	12.27
	Whitman.	
	Yakima.	
	Ferry	18.41
	Pend Oreille.	
	Stevens.	
	Callam	24.53
	Clark.	

APPENDIX A TO PART 11—FEE SCHEDULE FOR FY 1999—Continued

State	County	Rate per acre
	Cowlitz.	
	Grays Harbor.	
	Island.	
	Jefferson.	
	King.	
	Kitsap.	
	Lewis.	
	Mason.	
	Pacific.	
	Pierce.	
	San Juan.	
	Skagit.	
	Skamania.	
	Snohomish.	
	Thurston.	
	Wahkiakum.	
	Whatcom.	
West Virginia	All Counties	24.53
Wisconsin	All Counties	18.41
Wyoming	Albany	6.12
	Campbell.	
	Cargon.	
	Converse.	
	Goshen.	
	Hot Springs.	
	Johnson.	
	Laramie.	
	Lincoln.	
	Natrona.	
	Niobrara.	
	Platte.	
	Sheridan.	
	Sweetwater.	
	Fremont.	
	Sublette.	
	Uinta.	
	Washakie.	
	Big Horn	18.41
	Crook.	
	Park.	
	Teton.	
	Weston.	
All Other Zones		6.53

[FR Doc. 98–31890 Filed 11–30–98; 8:45 am]

BILLING CODE 6719–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM93–24–001; Order No. 600–A]

Revision of Fuel Cost Adjustment Clause Regulation Relating to Fuel Purchases From Company-Owned or Controlled Source; Order Denying Rehearsing and Other Relief

Issued November 24, 1998.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule; Order denying rehearing and other relief.

SUMMARY: The Federal Energy Regulatory Commission (Commission) denies a request, filed October 21, 1998, by Pacific Gas and Electric Company, for clarification, reconsideration or rehearing of the Final Rule, issued September 21, 1998, in which the Commission amended its regulations to state that where a regulatory body has jurisdiction over the price of fuel purchased from a company-owned or controlled source, and exercises that jurisdiction to approve such price, the Commission will presume, subject to rebuttal, that the cost of fuel so purchased is reasonable and includable in the fuel adjustment clause.

FOR FURTHER INFORMATION CONTACT: Wayne W. Miller, Federal Energy Regulatory Commission, Office of the General Counsel, 888 First Street, NE, Washington, DC 20426, (202) 208–0466.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in the Public Reference Room at 888 First Street, NE, Room 2A, Washington, DC 20426.

The Commission Issuance Posting System (CIPS) provides access to the texts of formal documents issued by the Commission. CIPS can be accessed via Internet through FERC's Homepage (http://www.ferc.fed.us) using the CIPS Link or the Energy Information Online icon. The full text of this document will be available on CIPS in ASCII and WordPerfect 6.1 format. CIPS is also available through the Commission's

electronic bulletin board service at no charge to the user and may be accessed using a personal computer with a modem by dialing 202–208–1397, if dialing locally, or 1–800–856–3920, if dialing long distance. To access CIPS, set your communications software to 19200, 14400, 12000, 9600, 7200, 4800, 2400, or 1200 bps, full duplex, no parity, 8 data bits and 1 stop bit. User assistance is available at 202–208–2474 or by E-mail to CipsMaster@FERC.fed.us.

This document is also available through the Commission's Records and Information Management System (RIMS), an electronic storage and retrieval system of documents submitted to and issued by the Commission after November 16, 1981. Documents from November 1995 to the present can be viewed and printed. RIMS is available in the Public Reference Room or remotely via Internet through FERC's Homepage using the RIMS link or the Energy Information Online icon. User assistance is available at 202–208–2222, or by E-mail to RimsMaster@FERC.fed.us.

Finally, the complete text on diskette in WordPerfect format may be purchased from the Commission's copy contractor, RVJ International, Inc. RVJ International, Inc., is located in the Public Reference Room at 888 First Street, NE, Washington, DC 20426.

Before Commissioners: James J. Hoecker, Chairman; Vicky A. Bailey, William L. Massey, Linda Breathitt, and Curt Hébert, Jr.

On October 21, 1998, Pacific Gas and Electric Company (PG&E) filed a request for clarification, reconsideration or rehearing of the Final Rule, issued September 21, 1998.[1] The Final Rule amended section 35.14(a)(7) of the Commission's regulations, 18 CFR § 35.14(a)(7) (1998), relating to fuel adjustment clauses, to state that where a regulatory body has jurisdiction over the price of fuel purchased by a utility from a company-owned or controlled source, and that regulatory body exercises that jurisdiction to approve such price, the Commission will presume, subject to rebuttal (rather than conclusively ''deem'') the cost of fuel so purchased to be reasonable and includable in the fuel adjustment clause. We deny the request for rehearing and other relief.

Background

In 1993, the Commission proposed to amend section 35.14(a)(7) of the Commission's regulations, relating to fuel adjustment clauses, to state that where a regulatory body has jurisdiction over the price of fuel purchased by a utility from a company-owned or controlled source, and that regulatory body exercises that jurisdiction to approve such price, the Commission will presume, subject to rebuttal (rather than conclusively ''deem'') the cost of fuel so purchased to be reasonable and includable in the fuel adjustment clause.[2] The Commission explained that the need for this amendment arises from the decision of the D.C. Circuit in *Ohio Power Company* v. *FERC*, 954 F.2d 779 (D.C. Cir.), *cert. denied*, 506 U.S. 981 (1992) (*Ohio Power*). In *Ohio Power*, among other things, the D.C. Circuit held that section 35.14(a)(7) establishes a *conclusive* presumption that a Securities and Exchange Commission (SEC)-approved price for an inter-affiliate fuel purchase is just and reasonable and, accordingly, cannot be upset by the Commission. In analyzing section 35.14(a)(7), the court focused on the meaning of the word ''deemed,'' finding that it establishes a conclusive presumption regarding the reasonableness of SEC-approved prices. The court thus rejected the Commission's position that the word ''deemed'' sets only a rebuttable presumption.[3]

As a consequence, the Commission proposed to amend section 35.14(a)(7) to clearly specify only a rebuttable presumption of reasonableness, making it clear that the Commission has no intention of abdicating its statutory responsibility to independently review wholesale rates (including fuel adjustment clauses) to ensure that they are just and reasonable. The Commission noted a special need for Commission review when affiliate transactions are involved.

The Commission received 12 comments in response to this NOPR; PG&E did not submit any comments. While generally in accord with (or at least neutral to) the intent of the NOPR, the commenters suggested various changes to the proposed regulation. The suggested modifications principally involved three concerns: (a) whether the relevant sentence of section 35.14(a)(7) should simply be eliminated, rather than revised to set forth a rebuttable presumption; (b) the meaning of the term ''regulatory body'' in the proposed rule; and (c) retroactivity. After reviewing and considering the comments, the Commission issued its Final Rule amending section 35.14(a)(7) in the manner initially proposed in the NOPR.

As relevant here, in the Final Rule, the Commission stated that, as to challenges to affiliate fuel prices recovered through the fuel adjustment clause prior to the effective date of this rule change (November 6, 1998) (and which are not subject to an alternate ground for decision in *Ohio Power*), how the Commission should address such challenges is best decided in each individual case in which the issue arises, rather than generically in the abstract.[4]

PG&E's Request

PG&E requests clarification that the Commission did not intend to apply the new rule to inter-affiliate fuel purchases that occurred, and were approved by regulatory authorities with jurisdiction over the purchases, prior to the effective date of the Final Rule. If the Commission did intend to leave the door open to such retroactive application, then PG&E requests reconsideration or rehearing. PG&E contends that any retroactive application of the new rule to inter-affiliate fuel purchases before the effective date of the Final Rule exceeds the Commission's authority under the Federal Power Act (FPA), and the Administrative Procedure Act (APA). PG&E argues that the Commission may not circumvent this prohibition by implementing a new legislative rule retroactively in case-by-case adjudications.[5] Additionally, PG&E argues that, because the NOPR was

[1] Revision of Fuel Cost Adjustment Clause Regulation Relating to Fuel Purchases From Company-Owned or Controlled Source, Order No. 600, 63 FR 53,085 (October 7, 1998), FERC Stats. & Regs. ¶ 31, 066 (1998) (Final Rule).

[2] Revision of Fuel Cost Adjustment Clause Regulation Relating to Fuel Purchases From Company-Owned or Controlled Source, 58 FR 51,259 (October 1, 1993), IV FERC Stats. & Regs. ¶ 32,502 (1993) (NOPR).

[3] 954 F.2d at 783–84.

[4] FERC Stats. & Regs. ¶ 31,066 at 30,727. The Commission noted that the fuel adjustment clause allows public utilities to pass through to their ratepayers increases or decreases in the cost of their fuel, without having to make separate filings to reflect each change in fuel cost and without having to obtain prior Commission review of each change in fuel cost. Consequently, the Commission stated that it has sanctioned after-the-fact review and refunds in later proceedings. Without later review and the ability to order refunds, the Commission explained, overcharges collected through the fuel adjustment clause would be exempt from all scrutiny and refunds. *Id.* at 30,727, n.21.

[5] PG&E maintains that the precedents cited by the Commission in footnote 21 of the Final Rule are inapplicable because in none of those cases did the Commission apply a new legislative rule retroactively in later adjudications. Instead, PG&E argues, the Commission retroactively reviewed the reasonableness of costs flowed through formula rates, applying the same regulations that were in effect at the time the costs were incurred. PG&E Request at 3.

silent on potential retroactive application of the rule, retroactive application violates the APA's notice and comment procedures.[6]

Discussion

We will deny PG&E's request for clarification, reconsideration and rehearing.

We disagree with PG&E that the Commission must clarify or reconsider the Final Rule at this time because of retroactivity concerns. In the Final Rule, the Commission did not state that it necessarily would take any particular action. Rather, the Commission merely stated that challenges to affiliate fuel prices recovered through the fuel adjustment clause prior to the effective date of this rule change are best decided on a case-by-case basis. When the Commission is presented with a case involving fuel adjustment clause recovery before the effective date of the Final Rule of the price of affiliate fuel purchases, the Commission can determine at that time how best to proceed.

The Commission Orders

PG&E's request for clarification, reconsideration and rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(SEAL)

David P. Boergers,

Secretary.

[FR Doc. 98–31960 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–01–P

[6] 5 U.S.C. 553 (1994).

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 172

[Docket No. 94F–0454]

Food Additives Permitted for Direct Addition to Food for Human Consumption; White Mineral Oil, USP

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of white mineral oil as a dust control agent for rough rice at an application rate of 800 parts per million (ppm). This action is in response to a petition filed by Lyondell-Citgo Refining Co., Ltd.

DATES: This regulation is effective December 1, 1998; written objections and requests for a hearing by December 31, 1998.

ADDRESSES: Submit written objections to the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Blondell Anderson, Center for Food Safety and Applied Nutrition (HFS–206), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, –202–418–3106.

SUPPLEMENTARY INFORMATION:

I. Introduction

In a notice published in the **Federal Register** of January 25, 1995 (60 FR 4920), FDA announced that a food additive petition (FAP 5A4440) had been filed by Lyondell-Citgo Refining Co., Ltd., P.O. Box 2451, Houston, TX 77252–2451, proposing that the food additive regulations be amended in § 172.878 *White mineral oil* (21 CFR 172.878), to provide for the safe use of white mineral oil as a dust control agent for rough rice at an application rate of 800 ppm (0.08 percent of the weight of the rice). An application rate of 200 ppm (0.02 percent of the weight of the grain) is currently permitted under § 172.878(c) for use on wheat, corn, soybean, barley, rice, rye, oats, and sorghum as a dust suppressant. On September 17, 1996, the petitioner amended the petition to limit its request to the use of white mineral oil of ISO 100 oil viscosity (100 centistokes (cSt) at 100°F).

II. Comments

The agency has received nine comments from rice warehouses and an oil supply company in support of the proposed application rate of food grade white mineral oil for rough rice indicating that the current regulated rate of 200 ppm does not effectively control rice dust. Because the comments are consistent with the regulation as set forth in the codified section of this document, FDA sees no need to address them.

III. Conclusion

The agency has evaluated all the data in the petition and other information and concludes that the proposed use of white mineral oil of ISO 100 oil viscosity (centistokes (cSt) at 100 °F) is safe for use as a dust control agent for rough rice and that the additive will achieve its technical effect. Therefore, the agency concludes that the food additive regulations should be amended as set forth as follows.

In accordance with § 171.1(h) (21 CFR 171.1(h)), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition are available for inspection at the Center for Food Safety and Applied Nutrition by appointment with the information contact person listed above. As provided in § 171.1(h), the agency will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

IV. Environmental Effects

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

V. Paperwork Reduction Act of 1995

This final rule contains no collections of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

VI. Objections

Any person who will be adversely affected by this regulation may at any time on or before December 31, 1998, file with the Dockets Management Branch (address above) written objections thereto. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents shall be submitted and shall be identified with the docket number found in brackets in the heading of this document. Any objections received in

response to the regulation may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 172

Food additives, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, and redelegated to the Director, Center for Food Safety and Applied Nutrition, 21 CFR part 172 is amended as follows:

PART 172—FOOD ADDITIVES PERMITTED FOR DIRECT ADDITION TO FOOD FOR HUMAN CONSUMPTION

1. The authority citation for 21 CFR part 172 continues to read as follows:

Authority: 21 U.S.C. 321, 341, 342, 348, 371, 379e.

2. –Section 172.878 is amended in the table in paragraph (c) by adding an entry under the headings ''Use'' and ''Limitation (inclusive of all petroleum hydrocarbons that may be used in combination with white mineral oil)'' to read as follows:

§ 172.878 White mineral oil.

* * * * *

(c) * * *

Use	Limitation (inclusive of all petroleum hydrocarbons that may be used in combination with white mineral oil)
* * *	* * * *
16. As a dust control agent for rice.	ISO 100 oil viscosity (100 centistokes (cSt) at 100°F) applied at a level of no more than 0.08 percent by weight of the rice grain.

Dated: November 7, 1998.

L. Robert Lake,

Director, Office of Policy, Planning, and Strategic Initiatives, Center for Food Safety and Applied Nutrition.

[FR Doc. 98–31845 Filed 11–30–98; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 172

[Docket No. 98F–0063]

Food Additives Permitted for Direct Addition to Food for Human Consumption; Natamycin (Pimaricin)

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of a dry form of natamycin as an antimycotic in cheeses. This action is in response to a petition filed by Protein Technologies International, Inc.

DATES: This regulation is effective December 1, 1998; written objections and requests for a hearing by December 31, 1998.

ADDRESSES: Submit written objections to the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: JoAnn Ziyad, Center for Food Safety and Applied Nutrition (HFS–206), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–418–3116.

SUPPLEMENTARY INFORMATION: In a notice published in the **Federal Register** of February 11, 1998 (63 FR 6945), FDA announced that a food additive petition (FAP 8A4581) had been filed by Protein Technologies International, Checkerboard Sq., St. Louis, MO 63164. The petition proposes to amend the food additive regulations in § 172.155 *Natamycin (pimaricin)* (21 CFR 172.155) to provide for the safe use of a dry form of the food additive for use on the surfaces of cuts and slices of cheese to inhibit mold spoilage, in accordance with various standards of identity for cheeses that allow the use of antimycotics and anticaking agents.

–FDA received two comments from the food industry on the use of the dry mix of natamycin and cellulose on cheese to inhibit mold spoilage. Both comments favored the petitioned use of the additive. One comment listed several reasons for supporting the current petitioned use. They include possible extension of shelf life of shredded cheese, reduction of risks associated with antimycotic suspension spray application and minimal new technology investment by utilizing existing anticaking agent application technology. However, the other comment stated that ''We realize that natamycin is permitted as a spray on the surface of cheese, but we are not comfortable with that method of application on grated cheese. We would like to test the efficacy of the method proposed in the cited petition.''

–FDA finds that the petitioner does not seek approval either for the use of the wet or dry application of the additive on grated cheese. The petitioner requests that FDA amend the food additive regulation for natamycin (pimaricin) found in § 172.155 to allow for the use of a dry form of the food additive only on the surfaces of cuts and slices of cheese to inhibit mold spoilage, and this does not extend to use of the additive on grated or shredded cheese. Therefore, the comments on grated or shredded cheese are outside the scope of this rulemaking.

–Natamycin is currently approved in § 172.155 for use as an antimycotic agent on the surfaces of cuts and slices of cheese(s). Natamycin may be used on surfaces of cuts and slices of a cheese listed in 21 CFR part 133 only if the standards for such cheese provides for or the use of ''safe and suitable'' mold-inhibiting ingredients. The subject additive is defined in § 172.155 and may be applied by dipping or by spraying, using an aqueous solution containing 200 to 300 parts per million (ppm) of the additive. The proposed use is for the application of natamycin to cuts and slices of cheese as a dry mixture with safe and suitable anticaking agents, such as cellulose.

–FDA has evaluated the data in the petition and other relevant material. As part of its review, FDA evaluated data on the technical effect of the additive, its stability, and the change in exposure resulting from the use of a dry mixture of natamycin and cellulose anticaking agent. The petitioner provided data to establish that a level of up to 20 ppm natamycin in the finished product is needed to obtain the same antimycotic effect as from the liquid application.

–The petitioner, by measuring the antimycotic effect of a dry mixture of natamycin and cellulose on several

cheeses resulting in no more than 20 ppm of natamycin in these cheeses, demonstrated that the additive will achieve its intended technical effect. The application of natamycin in dry form does not change the chemical composition of the additive, the uses in food, the use levels and, therefore, the dietary exposure to natamycin. Furthermore, the use of natamycin in the dry form does not result in any manufacturing changes that would affect the safety of the additive for this proposed use. The use of comparable levels of other safe and suitable anticaking agents, in addition to cellulose, would not change this conclusion. Therefore, the agency's safety evaluation of natamycin for the approved use in an aqueous application by dipping or spraying (47 FR 26823, June 22, 1982, as amended at 50 FR 49536, December 3, 1985) supports this proposed use of natamycin in dry form. Based on this information, the agency concludes that the proposed use of the additive is safe, that the additive will achieve its intended technical effect, and therefore, that the regulations in § 172.155 should be amended.

In accordance with § 171.1(h) (21 CFR 171.1(h)), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition are available for inspection at the Center for Food Safety and Applied Nutrition by appointment with the information contact person listed above. As provided in § 171.1(h), the agency will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

–The agency has previously considered the environmental effects of this rule as announced in the notice of filing for FAP 8A4581 (63 FR 6945, February 11, 1998). No new information or comments have been received that would affect the agency's previous determination that there is no significant impact on the human environment and that an environmental impact statement is not required.

–This final rule contains no collection of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

Any person who will be adversely affected by this regulation may at any time on or before December 31, 1998, file with the Dockets Management Branch (address above) written objections thereto. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents shall be submitted and shall be identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 172

–Food additives, Reporting and recordkeeping requirements.

–Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Foods and Drugs and redelegated to the Director, Center for Food Safety and Applied Nutrition, 21 CFR part 172 is amended as follows:

PART 172—FOOD ADDITIVES PERMITTED FOR DIRECT ADDITION TO FOOD FOR HUMAN CONSUMPTION

–1. The authority citation for 21 CFR part 172 continues to read as follows:

–Authority: 21 U.S.C. 321, 341, 342, 348, 371, 379e.

–2. Section 172.155 is amended by revising paragraph (c)(1) to read as follows:

§ 172.155 Natamycin (pimaricin).

* * * * *

(c) * * *

(1) The additive may be applied as a dry mix containing the additive and safe and suitable anticaking agents, resulting in no more than 20 parts per million of the additive in the finished product, or by dipping or spraying, using an aqueous solution containing 200 to 300 parts per million of the additive.

* * * * *

Dated: November 7, 1998.

L. Robert Lake,

Director, Office of Policy, Planning and Strategic Initiatives, Center for Food Safety and Applied Nutrition.

[FR Doc. 98–31855 Filed 11–30–98; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 343

[Docket No. 77N–094A]

Internal Analgesic, Antipyretic, and Antirheumatic Drug Products for Over-The-Counter Human Use; Final Rule for Professional Labeling of Aspirin, Buffered Aspirin, and Aspirin in Combination With Antacid Drug Products; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a final rule that appeared in the **Federal Register** of October 23, 1998 (63 FR 56802). The document provided for professional labeling for over-the-counter (OTC) internal analgesic, antipyretic, and antirheumatic drug products containing aspirin, buffered aspirin, and aspirin in combination with an antacid. The document published with some inadvertent editorial errors. This document corrects those errors.

EFFECTIVE DATE: The regulation is effective October 25, 1999.

FOR FURTHER INFORMATION CONTACT: Ida I. Yoder, Center for Drug Evaluation and Research (HFD–560), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–2222.

SUPPLEMENTARY INFORMATION: In FR Doc. 98–28519, appearing on page 56802, in the **Federal Register** of October 23, 1998, the following corrections are made:

1. On page 56809, in Table 5, in the second entry in the fourth column, ''-3.9'' is corrected to read ''-39''.

2. On page 56810, in the third column, in the eighteenth line, ''preoperative'' is corrected to read ''perioperative''.

3. On page 56812, in the first column, in the third paragraph, in the eighteenth line, ''were'' is corrected to read ''was''.

§ 343.80 [Corrected]

4. On page 56817, in § 343.80(a)(1), the last paragraph is corrected to read ''REV: October 23, 1998''.

5. On page 56818, in § 343.80(a)(2), the entire page ''**HIGHLIGHTS OF PRESCRIBING INFORMATION**'' is corrected to read as follows:

Dated: November 20, 1998.

William K. Hubbard,

Associate Commissioner for Policy Coordination.

[FR Doc 98–31854 Filed 11–30–98; 8:45 am]

BILLING CODE 4160–01–F

HIGHLIGHTS OF PRESCRIBING INFORMATION
ASPIRIN (FORMULATION)
(acetylsalicylic acid)

PROFESSIONAL INDICATIONS AND USAGE
Vascular Indications:
· Ischemic Strokes and Transient Ischemic Attacks (TIA)
· Suspected Acute Myocardial Infarction (MI)
· Prevention of Recurrent MI
· Unstable Angina Pectoris
· Chronic Stable Angina Pectoris
Revascularization Procedures in Select Patients:
· Coronary Artery Bypass Graft (CABG)
· Percutaneous Transluminal Coronary Angioplasty (PTCA)
· Carotid Endarterectomy
Rheumatologic Disease Indications:
· Rheumatoid Arthritis
· Juvenile Rheumatoid Arthritis
· Spondyloarthropathies
· Osteoarthritis
· Arthritis and Pleurisy of Systemic Lupus Erythematosus (SLE)

Warnings Regarding Use In Pregnancy
Pregnant women should only take aspirin if clearly needed. Because of the known effects of nonsteroidal anti-inflammatory drugs on the fetal cardiovascular system (closure of the ductus arteriosus), use during the third trimester of pregnancy should be avoided. Salicylate products have also been associated with alterations in maternal and neonatal hemostasis mechanisms, decreased birth weight, and with perinatal mortality. Salicylate is excreted in breast milk. (See "Pregnancy," "Labor and Delivery" and "Nursing Mothers" in the "Precautions" section of the Comprehensive Prescribing Information.)

[1]Patients with a pre-existing condition for which aspirin is already indicated. See "Revascularization Procedures" under the "Indications and Usage" and "Clinical Studies" sections in the Comprehensive Prescribing Information.

Dosage and Administration

General: Each dose should be taken with a full glass of water unless contraindicated. Doses may need to be individualized depending on indication.

Indications	Recommended Daily Dose	Duration of Therapy
Vascular Indications:		
Ischemic Strokes and TIA	50-325 milligrams (mg) daily	Indefinitely
Suspected Acute MI	160-162.5 mg taken as soon as infarction is suspected; then once daily	For 30 days post infarction (after 30 days consider further treatment based on indication for previous MI)
Prevention of Recurrent MI	75-325 mg daily	Indefinitely
Unstable Angina Pectoris	75-325 mg daily	Indefinitely
Chronic Stable Angina Pectoris	75-325 mg daily	Indefinitely
Revascularization Procedures in Select Patients:		
CABG	325 mg daily starting 6 hrs. postprocedure	1 year
PTCA	325 mg 2 hours presurgery Maintenance therapy: 160-325 mg daily	Indefinitely
Carotid Endarterectomy	80 mg daily to 650 mg twice a day started presurgery	Indefinitely
Rheumatologic Disease Indications:		
Rheumatoid Arthritis	Initial dose 3 g daily. Target plasma salicylate levels 150-300 micrograms/milliliter (μg/mL)	As indicated
Juvenile Rheumatoid Arthritis	Initial dose 90-130 mg/kilograms/day. Target plasma salicylate levels 150-300 μg/mL	As indicated
Spondyloarthropathies	Up to 4 grams (g) daily	As indicated
Osteoarthritis	Up to 3 g daily	As indicated
Arthritis and Pleurisy of SLE	Initial dose 3 g daily. Target plasma salicylate levels 150-300 μg/mL	As indicated

CONTRAINDICATIONS
Aspirin is contraindicated in patients with known allergy to nonsteroidal anti-inflammatory drugs and in patients with the syndrome of asthma, rhinitis, and nasal polyps. Aspirin should not be used in children or teenagers for viral infections, with or without fever, because of the risk of Reye's syndrome with concomitant use of aspirin in certain viral illnesses.
PRECAUTIONS
General
· Renal Failure
· Hepatic Insufficiency
· Sodium Restricted Diets
Laboratory Tests
Drug Interactions:
· Angiotensin Converting Enzyme (ACE) Inhibitors
· Acetazolamide
· Anticoagulant Therapy
· Anticonvulsants
· Beta Blockers
· Diuretics
· Methotrexate
· Nonsteroidal Anti-inflammatory Drugs (NSAID's)
· Oral Hypoglycemics
· Uricosuric Agents
Carcinogenesis, Mutagenesis, Impairment of Fertility
Pregnancy, Labor and Delivery, Nursing Mothers
Pediatric Use

WARNINGS
· Alcohol Warning
· Coagulation Abnormalities
· Gastrointestinal Side Effects
· Peptic Ulcer Disease
ADVERSE REACTIONS (Most common)
· Gastrointestinal (Abdominal Pain, Ulceration, Bleeding)
· Inhibition of Platelet Aggregation (Bleeding)
· Tinnitus
· Dizziness
· Hearing Loss
To report SERIOUS adverse drug reactions, call (manufacturer) at (phone number) or MEDWATCH at 1-800-FDA-1088
HOW SUPPLIED
(Insert specific information regarding, strength of dosage form, units in which the dosage form is generally available, and information to facilitate identification of the dosage form.) Store in a tight container at 25 °C (77 °F); excursions permitted to 15-30 °C (59-86 °F).

These highlights do not include all the information needed to prescribe aspirin safely and effectively. See aspirin's comprehensive prescribing information.

[FR Doc. 98–31854 Filed 11–30–98; 8:45 am]
BILLING CODE 4160–01–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 558

New Animal Drugs for Use In Animal Feeds; Melengestrol Acetate and Lasalocid; Technical Amendment

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; technical amendment.

SUMMARY: The Food and Drug Administration (FDA) is amending and clarifying the animal drug regulations concerning melengestrol acetate (MGA) and the special considerations related to making type B and C feeds and lasalocid type B liquid feed specifications used for making lasalocid/MGA type C heifer feed.

EFFECTIVE DATE: December 1, 1998.

FOR FURTHER INFORMATION CONTACT: Jack Caldwell, Center For Veterinary Medicine (HFV–126), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–594–1638.

SUPPLEMENTARY INFORMATION: Pharmacia & Upjohn Co., 7000 Portage Rd., Kalamazoo, MI 49001–0199, is sponsor of NADA's 39–402 and 140–288 that provide for combining separately approved melengestrol acetate (MGA) (dry and liquid) and lasalocid (dry and liquid) type A medicated articles to make lasalocid/MGA (dry and liquid) type B feeds. The type B feeds are used to make dry type C feeds for heifers fed in confinement for slaughter for increased rate of weight gain, improved feed efficiency, and suppression of estrus (heat). The sponsor requested that § 558.342 (21 CFR 558.342) be amended to change the special considerations in paragraph (c)(1) to read ''type B or C medicated feeds'' and to change the limitations in paragraph (d)(3)(ii) by adding the specification ''The liquid medicated feeds are required to be manufactured in accordance with § 558.311(d).'' FDA concurs with the sponsor's request and extends the amendments to special considerations to include all type B or C feeds for clarity as originally intended. The regulations are amended in paragraph (c) of § 558.342 as requested.

–FDA has determined under 21 CFR 25.33(a)(1) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

List of Subjects in 21 CFR Part 558

–Animal drugs, Animal feeds.

–Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center For Veterinary Medicine, 21 CFR part 558 is amended as follows:

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

–1. The authority citation for 21 CFR part 558 continues to read as follows:

–Authority: 21 U.S.C. 360b, 371.

§ 558.342 [Amended]

–2. Section 558.342 *Melengestrol acetate* is amended in paragraph (c) after the phrase ''Type B'' each place it appears by adding the phrase ''or C'' and in paragraph (d)(3)(ii) by adding a sentence after the first sentence to read ''The liquid medicated feeds are required to be manufactured in accordance with § 558.311(d).''.

Dated: November 10, 1998.

Andrew J. Beaulieu,

Acting Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.

[FR Doc. 98–31573 Filed 11–30–98; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. S–019A]

RIN 1218–AA51

Permit-Required Confined Spaces

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Final rule.

SUMMARY: This final rule amends the Occupational Safety and Health Administration (OSHA) standard on Permit-Required Confined Spaces (permit spaces) (29 CFR 1910.146) to provide for enhanced employee participation in the employer's permit space program, to provide authorized permit space entrants or their authorized representatives with the opportunity to observe any testing or monitoring of permit spaces, and to strengthen and clarify the criteria employers must satisfy when preparing for the timely rescue of incapacitated permit space entrants. The revisions being made to the final rule will substantially enhance the protections being provided to permit space entrants and will additionally clarify a number of issues that have arisen since promulgation of the final Permit-Required Confined Spaces rule in 1993.

Specifically, OSHA is clarifying and strengthening the requirements in revised paragraphs (d), *Permit-required confined space program*, and (e), *Permit system*, to allow for greater employee participation in the permit-space program and for employee access to program information developed under the standard. The Agency is also revising paragraphs (c) and (d) to specify that employers must provide those employees who are authorized permit space entrants, or their authorized representatives, an opportunity to observe any testing of the space that is conducted prior to entry or subsequent to such entry. The Agency believes that these revisions are necessary to ensure that permit space entrants, whose work often requires entry into potentially life-threatening atmospheres, have the information necessary to protect themselves and their co-workers from confined space hazards. Allowing authorized entrants or their authorized representatives to observe the testing of the spaces they are required to enter will help to ensure that the testing has been done properly, that the respirators and other personal protective equipment being worn are appropriate, and that the entrants understand the nature of the hazards present in the space. In addition, paragraph (k) of the final rule, *Rescue and emergency services*, is being revised to clarify the criteria employers must satisfy when selecting a rescue team or service to rescue incapacitated permit space entrants, and a new paragraph (l), *Employee participation*, is being added to the final rule to ensure employee involvement in permit space program development and implementation. A non-mandatory appendix is also being added to the standard to assist employers in selecting appropriately trained and equipped rescuers.

EFFECTIVE DATE: This final rule will become effective February 1, 1999.

ADDRESSES: In compliance with 28 U.S.C. 2112(a), the Agency designates for receipt of petitions for review of the standard the Associate Solicitor for Occupational Safety and Health, Office of the Solicitor, Room S–4004, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, D.C. 20210.

FOR FURTHER INFORMATION CONTACT: Ms. Bonnie Friedman, U.S. Department of Labor, Occupational Safety and Health Administration, Office of Information and Consumer Affairs, Room N3647,

Washington, D.C. 20210, telephone (202) 693–1999.

SUPPLEMENTARY INFORMATION:

I. Background

On January 14, 1993, the Occupational Safety and Health Administration (OSHA) issued a general industry standard (29 CFR 1910.146) to require protection for employees who enter permit-required confined spaces (permit spaces). The permit space standard, which provides a comprehensive regulatory framework for the safe performance of entry operations in general industry workplaces, became effective on April 15, 1993.

The United Steelworkers of America (USWA), the American Gas Association, and the Edison Electric Institute sought judicial review of the standard. In particular, the USWA argued that paragraph (k)(2) of the standard, which addresses the use of off-site rescue services, was vague and ineffective. The USWA also stated that OSHA had inappropriately omitted from the final rule a provision allowing affected employees or their designated representatives to observe any required testing or monitoring of permit spaces and a provision granting affected employees access to permit space testing or monitoring results. All three petitions were subsequently withdrawn pursuant to settlement agreements.

Based on settlement discussions with the USWA, OSHA agreed to initiate further rulemaking, and a notice of proposed rulemaking (NPRM) was accordingly issued on November 28, 1994. In the notice, the Agency specifically asked for public input on the USWA's suggestion that OSHA add provisions to the rule providing employees the opportunity to observe permit space monitoring or testing as well as granting them access to the results of such testing or monitoring. The notice also proposed changes to paragraph (k)(2) to clarify that host employers must ensure that rescue teams or services selected to perform permit space rescues at the host employer's facility have the capability to provide rescue in a timely manner, depending on the hazard(s) present in the permit spaces at the host employer's facility. In addition, on the basis of information received after the 1993 final rule was published, OSHA proposed to make the requirement for the point of attachment of a retrieval line more performance oriented by permitting any point of attachment to be used that enables the entrant's body to present the smallest possible profile during removal.

The NPRM set a 90-day comment period, ending on February 27, 1995, to receive written comments on the proposed revisions and the issues raised. OSHA received 51 written comments (Exs. 161–1 through 161–51). Several commenters (Exs. 161–21, 161–22, 161–38, 161–40, 161–44) requested that OSHA convene an informal public hearing to address their concerns.

OSHA published a notice of informal public hearing on August 2, 1995, scheduling a hearing for September 27, 1995, in Washington, D.C. In the hearing notice, OSHA also announced the extension, until September 13, 1995, of the public comment period to receive comments relating to the issues raised in the hearing notice. Twenty-seven additional comments (Exs. 161–52 through 161–78) were received as a result of the reopening of the record.

Twelve participants introduced testimony and evidence at the September 27 and 28 public hearing, which was presided over by Administrative Law Judge Joel Williams. At the conclusion of the hearing, Judge Williams set a post-hearing period for the submission of additional briefs, arguments and summations (ending on December 20, 1995). A total of 12 submissions (Exs. 178 through 189) were received during the post-hearing period. On February 14, 1996, the record for the rulemaking was closed and certified to OSHA. The record for this phase of the rulemaking contains a total of 90 submissions and more than 470 pages of hearing transcript. OSHA has carefully considered all of the materials submitted as part of this rulemaking in the drafting of this final rule. The materials submitted are available for review and copying in the OSHA Docket Office, Docket S–019A.

A few commenters appeared to believe that this revision constitutes an entirely new rulemaking proceeding (Exs. 161–33, 167). OSHA emphasizes, however, that this proceeding is properly viewed as a continuation of the rulemaking leading to the 1993 standard. Therefore, the Agency is not required to demonstrate that the relatively minor changes it is making to the PRCS standard are independently justified or that they, by themselves, effect a substantial reduction in significant risk. OSHA made that finding for the PRCS standard as a whole in 1993. In this case, the changes OSHA is making to paragraphs (c), (d), (e), and (k) essentially clarify what was always the Agency's intent with regard to employee representatives' access to information and employers' evaluation and selection of rescue services and teams. Although it is OSHA's view that the employee participation revisions it is making to paragraphs (c) and (d), and the addition of paragraph (l), will in fact substantially reduce the risks faced by permit space entrants, the revisions are proper so long as they are rationally related to the purposes of the OSH Act and the standard as a whole, and are supported by the rulemaking record.

II. Summary and Explanation of the Final Rule

The revisions to the final rule make changes to several provisions of paragraphs (c), (d), (e), and (k) of OSHA's permit-space standard (29 CFR 1910.146), and add a new paragraph (l). These changes, and the Agency's rationale for making them, are described below. References to exhibits in the docket (Docket S–019A) are designated ''Ex.,'' followed by the exhibit number. References to the continuously paginated transcript of the public hearing held on September 27 and 28, 1995 (Exs. 192X, 193X), are designated Tr., followed by the page number.

Paragraphs (c), General Requirements, (d), Permit-required confined space program, and (e), Permit system

A. Clarification of the Need To Provide Authorized Representatives With Information Required by the Standard

Paragraphs (c)(5)(i)(E), (c)(5)(ii)(H), and (c)(7)(iii) have been revised to specify that OSHA intends authorized representative(s) of employees to have access to any information provided to employees under the standard. These wording changes are meant to clarify what has been longstanding OSHA policy and practice, i.e., to recognize the right of authorized representatives of employees to receive the same information as employees receive under the Agency's standards. In recognition of that policy, the Permit Space standard promulgated in 1993 specifically provides, in paragraph (c)(4), that the written program, which contains the employer's procedures and policies for implementing that program, be available for inspection and copying ''by employees and their authorized representatives.'' Thus, the changes being made to paragraphs (c)(5)(i)(E), (c)(5)(ii)(H), and (c)(7)(iii) in this revised rule merely provide additional clarification of the Agency's intent.

The need to clarify these provisions was discussed by the USWA, which noted (Ex. 161–38) that ''The right of employees and their representatives to relevant information has been a regular feature of OSHA standards since the beginning.'' In the same exhibit, the

USWA points to several OSHA standards, including the Hazard Communication standard (29 CFR 1910.1200), the Employee Access to Exposure and Medical Records standard (29 CFR 1910.1020), and the Process Safety Management standard (29 CFR 1910.119) that ''give employees and their representatives very broad rights to information.'' The USWA reiterated this view in post-hearing comments (Ex. 188). OSHA agrees that it was the intent of the Permit Space standard to provide both employees and their authorized representatives with access to the information addressed by these provisions of paragraph (c), and the changes made to the final rule reflect this position and bring the Permit Space standard into conformance with the language traditionally used in OSHA standards.

B. Employee Observation of Atmospheric Testing

Paragraphs (c)(5)(ii)(C) and (c)(5)(ii)(F) have been revised by adding a sentence to each of them that specifically requires employers whose employees enter permit spaces to give these employees, or their authorized representatives, an opportunity to observe the testing of the space during pre-entry (paragraph (c)(5)(ii)(C)) and during entry (paragraph (c)(5)(ii)(F)). In the NPRM, OSHA solicited comment (59 FR 60737) about revising 29 CFR 1910.146 to allow affected employees or their authorized representatives to observe the testing and evaluation of confined space conditions, prior to and during entry. Specifically, the proposal stated, ''* * * the Agency is considering whether such a provision [one requiring affected employees or their designated representatives to be permitted to observe any testing conducted under the confined space standard] should be added to the permit space standard based on the concerns expressed and on the record developed as a result of this notice.''

The USWA (Ex. 161–38), which requested a hearing on this and other matters, urged OSHA to incorporate such a provision into the standard both on the grounds that employee protections would be enhanced and that Section 8(c)(3) of the Act mandated the inclusion of such a provision:

> The benefits of employee observation of monitoring are well established. Congress certainly thought employees should have the right to observe the monitoring for air contaminants to which they could be exposed * * *. We believe employee observation should be viewed as a matter of right. Employees now have the right to observe the monitoring of air contaminants outside confined spaces, even when the potential health effects may not occur for many years. A worker entering a confined space risks sudden death if the monitoring was not done properly. Surely that worker should have the right to observe the monitoring. (Ex. 161–38).

Many commenters argued that it was not necessary or appropriate to add an observation of monitoring provision to the Permit Space standard (see, for example, Exs. 161–9, 161–14, 161–20, 161–49, 161–55, 161–78, 184, 187, Tr. 40, 127, 170, 207). The issues raised by these commenters centered on the following points:

(1) That the existing standard is adequately protective and thus that no further changes are necessary;

(2) That the Act does not, at Section 8(c)(3), mandate such a requirement for safety, as opposed to health, standards;

(3) That allowing employees and their representatives to observe the testing of spaces would slow operations without adding to the safety of the entry and might actually increase risks; and

(4) That such a provision has the potential for abuse and could become a labor-management issue.

These issues, and OSHA's responses to them, are addressed in turn below.

Several commenters were of the opinion that adding an observation of monitoring provision is unnecessary because the existing Permit Space standard already adequately provides for the sharing of relevant testing information with entrants. For example, the Pennzoil Company (Ex. 161–49) stated, ''Existing requirements at Section 1910.146(d)(5) and (e)(3) already provide for adequate employee access to the results of testing and monitoring in permit spaces.'' Arguing along similar lines, Union Electric (Ex. 161–35) noted that the existing standard ''already requires that the results of initial and periodic tests performed under 1910.146(d)(5) be entered on the entry permit, and 1910.146(e)(3) now requires that the permit be made available to all authorized entrants at the time of entry. As a practical matter, affected employees are usually briefed on the results of the exposure monitoring during the pre-job briefing and before entry into the space.''

OSHA is pleased to learn that some employers have taken the additional safety precaution of providing entrants with a pre-entry briefing that includes a report on the results of the monitoring of the space, and the Agency is also aware that the existing standard contains a number of provisions requiring employers to provide information on the results of testing to those employees who are entering a permit space. However, OSHA concludes that these provisions, although essential to the safety and health of entrants, are not a substitute for the observation of monitoring provisions being added to the standard, for the following reasons.

Having access to the entry permit will not prevent the kinds of errors that could be detected by having employees or their representatives observe the actual testing of the space. For example, evidence in the rulemaking record shows that monitoring errors, such as using the wrong monitor, monitoring for the wrong substance, or failing to test the space thoroughly, contribute to a number of confined space accidents (Tr. 286, 317). And if the evaluation or testing of the space is improperly performed, inaccurate information will unknowingly be recorded on the entry permit, and entrants relying on this inaccurate information could be placed at risk of sudden death or serious injury. In situations such as these, the presence of authorized employees or their representatives could well have detected the error and remedied the problem.

The record contains reports of several incidents where employees who observed improperly performed atmospheric tests were able to bring the errors to the attention of the testers before an accident occurred. For example, in one case, the person doing the atmospheric testing calibrated the testing instrument inside the confined space. The entrant pointed out this error and it was corrected (Ex. 161–38, Tr. 332–333). In other cases in the record, employee observation of testing and monitoring might have prevented an accident. The International Chemical Workers Union described an incident involving a vessel that had been tested by a poorly trained evaluator who had apparently failed to detect a flammable atmosphere. The vessel later exploded, killing several workers. There are a number of other dangerous situations that could arise that employee observation of monitoring could avert. For example, authorized employees and their representatives are often aware that significant changes may have occurred in conditions within the space, e.g., that the employer is considering reclassifying the space based on new monitoring data and can be expected to take extra precautions as a result. Observing the testing process would also permit employees or their representatives to detect human errors, such as the inadvertent recording of inaccurate data. In addition, OSHA believes that employees who directly observe the monitoring are likely to gain

an enhanced appreciation for the hazards they face.

Thus, OSHA believes that providing employees or their representatives with the opportunity to observe the testing and monitoring of permit spaces will have the same kinds of benefits that such observation has had in the context of OSHA's health standards: knowledgeable employees who are given the opportunity to participate actively in protecting their own safety and health and that of their co-workers often identify potentially serious problems and help to solve them as well. Accordingly, paragraph (c)(5)(ii)(C) has been revised by adding the sentence ''Any employee who enters the space, or that employee's authorized representative, shall be provided an opportunity to observe the pre-entry testing required by this paragraph.'' Similarly, the language of paragraph (c)(5)(ii)(F) has been revised to add the following sentence: ''Any employee who enters the space, or that employee's authorized representative, shall be provided with an opportunity to observe the periodic testing required by this paragraph.''

A number of commenters (see, e.g., Exs. 161–26, 161–35, 161–37, 161–48, 161–56, 161–72, 161–60, 187, Tr. 127, 170) expressed disagreement with the USWA's view that Section 8(c)(3) of the Act mandated such observation in the case of safety standards such as the permit space standard. Section 8(c)(3) of the Act directs OSHA to issue regulations requiring employers to maintain records of employee exposure to potentially toxic materials or harmful physical agents and providing employees or their representatives with ''an opportunity to observe such monitoring or measuring, and to have access to the records thereof.'' This section of the Act provides the basis for the observation of monitoring provisions in virtually all of OSHA's health standards (see, for example, the asbestos, benzene, cadmium, lead, methylenedianiline, methylene chloride, and butadiene standards). Typical of these comments was one submitted by the Dow Chemical Company (Ex. 161–20):

> Section 8(c)(3) requires OSHA to promulgate regulations which provide employees, and their designated representatives, with the opportunity to observe the monitoring and measuring of, and have access to, employee exposure records (emphasis in the original). The atmospheric tests and space evaluations required under the Confined Space Standard are not the type of employee exposure monitoring that is envisioned by the Act.

In fact, OSHA stated in the NPRM its position that section 8(c)(3) does not require inclusion of a requirement for employee observation of monitoring in safety standards (59 FR 60737). Instead, the proposal explained that any decision to add an employee observation provision to the standard would be based on the record developed in this proceeding, including the concerns expressed about the original standard. OSHA does note, however, that the fact that Congress included a requirement that observation of monitoring be allowed for toxic substance standards indicates a Congressional preference for well-informed and involved employees. And as explained elsewhere in this section, OSHA has determined that the record in this rulemaking shows that employee observation can have substantial benefits for employee safety and health.

OSHA believes that this safety benefit adequately justifies any minimal slowing of operations caused by the employee observation requirement. In any event, as shown by other evidence in the record, the employees assigned to enter the permit space are often already in the area, waiting to enter it, while the space is being tested and monitored (Ex. 161–25). Indeed, in a great many cases, it is the permit space entrants themselves who perform the testing and monitoring (Ex. 161–09, Tr. 186–187, 190). Moreover, as with all of the employee participation provisions being added in this revision, the record shows that this practice is already fairly common and indicates that it has not caused any production problems (Exs. 161–57, 172, Tr. 202).

A few commenters suggested that employee observation could actually decrease employee safety, for example when monitoring must take place in a hazardous environment, such as an elevated location or one containing a toxic atmosphere (Exs. 161–56, 161–74, 167, 181). But the standard does not require employees to observe all monitoring or testing, it merely offers them the opportunity to do so. The employees and their representatives are less likely to take advantage of that opportunity in particularly hazardous situations. Moreover, even having an entrant or representative close by observing the actions of the person testing the atmosphere, and checking the instruments after the tests are complete could provide safety benefits. Employees already have extensive rights to observe monitoring under OSHA's health standards. OSHA has seen no evidence, and none was presented in this rulemaking, that this observation creates safety hazards (Tr. 92–93).

OSHA does not believe that the final rule's requirements that employers provide affected employees with an opportunity for employee observation, or those requiring employee participation in paragraph (l), are particularly subject to abuse or constitute an unwarranted infringement on labor-management relations. OSHA standards frequently require that work be performed in a particular way or by specific employees. For example, the Lockout/Tagout (LO/TO) standard, 29 CFR 1910.147(c)(8), requires that locks and tags be affixed by the workers who will be performing the service or maintenance covered by the standard and, as discussed above, numerous toxic substance standards provide affected employees and their representatives with the right to observe hazardous substance monitoring. The requirement that employees who are to enter hazardous confined spaces be allowed to observe the required monitoring of those spaces is analogous to these provisions. Like the LO/TO requirement, it recognizes that the employees whose lives could be endangered by inadequate completion of these preliminary safeguards have the strongest incentive to see that they are performed properly (see Tr. 333).

OSHA also is not persuaded that the monitoring observation requirement is especially subject to employee abuse. Some commenters suggested that during periods of labor management discord, employees could abuse the observation right to slow down or disrupt production (see, e.g., Exs. 161–12, 161–25). Others expressed concern that the provision could cause what one called a ''logistical nightmare'' if all of the employees and representatives insisted on observing each instance of testing and monitoring (see, e.g., Exs. 161–12, 161–26, 161–35, 161–78). But again, there was no evidence that this type of disruption is caused by the employee observation provisions in OSHA's health standards. The standard allows the opportunity for observation by an entrant or his authorized representative, not by every employee and representative at the workplace. Moreover, some employers, either contractually or otherwise, already provide employees with the right to observe monitoring and testing of confined space atmospheres (Exs. 161–57, 173–B, Tr. 184–185, 202). One witness pointed out that, even in those plants, confined space entrants did not always choose to observe the monitoring (Tr. 202). And of course nothing in this standard interferes with an employer's existing power to direct and control its

workforce, so long as it does not attempt to do so in a manner inconsistent with the standard.

Nor does the provision interfere improperly in labor-management relations, as suggested by some commenters (e.g., Ex. 161–35). In a general sense, many safety and health issues could, in the absence of OSHA requirements, be dealt with through traditional labor management mechanisms. That does not mean, however, that OSHA does not have the authority to require that work be performed in the manner it determines can best reduce safety or health hazards. And OSHA's exercise of this authority may, in some cases, force employers to alter some aspects of their employee relations. For example, OSHA standards sometimes require employers to provide medical removal benefits to workers whose health may already have been affected by exposure to a toxic substance. These benefits may include job assignments in areas with less exposure to the toxic substance, continuation of pay, or training for new job assignments (29 CFR 1910.1025(k) (lead), 1910.143(f)(2)(iv) (cotton dust)). Although these issues would have been considered labor relations matters in the absence of the OSHA standards, it is clear that OSHA can impose such regulatory requirements to protect employee safety and health. *United Steelworkers of America* v. *Marshall*, 647 F.2d 1189, 1236 (D.C. Cir. 1980).

Paragraph (k)—Rescue and Emergency Services

OSHA is amending and reorganizing paragraph (k), the rescue and emergency services provision of the standard.

A. Evaluation and Selection of Rescue and Emergency Services

The revisions to paragraphs (k)(1) and (k)(2) clarify an employer's obligations to select a rescue service that is trained, equipped and available to respond to emergencies that occur during confined space entries. The emphasis of the revised language is on the employer's evaluation of potential rescue providers, and on the factors that the employer must consider in determining whether a particular provider is capable of providing effective rescue services for the particular situations that its confined space entrants may face. OSHA is also adding a new non-mandatory Appendix F to the standard to provide employers with additional assistance in evaluating potential rescue services.

In the 1993 Permit Required Confined Spaces standard, OSHA promulgated separate requirements for employers of rescue and emergency teams and employers who used teams they did not employ. The requirements were more specific for what the rule considered in-house teams employed by the employer (29 CFR 1910.146(k)(1), (k)(2)). The rule was criticized for its failure to contain equally explicit requirements for ''outside'' rescue teams, or to contain an explicit requirement that those teams be able to arrive at the worksite in a timely fashion (Ex. 162–1). In the NPRM, OSHA proposed to require employers to ensure that outside rescue teams be equipped, trained, capable of responding in a timely manner, and aware of the hazards they may encounter during rescue operations, and be provided with access to the employer's confined spaces for rescue plan development and rescue drill purposes (59 FR 60739).

OSHA received a wide array of comment on this proposal. Some commenters believed that the language of the 1993 rule, particularly as explained in the preamble to that rule, was adequate to assure effective and timely rescue (Exs. 161–48, 161–49, 161–56, 167, 184). Others argued that the proposed revisions did not go far enough, and that OSHA should either prohibit outside rescue teams altogether or, at a minimum, require that any rescuer be able to respond to an emergency within some specified time frame, generally four to six minutes (Exs. 161–38; 161–39; 161–40; 161–62; 170). A number of commenters criticized the distinction between in-house and outside rescue services, pointing out that some of the assumptions on which OSHA based this distinction were inaccurate (see, e.g., Ex. 161–20). Many of the comments emphasized the need for knowledgeable and well-trained rescuers, not only to provide more effective rescue to the endangered confined space entrants but also to assure that the rescuers do not unnecessarily endanger themselves (Exs. 161–7, 161–20, 170).

The commenters who believed that OSHA should not amend the existing rule generally made four points:

1. Properly interpreted, the 1993 rule already imposes a requirement for timely and effective rescue.

2. Making employers responsible for the performance of outside rescue teams is unrealistic for those employers who rely on outside teams because they lack the expertise to develop their own in-house teams.

3. Imposing a short time within which a rescue team must arrive at the location of the emergency amounts to an effective prohibition of outside rescue teams.

4. Requiring an employer to ''ensure'' the competence, timeliness, and effectiveness of outside rescuers is a requirement that employers guarantee successful rescue.

Typical of these comments is one by the Chemical Manufacturers Association:

> OSHA's proposed revisions to paragraph (k)(2) place an undue burden on host employers. The likely outcome is that host employers will not be able to use outside rescue services. Such an outcome is totally inappropriate. Under the proposed revision, if the host employer decides to use an outside rescue service, then it must also ensure that this outside rescue service is ''capable of functioning appropriately.'' If a host employer is using the outside rescue service, presumably the host employer does not have the expertise to maintain a team in-house. In such a situation, how can the host employer ensure that the service is capable of functioning appropriately?

* * * * *

Paragraph (k)(2), as originally promulgated, required the correct amount of accountability for host employers (Ex. 161–29).

Dow Chemical stated its belief that ''In essence, by requiring host employers to ''ensure'' that the outside rescuer can ''effectively respond in a timely manner'' and that the outside rescuer is equipped, trained and ''capable of functioning appropriately,'' OSHA is requiring that host employers guarantee their performance'' (Ex. 181).

Those commenters who supported more stringent requirements made two general points:

1. Without a clear requirement for rescuers to respond within a very short time after an emergency arises, entrants will often die while awaiting rescue.

2. Outside rescuers, particularly emergency responders, often do not have the information or equipment necessary for effective and timely rescue, and in some cases may not even know that employers are relying on them for confined space rescue.

These comments, and OSHA's responses to them, will be discussed in greater detail below.

A. Timely Response

OSHA has retained the language in the NPRM calling for timely rescue capability. Although virtually all rulemaking participants agreed on the need for ''timely'' rescue, a great deal of debate concerned whether OSHA should include a particular response time in the standard. Proponents of such a provision argued that in many confined space emergencies, an entrant is not receiving adequate breathing air and will suffer irreversible and frequently fatal effects within four to six

minutes (Exs. 161–38, 161–39, 161–64, 161–71). Moreover, some of them claimed that if rescuers are not on the scene quickly enough, co-workers of the victim who are not equipped to perform rescue operations are more likely to endanger themselves by attempting rescue operations on their own (Ex. 161–38). They noted that a majority of deaths in confined spaces occur among would-be rescuers (Exs. 161–38, 161–64).

Opponents of the inclusion of a specific time frame in the standard pointed out that, realistically, a four to six minute response time would require having fully equipped rescuers standing by during the entire length of every permit space entry (Ex. 161–56). While others noted that this would be appropriate on some occasions, but would not be on many others (Tr. 51–52, 93, 210, 254). These commenters agreed that inadequately prepared rescuers are likely endanger themselves more than they assist the victim, but expressed concern that even designated rescuers could endanger themselves if they are under too much pressure to respond too quickly (Ex. 161–56). For example, Michael Roop of ROCO Corp. testified that, in training rescuers ROCO instructs them ''that if you arrive at a scene and you're inside that confined space in two or three minutes to made a rescue, then you're doing something wrong. You're not being safe'' (Tr. 248).

In the same context, ROCO and other rescue provider commenters pointed out that ''response time'' is not the same as rescue time, and that there are a number of discrete stages to a successful rescue operation (Tr. 246–249; Ex. 161–52).

OSHA does not believe these concerns are irreconcilable. OSHA's recently revised Respiratory Protection standard, 29 CFR 1910.134 (1998), promulgated at 63 FR 1152–1300 (Jan. 8, 1998), as well as the predecessor to that standard, 29 CFR 1910.134 (1997), require standby rescue personnel when employees are working in atmospheres that are immediately dangerous to life or health (IDLH). It is clear that the atmosphere in a permit space where an entrant could suffer irreversible impairment within four to six minutes would meet the definition of an IDLH atmosphere: ''an atmosphere that poses an immediate threat to life, would cause irreversible adverse health effects, or would impair an individual's ability to escape from a dangerous atmosphere'' (29 CFR 1910.134(b)); see also the preamble discussion at 63 FR 1184–1185.

According to the Respiratory Protection standard, when employees enter such a space, the employer must ensure that:

(i) One employee, or when needed, more than one employee is located outside the IDLH atmosphere;

(ii) Visual, voice, or signal line communication is maintained between the employee(s) in the IDLH atmosphere and the employee(s) located outside the IDLH atmosphere;

(iii) The employee(s) located outside the IDLH atmosphere are trained and equipped to provide effective emergency rescue;

(iv) The employer or designee is notified before the employee(s) located outside the IDLH atmosphere enter the IDLH atmosphere to provide emergency rescue;

(v) The employer or designee authorized to do so by the employer, once notified, provides the appropriate assistance necessary to the situation;

(vi) Employee(s) located outside the IDLH atmospheres are equipped with:

(A) Pressure demand or other positive pressure SCBAs, or a pressure demand or other positive pressure supplied-air respirator with auxiliary SCBA; and either

(B) Appropriate retrieval equipment for removing the employee(s) who enter(s) these hazardous atmospheres where retrieval equipment would contribute to the rescue of the employee(s) and would not increase the overall risk resulting from entry; or

(C) Equivalent means for rescue where retrieval equipment is not required under paragraph (g)(3)(vi)(B) (29 CFR 1910.134(g)(3)); see also preamble discussion at 63 FR 1242–1245.

OSHA believes that compliance with these requirements will meet the concerns of those commenters who urged OSHA to require a rescue response time of only a few minutes. Because the standby personnel required by the Respiratory Protection standard will have been monitoring the confined space entrant's condition throughout the operation and will be fully equipped to begin rescue operations, they will be able to respond more quickly than rescue team members arriving from another location, whether inside or outside the plant, who would need to gather appropriate equipment, prepare to use that equipment, and be briefed on the emergency situation before beginning rescue operations. And because the standby personnel must be appropriately trained and equipped to perform rescue operations, other inadequately prepared employees will be less likely to endanger themselves by attempting hasty and dangerous rescues. (Note that at least one employee, serving as attendant, must still remain outside the permit space, as required by Section 1910.146(i)(4).) On the other hand, because the Respiratory Protection standard requirement only applies to IDLH atmospheres, a less resource-intensive and more measured response capability may be used for those situations where there is not the same need for virtually instant response.

OSHA has therefore decided to promulgate the requirement it proposed for ''timely'' rescue, a requirement that was not opposed by any rulemaking participant, rather than to define precisely what is timely. That determination will be based on the particular circumstances and hazards of each confined space, circumstances and hazards which the employer must take into account in developing a rescue plan. OSHA has added a note to paragraph (k)(1)(i) to clarify this point.

B. Evaluation, Selection, and Use of Rescue Services

OSHA has generally reorganized paragraph (k) to de-emphasize the distinction between in-house and outside rescuers and to focus instead on the employer's obligation to evaluate rescue services so that it can select one that is competent to provide the rescue services appropriate for that employer's operations. Several commenters explained that OSHA's assumption that in virtually all cases the ''host'' employer would be the employer of both the confined space entrants and any *in-situ* rescue team but would not be the employer of an off-premises team was erroneous (Ex. 181). These commenters described a number of situations where this assumption would be inaccurate. For example, in some cases, confined space entrants may be contractor employees, although the rescue team may be composed of on-site employees of either the host employer or another contractor (Ex. 179). In other cases, the host employer may arrange for the standby presence of an ''outside,'' non-employee rescue team during particularly hazardous permit space entries. In still other situations, an employer may use a rescue team comprised of employees of a different facility that it operates.

As a result OSHA has revised paragraph (k)(1) to emphasize the evaluation that an employer must perform of available rescue and emergency resources before designating a rescue provider for purposes of this standard. This also responds to the concerns of a number of commenters that the language OSHA used in the NPRM, requiring the employer to ''ensure'' that the rescue service it selected was able to function adequately, appeared too result oriented. These commenters believed that compliance could only be determined by a *post hoc* consideration of the success or failure of an actual rescue effort. They said the focus should

instead be on the employer's assessment of the rescuer's capabilities (Ex. 161–20). OSHA agrees that assessment of capabilities is the appropriate focus for employer efforts, and intended this result in both the 1993 standard and the NPRM. The language of this final rule, by explicitly framing the employer's obligations in terms of the evaluations it performs, will clarify this intent.

Paragraph (k)(1)(i) explains that the rescue service evaluation must take into account the rescuer's ability to respond in a timely manner to the types of emergencies that may arise in the employer's confined spaces. As noted above, the note to paragraph (k)(1)(i) explains that what will be considered timely rescue will vary according to the specific hazards involved in each confined space entry.

Paragraph (k)(1)(ii) requires that the evaluation also include an assessment of the skill and competence of the prospective rescuers. Several commenters pointed out that in some cases employers have designated local fire and rescue services as their rescuers without first confirming that those services even have a confined space rescue capability (Ex. 161–41). Although many emergency responders may be able to provide proper permit space rescue functions for all spaces that do not require immediate, stand-by rescue capability, not all responders have this ability (Ex. 161–41). Each employer relying on these services should verify that the emergency responder is indeed trained, equipped, able, and willing to perform rescue for confined spaces in its facility.

In evaluating a prospective rescue provider's abilities under this subparagraph, the employer must also consider the willingness of the service to become familiar with the particular hazards and circumstances faced during its permit space entries. Subparagraphs (k)(1)(iv) and (k)(1)(v) require the employer to provide its designated rescuers with information about its confined spaces and access to those spaces, both to allow the development of appropriate rescue plans and to perform rescue drills. A rescue service's receptiveness to this information is directly relevant to its ability to function appropriately during actual rescue operations.

A few commenters provided information on particular products, including communication equipment (Ex. 161–52) and *in-situ* resuscitation devices (Tr. 459–468) for use in permit space rescue operations. OSHA does not, of course, endorse specific products. However, the Agency notes that the equipment used by a rescue service, and that equipment's utility in enhancing rescue efforts, is a relevant factor for employers to consider during the rescuer evaluations required by this paragraph.

Paragraph (k)(1)(iii) requires the employer, after performing the evaluations required by paragraphs (k)(1)(i) and (k)(1)(ii), to select a rescue provider that has the ability to respond in a timely manner to the particular hazards at issue, and to provide proficient rescue services. In other words, it is not enough for an employer simply to perform the evaluations required. The employer must also utilize the results of those evaluations to select a rescue service that will meet the goals of this standard.

Paragraph (k)(1)(iv) requires the employer to notify the rescue service it selects of the hazards that may exist at the permit spaces in its facility. This requirement was included in the NPRM and was also present in the 1993 standard. In the context of this revised standard, this notification provision obviously includes notifying the rescue service that it has been selected and that the employer will be relying on it. In some cases compliance with this section, as well as with paragraphs (k)(1)(i) and (k)(1)(ii), may require the employer to notify the rescue service immediately prior to each permit space entry.

Paragraph (k)(1)(v) requires employers to provide the rescue service selected with access to all confined spaces from which rescue may be necessary so that the rescue service can develop appropriate rescue plans and practice rescue operations. This provision, which is essentially unchanged from both the NPRM and the 1993 standard, was the subject of a significant amount of comment from employer representatives who urged OSHA to require only that they provide access to ''representative'' or ''typical'' spaces (Exs. 161–29, 161–20, 161–25, 161–26, 161–2–9, 161–60, 184). These commenters pointed out that a number of an employer's confined spaces were likely to share identical configurations, and that it would therefore not be necessary for the rescue service to have access to each of them (Exs.161–25, 181, 184). Some also expressed concern that providing access to some permit spaces, which are only entered at rare intervals for cleaning or other servicing, could be costly and disruptive of the employer's ongoing operations.

OSHA recognizes the validity of these concerns but believes that the employer's needs can be accommodated within the context of the existing requirement. Accordingly, OSHA has not made the suggested change. Although OSHA agrees that a rescue service is unlikely to need access to every one of a group of similar spaces, OSHA believes that it should be the rescue service that decides which space, or spaces, will be used for planning and practice purposes. This is particularly true for off-site rescue services, who are less likely to be familiar with the layout of the host employer's workplace. The Agency also took this position in the January 14, 1993 final rule (58 FR 4529–4530), and at the September 27, 1995, public hearing (Tr. 22). Similarly, although providing access to some permit spaces may be disruptive of normal production operations, OSHA believes that employers should be able to work out with their designated rescue services mutually convenient times to provide access to those spaces, if the rescue service believes that access to those particular spaces is necessary for planning or practice drill purposes. Indeed, none of the commenters argued that such accommodations could not be made.

As proposed, OSHA has redesignated paragraph (k)(1) of the 1993 standard, dealing with the requirements for rescue service employers, as (k)(2) of this revision, but has not made substantive changes in this requirement. Most of the comment OSHA received on this provision dealt with the fact that employers have different obligations toward rescue teams comprised of their own employees than toward teams they do not employ directly. However, as a number of commenters recognized, to the extent that the ''non-employee'' rescue services are comprised of employees of another employer subject to the OSH Act, they also will receive the benefits of these provisions (Ex. 161–20). And to the extent that a service's failure to comply with these provisions affects its rescue skills and competence, employers should take this into account in deciding whether to select that service to provide its rescue operations.

OSHA has made some editorial changes in this paragraph. For example, revised paragraph (k)(2)(i) states that rescue PPE and related training are to be provided at no cost to affected employees. This language has been added so it is clear that this provision is consistent with existing § 1910.146(d)(4).

C. Retrieval Systems

OSHA proposed to revise paragraph (k)(3)(i) to allow attachment of retrieval lines at any point ''which the employer can establish will ensure that the entrant will present the smallest

possible profile during removal'' rather than only at the entrant's back near shoulder level or above the entrant's head. The final rule changes this language somewhat, but retains the performance orientation of the proposal. OSHA explained in the NPRM that, subsequent to the 1993 promulgation, the Agency received information which indicated that other equally effective and safe points of attachment exist. Accordingly, OSHA proposed to add the new language to paragraph (k)(3)(i). The proposed paragraph, however, inadvertently omitted language providing for the use of wristlets in certain circumstances.

Commenters (Exs. 161–1, 161–9, 161–13, 161–14, 161–15, 161–20, 161–26, 161–29, 161–34, 161–37, 161–43, 161–45) uniformly supported the increase in flexibility allowed by the proposed revision. Some, however, suggested changes to OSHA's proposed language. The National Grain and Feed Association (Ex. 161–14) suggested that the standard allow attachment ''in the manner determined by the employer most effective to ensuring that the entrant'' will present the smallest possible profile during removal. OSHA has not adopted this suggestion because it believes the two points of attachment listed (the center of the entrant's back near shoulder level and above the entrant's head) should be emphasized because those points are preferred for most situations.

Another commenter (Ex. 161–45) suggested replacing the proposed ''smallest possible profile'' with ''best possible profile.'' OSHA agrees that it may not always be desirable for the entrant to present the smallest possible profile during rescue. For instance, in situations where the size of the space or portal is not limiting, a point of attachment which results in the smallest possible profile may be less desirable than some other point of attachment which better facilitates the work to be done. Accordingly, OSHA has decided to replace the proposed language with the phrase ''profile small enough for the successful removal of the entrant.'' OSHA also has not adopted a suggestion of the Tennessee Valley Authority (Ex. 161–34) that OSHA change the term ''profile'' to ''cross sectional profile'' because OSHA believes that the term ''profile'' is clear in this context. Finally, two commenters called to OSHA's attention the inadvertent omission in the NPRM of the option to use wristlets where the use of a body harness is infeasible or would create a greater hazard (Exs. 161–20, 161–26). The revised rule retains the language on wristlets.

OSHA did not propose, and has not made, any change to subparagraphs (k)(3)(ii) or (k)(4). Subparagraph (k)(3)(ii) requires a mechanical device to be available to retrieve entrants from a vertical confined space more than five feet deep. OSHA notes that it has always intended that the word ''available'' in this provision mean ''at the access point of the vertical entry and ready for use.''

Paragraph (l)—Employee Participation

A new paragraph (l) has been added to the standard, dealing with employee participation in confined space programs. Paragraph (l)(1) requires employers to consult with affected employees and their representatives in the development and implementation of their confined space programs; paragraph (l)(2) requires that those employees and representatives have access to all information developed under this standard.

OSHA's original Permit Required Confined Spaces standard hearing notice (54 FR 41462) requested comments on the subject of worker participation in the design and implementation of a PRCS program. OSHA received several comments on the subject (Exs. 14–318, 14–210, 14–215, 14–220, 14–222) and some testimony at the public hearings also addressed it (Tr. 225–226, 251, 386, 589–590; Tr. 1063–1064; Tr. 317–318, 348–352, 356, 376, 379–380, 411, 427–428, 532–533, 612–613, 622–623). The Agency addressed these comments in the preamble to the January 1993 standard (58 FR 4484–4485).

The standard encouraged the involvement by employees and clearly recognized it as vital to the creation of an effective permit space program. However, it did not require employee involvement in the development of the permit program, although it did provide for such involvement in permit space program inspection and review (paragraphs (c)(4) and (d)(13)), and in review of employee training upon evidence of deficiencies ((g)(2)(iv)). OSHA explained its decision not to require employee involvement in the development of confined space programs by referring to the difficulties of mandating labor-management collaboration in the development of the permit space program and of resolving conflicts between workers and employers (FR 4484–4485). As is discussed more fully below, OSHA believes this revision avoids both of these problems.

Although the NPRM on which this revision is based did not explicitly mention employee involvement in the development of confined space programs, some commenters submitted statements urging OSHA to include a provision explicitly allowing such participation (see, e.g., Ex. 161–38; 161–40). Further discussion of this issue occurred at the public hearing.

Commenters supporting the addition of an employee participation provision to the standard pointed out that employee participation in plan design is already done at many workplaces pursuant to collective bargaining agreements, and that such participation would be consistent with that occurring under other OSHA standards, particularly the Process Safety Management standard (29 CFR 1910.119) (Ex. 161–140). It was also pointed out that employees who actually work in confined spaces and their representatives are particularly well qualified to contribute to the task analysis that is a necessary step in developing a confined space program (Exs. 161–38; 161–140).

In contrast, even the American Petroleum Institute (API), the commenter who most explicitly opposed inclusion of such a requirement, acknowledged that involvement by employees in the program development process could be useful. API said that OSHA should continue to ''encourage'' such involvement but should not require it because such a requirement could expose the standard to ''additional controversy or litigation'' (Ex. 167). The American Gas Association made a similar statement (Ex. 161–770). Other more general comments on employee participation repeated the point made in the original rulemaking that such participation raises labor relations issues that should not be addressed by an OSHA standard (see, e.g., Exs. 184, 187).

OSHA has determined that the consultation requirement in new paragraph (l) will provide the benefits discussed by the participants who favored an employee involvement requirement. By leaving the final contents of the confined space program up to the employer, however, this provision should minimize controversy and avoid the need to develop a cumbersome procedure to resolve conflicts. OSHA expects that there will be few conflicts in any event, because it believes that the vast majority of employers and employees will cooperate to make confined space entry procedures as safe and efficient as possible. This requirement should only have a minimal effect on labor-management relations although, as noted in the discussion of paragraph (c) above, the importance of employee

safety and health would justify such an effect even if it were substantial.

As the UAW pointed out, the employees who perform the actual entry can contribute immeasurably to the analysis of the tasks performed during a permit space entry to ensure that the hazards within the space remain under control and that additional hazards are not introduced (Ex. 161–40). These employees are the people most familiar with the actual practices during confined space entries. If those practices differ significantly from the practices intended by the employer, the employer needs to be made aware of the differences and to take appropriate steps to remedy any deficiencies in the permit entry procedures. Likewise, employees may be aware of hazards within the space that are not being taken into consideration by non-entrants.

In addition, OSHA's own experience in enforcing the Congressionally mandated employee participation requirement under the Process Safety Management standard has convinced the Agency of both the value and the workability of the new provisions being added in paragraph (l). OSHA believes that, as well as improving the quality of the permit space programs developed under the standard, this new provision will also enhance compliance with those programs. Clearly, employees who have participated in the development of programs will have a better understanding of the reasons for the various provisions of the program and will therefore be more likely to comply with those provisions. Similarly, any manager who might be tempted to bypass any of the program safeguards will be less able to convince an employee that such an action would not affect safety and health.

Finally, paragraph (l) is consistent with both the Congressional intent and OSHA's long practice of promoting employer-employee cooperation in safety and health matters. The Congressional intent is shown in part by Section 2(13) of the OSH Act, 29 U.S.C. 652(13), which states that one of the purposes of the Act is to ''encourage joint labor-management efforts to reduce injuries and disease arising out of employment.'' More recently, Congress' intent can be seen in its directive to OSHA to promulgate a PSM standard that explicitly provides for employee involvement in the development of the process safety management programs mandated by that standard.

An example of OSHA's longstanding practice of encouraging and promoting employee involvement is the Agency's 1989 *Safety and Health Program Management Guidelines* (54 FR 3904), which recognize the importance of involving employees in safety and health programs at the workplace. Paragraph (c)(1)(iv) of those guidelines urges employers to provide for and encourage employee involvement in ''the structure and operation of the [safety and health] program and in decisions that affect their safety and health, so that they will commit their insight and energy to achieving the safety and health program's goal and objectives.'' Although the guidelines are voluntary, this provision demonstrates OSHA's belief that employee involvement is necessary to the day-to-day safety and health of workers. Additionally, the guidelines are being applied in many workplaces through several OSHA programs, such as the Voluntary Protection Program, the Safety and Health Achievement and Recognition Program, and in several State and Regional experimental programs. OSHA's 1998 Strategic Plan also emphasizes the importance of employee involvement in safety and health and establishes as an Agency objective the enhancement of such involvement in all OSHA initiatives, as appropriate.

New paragraph (l)(2) requires employers to share with employees and their authorized representatives all of the information generated under this standard. Comments objecting to this provision were generally limited to pointing out that it would be redundant with other provisions in the standard that already require the great majority, if not all, of this information to be made available to employees and representatives. OSHA recognizes this redundancy; it is adding this provision for purposes of emphasis and clarification.

For all of the reasons described above, OSHA has determined that the consultation requirement in paragraph (l)(1) is supported by the record of this rulemaking; it will contribute to confined space safety; and it is consistent with longstanding agency policy. The information provision requirement in paragraph (l)(2) is also consistent with agency policy, and will emphasize that employees and their representatives have a right to all information affecting their health and safety.

Section 1910.146 Appendix F—Example of Rescue Service Evaluation Criteria

As discussed above, OSHA has added a new, non-mandatory Appendix F. This appendix provides guidance to employers in choosing appropriate rescue services. The Agency received several comments (Exs. 161–4, 161–7, 161–44, 161–55) which addressed the need for criteria to assist employers in evaluating potential rescuers. As expressed by one commenter (Ex. 161–44): ''If an employer does not have rescue knowledge and experience, how can he possibly evaluate a prospective rescue service? What evaluation and verification process is reasonable and acceptable to OSHA?''

The Agency recognizes that some employers will need information on how to evaluate prospective rescue services. However, presenting criteria that match every situation would be difficult. For this reason, OSHA has determined that the suggested criteria for rescue service evaluations should be presented in a non-mandatory appendix. Additionally, this appendix provides criteria for ongoing performance critiques for rescue services so that employers will have a means to judge whether a rescue service has maintained its ability to perform safe and effective permit space rescues. Although the Appendix is divided into a section addressing initial assessments and one addressing performance critiques for rescue services already operating at an employer's facility, the considerations in the two sections should not be seen as mutually exclusive. To the extent the employer can obtain enough information to make a determination, the same factors would be applicable to both determinations.

III. Final Economic Analysis

Introduction

In accordance with Executive Order 12866 and the Regulatory Flexibility Act (as amended), OSHA has prepared this Final Economic Analysis to accompany the final rule amending the Agency's Permit-Required Confined Spaces (PRCS) standard (29 CFR 1910.146). The final rule is being amended to require employers to provide authorized entrants (i.e., those employees who are authorized to enter PRCSs) or their designated representatives with the opportunity to observe the monitoring or testing of permit spaces and to request the reevaluation of any permit space that they believe may have been inadequately tested. The final rule also clarifies the criteria employers must satisfy when preparing for the timely rescue of incapacitated permit space entrants. Employee participation in the permit space program is enhanced in the final rule, which provides authorized employees and their designated representatives with access to program information developed under the standard and requires employers to consult with such

employees about the implementation of the permit space program.

When the Permit-Required Confined Spaces standard was promulgated in 1993, the Regulatory Impact Assessment (RIA) that accompanied the rule was placed into the rulemaking docket [Docket S–019, Ex. 149]. The RIA evaluated the costs, benefits, impacts, and technological and economic feasibility of the 1993 final rule. The Final Economic Analysis presented here estimates the costs of those requirements of the amended rule that will impose new regulatory burdens on affected employers, analyzes the benefits that will accrue to employers, employees, and others as a result of these new provisions, examines the technological and economic feasibility of the amended provisions, and assesses the impacts of the costs of compliance on affected employers and on small businesses in particular. The Final Economic Analysis does not re-analyze the estimates presented in the RIA for the 1993 rule or assess the costs and benefits of provisions in the amended final rule that merely interpret or explain the intent of provisions in the 1993 rule because the costs and benefits of such provisions were fully taken into account in the earlier RIA.

This Final Economic Analysis assesses the costs, benefits, technological and economic feasibility, and impacts of two provisions of the amended final rule. These provisions include revised paragraph (d), which now requires employers to permit authorized employees or their designated representatives to observe the testing or monitoring of permit spaces, and paragraph (l), which requires employee participation in the development and implementation of the permit space program and requires employers to provide employees and their designated representatives with access to information developed under the standard. The Agency has determined that the revised provisions will enhance the safety and health protections provided to confined space entrants by the standard and will also benefit employers by saving some of the direct costs associated with deaths and serious injuries that now occur but will in future be prevented.

The following sections of this analysis briefly summarize the industry profile and the findings of the Agency's technological feasibility analysis for the amended rule.

Industry Profile

Tanks, vats and pits are examples of common confined spaces. Although confined spaces of these types are concentrated in the manufacturing and utilities sectors, they are also found in some trade and service sectors. The 1993 RIA estimated that 1.6 million workers in nearly 240,000 establishments enter confined spaces annually. A profile of these spaces is presented in Table I. A more detailed description of confined spaces in industry is available in the earlier RIA [Docket S–019, Ex. 149].

BILLING CODE 4510–26–P

TABLE I

PROFILE OF ESTABLISHMENTS AND EMPLOYEES AFFECTED BY THE CONFINED SPACES STANDARD

SIC	Industry	Number of Establishments with Permit Spaces	Number of Permit Spaces	Number of Employees	Number of Permit Space Entrants (a)
07	Agricultural Services	10,864	79,821	62,990	25,748
13	Oil & Gas Extraction	10,000	12,477	155,660	11,239
20	Food and Kindred Products	10,236	142,727	805,247	99,420
21	Tobacco Products	69	776	37,845	2,007
22	Textile Mill Products	1,491	17,062	186,752	27,831
24	Wood Products(except furniture)	10,290	39,409	146,042	31,035
25	Furniture and Fixtures	5,254	26,012	224,589	35,424
26	Paper Products	4,397	95,533	475,171	46,208
27	Printing and Publishing	47	206	2,196	94
28	Chemicals & Allied Products	8,098	170,982	593,738	71,962
29	Petroleum Refining	1,644	93,700	104,704	15,560
30	Rubber Products	6,282	143,818	319,262	143,522
31	Leather and Leather Products	151	514	6,395	1,055
32	Stone, Clay,Glass & Concrete	12,290	116,708	366,454	110,568
33	Primary Metals Industry	2,788	35,521	463,942	56,669
34	Fabricated Metal Products	8,441	88,507	346,800	33,959
35	Machinery, Except Electrical	4,330	34,670	437,200	116,987
36	Electric/Electronic Equipment	6,610	176,895	892,336	111,087
37	Transportation Equipment	3,302	1,085,966	1,043,403	31,706
38	Instruments & Related Products	64	901	7,296	514
39	Miscellaneous Manufacturing	885	31,267	18,926	5,744
42	Motor Freight Transportation	14,583	201,680	201,679	40,336
49	Electric, Gas, Sanitary Services	28,444	1,575,170	410,290	263,217
50	Wholesale Trade/Durables	2,753	3,965	36,485	3,359
51	Wholesale Trade/Nondurables	36,913	411,095	358,647	194,454
54	Food Stores	10,073	10,073	318,010	10,073
59	Miscellaneous Retail	7,149	28,201	57,923	10,694
65	Real Estate (Commercial)	13,582	45,190	391,923	12,442
70	Hotels and Other Lodging	5,099	77,672	163,323	80,224
72	Personal Services	3,577	24,604	198,447	7,154
76	Miscellaneous Repair Services	752	802	3,718	752
78	Motion Pictures	11	33	16,500	66
80	Health Services	8,252	71,709	3,357,391	27,308
84	Museums, Botanical Gardens, Zoos	130	1,183	7,338	781
	TOTAL	238,853	4,844,849	12,218,622	1,629,201

Source: U.S. Department of Labor, OSHA, Office of Regulatory Analysis.

BILLING CODE 4510–26–C

Technological Feasibility

Paragraphs (d) and (l) of the amended final rule will impose new costs on some affected employers because they will be required to spend additional time consulting with employees, to allow employees or their representatives to spend time observing the testing or monitoring of permit spaces, and so forth. However, the amended rule will not require employers to employ additional or new technologies to achieve compliance. As explained in the RIA [Docket S–019, Ex. 149], compliance with all aspects of the standard can be achieved and is being achieved with readily available off-the-shelf equipment.

Costs of Compliance

Observation of Testing

The Agency is modifying paragraph (d)(5), by adding paragraphs (iv), (v), and (vi), which require employers to offer authorized entrants or their designated representatives the opportunity to observe the pre-entry testing or monitoring and any subsequent testing or monitoring of permit spaces (paragraph (d)(5)(iv)); to reevaluate any space that the entrant or representative believes was inadequately tested (paragraph (d)(5)(v)); and to provide entrants and their representatives with the results of such testing immediately (paragraph (d)(5)(vi)).

OSHA concludes, based on evidence in the record, that paragraphs (d)(5)(v) and (d)(5)(vi) will not impose new costs on affected employers because they simply restate or explain requirements that were implicit in paragraph (e)(3) of the existing permit space rule. Paragraph (e)(3) requires the posting of entry permits, which contain the results of initial or periodic testing or monitoring (including the results of any remonitoring or testing), to enable authorized entrants to verify that preentry preparations have been completed. As stated in the preamble to the original rule [58 FR 4505], this provision ensures that ''Entrants will then be able to make their own judgments as to the completeness of pre-entry preparations and to point out any deficiencies that they believe exist.'' Commenters affirmed that permits are posted and used in this way and thus that this provision reflects current industry practice [Ex. 161–45; Ex. 161–72]. Paragraph (d)(5)(vi) of the amended rule, which requires employers to provide entrants and their representatives with the results of such testing or monitoring, is also implicit in paragraph (e)(3), which requires that ''The completed permit shall be made available at the time of entry to all authorized entrants, by posting it at the entry portal or by any other equally effective means, so that the entrants can confirm that pre-entry preparations have been completed.'' As stated above, it is current industry practice to provide immediate access to the information on entry permits.

Paragraph (d)(5)(iv) may impose new costs on some employers, although there is evidence in the record that many employers already allow permit space entrants to observe the testing or monitoring of spaces. For example, different firms indicated that they routinely provide employees with assurances of safety, showing them the various pre-entry safety procedures, if necessary [Tr., p. 57] or allowing employees to do the monitoring themselves [Tr., p. 186]. Mike Roop of the Roco Corporation indicated that, in the companies with which he had worked, employee requests to observe testing were not denied [Tr., p. 267]. Other firms actually encourage employees to observe monitoring [Tr., p. 202]. Duane Barnes, speaking for Dow, indicated that his company's safety record was so good that, although it was company policy to provide employees with any reassurance that was required in the area of safety, Dow had simply not had such requests [Tr., p. 57].

OSHA notes that its economic analyses for health standards, which routinely allow employees and their representatives to observe any employee exposure monitoring required by such standards, do not estimate any costs for the observation of monitoring provision (see, for example, the RIAs for ethylene oxide [Ex. 163, Docket H–200], cadmium [Ex. L173, Docket H–057A]). The Agency also has not received comments suggesting that employers actually incur costs by permitting employees to observe monitoring for health standards. In the present rulemaking, an industry representative stated that allowing employees to observe the monitoring required by OSHA health standards did not present a problem [Tr. p. 93]. Based on this history and evidence, OSHA assumes that such costs are essentially negligible.

OSHA also believes, based on the record, that many employers will meet the requirement for employee observation of monitoring by allowing employees requesting such information to perform the monitoring themselves. The task of testing has been greatly simplified by the introduction and improvement of electronic ''instant'' monitoring devices; for many spaces, employers currently place the monitoring devices directly on the employees [Tr. pp. 186, 188]. To the extent entrants test the atmosphere themselves before entering spaces, there would be no cost to this requirement.

Nonetheless, although the Agency believes that the costs of compliance with paragraph (d)(5)(iv) will be negligible, it has assessed the costs this provision might impose under worst case conditions, i.e., assuming that no employer currently permits any employee to observe such monitoring or testing of permit spaces *and* that every authorized entrant or designated representative will do so in the future. At the time of the original rulemaking, OSHA estimated that a total of 1.2 million hours would need to be spent on pre-entry testing (this estimate includes those facilities that were considered already to be in compliance with the monitoring provisions of the original confined spaces standard).[1] After adjusting the compensation rates in the original RIA to 1994,[2] the annual costs of compliance with paragraph (d)(5)(iv) under this extreme scenario would amount to $22.6 million.

OSHA believes, based on the record and the Agency's experience in health standards rulemakings, that costs for this provision will be incurred in no more than 10 percent of permit space entries, i.e., that the actual costs of this provision will be one-tenth of those outlined in the ''worst case'' scenario, or $2.3 million. Estimated costs for this provision, by industry, are shown in Table II.

Employee Consultation

As indicated previously, the Agency is adding a new paragraph (l) to the amended final rule. This provision requires employers to consult with affected employees and their authorized representatives. The existing rule, at paragraph (c)(4), already requires that the written plan be available for review by employees and their authorized representative(s). However, the Agency believes that the requirements in new paragraph (l) will lead to a modest increase in the amount of time employees and employers spend in

[1] Based upon an assumption of an average of five minutes of labor time required for pre-entry testing. This assumption was presented in the Preliminary Regulatory Impact Analysis (PRIA) for the original rule [Docket S–019, Ex. 15], was not questioned in the record, and was therefore carried over into the final RIA [Docket S–019, Ex. 149]. The final RIA was not subsequently challenged.

[2] Thus comparing 1994 costs to 1994 financial data (discussed further in the Economic Impact Section). The compensation rate was also updated to reflect recent BLS data, which indicates a 39 fringe benefit rate [BLS, 1995], as opposed to the 30 percent rate used in original analysis [Docket S–019, Exhibit 149].

developing and implementing their confined spaces programs.

Although the Agency lacks specific data on current industry practice with regard to employee consultation in the development and implementation of permit space programs, the Agency believes it reasonable to assume that the requirements in paragraph (l) will require an average of 10 minutes for authorized entrants and attendants to meet with a member of management or an entry supervisor to discuss ways to improve the program and its implementation. The Regulatory Impact Analysis in support of the original rule assumed that programs would need to be updated fully on an average of once every five years. Therefore, the annual cost of this provision is estimated to be:

(We+Wm) X (# of entrants + # attendants) X 10/60 hour X .24 where We is the hourly compensation of affected employees and Wm is the hourly compensation of management. Hourly compensation is based on 1994 industry hourly wage rates for production workers [BLS, 1994], plus the average nonagricultural benefit rate of 39 percent [BLS, 1995]. Consistent with the PRIA [Docket S–019, Ex. 15] and RIA [Docket S–019, Ex. 149], management compensation is assumed to be 20 percent greater than that of the entrants and attendants. The annualization factor for a five-year period at a 7 percent rate of interest is .24. Given these assumptions, the Agency estimates that this provision will cost $3.6 million to implement. Estimated costs for this provision, by industry, are shown in Table II. Combined with the amended final rule's provision requiring employers to provide employees with the opportunity to observe testing, the Agency estimates the total costs of compliance for the amended final rule to be $5.8 million annually.

BILLING CODE 4510–26–P

TABLE II

ANNUAL COST OF EMPLOYEE INVOLVEMENT IN CONFINED SPACES PROGRAM

SIC	Industry	Annual Cost of Observing Testing	Annual Cost of Employee Consultation in Program Development	Total Annual Cost of Employee Involvement
07	Agricultural Services	$29,935	$50,694	$80,629
13	Oil & Gas Extraction	$2,019	$36,881	$38,900
20	Food and Kindred Products	$33,805	$161,200	$195,004
21	Tobacco Products	$156	$5,656	$5,812
22	Textile Mill Products	$995	$35,992	$36,987
24	Wood Products(except furniture)	$1,239	$73,902	$75,141
25	Furniture and Fixtures	$4,925	$53,800	$58,725
26	Paper Products	$27,951	$96,427	$124,377
27	Printing and Publishing	$7	$283	$290
28	Chemicals & Allied Products	$114,791	$170,192	$284,982
29	Petroleum Refining	$33,994	$45,331	$79,326
30	Rubber Products	$22,115	$217,948	$240,063
31	Leather and Leather Products	$0	$1,342	$1,342
32	Stone, Clay,Glass & Concrete	$22,750	$172,816	$195,566
33	Primary Metals Industry	$56,410	$122,447	$178,858
34	Fabricated Metal Products	$677,225	$69,194	$746,419
35	Machinery, Except Electrical	$62,081	$210,048	$272,128
36	Electric/Electronic Equipment	$96,953	$183,031	$279,984
37	Transportation Equipment	$156,623	$78,293	$234,916
38	Instruments & Related Products	$416	$992	$1,408
39	Miscellaneous Manufacturing	$1,499	$8,967	$10,466
42	Motor Freight Transportation	$305,633	$105,767	$411,401
49	Electric, Gas, Sanitary Services	$482,369	$679,265	$1,161,634
50	Wholesale Trade/Durables	$568	$9,390	$9,958
51	Wholesale Trade/Nondurables	$63,111	$370,891	$434,002
54	Food Stores	$918	$19,709	$20,627
59	Miscellaneous Retail	$298	$25,256	$25,554
65	Real Estate (Commercial)	$22,821	$403,564	$426,384
70	Hotels and Other Lodging	$21,809	$86,312	$108,121
72	Personal Services	$0	$13,072	$13,072
76	Miscellaneous Repair Services	$3	$139	$141
78	Motion Pictures	$20	$205	$225
80	Health Services	$17,536	$65,692	$83,228
84	Museums, Botanical Gardens, Zoos	$1,721	$1,414	$3,135
	TOTAL	$2,262,697	$3,576,110	$5,838,807

Source: U.S. Department of Labor, OSHA, Office of Regulatory Analysis

BILLING CODE 4510–26–C

Benefits

The benefits of providing employees with an opportunity to observe the testing of spaces are predictably difficult to quantify, although the Agency believes that the benefits of doing so are real. Allowing employees to observe the testing and monitoring of permit spaces will provide for safer confined space entry: the record shows that, had employees in the past been able to observe the testing of spaces before entry or to obtain a reevaluation of questionable testing results, it is likely that a number of fatalities could have been averted. For example, the Steelworkers [Ex. 188, p. 4] report a number of cases where employers have apparently tested spaces improperly, leading to fatal results both for the workers entering the space and the rescuers attempting to rescue their incapacitated co-workers.

However, defining the number of fatalities or injuries preventable annually by this provision is difficult because permit space accidents, like most safety accidents, are multi-causal in nature. Most confined space accidents reflect a number of failures in the permit program, which makes it difficult to isolate the effectiveness of any given provision of the program (or rule). At the time of the original rule, OSHA specifically asked in the **Federal Register** [54 FR 24080] for comment on the effectiveness of the permit space rule; there was general agreement that the standard would prevent 80–90 percent of accidents. There was little attempt, however, to try to break out the benefits of particular provisions, due to the substantial overlap of causes in accidents and the deliberate redundancy built into some provisions of the standard.

In addition, it is difficult to estimate how often authorized entrants or their designated representatives will avail themselves of the opportunity to observe the testing or monitoring of permit spaces. To gain an understanding of the magnitude of the potential benefits associated with new paragraph (d)(5)(iv), OSHA turned to the RIA, which estimated that 85% of permit space accidents would be eliminated by the standard but that 15% of such accidents would continue to occur [58 CFR 4543]. These 15% of fatal cases, or 9 cases annually, were attributed to ''human error'' but were also believed to be theoretically preventable.

The amended rule's provision for the observation of testing will function to provide a ''check'' on human error in those cases where monitoring was improperly performed. When these fatal accidents occur, more than one element of the safety system has typically failed; however, in almost all such cases, one critical element—the accurate monitoring of the atmosphere—has failed. Thus it is reasonable to assume that allowing authorized entrants or their designated representatives to observe the testing of spaces will prevent a substantial portion of the accidents attributed in the RIA to human error. Because approximately two-thirds of these fatalities were related to atmospheric hazards (toxic, explosive, or oxygen deficient atmospheres),[3] OSHA assumes in this benefits analysis that the same proportion of cases, or a total of approximately 6 fatalities annually, could be prevented if proper monitoring was assured in all cases of permit space entry.

How effective this provision will be in practice will depend on the number of employees who actually avail themselves of the opportunity to observe the testing of spaces. In the absence of data to quantify this effect specifically, the Agency is adopting the conservative assumption of direct proportionality—i.e., the Agency is assuming that if only a small number of employees observe such monitoring, only a small number of the potentially preventable fatal incidents will be prevented. In this case, since the cost analysis assumes that only 10 percent of employees will actually observe monitoring, the Agency assumes that only 10 percent of the 6 fatalities (or 0.6 fatalities) will be prevented annually. Borrowing similarly from the injury analysis of the RIA for the final rule, the Agency estimates that paragraph (d)(5)(iv) will prevent 50 lost workday injuries annually.[4] Finally, to the extent more employees than assumed here avail themselves of the opportunity provided by the final rule, both the benefits and costs will be higher.

Indirect benefits from this provision, as well as from paragraph (l), will come in the form of enhanced employee participation. A recent analysis of Oregon's mandatory safety and health program rule, which requires active employee participation, indicates that employers receive measurable safety benefits from enhanced employee participation in safety programs [Weil, 1994]. Consulting employees in the development of a confined spaces safety program, as required by paragraph (l), may also generate new ideas for more efficient confined spaces entry. As was noted by several commenters from industry in the original rulemaking [Docket S–019, Ex. 149, pp. V–68–71], confined spaces are frequently production vessels that cannot be used while they are being entered, and the employer therefore has an incentive to minimize the amount of time spent in the confined space. Therefore, extra time spent planning safe and efficient entry beforehand may pay dividends not only in increased labor productivity but in capital productivity as well. For example, an employee might have a suggestion for modifying the job so as to avoid the need to enter the space entirely.

Economic Impact

To assess the economic impact of these amendments to the permit required confined spaces standard, the Agency compared the estimated annual costs of these provisions against the revenues and profits of affected businesses. Revenue data were taken from the Bureau of the Census' Standard Statistical Establishment List data base; profit data were taken from Dun and Bradstreet's *Norms and Key Business Ratios* [Dun & Bradstreet]. Sales, profit and relevant cost data are all from 1994, the most recent year for which highly detailed small business data is currently available to the Agency.

The comparison of costs with revenue and profits for all affected establishments is shown in Table III. It indicates that costs to affected establishments in all industries are no more than .006% of revenues and are less than .07% of profits. Costs of this magnitude cannot be considered large enough to impose regulatory burdens on employers or to raise issues of economic feasibility.

BILLING CODE 4510–26–P

[3] Based on an examination of death certificates for 670 fatalities in confined spaces in NIOSH's National Traumatic Occupational Fatality (NTOF) data base [NIOSH, *Worker Deaths in Confined Spaces*, January 1994]. This is after excluding cases related to grain engulfment, which are dealt with under OSHA's grain handling standard (§ 1910.272). This figure is likely conservative, as NIOSH's figures include some trench cave-ins, which are dealt with under OSHA's excavation standard (§ 1926, Subpart P).

[4] The baseline number of lost-workday injuries in confined spaces was estimated to be 5,041 before the rule was published. (While the original projection of baseline injuries was based on a theoretical projection, it has subsequently been verified as being approximately correct, based on now-available 1993 BLS data [BLS, 1996, Table R64].) This leaves a residual of 756 ($.15 \times 5{,}041$) such injuries annually that would not be prevented by the original rule. If this provision could theoretically prevent ⅔ of these cases, or 507 ($.67 \times 756$), but will only be used 10 percent of the time, this suggests that 50 lost-workday injuries will be prevented annually as a result of this provision.

TABLE III

COST OF EMPLOYEE INVOLVEMENT
AS A PERCENT OF REVENUES AND PROFITS

SIC	Industry	Cost/ Establishment	Revenues/ Establishment	Costs/ Revenue	Profits/ Establishment	Cost/ Profits
07	Agricultural Services	$7	$269,290	0.003%	$17,425	0.043%
13	Oil & Gas Extraction	$4	$11,234,630	0.000%	$1,021,330	0.000%
20	Food and Kindred Products	$19	$20,620,629	0.000%	$999,788	0.002%
21	Tobacco Products	$84	$869,935,367	0.000%	$204,319,114	0.000%
22	Textile Mill Products	$25	$7,611,245	0.000%	$438,223	0.006%
24	Wood Products(except furniture)	$7	$2,539,729	0.000%	$146,588	0.005%
25	Furniture and Fixtures	$11	$3,571,798	0.000%	$216,729	0.005%
26	Paper Products	$28	$22,478,383	0.000%	$1,260,152	0.002%
27	Printing and Publishing	$6	$2,096,632	0.000%	$152,975	0.004%
28	Chemicals & Allied Products	$35	$29,454,052	0.000%	$2,231,368	0.002%
29	Petroleum Refining	$48	$143,210,471	0.000%	$6,292,581	0.001%
30	Rubber Products	$38	$8,202,235	0.000%	$584,099	0.007%
31	Leather and Leather Products	$9	$7,267,252	0.000%	$429,429	0.002%
32	Stone, Clay,Glass & Concrete	$16	$4,184,931	0.000%	$228,219	0.007%
33	Primary Metals Industry	$64	$18,123,180	0.000%	$1,015,996	0.006%
34	Fabricated Metal Products	$88	$4,348,383	0.002%	$266,070	0.033%
35	Machinery, Except Electrical	$63	$6,924,099	0.001%	$482,589	0.013%
36	Electric/Electronic Equipment	$42	$11,591,397	0.000%	$684,946	0.006%
37	Transportation Equipment	$71	$44,334,058	0.000%	$1,948,012	0.004%
38	Instruments & Related Products	$22	$10,720,444	0.000%	$763,426	0.003%
39	Miscellaneous Manufacturing	$12	$1,568,937	0.001%	$111,245	0.011%
42	Motor Freight Transportation	$28	$1,286,872	0.002%	$58,437	0.048%
49	Electric, Gas, Sanitary Services	$41	$14,371,043	0.000%	$1,350,007	0.003%
50	Wholesale Trade/Durables	$4	$2,282,652	0.000%	$102,134	0.004%
51	Wholesale Trade/Nondurables	$12	$4,447,849	0.000%	$172,734	0.007%
54	Food Stores	$2	$2,179,673	0.000%	$61,031	0.003%
59	Miscellaneous Retail	$4	$547,141	0.001%	$30,254	0.012%
65	Real Estate (Commercial)	$31	$500,929	0.006%	$46,869	0.067%
70	Hotels and Other Lodging	$21	$1,243,240	0.002%	$97,027	0.022%
72	Personal Services	$4	$128,952	0.003%	$10,164	0.036%
76	Miscellaneous Repair Services	$0	$181,478	0.000%	$11,743	0.002%
78	Motion Pictures	$20	$1,597,336	0.001%	$142,792	0.014%
80	Health Services	$10	$1,167,682	0.001%	$71,435	0.014%
84	Museums, Botanical Gardens, Zoo	$24	$560,217	0.004%	$40,331	0.060%
	TOTAL	$24				

Source: U.S. Department of Labor, OSHA, Office of Regulatory Analysis

BILLING CODE 4510–26–C

The Agency has also, as required by the Regulatory Flexibility Act (as amended) analyzed the impact of the standard specifically on small entities potentially affected by the revisions being made to the final rule. The Agency examined the impact of the revisions both on establishments with fewer than 20 employees and on firms with fewer than 500 employees. An industry profile for establishments with fewer than 20 employees is available in the RIA accompanying the original rule (Ex. 149, Docket S–019). For firms with fewer than 500 employees, industry profile data were not readily available; the Agency therefore analyzed impacts using a ''worst case'' impact scenario. Under this scenario, OSHA assumed that all of the costs of the revised final rule would be borne by firms in this size class, i.e., that no impacts would be borne by larger firms, a highly unlikely scenario. The impacts projected in Table III for firms in the 500-employee size class thus substantially overstate costs for these firms. Nonetheless, as shown in Tables IV and V, even under this worst case scenario, costs were very small relative to sales and profits. Costs did not exceed .006 percent of sales or more than .08 percent of profits for establishments with fewer than 20 or fewer than 500 employees in any affected industry.

Certification of No Significant Impact

Based on the results of the analysis presented above, OSHA certifies, in accordance with the Regulatory Flexibility Act (as amended) that the revised rule for permit required confined spaces will not have a significant economic impact on a substantial number of small entities.

BILLING CODE 4510–26–P

TABLE IV

COST OF EMPLOYEE INVOLVEMENT
AS A PERCENT OF REVENUES AND PROFITS (ESTABLISHMENTS WITH 20 OR LESS)

SIC	Industry	Cost	Number of Establishments w/ spaces	Cost/ Establishment	Revenues/ Establishment	Costs/ Revenues	Profits/ Establishments	Cost/ Profits
07	Agricultural Services	$41,211	10,349	$4	$176,234	0.002%	$11,403	0.035%
13	Oil & Gas Extraction	$31,847	8,762	$4	$1,018,518	0.000%	$92,593	0.004%
20	Food and Kindred Products	$52,404	5,294	$10	$2,999,329	0.000%	$145,422	0.007%
21	Tobacco Products	$321	18	$18	$88,542,532	0.000%	$20,795,719	0.000%
22	Textile Mill Products	$2,887	303	$10	$2,216,970	0.000%	$127,644	0.007%
24	Wood Products(except furniture)	$18,043	5,813	$3	$639,173	0.000%	$36,892	0.008%
25	Furniture and Fixtures	$19,094	2,761	$7	$1,073,602	0.001%	$65,144	0.011%
26	Paper Products	$7,136	1,349	$5	$3,961,392	0.000%	$222,078	0.002%
27	Printing and Publishing	$85	13	$6	$501,718	0.001%	$36,607	0.018%
28	Chemicals & Allied Products	$38,223	4,220	$9	$3,733,702	0.000%	$282,856	0.003%
29	Petroleum Refining	$26,191	1,118	$23	$17,282,049	0.000%	$759,363	0.003%
30	Rubber Products	$73,151	2,849	$26	$2,348,479	0.001%	$167,240	0.015%
31	Leather and Leather Products	$178	90	$2	$1,832,993	0.000%	$108,313	0.002%
32	Stone, Clay,Glass & Concrete	$98,854	8,464	$12	$1,462,893	0.001%	$79,777	0.015%
33	Primary Metals Industry	$1,381	192	$7	$6,754,239	0.000%	$378,647	0.002%
34	Fabricated Metal Products	$106,804	4,852	$22	$1,501,779	0.001%	$91,891	0.024%
35	Machinery, Except Electrical	$70,431	2,411	$29	$1,283,760	0.002%	$89,474	0.033%
36	Electric/Electronic Equipment	$71,336	3,115	$23	$1,974,741	0.001%	$116,689	0.020%
37	Transportation Equipment	$20,573	1,999	$10	$4,501,612	0.000%	$197,798	0.005%
38	Instruments & Related Products	$141	41	$3	$1,805,440	0.000%	$128,569	0.003%
39	Miscellaneous Manufacturing	$1,009	336	$3	$422,992	0.001%	$29,992	0.010%
42	Motor Freight Transportation	$132,282	10,937	$12	$484,432	0.002%	$21,998	0.055%
49	Electric, Gas, Sanitary Services	$508,510	18,248	$28	$4,468,716	0.001%	$419,788	0.007%
50	Wholesale Trade/Durables	$6,905	2,147	$3	$956,152	0.000%	$42,782	0.008%
51	Wholesale Trade/Nondurables	$331,752	33,360	$10	$1,575,151	0.001%	$61,172	0.016%
54	Food Stores	$11,491	5,612	$2	$633,938	0.000%	$17,750	0.012%
59	Miscellaneous Retail	$22,302	6,865	$3	$272,504	0.001%	$15,068	0.022%
65	Real Estate (Commercial)	$213,062	10,834	$20	$347,857	0.006%	$32,547	0.060%
70	Hotels and Other Lodging	$42,529	2,995	$14	$397,019	0.004%	$30,985	0.046%
72	Personal Services	$0	0	-	$86,133	0.000%	$6,789	0.000%
76	Miscellaneous Repair Services	$0	703	$0	$131,840	0.000%	$8,531	0.000%
78	Motion Pictures	$0	0	-	$485,136	0.000%	$43,368	0.000%
80	Health Services	$14,393	2,006	$7	$338,643	0.002%	$20,717	0.035%
84	Museums, Botanical Gardens, Zoos	$0	0	-	$145,699	0.000%	$10,489	0.000%
	TOTAL	$1,964,528	158,053	$12				

Source: U.S. Department of Labor, OSHA, Office of Regulatory Analysis.

TABLE V

COST OF EMPLOYEE INOLVEMENT AS A PERCENT OF REVENUES AND PROFITS (FIRMS WITH 500 OR FEWER EMPLOYEES)*

SIC	Industry	Cost/ Firm*	Revenues/ Firm	Costs/ Revenues*	Profits/ Firm	Costs/ Profits*
07	Agricultural Services	$7	$250,669	0.003%	$16,220	0.046%
13	Oil & Gas Extraction	$4	$2,017,392	0.000%	$183,399	0.002%
20	Food and Kindred Products	$20	$7,070,622	0.000%	$342,818	0.006%
21	Tobacco Products	$92	$419,423,746	0.000%	$98,508,799	0.000%
22	Textile Mill Products	$26	$4,485,467	0.001%	$258,254	0.010%
24	Wood Products(except furniture)	$7	$1,520,435	0.000%	$87,756	0.009%
25	Furniture and Fixtures	$11	$2,063,881	0.001%	$125,232	0.009%
26	Paper Products	$31	$7,356,895	0.000%	$412,432	0.008%
27	Printing and Publishing	$6	$1,349,101	0.000%	$98,434	0.006%
28	Chemicals & Allied Products	$39	$7,758,606	0.001%	$587,773	0.007%
29	Petroleum Refining	$64	$11,906,004	0.001%	$523,143	0.012%
30	Rubber Products	$41	$4,132,970	0.001%	$294,318	0.014%
31	Leather and Leather Products	$9	$2,312,572	0.000%	$136,652	0.007%
32	Stone, Clay,Glass & Concrete	$18	$2,337,003	0.001%	$127,445	0.015%
33	Primary Metals Industry	$69	$6,447,895	0.001%	$361,473	0.019%
34	Fabricated Metal Products	$93	$2,782,599	0.003%	$170,263	0.054%
35	Machinery, Except Electrical	$64	$2,001,196	0.003%	$139,477	0.046%
36	Electric/Electronic Equipment	$44	$3,836,835	0.001%	$226,722	0.019%
37	Transportation Equipment	$73	$3,362,262	0.002%	$147,736	0.050%
38	Instruments & Related Products	$23	$3,239,263	0.001%	$230,675	0.010%
39	Miscellaneous Manufacturing	$12	$1,539,311	0.001%	$109,144	0.011%
42	Motor Freight Transportation	$30	$841,165	0.004%	$38,197	0.078%
49	Electric, Gas, Sanitary Services	$48	$3,943,703	0.001%	$370,469	0.013%
50	Wholesale Trade/Durables	$4	$4,660,033	0.000%	$208,507	0.002%
51	Wholesale Trade/Nondurables	$13	$7,126,957	0.000%	$276,779	0.005%
54	Food Stores	$2	$1,009,391	0.000%	$28,263	0.008%
59	Miscellaneous Retail	$4	$623,036	0.001%	$34,450	0.012%
65	Real Estate (Commercial)	$33	$616,130	0.005%	$57,647	0.058%
70	Hotels and Other Lodging	$22	$752,216	0.003%	$58,705	0.038%
72	Personal Services	$4	$215,289	0.002%	$16,970	0.024%
76	Miscellaneous Repair Services	$0	$375,598	0.000%	$24,303	0.001%
78	Motion Pictures	$24	$738,175	0.003%	$65,988	0.036%
80	Health Services	$11	$683,798	0.002%	$41,832	0.026%
84	Museums, Botanical Gardens, Zoos	$26	$875,842	0.003%	$63,053	0.042%

*Costs/Firm represent costs for all firms divided by the revenues and profits of firms with fewer than 500 employees.

Source: U.S. Department of Labor, OSHA, Office of Regulatory Analysis

BILLING CODE 4510–26–C

Unfunded Mandates Reform Act

This amendment to the confined spaces standard has been reviewed by OSHA in accordance with the Unfunded Mandates Reform Act of 1995 (UMRA) (2 USC 1501 *et seq.*) and Executive Order 12875. OSHA has determined, as explained below, that this regulatory action will not impose a significant cost on employers in the public sector and will impose costs of substantially less than $100 million on establishments in the private sector. This rule is therefore not a significant regulatory action within the meaning of Section 202 of UMRA (2 U.S.C. 1532). OSHA standards do not apply to state and local governments except in states that have voluntarily elected to adopt an OSHA State Plan. Consequently, the confined spaces standard does not meet the definition of a ''federal intergovernmental mandate'' (Section 421(5) of UMRA (2 USC 658(5)). Further, OSHA has found that any impact on such entities would be insignificant. In sum, this amendment to the confined spaces standard does not impose unfunded mandates on state, local, or tribal governments.

However, this action may have some benefits to state and local governments. The record indicates that fire departments around the country have been bearing the burden of rescuing employees from confined spaces [Ex. 161–41], typically the result of inadequate or nonexistent entry procedures. To the extent that the opportunity to observe monitoring results in better adherence to preventive measures required by the existing standard, or that employee participation in program development and implementation improves the effectiveness of the underlying permit spaces plan, these entities will garner benefits from the rule. Additionally, to the extent that employers better understand their obligations for rescue preparedness under the existing standard and coordinate with fire departments more effectively, local fire departments will also benefit.

Environmental Assessment

The final permit required confined spaces standard has been reviewed in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), the regulations of the Council of Environmental Quality (CEQ) (40 CFR part 1500), and DOL NEPA procedures (29 CFR part 11). As a result of this review, OSHA has concluded that the rule will not have a significant environmental impact.

References

Dun and Bradstreet, *Norms and Key Business Ratios,* Desk-Top Edition, 1994–1995.

U.S. Department of Labor, Bureau of Labor Statistics, *Employment and Earnings,* October 1994.

U.S. Department of Labor, Bureau of Labor Statistics, ''Employer Costs for Employer Compensation'', News Release, June 22, 1995.

U.S. Department of Labor, Bureau of Labor Statistics, ''Number of nonfatal occupational injuries and illnesses involving days away from work by event or exposure leading to injury or illness and industry division, 1993''. Available at BLS Web site at: ftp://146.142.4.23/pub/special.requests/ocwc/osh/

Weil, *Working Paper 112,* Economic Policy Institute, 1994.

IV. Federalism

This standard has been reviewed in accordance with Executive Order 12612 (52 FR 31685, October 30, 1987) regarding Federalism. This order requires that agencies, to the extent possible, refrain from limiting State policy options and consult with States prior to taking any action. Agencies may act only when there is clear constitutional authority and the presence of a problem of national scope. The order provides for preemption of State law only if there is a clear congressional intent for the Agency to do so. Any such preemption is to be limited to the extent possible.

Section 18 of the Occupational Safety and Health Act of 1970 expresses Congress' clear intent to preempt State laws relating to issues on which Federal OSHA has promulgated occupational safety and health standards. Under the OSH Act, a State can avoid preemption only if it submits, and obtains Federal approval of, a plan for the development of such standards and their enforcement. Occupational safety and health standards developed by State Plan States must, among other things, be at least as effective in providing safe and healthful employment and places of employment as Federal standards. Where state standards are applicable to products distributed or used in interstate commerce, those standards may not unduly burden commerce and must be justified by compelling local conditions (see Section 18(c)(2) of the OSH Act).

This final rule has been drafted so that employees in every State will be protected by general, performance-oriented standards. To the extent that there are State or regional peculiarities caused by the terrain, the climate or other factors, States would be able, under the OSH Act, to develop their own State standards to deal with any special problems. And, under the Act, if a State develops an approved State program, it could set additional requirements in its standards. Moreover, the performance-oriented nature of this standard, of and by itself, allows flexibility to provide as much safety as possible using varying methods consonant with conditions in each State.

In short, there is a clear national problem related to occupational safety and health concerning entry into permit-required confined spaces. Those States that elect to participate in State plans under the statute would not be preempted by this standard and would be able to address special, local conditions within the framework provided by this performance-oriented standard, while ensuring that the state standards are at least as effective as that standard.

V. OMB Review Under the Paperwork Reduction Act

The collection of information requirements in this final rule are essentially the same as those in the current rule. OSHA does not believe the clarified language of the final rule increases or decreases the burden associated with the preparation, maintainence or disclosure of information beyond the current rule. OMB has approved the collection of information requirements in § 1910.146 under control number 1218–0203. The approval expires on June 30, 1999. OSHA anticipates that it will seek public comment on the burden associated with the information collection requirements in the entire standard in the early part of 1999, allowing the public the opportunity to comment on the need for, and the burden associated with, all collection of information requirements in the standard on permit required confined spaces.

VI. State Plans

The 25 states and territories with their own OSHA-approved occupational safety and health plans must adopt a comparable amended standard within six months of the publication date of a final Federal OSHA standard. These 25 States and territories are: Alaska, Arizona, California, Connecticut (for state and local government employees only), Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, New York (for state and local government employees only), North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington and Wyoming. Until such

time as a comparable standard is promulgated, Federal OSHA will provide interim enforcement assistance, as appropriate, in these states and territories.

VII. List of Subjects in 29 CFR Part 1910

Confined spaces, Monitoring, Occupational safety and health, Personal protective equipment, Rescue equipment, Retrieval lines, Safety, Testing.

VIII. Authority

This document was prepared under the direction of Charles N. Jeffress, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Accordingly, pursuant to sections 4, 6(b) and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), Secretary of Labor's Order No. 6–96 (62 FR 111), and 29 CFR part 1911, 29 CFR 1910.146 is amended as set forth below.

Signed at Washington, D.C. this 25th day of November, 1998.

Charles N. Jeffress

Assistant Secretary of Labor

PART 1910—OCCUPATIONAL SAFETY AND HEALTH STANDARDS

1. The authority citation for subpart J of part 1910 is revised to read as follows:

Authority: Secs. 4, 6, and 8, Occupational Safety and Health Act of 1970, 29 U.S.C. 653, 655, 657; Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), or 6–96 (62 FR 111), as applicable.

§ 1950.141 [Amended]

Sections 1910.141, 1910.142, 1910.145, 1910.146, and 1910.147 also issued under 29 CFR part 1911.

2. Section 1910.146 is amended:

a. By revising paragraphs (c)(5)(i)(E), (c)(5)(ii)(C), (c)(5)(ii)(F), (c)(5)(ii)(H), (c)(7)(iii), (e)(3), (k)(1), (k)(2), and (k)(3)(i);

b. By redesignating paragraphs (d)(3)(ii), (d)(3)(iii), (d)(3)(iv), and (d)(3)(v) as paragraphs (d)(3)(iii), (d)(3)(iv), (d)(3)(v), and (d)(3)(vi), respectively; and

c. By adding new paragraphs (d)(3)(ii); (d)(5)(iv), and (d)(5)(v), and (d)(5)(vi) (immediately following paragraph (d)(5)(iii) and before the Note); and (l), to read as follows:

§ 1910.146 Permit-required confined spaces.

* * * * *

(c) * * *

(5) * * *

(i) * * *

(E) The determinations and supporting data required by paragraphs (c)(5)(i)(A), (c)(5)(i)(B), and (c)(5)(i)(C) of this section are documented by the employer and are made available to each employee who enters the permit space under the terms of paragraph (c)(5) of this section or to that employee's authorized representative; and

* * * * *

(ii) * * *

(C) Before an employee enters the space, the internal atmosphere shall be tested, with a calibrated direct-reading instrument, for oxygen content, for flammable gases and vapors, and for potential toxic air contaminants, in that order. Any employee who enters the space, or that employee's authorized representative, shall be provided an opportunity to observe the pre-entry testing required by this paragraph.

* * * * *

(F) The atmosphere within the space shall be periodically tested as necessary to ensure that the continuous forced air ventilation is preventing the accumulation of a hazardous atmosphere. Any employee who enters the space, or that employee's authorized representative, shall be provided with an opportunity to observe the periodic testing required by this paragraph.

* * * * *

(H) The employer shall verify that the space is safe for entry and that the pre-entry measures required by paragraph (c)(5)(ii) of this section have been taken, through a written certification that contains the date, the location of the space, and the signature of the person providing the certification. The certification shall be made before entry and shall be made available to each employee entering the space or to that employee's authorized representative .

* * * * *

(7) * * *

(iii) The employer shall document the basis for determining that all hazards in a permit space have been eliminated, through a certification that contains the date, the location of the space, and the signature of the person making the determination. The certification shall be made available to each employee entering the space or to that employee's authorized representative.

* * * * *

(d) * * *

(3) * * *

(ii) Providing each authorized entrant or that employee's authorized representative with the opportunity to observe any monitoring or testing of permit spaces;

* * * * *

(5) * * *

(iv) Provide each authorized entrant or that employee's authorized representative an opportunity to observe the pre-entry and any subsequent testing or monitoring of permit spaces;

(v) Reevaluate the permit space in the presence of any authorized entrant or that employee's authorized representative who requests that the employer conduct such reevaluation because the entrant or representative has reason to believe that the evaluation of that space may not have been adequate;

(vi) Immediately provide each authorized entrant or that employee's authorized representative with the results of any testing conducted in accord with paragraph (d) of this section.

* * * * *

(e) * * *

(3) The completed permit shall be made available at the time of entry to all authorized entrants or their authorized representatives, by posting it at the entry portal or by any other equally effective means, so that the entrants can confirm that pre-entry preparations have been completed.

* * * * *

(k) *Rescue and emergency services.*

(1) An employer who designates rescue and emergency services, pursuant to paragraph (d)(9) of this section, shall:

(i) Evaluate a prospective rescuer's ability to respond to a rescue summons in a timely manner, considering the hazard(s) identified;

Note to paragraph (k)(l)(i): What will be considered timely will vary according to the specific hazards involved in each entry. For example, § 1910.134, Respiratory Protection, requires that employers provide a standby person or persons capable of immediate action to rescue employee(s) wearing respiratory protection while in work areas defined as IDLH atmospheres.

(ii) Evaluate a prospective rescue service's ability, in terms of proficiency with rescue-related tasks and equipment, to function appropriately while rescuing entrants from the particular permit space or types of permit spaces identified;

(iii) Select a rescue team or service from those evaluated that:

(A) Has the capability to reach the victim(s) within a time frame that is appropriate for the permit space hazard(s) identified;

(B) Is equipped for and proficient in performing the needed rescue services;

(iv) Inform each rescue team or service of the hazards they may confront when called on to perform rescue at the site; and

(v) Provide the rescue team or service selected with access to all permit spaces from which rescue may be necessary so that the rescue service can develop appropriate rescue plans and practice rescue operations.

Note to paragraph (k)(1): Non-mandatory Appendix F contains examples of criteria which employers can use in evaluating prospective rescuers as required by paragraph (k)(l) of this section.

(2) An employer whose employees have been designated to provide permit space rescue and emergency services shall take the following measures:

(i) Provide affected employees with the personal protective equipment (PPE) needed to conduct permit space rescues safely and train affected employees so they are proficient in the use of that PPE, at no cost to those employees;

(ii) Train affected employees to perform assigned rescue duties. The employer must ensure that such employees successfully complete the training required to establish proficiency as an authorized entrant, as provided by paragraphs (g) and (h) of this section;

(iii) Train affected employees in basic first-aid and cardiopulmonary resuscitation (CPR). The employer shall ensure that at least one member of the rescue team or service holding a current certification in first aid and CPR is available; and

(iv) Ensure that affected employees practice making permit space rescues at least once every 12 months, by means of simulated rescue operations in which they remove dummies, manikins, or actual persons from the actual permit spaces or from representative permit spaces. Representative permit spaces shall, with respect to opening size, configuration, and accessibility, simulate the types of permit spaces from which rescue is to be performed.

* * * * *

(3) * * *

(i) Each authorized entrant shall use a chest or full body harness, with a retrieval line attached at the center of the entrant's back near shoulder level, above the entrant's head, or at another point which the employer can establish presents a profile small enough for the successful removal of the entrant. Wristlets may be used in lieu of the chest or full body harness if the employer can demonstrate that the use of a chest or full body harness is infeasible or creates a greater hazard and that the use of wristlets is the safest and most effective alternative.

* * * * *

(l) *Employee participation.* (1) Employers shall consult with affected employees and their authorized representatives on the development and implementation of all aspects of the permit space program required by paragraph (c) of this section.

(2) Employers shall make available to affected employees and their authorized representatives all information required to be developed by this section.

Appendices to § 1910.146 [Amended]

3. In the Note preceding Appendix A to § 1910.146, the phrase ''Appendices A through E'' is revised to read ''Appendices A through F''.

4. A new Appendix F to § 1910.146 is added to read as follows:

Non-Mandatory Appendix F—Rescue Team or Rescue Service Evaluation Criteria

(1) This appendix provides guidance to employers in choosing an appropriate rescue service. It contains criteria that may be used to evaluate the capabilities both of prospective and current rescue teams. Before a rescue team can be trained or chosen, however, a satisfactory permit program, including an analysis of all permit-required confined spaces to identify all potential hazards in those spaces, must be completed. OSHA believes that compliance with all the provisions of § 1910.146 will enable employers to conduct permit space operations without recourse to rescue services in nearly all cases. However, experience indicates that circumstances will arise where entrants will need to be rescued from permit spaces. It is therefore important for employers to select rescue services or teams, either on-site or off-site, that are equipped and capable of minimizing harm to both entrants and rescuers if the need arises.

(2) For all rescue teams or services, the employer's evaluation should consist of two components: an initial evaluation, in which employers decide whether a potential rescue service or team is adequately trained and equipped to perform permit space rescues of the kind needed at the facility and whether such rescuers can respond in a timely manner, and a performance evaluation, in which employers measure the performance of the team or service during an actual or practice rescue. For example, based on the initial evaluation, an employer may determine that maintaining an on-site rescue team will be more expensive than obtaining the services of an off-site team, without being significantly more effective, and decide to hire a rescue service. During a performance evaluation, the employer could decide, after observing the rescue service perform a practice rescue, that the service's training or preparedness was not adequate to effect a timely or effective rescue at his or her facility and decide to select another rescue service, or to form an internal rescue team.

A. Initial Evaluation

I. The employer should meet with the prospective rescue service to facilitate the evaluations required by § 1910.146(k)(1)(i) and § 1910.146(k)(1)(ii). At a minimum, if an off-site rescue service is being considered, the employer must contact the service to plan and coordinate the evaluations required by the standard. Merely posting the service's number or planning to rely on the 911 emergency phone number to obtain these services at the time of a permit space emergency would not comply with paragraph (k)(1) of the standard.

II. The capabilities required of a rescue service vary with the type of permit spaces from which rescue may be necessary and the hazards likely to be encountered in those spaces. Answering the questions below will assist employers in determining whether the rescue service is capable of performing rescues in the permit spaces present at the employer's workplace.

1. What are the needs of the employer with regard to response time (time for the rescue service to receive notification, arrive at the scene, and set up and be ready for entry)? For example, if entry is to be made into an IDLH atmosphere, or into a space that can quickly develop an IDLH atmosphere (if ventilation fails or for other reasons), the rescue team or service would need to be standing by at the permit space. On the other hand, if the danger to entrants is restricted to mechanical hazards that would cause injuries (e.g., broken bones, abrasions) a response time of 10 or 15 minutes might be adequate.

2. How quickly can the rescue team or service get from its location to the permit spaces from which rescue may be necessary? Relevant factors to consider would include: the location of the rescue team or service relative to the employer's workplace, the quality of roads and highways to be traveled, potential bottlenecks or traffic congestion that might be encountered in transit, the reliability of the rescuer's vehicles, and the training and skill of its drivers.

3. What is the availability of the rescue service? Is it unavailable at certain times of the day or in certain situations? What is the likelihood that key personnel of the rescue service might be unavailable at times? If the rescue service becomes unavailable while an entry is underway, does it have the capability of notifying the employer so that the employer can instruct the attendant to abort the entry immediately?

4. Does the rescue service meet all the requirements of paragraph (k)(2) of the standard? If not, has it developed a plan that will enable it to meet those requirements in the future? If so, how soon can the plan be implemented?

5. For off-site services, is the service willing to perform rescues at the employer's workplace? (An employer may not rely on a rescuer who declines, for whatever reason, to provide rescue services.)

6. Is an adequate method for communications between the attendant, employer and prospective rescuer available so that a rescue request can be transmitted to the rescuer without delay? How soon after notification can a prospective rescuer dispatch a rescue team to the entry site?

7. For rescues into spaces that may pose significant atmospheric hazards and from which rescue entry, patient packaging and retrieval cannot be safely accomplished in a relatively short time (15–20 minutes), employers should consider using airline respirators (with escape bottles) for the rescuers and to supply rescue air to the patient. If the employer decides to use SCBA, does the prospective rescue service have an ample supply of replacement cylinders and procedures for rescuers to enter and exit (or be retrieved) well within the SCBA's air supply limits?

8. If the space has a vertical entry over 5 feet in depth, can the prospective rescue service properly perform entry rescues? Does the service have the technical knowledge and equipment to perform rope work or elevated rescue, if needed?

9. Does the rescue service have the necessary skills in medical evaluation, patient packaging and emergency response?

10. Does the rescue service have the necessary equipment to perform rescues, or must the equipment be provided by the employer or another source?

B. Performance Evaluation

Rescue services are required by paragraph (k)(2)(iv) of the standard to practice rescues at least once every 12 months, provided that the team or service has not successfully performed a permit space rescue within that time. As part of each practice session, the service should perform a critique of the practice rescue, or have another qualified party perform the critique, so that deficiencies in procedures, equipment, training, or number of personnel can be identified and corrected. The results of the critique, and the corrections made to respond to the deficiencies identified, should be given to the employer to enable it to determine whether the rescue service can quickly be upgraded to meet the employer's rescue needs or whether another service must be selected. The following questions will assist employers and rescue teams and services evaluate their performance.

1. Have all members of the service been trained as permit space entrants, at a minimum, including training in the potential hazards of all permit spaces, or of representative permit spaces, from which rescue may be needed? Can team members recognize the signs, symptoms, and consequences of exposure to any hazardous atmospheres that may be present in those permit spaces?

2. Is every team member provided with, and properly trained in, the use and need for PPE, such as SCBA or fall arrest equipment, which may be required to perform permit space rescues in the facility? Is every team member properly trained to perform his or her functions and make rescues, and to use any rescue equipment, such as ropes and backboards, that may be needed in a rescue attempt?

3. Are team members trained in the first aid and medical skills needed to treat victims overcome or injured by the types of hazards that may be encountered in the permit spaces at the facility?

4. Do all team members perform their functions safely and efficiently? Do rescue service personnel focus on their own safety before considering the safety of the victim?

5. If necessary, can the rescue service properly test the atmosphere to determine if it is IDLH?

6. Can the rescue personnel identify information pertinent to the rescue from entry permits, hot work permits, and MSDSs?

7. Has the rescue service been informed of any hazards to personnel that may arise from outside the space, such as those that may be caused by future work near the space?

8. If necessary, can the rescue service properly package and retrieve victims from a permit space that has a limited size opening (less than 24 inches (60.9 cm) in diameter), limited internal space, or internal obstacles or hazards?

9. If necessary, can the rescue service safely perform an elevated (high angle) rescue?

10. Does the rescue service have a plan for each of the kinds of permit space rescue operations at the facility? Is the plan adequate for all types of rescue operations that may be needed at the facility? Teams may practice in representative spaces, or in spaces that are ''worst-case'' or most restrictive with respect to internal configuration, elevation, and portal size. The following characteristics of a practice space should be considered when deciding whether a space is truly representative of an actual permit space:

(1) Internal configuration.

(a) Open—there are no obstacles, barriers, or obstructions within the space. One example is a water tank.

(b) Obstructed—the permit space contains some type of obstruction that a rescuer would need to maneuver around. An example would be a baffle or mixing blade. Large equipment, such as a ladder or scaffold, brought into a space for work purposes would be considered an obstruction if the positioning or size of the equipment would make rescue more difficult.

(2) Elevation.

(a) Elevated—a permit space where the entrance portal or opening is above grade by 4 feet or more. This type of space usually requires knowledge of high angle rescue procedures because of the difficulty in packaging and transporting a patient to the ground from the portal.

(b) Non-elevated—a permit space with the entrance portal located less than 4 feet above grade. This type of space will allow the rescue team to transport an injured employee normally.

(3) Portal size.

(a) Restricted—A portal of 24 inches or less in the least dimension. Portals of this size are too small to allow a rescuer to simply enter the space while using SCBA. The portal size is also too small to allow normal spinal immobilization of an injured employee.

(b) Unrestricted—A portal of greater than 24 inches in the least dimension. These portals allow relatively free movement into and out of the permit space.

(4) Space access.

(a) Horizontal—The portal is located on the side of the permit space. Use of retrieval lines could be difficult.

(b) Vertical—The portal is located on the top of the permit space, so that rescuers must climb down, or the bottom of the permit space, so that rescuers must climb up to enter the space. Vertical portals may require knowledge of rope techniques, or special patient packaging to safely retrieve a downed entrant.

[FR Doc. 98–31946 Filed 11–30–98; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 1

[Docket No.: 980511124–8284–02]

Revision of Patent Cooperation Treaty Application Procedure

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Final rule.

SUMMARY: The Patent and Trademark Office (Office or USPTO) is confirming the amendment of its rules of practice relating to applications filed under the Patent Cooperation Treaty (PCT). This amendment of the rules of practice conformed the United States rules of practice with the corresponding changes to the Regulations under the PCT which became effective July 1, 1998.

DATES: This final rule is effective on December 1, 1998. The interim rule, published at 63 FR 29614 (June 1, 1998), was effective on July 1, 1998.

FOR FURTHER INFORMATION CONTACT: Richard Lazarus, PCT Legal Office Supervisor, by telephone at (703) 308–6451; or by mail addressed to: Box PCT, Assistant Commissioner for Patents, Washington, DC 20231; or by facsimile to (703) 308–6459, marked to the attention of Richard Lazarus.

SUPPLEMENTARY INFORMATION: During a September–October 1997 meeting of the Governing Bodies of the World Intellectual Property Organization (WIPO), the PCT Assembly adopted amendments to the PCT Regulations. These amendments to the PCT Regulations took effect on July 1, 1998, and the amended PCT Regulations were published in the *Official Gazette* at 1210 *Off. Gaz. Pat. Office* 29 (May 12, 1998). An interim rule conforming the United States rules of practice to the corresponding changes in the PCT Regulations was published in the **Federal Register** at 63 FR 29614 (June 1, 1998), and in the *Official Gazette* at 1211 *Off. Gaz. Pat. Office* 76 (June 23, 1998).

The Office has received no comments on the changes to 37 CFR contained in the interim rule. Accordingly, the changes to 37 CFR contained in the

above-mentioned interim rule are adopted as final in this final rule.

Applicants are again notified that PCT Rules 20.4(c) and 26.3ter (a) and (c) as amended are not compatible with the national law of the United States, and thus the USPTO has taken a reservation on adherence to these Rules through its notification to the Director General of WIPO to such effect. *See* PCT Rules 20.4(d) and 26.3ter (b) and (d). Similarly, the USPTO continues not to adhere to the unchanged provisions of PCT Rule 49.5(cbis) and (k) with respect to the translation requirements for United States national stage applications (35 U.S.C. 371(c)(2)). *See* PCT Rule 49.5(l).

The above-noted changes to the PCT Regulations include the addition of new PCT Rules 89bis and 89ter (directed to electronic filing and processing of international applications) which will enter into force at the same time as the modifications to the Administrative Instructions implementing those PCT Rules. Implementation of PCT Rules 89bis and 89ter is optional with each national office. In the event that the USPTO decides to implement PCT Rules 89bis and 89ter, the USPTO will provide notice to that effect in the **Federal Register** and *Official Gazette.*

Discussion of Specific Rules

A section-by-section discussion of the changes to title 37 of the Code of Federal Regulations adopted as final in this final rule is set forth in the above-mentioned interim rule at 63 FR 29614–17, and 1211 *Off. Gaz. Pat. Office* 77–78.

Other Considerations

The United States rules of practice contained in title 37, CFR, must conform to the PCT Articles and the Regulations annexed to the PCT. *See* PCT Article 27(1). This final rule adopts as final changes required to conform the United States rules of practice for international applications to the amendments to the PCT Regulations which became effective on July 1, 1998. Thus, this final rule is covered by the foreign affairs function exception of 5 U.S.C. 553(a)(1), and may be adopted without prior notice and opportunity for public comment. *See International Brotherhood of Teamsters* v. *Pena,* 17 F.3d 1478, 1486 (D.C. Cir. 1994).

As prior notice and an opportunity for public comment are not required pursuant to 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, are inapplicable. This final rule does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 12612 (October 26, 1987). This final rule has been determined not to be significant for purposes of Executive Order 12866 (September 30, 1993).

This final rule contains information collection requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The principal impact of this final rule is to adopt as final changes that conform the United States rules of practice relating to applications filed under the PCT to the corresponding amendments made to the Regulations under the PCT.

The general purpose of the PCT is to provide a single set of standards and procedures for the filing of patent applications on the same invention in any of the over ninety PCT member countries. The PCT provides a common filing procedure and a standardized application format for international applications.

The collection of information in this final rule has been reviewed and approved by OMB under control number 0651–0021. The public reporting burden for this collection of information is estimated to average 0.95 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the information. Send comments regarding this burden estimate or any other aspect of the data requirement, including suggestions for reducing the burden to Richard Lazarus at the address specified above and to the Office of Information and Regulatory Affairs, OMB, 725 17th Street, N.W., Washington, D.C., 20503 (Attn: PTO Desk Officer).

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

List of Subjects in 37 CFR Part 1

Administrative practice and procedure, Courts, Freedom of information, Inventions and patents, Reporting and recordkeeping requirements, Small businesses.

For the reasons set forth in the preamble, the interim rule amending 37 CFR Part 1 which was published at 63 FR 29614–29620 on June 1, 1998, is adopted as a final rule without change.

Dated: November 23, 1998.

Q. Todd Dickinson,

Deputy Assistant Secretary of Commerce and Deputy Commissioner of Patents and Trademarks.

[FR Doc. 98–31952 Filed 11–30–98; 8:45 am]

BILLING CODE 3510–16–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

Copyright Rules and Regulations

AGENCY: Copyright Office, Library of Congress.

ACTION: Technical amendment; correction.

SUMMARY: The Copyright Office is making one amendment to its rule at 37 CFR 201.22(e) and one correction to its interim rule at 37 CFR 201.5 to update these portions of the copyright regulations. The amendment concerns service of advance notice of potential infringement of certain works, the fixation of which is made simultaneously with their transmission, and the correction concerns applications for supplementary registration.

EFFECTIVE DATE: December 1, 1998.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or Marilyn J. Kretsinger, Assistant General Counsel, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024. Telephone: (202) 707–8380. Fax: (202) 707–8366.

SUPPLEMENTARY INFORMATION: The Copyright Office is amending its regulation concerning service of Advance Notice of Potential Infringement of certain works pursuant to 17 U.S.C. 411(b), which was amended by section 6 of the Copyright Technical Amendments Act, Pub. L. 105–80 (1997). Section 411(b) provides that a copyright owner of a work consisting of sounds, images, or both, the fixation of which is made simultaneously with its transmission, may institute an action for copyright infringement if the copyright owner has served a notice on the infringer identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work. The copyright owner must also register the work within three months after its first transmission. Prior to the 1997 amendment, section 411(b) required that the notice be served on the infringer ''not less than ten or more than thirty days before such fixation.'' The 1977

amendment changed the time period to ''not less than 48 hours before such fixation.'' The amendment to 37 CFR 201.22(e) similarly changes the period of time in which notice must be served from ''at least ten days but not more than thirty days'' to ''not less than 48 hours''.

The Office also corrects recently amended language in 37 CFR 201.5(b)(2)(iii)(A) by inserting the word ''As'' at the beginning of the sentence that comprises that paragraph. The word ''As'' was inadvertently omitted when the amendment was made. See 63 FR 59235 (November 3, 1998).

List of Subjects in 37 CFR Part 201

Copyright, General provisions.

For the reasons stated above, the rules at 37 CFR part 201 are corrected and amended as follows:

PART 201—GENERAL PROVISIONS

1. The authority citation for Part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

§ 201.5 [Corrected]

2. In § 201.5(b)(2)(iii)(A), add ''As'' before the phrase ''an amplification,''.

3. Section 201.22 is amended by revising paragraph (e)(1) to read as follows:

§ 201.22 Advance notices of potential infringement of works consisting of sounds, images, or both.

* * * * *

(e) * * *

(1) An Advance Notice of Potential Infringement shall be served on the person responsible for the potential infringement not less than 48 hours before the first fixation and simultaneous transmission of the work as provided by 17 U.S.C. 411(b)(1).

* * * * *

Dated: November 20, 1998.

Marybeth Peters,

Register of Copyrights.

[FR Doc. 98–31852 Filed 11–30–98; 8:45 am]

BILLING CODE 1410–30–P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 98–5 CARP]

37 CFR Part 253

Cost of Living Adjustment for Performance of Musical Compositions by Colleges and Universities

AGENCY: Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Office of the Library of Congress announces a cost of living adjustment of 1.5% in the royalty rates paid by colleges, universities, or other nonprofit educational institutions that are not affiliated with National Public Radio, for the use of copyrighted published nondramatic musical compositions. The cost of living adjustment is based on the change in the Consumer Price Index from October, 1997, to October, 1998.

EFFECTIVE DATE: January 1, 1999.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or Tanya M. Sandros, Attorney Advisor, at Copyright Arbitration Royalty Panel, P.O. Box 70977, Southwest Station, Washington, DC 20024. Telephone: (202) 707–8380. Telefax: (202) 252–3423.

SUPPLEMENTARY INFORMATION: Section 118 of the Copyright Act, 17 U.S.C., creates a compulsory license for the use of published nondramatic musical works and published pictorial, graphic, and sculptural works in connection with noncommercial broadcasting. Terms and rates for this compulsory license, applicable to parties who are not subject to privately negotiated licenses, are published in 37 CFR part 253 and are subject to adjustment at five-year intervals. 17 U.S.C. 118(c). The last proceeding to adjust the terms and rates for the section 118 license began in 1996. 61 FR 54458 (October 18, 1996).

On January 14, 1998, the Copyright Office announced final regulations governing the terms and rates of copyright royalty payments with respect to certain uses by public broadcasting entities of published nondramatic musical works, and published pictorial, graphic, and sculptural works, including the 1998 rates for the public performance of musical compositions in the ASCAP, BMI, and SESAC repertories by public broadcasting entities licensed to colleges and universities. 63 FR 2142 (January 14, 1998).

Pursuant to the regulations, on December 1 of each year ''the Librarian of Congress shall publish a notice of the change in the cost of living during the period from the most recent Index published prior to the previous notice, to the most recent Index published prior to December 1, of that year.'' 37 CFR 253.10(a). The regulations also require that the Librarian publish a revised schedule of rates for the public performance of musical compositions in the ASCAP, BMI, and SESAC repertories by public broadcasting entities licensed to colleges and universities, reflecting the change in the Consumer Price Index. 37 CFR 253.10(b).

Accordingly, the Copyright Office of the Library of Congress is hereby announcing the change in the cost of living Index and performing the annual cost of living adjustment to the rates set out in § 253.5(c). 63 FR 2142 (January 14, 1998).

The change in the cost of living as determined by the Consumer Price Index (all consumers, all items) during the period from the most recent Index published before December 1, 1997, to the most recent Index published before December 1, 1998, was 1.5% (1997's figure was 161.6; 1998's figure is 164.0, based on 1982–1984=100 as a reference base). Rounding off to the nearest dollar, the adjustment in the royalty rate for the use of musical compositions in the repertory of ASCAP and BMI is $225, each, and $61 for the use of musical compositions in the repertory of SESAC.

List of Subjects in 37 CFR Part 253

Copyright, Radio, Television.

PART 253—USE OF CERTAIN COPYRIGHTED WORKS IN CONNECTION WITH NONCOMMERCIAL EDUCATIONAL BROADCASTING

1. The authority citation for Part 253 continues to read as follows:

Authority: 17 U.S.C. 118, 801(b)(1) and 803.

2. 37 CFR 253.5 is amended by revising paragraphs (c)(1) through (c)(3).

§ 253.5 Performance of musical compositions by public broadcasting entities licensed to colleges and universities.

* * * * *

(c) * * *

(1) For all such compositions in the repertory of ASCAP, $225 annually.

(2) For all such compositions in the repertory of BMI, $225 annually.

(3) For all such compositions in the repertory of SESAC, $61 annually.

* * * * *

Dated: November 19, 1998.

Marybeth Peters,

Register of Copyrights.

[FR Doc. 98–31658 Filed 11–30–98; 8:45 am]

BILLING CODE 1410–33–P

POSTAL SERVICE

39 CFR Part 20

Global Package Link Rate Adjustments and Introduction of Service to Argentina

AGENCY: Postal Service.

ACTION: Interim rule and request for comment.

SUMMARY: The Postal Service is adjusting the rates for Global Package Link and introducing a new structure for volume discounts. In addition, service to Argentina is being initiated.

DATES: The interim rule is effective 12:01 a.m., December 27, 1998. Comments must be received on or before December 31, 1998.

ADDRESSES: Written comments should be mailed or delivered to the Manager, Pricing, Costing, and Classification, Room 370–IBU, International Business Unit, U.S. Postal Service, Washington, DC 20260–6500. Copies of all written comments will be available for public inspection between 9:00 a.m. and 4:00 p.m., Monday through Friday, in the International Business Unit, 10th Floor, 901 D Street SW, Washington DC.

FOR FURTHER INFORMATION CONTACT: Robert Michelson, (202) 268–5731.

SUPPLEMENTARY INFORMATION: Global Package Link (GPL) is an international mail service designed for companies sending merchandise packages to other countries. To use GPL, a customer is required to mail at least 10,000 packages per year using the service and agree to link its information systems with the Postal Service so that certain information about the contents of the customer's packages can be extracted for customs clearance and other purposes.

The Postal Service is announcing new rates and a new discount structure for GPL. The increased rates are the result of declining economic conditions in Japan and other countries and rising costs, including implementation of harmonization for all items to Japan. Overall, the base rates are increased approximately 9 percent. See Appendix 1 for specific rates to each GPL country.

Currently, GPL provides a volume discount within each country beginning at 100,000 packages. The new discount structure is based on a mailer's worldwide volume and discounts are available when volume reaches more than 25,000 packages per postal fiscal year. Discounts will increase with volume based on the following schedule:

Number of packages	Discount (percent)
25,001 to 50,000	1
50,001 to 75,000	2
75,001 to 100,000	3
100,001 and over	4

Each year's discounts will be calculated on the previous postal fiscal year's volume and will apply to mailings made during the next calendar year. For example, a mailer who mails 55,000 packages during postal fiscal year 1998 (September 13, 1997 through September 11, 1998) will receive a discount from the base rate for all GPL mailings made during calendar year 1999 (January 1, 1999 through December 31, 1999). Postal fiscal year 1998 will be used for discounts applied in calendar year 1999.

The Postal Service is also introducing GPL service to Argentina. Two levels of service, Premium and Standard, will be offered. The maximum weight of parcels to Argentina is 44 pounds with a maximum size of 42 inches in length and a maximum length and girth combined of 79 inches. Rates are shown in Appendix 1. Packages sent in Premium service are insured at no additional charge subject to the provisions of Domestic Mail Manual (DMM) S010 and S500. No insurance is available for packages sent to Argentina as Standard service.

Although the Postal Service is exempted by 39 U.S.C. 410(a) from the advance notice requirements of the Administrative Procedure Act regarding proposed rulemaking (5 U.S.C. 553), the Postal Service invites public comment at the above address.

The Postal Service is amending Subchapter 620, Global Package Link, and the appropriate Individual Country Listings, International Mail Manual, which are incorporated by reference in the Code of Federal Regulations. See 39 CFR 20.1.

List of Subjects in 39 CFR Part 20

Foreign relations, incorporation by reference, international postal services.

PART 20—[AMENDED]

1. The authority citation for 39 CFR Part 20 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 401, 404, 407, 408.

2. The International Mail Manual is amended to incorporate program changes to Subchapter 620 Global Package Link as follows:

620 Global Package Link

621 Description

* * * * *

621.3 Availability

Global Package Link service is available only to Argentina, Brazil, Canada, Chile, China, France, Germany, Hong Kong, Japan, Mexico, Singapore, and the United Kingdom.

* * * * *

623 General

* * * * *

623.3 Size and Weight Limits

623.31 Weight

The weight limits for Global Package Link service are 70 pounds for Chile, China, and Germany; 66 pounds for Brazil, Canada, France, Singapore, and the United Kingdom; 64 pounds for Mexico; 44 pounds for Argentina and Hong Kong; and 44 pounds for Japan with Premium service. * * *

623.32 Size

The maximum length of GPL packages is 60 inches. The maximum length and girth combined is 108 inches.

Exceptions: Maximum size for Germany is length 47 inches, height 23 inches, width 23 inches; for Japan Standard packages weighing less than 1 pound, the maximum length is 24 inches with a combined maximum length, depth, and height of 36 inches. The maximum size for packages to Argentina is 42 inches in length and 79 inches length and girth combined.

* * * * *

623.4 Postage

* * * * *

623.44 Base Rates

The Postal Service will charge the base rates, in 1-pound increments, unless the mailer qualifies for the discounts in 623.441 by mailing more than 25,000 packages in a postal fiscal year. The discounts apply to mailings made during the following calendar year.

623.441 Discounts

Number of packages	Discount (percent)
25,001 to 50,000	1
50,001 to 75,000	2
75,001 to 100,000	3
100,001 and over	4

* * * * *

626 Services Available

626.1 Delivery Options

* * * * *

626.12 Standard Service

Standard service is available to Argentina, Canada, France, Japan, Singapore, and the United Kingdom. * * *

* * * * *

626.4 Customs

* * * * *

626.43 Payment of Customs Duty

626.431 All Countries Except China, Japan, Hong Kong, and Singapore

For all countries except China, Japan, Hong Kong, and Singapore, the Postal Service will arrange payment of customs duty on behalf of the recipient at the time the merchandise enters the country of destination. Any banking costs or foreign exchange fees applicable to the customs payments will be charged back to the mailer. The Postal Service will notify the mailer electronically of the amount of duty and fees paid, and the mailer will reimburse the Postal Service in a manner and within a time agreed between the mailer and the Postal Service. Because of the need to have funds available for customers at the time of clearance in Argentina, Brazil, Chile, and Mexico, mailers must make an advance deposit prior to the first mailing to cover anticipated duties and taxes in addition to postage. * * *

Appendix 1.—Global Package Link Rates

STANDARD SERVICE RATES—CANADA

Weight not to exceed (pounds)	US origin zone A: Buffalo, New York, Chicago Canadian entry: Toronto*				US origin zone B: Miami, Dallas Canadian Entry: Toronto*		
	Premium	Local	Regional	National	Local	Regional	National
1	$10.00	$5.50	$7.25	$7.50	$6.25	$7.75	$8.00
2	11.00	6.00	8.25	8.75	7.25	9.50	10.00
3	12.50	6.50	9.25	10.00	8.25	11.00	11.75
4	14.25	7.00	10.00	11.25	9.25	12.25	13.50
5	15.75	7.50	10.75	12.50	10.25	13.75	15.50
6	17.50	8.00	11.75	13.75	11.50	15.25	17.25
7	19.00	8.50	12.50	15.00	12.50	16.50	19.25
8	20.75	9.00	13.25	16.25	13.50	18.00	21.00
9	22.25	9.50	14.25	17.50	14.75	19.50	22.75
10	24.00	10.00	15.00	18.75	15.75	20.75	24.75
11	25.50	10.50	15.50	19.25	16.75	21.75	25.75
12	27.00	11.00	16.25	20.50	17.75	23.25	27.50
13	28.75	11.50	17.25	21.75	19.00	24.75	29.25
14	30.25	12.00	18.00	23.00	20.00	26.00	31.25
15	32.00	12.50	18.75	24.25	21.25	27.50	33.00
16	33.50	13.00	19.75	25.50	22.25	29.00	34.75
17	35.25	13.50	20.50	26.75	23.25	30.25	36.75
18	36.75	14.00	21.25	28.00	24.50	31.75	38.50
19	38.50	14.50	22.25	29.50	25.50	33.25	40.25
20	40.00	15.00	23.00	30.75	26.50	34.50	42.25
21	41.50	15.50	24.00	32.00	27.75	36.00	44.00
22	43.00	16.00	24.25	32.25	28.75	37.00	45.00
23	44.75	16.50	25.25	33.50	29.75	38.50	46.75
24	46.25	17.00	26.00	34.75	30.75	39.75	48.75
25	48.00	17.50	26.75	36.00	32.00	41.25	50.50
26	49.50	18.00	27.75	37.25	33.00	42.75	52.25
27	50.75	18.50	28.50	38.50	34.00	44.00	54.25
28	52.75	19.00	29.25	40.00	35.25	45.50	56.00
29	54.50	19.50	30.25	41.25	36.25	47.00	57.75
30	56.00	20.00	31.00	42.50	37.50	48.25	59.75
31	57.25	20.50	31.75	43.75	38.50	49.75	61.50
32	58.75	21.25	32.75	45.00	39.50	51.25	63.25
33	60.50	21.50	33.00	45.25	40.50	52.25	64.25
34	62.00	22.00	34.00	46.50	41.75	53.50	66.25
35	63.75	22.50	34.75	47.75	42.75	55.00	68.00
36	65.25	23.00	35.75	49.00	43.75	56.50	69.75
37	67.00	23.50	36.50	50.50	45.00	57.75	71.75
38	68.50	24.00	37.25	51.75	46.00	59.25	73.50
39	70.00	24.75	38.25	53.00	47.00	60.75	75.25
40	71.75	25.25	39.00	54.25	48.25	62.00	77.25
41	72.75	25.75	39.75	55.50	49.25	63.50	79.00
42	74.50	26.25	40.75	56.75	50.25	65.00	80.75
43	76.00	26.75	41.50	58.00	51.50	66.25	82.75
44	77.50	27.00	42.00	58.25	52.50	67.25	83.75
45	79.25	27.50	42.75	59.50	53.50	68.75	85.50
46	80.25	28.25	43.75	61.00	54.75	70.00	87.50
47	81.75	28.75	44.50	62.25	55.75	71.50	89.25
48	83.25	29.25	45.25	63.50	56.75	73.00	91.00
49	84.75	29.75	46.25	64.75	58.00	74.25	93.00
50	86.50	30.25	47.00	66.00	59.00	75.75	94.75
51	88.00	30.75	47.75	67.25	60.00	77.25	96.50

STANDARD SERVICE RATES—CANADA—Continued

Weight not to exceed (pounds)	US origin zone A: Buffalo, New York, Chicago Canadian entry: Toronto*				US origin zone B: Miami, Dallas Canadian Entry: Toronto*		
	Premium	Local	Regional	National	Local	Regional	National
52	89.75	31.25	48.75	68.50	61.25	78.50	98.50
53	91.25	31.75	49.50	69.75	62.25	80.00	100.25
54	92.75	32.25	50.00	70.25	63.25	81.00	101.25
55	94.50	32.75	50.75	71.50	64.25	82.50	103.00
56	95.25	33.25	51.50	72.75	65.50	83.75	105.00
57	97.00	33.75	52.50	74.00	66.50	85.25	106.75
58	98.50	34.25	53.25	75.25	67.50	86.75	108.50
59	100.00	34.75	54.25	76.50	68.75	88.00	110.50
60	101.75	35.25	55.00	77.75	69.75	89.50	112.25
61	103.25	35.75	55.75	79.00	71.00	91.00	114.00
62	104.75	36.25	56.75	80.25	72.00	92.25	116.00
63	105.50	36.75	57.50	81.50	73.00	93.75	117.75
64	107.25	37.25	58.25	82.75	74.25	95.25	119.50
65	108.75	37.75	58.75	83.25	75.25	96.25	120.50
66	110.25	38.25	59.50	84.50	76.25	97.50	122.50

*By special arrangement, Dallas origin mail may be entered in Vancouver. This mail will be charged Origin Zone C rates.

Weight not to exceed (pounds)	Schedule C, US origins: Seattle, Canadian entry: Vancouver			Schedule D, US Origins: San Francisco, Canadian entry: Vancouver			Returns
	Local	Regional	National	Local	Regional	National	
1	$7.50	$9.00	$11.50	$8.00	$9.50	$12.00	$7.00
2	8.00	9.25	11.75	9.00	10.50	13.00	7.75
3	8.25	9.75	12.25	10.00	11.50	14.00	8.50
4	8.75	10.25	12.75	11.00	12.50	15.00	9.25
5	9.25	10.50	13.00	12.00	13.50	16.00	10.00
6	9.50	11.00	13.50	13.00	14.50	17.00	10.75
7	10.00	11.25	13.75	14.00	15.50	18.00	11.50
8	10.25	11.75	14.25	15.00	16.50	19.00	12.25
9	10.75	12.25	14.75	16.00	17.25	19.75	13.00
10	11.25	12.50	15.00	17.00	18.25	20.75	13.50
11	11.75	13.00	15.50	18.00	19.50	22.00	14.25
12	12.25	13.75	16.25	19.00	20.50	23.00	15.00
13	12.75	14.25	16.75	20.25	21.75	24.25	15.75
14	13.00	14.75	17.25	21.25	22.75	25.25	16.50
15	13.50	15.25	17.75	22.25	24.00	26.50	17.25
16	14.00	16.00	18.25	23.25	25.00	27.50	18.00
17	14.50	16.50	19.00	24.50	26.25	28.75	18.75
18	15.00	17.00	19.50	25.50	27.25	29.75	19.50
19	15.50	17.50	20.00	26.50	28.50	31.00	20.25
20	16.00	18.00	20.50	27.50	29.75	32.25	21.00
21	16.50	18.75	21.25	28.75	30.75	33.25	21.50
22	17.00	19.25	21.75	29.75	32.00	34.50	22.25
23	17.50	19.75	22.25	30.75	33.00	35.50	23.00
24	18.00	20.25	22.75	31.75	34.25	36.75	23.75
25	18.50	20.75	23.25	33.00	35.25	37.75	24.50
26	19.00	21.50	24.00	34.00	36.50	39.00	25.25
27	19.50	22.00	24.50	35.00	37.50	40.00	26.00
28	20.00	22.50	25.00	36.00	38.75	41.25	26.75
29	20.50	23.00	25.50	37.25	39.75	42.25	27.50
30	21.00	23.50	26.00	38.25	41.00	43.50	28.25
31	21.50	24.25	26.75	39.25	42.00	44.50	29.00
32	22.00	24.75	27.25	40.25	43.25	45.75	29.50
33	22.25	25.25	27.75	41.50	44.25	46.75	30.25
34	22.75	25.75	28.25	42.50	45.50	48.00	31.00
35	23.25	26.25	28.75	43.50	46.50	49.00	31.75
36	23.75	27.00	29.50	44.50	47.75	50.25	32.50
37	24.25	27.50	30.00	45.75	48.75	51.25	33.25
38	24.75	28.00	30.50	46.75	50.00	52.50	34.00
39	25.25	28.50	31.00	47.75	51.00	53.50	34.75
40	25.75	29.00	31.50	49.00	52.25	54.75	35.50
41	26.25	29.75	32.25	50.00	53.25	55.75	36.25
42	26.75	30.25	32.75	51.00	54.50	57.00	37.00
43	27.25	30.75	33.25	52.00	55.50	58.00	37.75
44	27.75	31.25	33.75	53.25	56.75	59.25	38.25
45	28.25	31.75	34.25	54.25	57.75	60.25	39.00
46	28.75	32.50	35.00	55.25	59.00	61.50	39.75

Weight not to exceed (pounds)	Schedule C, US origins: Seattle, Canadian entry: Vancouver			Schedule D, US Origins: San Francisco, Canadian entry: Vancouver			Returns
	Local	Regional	National	Local	Regional	National	
47	29.25	33.00	35.50	56.25	60.00	62.50	40.50
48	29.75	33.50	36.00	57.50	61.25	63.75	41.25
49	30.25	34.00	36.50	58.50	62.25	64.75	42.00
50	30.75	34.50	37.00	59.50	63.50	66.00	42.75
51	31.25	35.25	37.75	60.50	64.50	67.00	43.50
52	31.50	35.75	38.25	61.75	65.75	68.25	44.25
53	32.00	36.25	38.75	62.75	66.75	69.25	45.00
54	32.50	36.75	39.25	63.75	68.00	70.50	45.75
55	33.00	37.25	39.75	64.75	69.00	71.50	46.25
56	33.50	38.00	40.50	66.00	70.25	72.75	47.00
57	34.00	38.50	41.00	67.00	71.25	73.75	47.75
58	34.50	39.00	41.50	68.00	72.50	75.00	48.50
59	35.00	39.50	42.00	69.00	73.50	76.00	49.25
60	35.50	40.00	42.50	70.25	74.75	77.25	50.00
61	36.00	40.75	43.25	71.25	75.75	78.25	50.75
62	36.50	41.25	43.75	72.25	77.00	79.50	51.50
63	37.00	41.75	44.25	73.25	78.00	80.50	52.25
64	37.50	42.25	44.75	74.50	79.25	81.75	53.00
65	38.00	42.75	45.25	75.50	80.50	83.00	53.75
66	38.50	43.50	46.00	76.50	81.50	84.00	54.25

STANDARD SERVICE RATES

Weight not over (lb.)	Argentina	France	Japan	Singapore	Mexico	UK	UK economy rate
1	$8.50	$7.25	$6.00	$11.50	$5.50	$12.2	$10.75
2	11.25	9.50	9.25	15.25	6.50	13.50	12.25
3	13.50	11.75	14.25	18.50	7.75	15.00	13.50
4	15.50	14.00	18.00	22.25	8.75	16.50	15.00
5	17.75	16.00	24.00	26.75	9.75	17.75	16.25
6	19.75	18.25	27.25	30.50	11.50	19.25	17.50
7	22.50	20.50	.....	34.25	12.50	20.50	19.00
8	24.75	22.50	.....	38.25	13.75	22.00	20.25
9	26.75	24.75	.....	42.00	14.75	23.50	21.75
10	29.00	27.00	.....	45.75	15.75	24.75	23.00
11	32.25	29.25	.....	49.50	17.00	26.25	24.25
12	34.50	31.25	.....	53.50	18.00	27.50	25.75
13	36.50	33.50	.....	57.25	19.00	29.00	27.00
14	38.75	35.75	.....	61.50	20.25	30.50	28.50
15	41.75	38.00	.....	65.50	21.25	31.75	29.75
16	44.00	40.00	.....	69.25	22.25	33.25	31.00
17	46.25	42.25	.....	73.00	23.50	34.75	32.50
18	48.75	44.50	.....	76.75	24.50	36.00	33.75
19	51.00	46.50	.....	80.75	25.50	37.50	35.25
20	53.75	48.75	.....	85.00	26.75	38.75	36.50
21	56.00	51.00	.....	88.25	27.25	40.25	37.75
22	59.00	53.25	.....	92.00	28.25	41.75	39.25
23	61.50	55.25	.....	98.75	29.50	43.00	40.50
24	63.75	57.50	.....	102.50	30.50	44.50	42.00
25	66.25	59.75	.....	105.75	31.50	45.75	43.25
26	68.50	61.75	.....	109.50	32.75	47.25	44.50
27	71.00	64.00	.....	113.25	33.75	48.75	46.00
28	73.25	66.25	.....	117.25	35.00	50.00	47.25
29	75.75	68.50	.....	120.50	35.50	51.50	48.75
30	78.25	70.50	.....	124.25	36.50	52.75	50.00
31	80.50	72.75	.....	128.00	37.50	54.25	51.50
32	83.00	75.00	.....	132.00	38.75	55.75	52.75
33	85.25	77.00	.....	135.25	39.75	57.00	54.00
34	87.75	79.25	.....	141.75	40.25	58.50	55.50
35	91.25	81.50	.....	145.50	41.50	60.00	56.75
36	93.50	83.75	.....	149.25	42.50	61.25	58.25
37	96.00	85.75	.....	152.50	43.50	62.75	59.50
38	98.50	88.00	.....	156.50	44.25	64.00	60.75
39	100.75	90.25	.....	160.25	45.25	65.50	62.25
40	103.25	92.50	.....	164.00	46.25	67.00	63.50
41	105.50	94.50	.....	167.25	47.50	68.25	65.00
42	108.00	96.75	.....	171.25	48.00	69.75	66.25
43	110.50	99.00	.....	175.00	49.00	71.00	67.50
44	112.75	101.00	.....	178.25	50.25	72.50	69.00

STANDARD SERVICE RATES—Continued

Weight not over (lb.)	Argentina	France	Japan	Singapore	Mexico	UK	UK economy rate
45	.....	103.25	.....	184.75	50.75	74.00	70.25
46	.....	105.50	.....	188.50	51.75	75.25	71.75
47	.....	107.75	.....	192.50	52.75	76.75	73.00
48	.....	109.75	.....	195.75	53.50	78.25	74.25
49	.....	112.00	.....	199.50	54.50	79.50	75.75
50	.....	114.25	.....	203.25	55.00	81.00	77.00
51	.....	116.25	.....	207.00	56.25	82.25	78.50
52	.....	118.50	.....	210.25	57.25	83.75	79.75
53	.....	120.75	.....	214.25	57.75	85.25	81.00
54	.....	123.00	.....	218.00	58.75	86.50	82.50
55	.....	125.00	.....	221.75	59.50	88.00	83.75
56	.....	.....	.....	227.75	60.50	89.25	85.25
57	.....	.....	.....	231.75	61.00	90.75	86.50
58	.....	.....	.....	235.50	62.25	92.25	87.75
59	.....	.....	.....	239.25	62.75	93.50	89.25
60	.....	.....	.....	242.50	63.75	95.00	90.50
61	.....	.....	.....	246.25	64.25	96.25	92.00
62	.....	.....	.....	250.25	65.50	97.75	93.25
63	.....	.....	.....	254.00	66.00	99.25	94.50
64	.....	.....	.....	257.25	67.00	100.50	96.00
65	.....	.....	.....	261.00	.....	102.00	97.25
66	.....	.....	.....	264.75	.....	103.50	98.75

PREMIUM SERVICE RATES

Weight not over (lbs.)	Argentina	Brazil	Canada	Chile	China
1	$11.00	$13.50	$10.00	$10.50	$14.00
2	14.50	15.50	11.00	12.75	17.00
3	17.50	18.50	12.50	15.25	20.00
4	20.25	20.50	14.25	17.50	23.00
5	23.25	23.50	15.75	20.00	29.25
6	26.00	25.50	17.50	22.00	32.25
7	29.25	28.50	19.00	24.50	35.25
8	32.00	30.50	20.75	26.75	38.25
9	34.75	33.50	22.25	29.25	41.50
10	37.25	35.50	24.00	31.50	44.50
11	41.25	37.50	25.50	33.75	47.50
12	43.50	40.50	27.00	36.00	50.50
13	46.50	42.50	28.75	38.25	53.50
14	49.50	45.50	30.25	40.75	56.50
15	52.50	47.50	32.00	43.00	59.75
16	55.25	50.50	33.50	45.50	62.75
17	58.25	52.50	35.25	47.75	65.75
18	61.25	54.75	36.75	50.00	68.75
19	64.25	56.75	38.50	52.25	72.00
20	67.25	59.50	40.00	54.75	75.00
21	70.25	61.50	41.50	57.00	78.00
22	73.75	63.75	43.00	59.25	81.00
23	76.25	66.50	44.75	61.50	84.00
24	78.75	68.50	46.25	63.75	87.00
25	81.75	71.50	48.00	66.25	90.25
26	84.50	73.50	49.50	68.50	93.25
27	87.50	76.50	50.75	71.00	96.25
28	90.50	78.50	52.75	73.25	99.25
29	93.25	81.25	54.50	75.50	102.25
30	96.25	83.25	56.00	77.75	105.25
31	99.25	86.25	57.25	80.25	108.50
32	102.25	88.25	58.75	82.50	111.50
33	105.00	90.25	60.50	84.75	114.50
34	108.00	93.25	62.00	87.25	117.50
35	112.00	95.25	63.75	89.25	120.50
36	114.50	98.00	65.25	91.75	123.50
37	117.00	100.25	67.00	94.00	126.75
38	120.00	103.00	68.50	96.50	129.75
39	122.75	105.00	70.00	98.75	132.75
40	125.75	108.00	71.75	101.00	135.75
41	128.75	110.00	72.75	103.25	138.75
42	131.50	113.00	74.50	105.75	141.75

PREMIUM SERVICE RATES—Continued

Weight not over (lbs.)	Argentina	Brazil	Canada	Chile	China
43	134.50	115.00	76.00	108.00	145.00
44	137.50	117.00	77.50	110.25	148.00
45	.....	119.75	79.25	112.75	151.00
46	.....	121.75	80.25	114.75	154.00
47	.....	124.75	81.75	117.25	157.00
48	.....	126.75	83.25	119.50	160.00
49	.....	129.75	84.75	122.00	163.25
50	.....	131.75	86.50	124.25	166.25
51	.....	134.50	88.00	126.50	169.25
52	.....	136.75	89.75	128.75	172.25
53	.....	139.50	91.25	131.25	175.25
54	.....	141.50	92.75	133.50	178.50
55	.....	143.50	94.50	135.75	181.50
56	.....	146.50	95.25	138.25	184.50
57	.....	148.50	97.00	140.50	187.50
58	.....	151.50	98.50	142.75	190.50
59	.....	153.50	100.00	145.00	193.50
60	.....	156.25	101.75	147.50	196.75
61	.....	158.25	103.25	149.75	199.75
62	.....	161.25	104.75	152.25	202.75
63	.....	163.25	105.50	154.25	205.75
64	.....	166.25	107.25	156.75	208.75
65	.....	168.25	108.75	159.00	211.75
66	.....	170.25	110.25	161.25	215.00
67	.....	.....	.....	163.75	218.00
68	.....	.....	.....	166.00	221.00
69	.....	.....	.....	168.25	224.00
70	.....	.....	.....	170.50	227.00

Weight not over (lbs.)	Germany	Hong Kong	Japan	Mexico	Singapore	UK
1	$11.75	$17.00	$15.75	$8.25	$14.75	$15.00
2	13.50	20.50	18.00	9.75	18.50	16.50
3	15.25	24.00	20.75	11.50	22.25	18.00
4	17.00	27.50	23.50	13.00	26.25	19.50
5	18.75	31.00	26.25	14.75	31.00	21.00
6	20.50	34.50	29.50	16.25	35.00	22.50
7	22.25	38.00	32.25	17.50	39.25	23.75
8	24.00	41.50	35.00	19.00	43.00	25.75
9	25.75	45.00	37.50	20.75	48.00	27.25
10	27.50	48.50	40.25	22.25	51.75	29.00
11	29.25	52.00	43.00	24.00	55.50	30.50
12	31.00	55.50	45.75	25.00	60.00	32.00
13	32.75	59.25	48.50	26.75	64.25	33.75
14	34.50	62.50	51.25	28.25	68.75	35.25
15	36.25	66.25	54.00	29.50	72.50	37.00
16	38.00	69.75	56.75	31.00	76.75	38.50
17	39.75	73.25	59.50	32.75	81.25	40.25
18	41.50	76.75	62.25	33.75	85.50	42.25
19	43.25	80.25	64.75	35.50	89.50	44.25
20	45.00	83.75	67.50	36.50	93.75	45.75
21	46.75	87.25	70.25	38.25	98.00	47.50
22	48.50	90.75	73.00	39.25	102.00	49.00
23	50.25	94.25	75.75	41.00	110.75	50.50
24	52.00	97.75	78.50	42.00	115.00	52.00
25	53.75	101.25	81.25	43.50	118.75	53.50
26	55.75	104.75	84.00	44.75	122.75	55.25
27	57.50	108.25	86.75	46.25	127.00	58.25
28	59.25	111.75	89.50	47.50	130.75	59.75
29	61.00	115.25	92.00	48.50	134.50	61.50
30	62.75	118.75	94.75	50.25	138.50	63.00
31	64.50	122.25	97.50	51.25	142.75	64.75
32	66.25	126.00	100.25	52.25	146.50	66.25
33	68.00	129.50	103.00	53.50	150.50	67.75
34	69.75	133.00	105.75	55.00	159.75	69.50
35	71.50	136.50	108.50	56.25	163.50	71.00
36	73.25	140.00	111.25	57.25	167.25	72.75

Weight not over (lbs.)	Germany	Hong Kong	Japan	Mexico	Singapore	UK
37	75.00	143.50	114.00	58.25	171.75	74.25
38	76.75	147.00	116.75	59.50	175.50	75.75
39	78.50	150.50	119.25	60.50	179.25	79.00
40	80.25	154.00	122.00	61.50	183.75	80.50
41	82.00	157.50	124.75	63.25	187.50	82.25
42	83.75	161.00	127.50	64.25	191.25	83.75
43	85.50	164.50	130.25	65.50	195.00	85.50
44	87.25	168.00	133.00	66.50	199.50	87.25
45	89.00	.....	.....	67.50	208.25	88.75
46	90.75	.....	.....	68.25	212.00	90.50
47	92.50	.....	.....	69.25	216.25	92.00
48	94.25	.....	.....	70.25	220.25	93.75
49	96.00	.....	.....	71.50	224.00	95.25
50	97.75	.....	.....	72.50	228.25	97.00
51	99.50	.....	.....	73.50	232.25	98.50
52	101.25	.....	.....	74.75	236.00	100.25
53	103.00	.....	.....	75.25	239.75	101.75
54	104.75	.....	.....	76.25	244.25	103.50
55	106.50	.....	.....	77.50	248.00	105.00
56	108.25	.....	.....	78.50	256.75	106.75
57	110.00	.....	.....	79.00	261.00	108.25
58	111.75	.....	.....	80.00	264.75	110.00
59	113.50	.....	.....	81.25	268.75	111.50
60	115.25	.....	.....	81.75	273.00	113.25
61	117.25	.....	.....	82.75	276.75	114.75
62	119.00	.....	.....	83.50	280.75	116.50
63	120.75	.....	.....	84.50	284.50	118.25
64	122.50	.....	.....	85.50	288.75	119.75
65	124.25	.....	.....	.....	292.75	121.50
66	126.00	.....	.....	.....	296.50	123.00
67	127.75	.....	.....	.....	.....	.....
68	129.50	.....	.....	.....	.....	.....
69	131.25	.....	.....	.....	.....	.....
70	133.00	.....	.....	.....	.....	.....

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. 98–31973 Filed 11–30–98; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

39 CFR Parts 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965 and 966

Rules of Procedure Before the Judicial Officer

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: The Postal Service is amending the Rules of Procedure Before the Judicial Officer to reflect a new address for the Judicial Officer, Office of Administrative Law Judges, Office of the Board of Contract Appeals, and the Office of the Recorder, to correct titles and references, and to make other technical and grammatical changes.

EFFECTIVE DATE: December 1, 1998.

FOR FURTHER INFORMATION CONTACT: Diane M. Mego, (703) 812–1905.

SUPPLEMENTARY INFORMATION: The Judicial Officer, Office of Administrative Law Judges, Office of the Board of Contract Appeals, and the Office of the Recorder were relocated effective October 1, 1998. The Rules of Practice are being updated to reflect the new address for these offices. Additional amendment is needed to update and correct the titles of the Docket Clerk, Department Head, Law Librarian, and Law Library, to the Recorder, Vice President, Librarian, and Library, respectively. Also, several grammatical amendments reflecting gender neutrality are being made, and references to other regulations are corrected as necessary to reflect past revision or renumbering of those rules.

These revisions are changes in agency rules of procedure before the Judicial Officer and do not substantially affect any rights or obligations of private parties. Therefore, it is appropriate for their adoption by the Postal Service to become effective immediately.

List of Subjects

39 CFR Part 952

Administrative practice and procedure, Fraud, Lotteries, Postal Service.

39 CFR Part 953

Administrative practice and procedure, Mailability, Postal Service.

39 CFR Part 954

Administrative practice and procedure, Periodicals, Postal Service.

39 CFR Part 955

Administrative practice and procedure, Contract Disputes Act of 1978, Postal Service.

39 CFR Part 956

Administrative practice and procedure, employment, Postal Service.

39 CFR Part 957

Administrative practice and procedure, Debarment, Suspension, Postal Service.

39 CFR Part 958

Administrative practice and procedure, Postal Service.

39 CFR Part 959

Administrative practice and procedure, Private Express Statute, Privacy, Postal Service.

39 CFR Part 960

Administrative practice and procedure, Claims, Equal Access to Justice Act, Postal Service.

39 CFR Part 961

Administrative practice and procedure, Claims, Debt Collection Act, Postal Service.

39 CFR Part 962

Administrative practice and procedure, Fraud, Program Fraud Civil Remedies Act, Postal Service.

39 CFR Part 963

Administrative practice and procedure, Advertising, Postal Service.

39 CFR Part 964

Administrative practice and procedure, Fictitious names or addresses, Fraud, Lotteries, Postal Service.

39 CFR Part 965

Administrative practice and procedure, Mail Disputes, Postal Service.

39 CFR Part 966

Administrative practice and procedure, Claims, Debt Collection Act, Postal Service.

PART 952—RULES OF PRACTICE IN PROCEEDINGS RELATIVE TO FALSE REPRESENTATION AND LOTTERY ORDERS

The Postal Service adopts amendments to 39 CFR Part 952 as specifically set forth below:

1. The authority citation for Part 952 continues to read as follows:

Authority: 39 U.S.C. 204, 401, 3005.

§ 952.4 [Amended]

2. Section 952.4 is revised to read as follows:

§ 952.4 Office business hours.

The offices of the officials mentioned in these rules are located at 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078, and are open Monday through Friday except holidays from 8:15 a.m. to 4:45 p.m.

§ 952.8 [Amended]

3. Section 952.8(a) is amended by substituting ''2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078'' for ''Washington, DC 20260''.

4. Section 952.14 is revised to read as follows:

§ 952.14 Hearings.

Hearings are held at 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078, or other locations designated by the presiding officer.

§ 952.15 [Amended]

5. Section 952.15(c) is amended by substituting ''Arlington, VA'' for ''Washington, DC''.

PART 953—RULES OF PRACTICE IN PROCEEDINGS RELATIVE TO MAILABILITY

The Postal Service adopts amendments to 39 CFR Part 953 as specifically set forth below:

1. The authority citation for Part 953 continues to read as follows:

Authority: 39 U.S.C. 204, 401.

2. Section 953.2 is revised to read as follows:

§ 953.2 Initiation.

Mailability proceedings are initiated upon the filing of a written appeal with the Recorder, Judicial Officer Department, U.S. Postal Service, 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078.

3. Section 953.8 is amended to read as follows:

§ 953.8 Location of hearing.

Unless otherwise ordered by the presiding officer, the hearing shall be held at 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078, on the date set in the notice.

§ 953.9 [Amended]

4. Section 953.9(a)(3) is amended by substituting ''Arlington, VA'' for ''Washington, DC''.

PART 954—RULES OF PRACTICE IN PROCEEDINGS RELATIVE TO THE DENIAL, SUSPENSION, OR REVOCATION OF PERIODICALS PRIVILEGES

The Postal Service adopts amendments to 39 CFR Part 954 as specifically set forth below:

1. The authority citation for Part 954 continues to read as follows:

Authority: 39 U.S.C. 204, 401.

2. Section 954.4 is revised to read as follows:

§ 954.4 Office business hours.

The offices of the officials mentioned in these rules are located at 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078 and are open Monday through Friday from 8:15 a.m. to 4:45 p.m.

3. Section 954.11 is revised to read as follows:

§ 954.11 Hearings.

Hearings are held at 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078, or other locations designated by the presiding officer.

§ 954.12 [Amended]

4. Section 954.12(c) is amended by substituting ''Arlington, VA'' for ''Washington, DC''.

PART 955—RULES OF PRACTICE BEFORE THE BOARD OF CONTRACT APPEALS

The Postal Service adopts amendments to 39 CFR Part 955 as specifically set forth below:

1. The authority citation for Part 955 continues to read as follows:

Authority: 39 U.S.C. 204, 401; 41 U.S.C. 607, 608.

§ 955.1 [Amended]

2. Section 955.1 (b)(1) and (d)(5) are revised to read as follows:

§ 955.1 Jurisdiction, procedure, representation of parties.

* * * * *

(b) *Organization and location of the Board.* (1) The Board is located in Arlington, VA and its mailing address is 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078.

* * * * *

(d) * * *

(5) Place of filings. Unless the Board otherwise directs, all notices of appeal, pleadings and other communications shall be filed with the Recorder of the Board at its office at 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078.

* * * * *

§ 955.18 [Amended]

3. Section 955.18 is amended by substituting ''Arlington, VA'' for ''Washington, DC''.

§ 955.29 [Amended]

4. Section 955.29 is amended by substituting ''Arlington, VA'' for ''Washington, DC''.

PART 956—RULES OF PRACTICE IN PROCEEDINGS RELATIVE TO DISCIPLINARY ACTION FOR VIOLATION OF RESTRICTIONS ON POST-EMPLOYMENT ACTIVITY

The Postal Service adopts amendments to 39 CFR Part 956 as specifically set forth below:

1. The authority citation for Part 956 continues to read as follows:

Authority: 18 U.S.C. 207(j), 39 U.S.C. 204, 401.

2. Section 956.3(c) is revised to read as follows:

§ 956.3 Definitions.

* * * * *

(c) The *Recorder* means the Recorder of the U.S. Postal Service, 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078.

Section 956.13(a) is revised to read as follows:

§ 956.13 Hearings.

(a) Hearings are held at 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078, or other locations designated by the presiding officer.

* * * * *

PART 957—RULES OF PRACTICE IN PROCEEDINGS RELATIVE TO DEBARMENT AND SUSPENSION FROM CONTRACTING

The Postal Service adopts amendments to 39 CFR Part 957 as specifically set forth below:

1. The authority citation for Part 957 continues to read as follows:

Authority: 39 U.S.C. 204, 401.

§ 957.1 [Amended]

Section 957.1 is amended by substituting ''chapter 3, section 7 of the Postal Service Purchasing Manual'' for ''sec. 1, part 6 of the Postal Contracting Manual''.

§ 957.2 [Amended]

2. Section 957.2 is amended by substituting ''chapter 3, section 7 of the Postal Service Procurement Manual'' for ''sec. 1, part 6 of the Postal Contracting Manual''.

3. Section 957.3(a) is revised to read as set forth below.

4. Section 957.3(b) is amended by substituting ''the General Counsel's'' for ''his''.

5. Section 957.3(f) is amended by substituting ''chapter 3, section 7 of the Postal Service Purchasing Manual'' for ''Section 1, part 6 of the Postal Contracting Manual''.

6. Section 957.3(g) is revised to read as follows:

§ 957.3 Definitions.

(a) the term Vice President means a Vice President with purchasing authority in the Postal Service or the Vice President's representative for the purpose of carrying out the provisions of chapter 3, section 7 of the Postal Service Purchasing Manual.

* * * * *

(g) The Recorder means the Recorder of the United States Postal Service, 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078.

§ 957.4 [Amended]

7. Section 957.4(a) is amended by substituting ''Vice President'' for ''Department Head''.

8. Section 957.4(c) is amended by substituting ''Vice President'' for ''Department Head''.

9. Section 957.4(d) is amended by substituting ''the Judicial Officer'' for ''he'' wherever it appears.

§ 957.5 [Amended]

10. Section 957.5 is amended by substituting ''Vice President'' for ''Department Head''.

§ 957.7 [Amended]

11. Section 957.7 is amended by substituting ''Vice President'' for ''Department Head''.

§ 957.8 [Amended]

12. Section 957.8 is amended by substituting ''Recorder'' for ''Docket Clerk'' wherever it appears.

13. Section 957.8(d) is amended by substituting ''Vice President'' for ''Department''.

14. Section 957.8(d) is amended by adding ''or her'' after ''his''.

15. Section 957.8(d) is amended by substituting ''Vice President'' for ''Department Head''.

§ 957.9 [Amended]

16. Section 957.9 is amended by substituting ''Vice President's'' for ''Department Head's''.

§ 957.10 [Amended]

17. Section 957.10 is amended by substituting ''Vice President'' for ''Department Head'' wherever it appears.

18. Section 957.13(a) is revised to read as follows:

§ 957.13 Hearings.

(a) Hearings are held at 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078, or other locations designated by the Judicial Officer.

* * * * *

19. Section 957.13(b) is amended by substituting ''The party'' for ''He'' and adding ''or her'' after ''his''.

20. Section 957.13(b)(3) is amended by substituting ''Arlington, VA'' for ''Washington, DC''.

§ 957.14 [Amended]

21. Section 957.14(e) is amended by substituting ''Vice President'' for ''Department Head''.

§ 957.15 [Amended]

22. Section 957.15(f) is amended by substituting ''the Judicial Officer'' for ''he''.

23. Section 957.15(h) is amended by substituting ''or her'' after ''his''.

§ 957.16 [Amended]

24. Section 957.16(e) is amended by substituting ''or her'' after ''his''.

§ 957.18 [Amended]

25. Section 957.18(a) is amended by substituting ''Recorder'' for ''Docket Clerk''.

§ 957.19 [Amended]

26. Section 957.19(a) is amended by deleting ''to him''.

27. Section 957.19(a) is amended by substituting ''Recorder'' for ''Docket Clerk''.

28. Section 957.19(b) is amended by substituting ''the party'' for ''he''.

29. Section 957.19(b) is amended by adding ''or her'' after ''his'' wherever it appears.

§ 957.20 [Amended]

30. Section 957.20(a) is amended by substituting ''Recorder'' for ''Docket Clerk''.

§ 957.23 [Amended]

31. Section 957.23 is amended by substituting ''Recorder'' for ''Docket Clerk'' wherever it appears.

§ 957.26 [Amended]

32. Section 957.26 is amended by substituting ''Librarian'' for ''Law Librarian''.

33. Section 957.26 is amended by substituting ''Library'' for ''Law Library''.

34. Section 957.26 is amended by substituting ''Recorder'' for ''Docket Clerk''.

§ 957.27 [Amended]

35. Section 957.27 is amended by substituting ''the'' for ''his'' wherever it appears.

36. Section 957.27(a) is amended by substituting ''chapter 3, section 7 of the Postal Service Purchasing Manual'' for ''section 1, part 6 of the Postal Contracting Manual''.

37. Section 957.27(b) is amended by substituting ''Vice President'' for ''Department Head''.

PART 958—RULES OF PRACTICE IN PROCEEDINGS RELATIVE TO THE REFUSAL TO PROVIDE POST OFFICE BOX OR CALLER SERVICE AND THE TERMINATION OF POST OFFICE BOX OR CALLER SERVICE

The Postal Service adopts amendments to 39 CFR Part 958 as specifically set forth below:

1. The authority citation for Part 958 continues to read as follows:

Authority: 39 U.S.C. 204, 401.

2. Section 958.3(a) is amended by removing the last sentence thereof and adding the following in its place:

§ 958.3 Petition; notice of hearing; answer; summary judgment.

(a) * * *

The postmaster shall immediately forward two copies of the Petition to the Recorder, Judicial Officer Department, U.S. Postal Service, 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078.

* * * * *

§ 958.4 [Amended]

3. Section 958.4 is amended by substituting ''2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078'' for ''the Headquarters Office of the United States Postal Service, Washington, DC''.

4. Section 958.4(c) is amended by substituting ''Arlington, VA'' for ''Washington, DC''.

§ 958.13 [Amended]

5. Section 958.13 is amended by substituting ''Recorder'' for ''Docket Clerk'' wherever it appears.

PART 959—RULES OF PRACTICE IN PROCEEDINGS RELATIVE TO THE PRIVATE EXPRESS STATUTES

The Postal Service adopts amendments to 39 CFR Part 959 as specifically set forth below:

1. The authority citation for Part 959 continues to read as follows:

Authority: 39 U.S.C. 204, 401; 39 CFR 224.1(c)(6)(ii)(D).

§ 959.3 [Amended]

2. Section 959.3 is revised to read as follows:

§ 959.3 Office, business hours.

The offices of the officials mentioned in these rules are located at 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078 and are open Monday through Friday from 8:15 a.m. to 4:45 p.m.

§ 959.5 [Amended]

3. Section 959.5(a) is amended by substituting ''Recorder'' for ''Docket Clerk''.

§ 959.6 [Amended]

4. Section 959.6 is amended by substituting ''Recorder'' for ''Docket Clerk'' wherever it appears.

5. Section 959.6(a) is amended by substituting ''the General Counsel's'' for ''his''.

6. Section 959.6(a) is amended by substituting ''may be designated'' for ''he may designate''.

7. Section 959.6(b)(1) is amended by substituting ''being'' for ''he is''.

8. Section 959.6(b)(5) is amended by substituting ''respondent's'' for ''his''.

§ 959.7 [Amended]

9. Section 959.7 is amended by substituting ''Recorder'' for ''Docket Clerk''.

§ 959.8 [Amended]

10. Section 959.8 is amended by substituting ''Recorder'' for ''Docket Clerk'' wherever it appears.

11. Section 959.8 is amended by substituting ''the postmaster's designee'' for ''his designee'' wherever it appears.

12. Section 959.8(a) is amended by substituting ''respondent's agent'' for ''his agent'' wherever it appears.

§ 959.9 [Amended]

13. Section 959.9 is amended by substituting ''Recorder'' for ''Docket Clerk'' wherever it appears.

§ 959.10 [Amended]

14. Section 959.10(a) is amended by substituting ''the respondent'' for ''he''.

§ 959.11 [Amended]

15. Section 959.11(a) is amended by substituting ''Recorder'' for ''Docket Clerk''.

16. Section 959.11(b) is amended by adding ''or she'' after ''he''.

17. Section 959.11(d) is amended by substituting ''the objecting party'' for ''him''.

18. Section 959.13 is revised to read as follows:

§ 959.13 Hearings.

Hearings are held at 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078, or other locations designated by the presiding officer.

§ 959.14 [Amended]

19. Section 959.14 is amended by substituting ''The party'' for ''He'' and ''the'' for ''his''.

20. Section 959.14(c) is amended by substituting ''Arlington, VA'' for ''Washington, D.C.''.

§ 959.16 [Amended]

21. Section 959.16(b)(6) is amended by adding ''or she'' after ''he''.

22. Section 959.16(b)(8) is amended by adding ''or her'' after ''his''.

§ 959.17 [Amended]

23. Section 959.17(e) is amended by adding ''or her'' after ''his''.

§ 959.20 [Amended]

24. Section 959.20(a) is amended by substituting ''Recorder'' for ''Docket Clerk''.

§ 959.21 [Amended]

25. Section 959.21(a) is amended by removing ''to him''.

26. Section 959.21(b) is amended by adding ''or her'' after ''his'' wherever it appears.

§ 959.22 [Amended]

27. Section 959.22(a) is amended by adding ''or she'' after ''he''.

28. Section 959.22(b) is amended by substituting ''Recorder'' for ''Docket Clerk''.

§ 959.23 [Amended]

29. Section 959.23(a) is amended by adding ''or her'' after ''his''.

30. Section 959.23(c) is amended by adding ''or she'' after ''he''.

§ 959.24 [Amended]

31. Section 959.24 is amended by substituting ''Recorder'' for ''Docket Clerk'' wherever it appears.

32. Section 959.24(a) is amended by substituting ''party'' for ''part''.

§ 959.27 [Amended]

33. Section 959.27 is amended by substituting ''Recorder'' for ''Docket Clerk'' wherever it appears.

§ 959.30 [Amended]

34. Section 959.30 is amended by substituting ''Librarian'' for ''Law Librarian''.

35. Section 959.30 is amended by substituting ''Library'' for ''Law Library''.

36. Section 959.30 is amended by substituting ''Recorder'' for ''Docket Clerk''.

PART 960—RULES RELATIVE TO IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT IN POSTAL SERVICE PROCEEDINGS

The Postal Service adopts amendments to 39 CFR Part 960 as specifically set forth below:

1. The authority citation for Part 960 continues to read as follows:

Authority: 5 U.S.C. 504(c)(1); 39 U.S.C. 204, 401(2).

§ 960.22 [Amended]

2. Section 960.22 is amended by substituting ''Judicial Officer, 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078'' for ''Judicial Officer, Room 10833, U.S. Postal Service, 475 L'Enfant Plaza W., S.W., Washington, D.C. 20260–6100''.

PART 961—RULES OF PRACTICE IN PROCEEDINGS RELATIVE TO EMPLOYEE HEARING PETITIONS UNDER SECTION 5 OF THE DEBT COLLECTION ACT

The Postal Service adopts amendments to 39 CFR Part 961 as specifically set forth below:

1. The authority citation for Part 961 continues to read as follows:

Authority: 39 U.S.C. 204, 401; 5 U.S.C. 5514(a).

2. Section 961.3(g) is revised to read as follows:

§ 961.3 Definitions.

* * * * *

(g) Recorder refers to the Recorder, Judicial Officer Department, U.S. Postal Service, 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078.

§ 961.4 [Amended]

3. Section 961.4(a) is amended by substituting ''2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078'' for ''475 L'Enfant Plaza, SW, Washington, DC 20260–6100''.

PART 962—RULES OF PRACTICE IN PROCEEDINGS RELATIVE TO THE PROGRAM FRAUD CIVIL REMEDIES ACT

The Postal Service adopts amendments to 39 CFR Part 962 as specifically set forth below:

1. The authority citation for Part 962 continues to read as follows:

Authority: 31 U.S.C. Chapter 38; 39 U.S.C. 401.

2. Section 962.2(j) is revised to read as follows:

§ 962.2 Definitions.

* * * * *

(j) Recorder refers to the Recorder of the United States Postal Service, 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078.

* * * * *

§ 962.22 [Amended]

3. Section 962.22(b) is amended by substituting ''2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078'' for ''475 L'Enfant Plaza West SW., Washington, DC 20260–6100''.

PART 963—RULES OF PRACTICE IN PROCEEDINGS RELATIVE TO VIOLATIONS OF THE PANDERING ADVERTISEMENTS STATUTE, 39 U.S.C. 3008

The Postal Service adopts amendments to 39 CFR Part 963 as specifically set forth below:

1. The title of Part 963 is revised to read as set forth above.

2. The authority citation for Part 963 continues to read as follows:

Authority: 39 U.S.C. 204, 401, 3008.

§ 963.3 [Amended]

3. Section 963.3(a) is amended by substituting ''2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078'' for ''Washington, DC 20260–6100''.

4. Section 963.7 is revised to read as follows:

§ 963.7 Location of hearing.

Hearings are held at 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078, or other locations designated by the presiding officer.

§ 963.8 [Amended]

5. Section 963.8(c) is amended by substituting ''Arlington, VA'' for ''Washington, DC''.

§ 963.22 [Amended]

6. Section 963.22 is amended by substituting ''Librarian'' for ''Law Librarian''.

7. Section 963.22 is amended by substituting ''Library'' for ''Law Library''.

PART 964—RULES OF PRACTICE GOVERNING DISPOSITION OF MAIL WITHHELD FROM DELIVERY PURSUANT TO 39 U.S.C. 3003, 3004

The Postal Service adopts amendments to 39 CFR Part 964 as specifically set forth below:

1. The authority citation for Part 964 continues to read as follows:

Authority: 39 U.S.C. 204, 401, 3003, 3004.

§ 964.3 [Amended]

2. Section 964.3(a) is amended by substituting ''2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078'' for ''Washington, DC 20260–6100''.

3. Section 964.4 is amended by removing the first sentence thereof, and adding the following in its place:

§ 964.4 Hearings.

Hearings are held at 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078, or other locations designated by the presiding officer. * * *

4. Section 964.4(c) is amended by substituting ''Arlington, VA'' for ''Washington, DC''.

§ 964.22 [Amended]

5. Section 964.22 is amended by substituting ''Librarian'' for ''Law Librarian''.

6. Section 964.22 is amended by substituting ''Library'' for ''Law Library''.

PART 965—RULES OF PRACTICE IN PROCEEDINGS RELATIVE TO MAIL DISPUTES

The Postal Service adopts amendments to 39 CFR Part 965 as specifically set forth below:

1. The authority citation for Part 965 continues to read as follows:

Authority: 39 U.S.C. 204, 401.

§ 965.2 [Amended]

2. Section 965.2 is amended by substituting ''the chief field counsel'' for ''Regional Counsel'' and ''Postal Operations Manual section 616.21'' for ''Domestic Mail Manual 153.72''.

§ 965.3 [Amended]

3. Section 965.3 is amended by substituting ''the chief field counsel'' for ''Regional Counsel''.

4. Section 965.3 is amended by substituting ''2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078'' for ''475 L'Enfant Plaza, SW, Washington, DC 20260–6100''.

5. Section 965.8(b) is revised to read as follows:

§ 965.8 Hearings.

* * * * *

(b) Hearings are held at 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078, or such other place as may be designated by the presiding officer.

§ 965.14 [Amended]

6. Section 965.14 is amended by substituting ''Librarian'' for ''Law Librarian''.

7. Section 965.14 is amended by substituting ''Library'' for ''Law Library''.

PART 966—RULES OF PRACTICE IN PROCEEDINGS RELATIVE TO ADMINISTRATIVE OFFSETS INITIATED AGAINST FORMER EMPLOYEES OF THE POSTAL SERVICE

The Postal Service adopts amendments to 39 CFR Part 966 as specifically set forth below:

1. The authority citation for Part 966 continues to read as follows:

Authority: 39 U.S.C. 204, 401, 2601.

§ 966.3 [Amended]

2. Section 966.3(i) is amended by substituting ''2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078'' for ''475 L'Enfant Plaza, SW, Washington, DC 20260–6100''.

§ 966.4 [Amended]

3. Section 966.4(b) is amended by substituting ''2101 Wilson Boulevard, Suite 600, Arlington, VA 22201–3078'' for ''475 L'Enfant Plaza, SW., Washington, DC 20260–6100''.

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. 98–31577 Filed 11–30–98; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 61 and 63

[FRL–6187–8]

Approval of the Clean Air Act, Section 112(l), Delegation of Authority to Three Local Air Agencies in Washington

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule and delegation of authority.

SUMMARY: EPA is promulgating direct final approval of the state of Washington Department of Ecology (Ecology) request for program approval and delegation of authority for three local agencies in Washington to implement and enforce locally-adopted hazardous air pollutant (HAP) regulations which adopt by reference the federal National Emission Standards for Hazardous Air Pollutants (NESHAP) contained within 40 CFR Parts 61 and 63, as these regulations apply to all sources (i.e., both Part 70 and non-Part 70 sources). In this action EPA is delegating these programs to Ecology for the purpose of redelegating them to three local agencies in Washington, consistent with Ecology's statute, the Revised Code of Washington (RCW) 70.94.860. EPA is also promulgating approval of a mechanism by which these three agencies will receive delegation of future NESHAPs; and is waiving its notification requirements such that sources will only need to send notifications and reports to the delegated local agencies. Additionally, EPA is promulgating direct final approval of certain local air agency potential-to-emit limiting regulations which will now be recognized as federally enforceable.

The adopted regulations approved as part of this action will be implemented and enforced by the following local air authorities within the state of Washington: the Northwest Air Pollution Authority (NWAPA); the Puget Sound Air Pollution Control Agency (PSAPCA); and the Southwest Air Pollution Control Authority (SWAPCA) collectively referred to as ''NWAPA, PSAPCA, and SWAPCA.'' (For purposes of this action and consistent with RCW 70.94.860, ''delegation to NWAPA, PSAPCA, and SWAPCA'' means ''delegation to Ecology for the purpose of redelegation to NWAPA, PSAPCA, and SWAPCA''). Delegation to Ecology to directly implement 40 CFR Parts 61 and 63 and to redelegate the same authority to the remaining four Washington local agencies (the Benton Clean Air Authority, the Olympic Air Pollution Control Authority, the Spokane County Air Pollution Control Authority, and the Yakima Regional Clean Air Authority) is anticipated in the near future and will be the subject of a separate rulemaking.

DATES: This action will be effective on February 1, 1999 without further notice, unless EPA receives relevant adverse comments by December 31, 1998. If EPA receives such comments, then it will publish a timely withdrawal in the **Federal Register** informing the public that this direct final rule will not take effect.

ADDRESSES: Comments must be submitted to Doug Hardesty at the Region X office listed below. Copies of the requests for delegation and other supporting documentation are available for public inspection at the following location: U.S. Environmental Protection Agency, Region X, Office of Air Quality (OAQ–107), 1200 Sixth Avenue, Seattle, WA, 98101.

FOR FURTHER INFORMATION CONTACT: Andrea Wullenweber, US EPA, Region X (OAQ–107), 1200 Sixth Avenue, Seattle, WA, 98101, (206) 553–8760.

SUPPLEMENTARY INFORMATION:

I. Background and Purpose

Section 112(l) of the federal Clean Air Act (CAA) enables the EPA to approve State and local air toxics programs or rules to operate in place of the federal air toxics program or rules. The federal air toxics program implements the requirements found in section 112 of the CAA pertaining to the regulation of hazardous air pollutants. Approval of an air toxics program is granted by EPA if the Agency finds that: (1) the State (or local) program is ''no less stringent'' than the corresponding federal program or rule, (2) the State (or local) has adequate authority and resources to implement the program, (3) the schedule for implementation and compliance is sufficiently expeditious, and (4) the program is otherwise in compliance with federal guidance. Once approval is granted, the air toxics program can be implemented and enforced by State or local agencies, as well as EPA.

On February 16, 1996 (*see* 61 FR 6184), EPA proposed to approve the request of Ecology and the Washington local agencies, including NWAPA, PSAPCA, and SWAPCA, for delegation of authority to implement and enforce certain 40 CFR Parts 61 and 63 NESHAP rules, as they apply to Part 70 sources. On August 26, 1996 (*see* 61 FR 43675), under the authority of CAA section 112(l)(5) and 40 CFR 63.91, EPA promulgated final interim approval of this request. EPA also promulgated interim approval of NWAPA, PSAPCA, and SWAPCA's mechanism for receiving future delegation of CAA section 112 standards that are adopted unchanged from federal standards as promulgated. Additionally, EPA promulgated interim approval of PSAPCA and SWAPCA's potential-to-emit limiting regulations to be recognized as federally enforceable.

In the August 26, 1996, rulemaking, EPA granted only interim approval of the request for delegation because EPA determined that the criminal authorities under Ecology's statute, RCW 70.94.430, did not meet the stringency requirements of 40 CFR 70.11. In this respect, EPA retained implementation and enforcement authority for these rules as they applied to non-Part 70 sources during the interim period or until such time as Ecology and the local agencies could demonstrate that their criminal authorities met EPA stringency requirements. Full approval has been contingent upon a demonstration that Ecology and the local agencies' criminal enforcement authorities are consistent with the requirements of 40 CFR 70.11(a), and therefore 40 CFR 63.91(b)(1) and (b)(6). Specifically, in the proposed interim approval notice (see 61 FR 6184), EPA requested the following of Ecology and the local agencies:

(1) Revise RCW 70.94.430 to provide for maximum criminal penalties of not less than $10,000 per day per violation, as required by 40 CFR 70.11(a)(3)(ii),

(2) Revise RCW 70.94.430 to allow the imposition of criminal penalties against any person who knowingly makes any false material statement, representation or certification in any form, in any notice or report required by a permit, as required by 40 CFR 70.11(a)(3)(iii). This provision must include maximum penalties of not less than $10,000 per day per violation, and

(3) Revise RCW 70.94.430 to allow the imposition of criminal penalties against any person who knowingly renders inaccurate any required monitoring device or method, as required by 40 CFR 70.11(a)(3)(iii). This provision must include maximum penalties of not less than $10,000 per day per violation, or

(4) Demonstrate to the satisfaction of EPA that these authorities are consistent with 40 CFR 70.11, and therefore 40 CFR 61.91.

In response to EPA's request, Ecology submitted a letter dated October 7, 1996, that addressed these issues. This documentation included a legal memorandum from the Washington State Attorney General's Office dated May 23, 1996, explaining how the

statutory authority in RCW 70.94.430(1) may be interpreted to provide the required authority, which satisfied condition 1. In addition, Ecology amended the state regulation at Washington Administrative Code (WAC) 173–400–105(7) and (8) to include prohibitions against knowingly making false statements and knowingly rendering inaccurate any monitoring device, thus satisfying requirements 2 and 3. Furthermore, in a letter dated February 28, 1997, Ecology provided supporting documentation from NWAPA, PSAPCA, and SWAPCA describing how they each have addressed these issues. NWAPA and PSAPCA committed to enforcing WAC 173–400–105(7) and (8) until such time as they might adopt their own equivalent regulations on this subject. SWAPCA is requesting delegation based on its local regulation, SWAPCA 400–105(7) and (8), which contains the same language as the state rule. Based on information provided by Ecology, NWAPA, PSAPCA, and SWAPCA, EPA has determined that these actions adequately address the issue of adequate criminal authorities needed to meet the requirements of 40 CFR 70.11 and 61.91, and to obtain final delegation for all sources within NWAPA, PSAPCA, and SWAPCA's jurisdiction.

After resolving the above issues related to criminal authorities, this delegation was again delayed due to certain state regulations which EPA believed conflicted with the enforcement authorities required for delegation of federal programs. The regulation in question was the State of Washington's Regulatory Reform Act of 1995 (''Act''), codified at Chapter 43.05 RCW. The Act precludes ''regulatory agencies'', as defined in RCW 43.05.010, from assessing civil penalties except for a violation of a specific permit term or condition; a repeat violation; a violation that is not corrected within a reasonable period of time; or a violation that has a probability of placing a person in danger of death or bodily harm, a probability of causing more than minor environmental harm, or of causing physical damage to the property of another in excess of one thousand dollars. Counsel for PSAPCA has provided EPA with a legal opinion stating that the Act does not apply to local air pollution control authorities in Washington because local air pollution control authorities are not ''regulatory agencies'' within the meaning of the Act. EPA has reviewed the statutory and regulatory language relied on by PSAPCA's counsel in reaching this conclusion and agrees that the Act does not constrain the enforcement authority of local air pollution control authorities and therefore does not pose a bar to delegation of CAA programs to local air pollution control agencies in Washington.[1]

In the August 26, 1996, rulemaking, EPA granted interim approval for delegation of the regulations implementing CAA sections 112(g) and 112(j), codified at 40 CFR Part 63, Subpart B. After further review, EPA recognizes that Subpart B need not be delegated under the section 112(l) approval process. When promulgating the regulations implementing CAA section 112(g), EPA stated its view that ''the Act directly confers on the permitting authority the obligation to implement section 112(g) and to adopt a program which conforms to the requirements of this rule. Therefore, the permitting authority need not apply for approval under section 112(l) in order to use its own program to implement section 112(g)'' (*see* 61 FR 68397). Similarly, when promulgating the regulations implementing section 112(j), EPA stated its belief that ''section 112(l) approvals do not have a great deal of overlap with the section 112(j) provision, because section 112(j) is designed to use the title V permit process as the primary vehicle for establishing requirements'' (*see* 59 FR 26447). Therefore, state or local agencies implementing the requirements under sections 112(g) and 112(j) do not need approval under section 112(l). As a result, EPA is not taking action to grant direct final delegation of 40 CFR Part 63, Subpart B, to NWAPA, PSAPCA, and SWAPCA.

Since the August 26, 1996, rulemaking, Ecology has submitted updated delegation requests on behalf of NWAPA, PSAPCA, and SWAPCA. Ecology submitted requests on behalf of NWAPA on March 21, 1997, May 5, 1997, and August 28, 1998, to update NWAPA's delegation request such that its current request includes certain subparts in 40 CFR Parts 61 and 63 in effect on May 14, 1998, as adopted into NWAPA Regulation Section 104.2 (effective May 14, 1998). On November 18, 1996 and October 27, 1997, Ecology submitted requests on behalf of PSAPCA to update its delegation request such that its current request includes certain subparts in 40 CFR Parts 61 and 63 in effect on July 1, 1997, as adopted into PSAPCA Regulation III, Section 2.02 (effective November 1, 1997). On February 28, 1997, and May 14, 1998, Ecology submitted requests on behalf of SWAPCA to update its delegation request such that its current request includes certain subparts in 40 CFR Parts 61 and 63 in effect on August 1, 1996, as adopted into SWAPCA Regulation 400 Section 075 (effective November 21, 1996), and to add SWAPCA Regulation 400 Section 111 to its delegation request for potential-to-emit regulations.

Additionally, Ecology submitted a request on behalf of PSAPCA for approval of rule adjustments for 40 CFR Part 63, Subparts M and N (Drycleaning and Chromium Electroplating, respectively). The original request for the 40 CFR Part 63, Subpart M rule adjustment was dated January 16, 1997, with a correction letter dated September 4, 1997. The request for the 40 CFR Part 63, Subpart N rule adjustment was dated June 26, 1997. Because EPA approval of the requested rule adjustments will require a more detailed review under 40 CFR 63.92, EPA will address PSAPCA's request for rule adjustments in a separate notice to avoid further delay of this delegation.

NWAPA, PSAPCA, and SWAPCA have also requested that EPA waive the Part 63 General Provisions notification requirements, in accordance with 40 CFR 63.9 and 63.10, such that sources would not need to send notifications and reports to EPA, Region X. Ecology submitted this request for PSAPCA in a letter dated January 10, 1997, for NWAPA in a letter dated May 5, 1997, and for SWAPCA in a letter dated May 14, 1998. These three local agencies prefer to be the sole recipient of notifications and reports to reduce the burden on sources and EPA.

Ecology submitted a letter dated July 31, 1998, describing the Washington state process for delegating the federal hazardous air pollutants program to local agencies in Washington. Pursuant to RCW 70.94.860, Ecology must first accept delegation of this program on behalf of the local agency and then redelegate the program to that agency. In

[1] As for the Act's applicability to Ecology's enforcement authorities, in letters dated June 10, 1997, and November 20, 1997, EPA advised Ecology that the Act conflicted with the necessary enforcement authority required for authorization or approval of federal environmental programs to Ecology. Subsequently, on December 10, 1997, in accordance with RCW 43.05.902, Ecology formally notified the Governor of Washington that a conflict existed between the Act and the requirements for State authorization or approval of certain federal environmental programs. As a result of the determination of an existing conflict, RCW 43.05.040, .050, .060(3), and .070, which prohibit the State from issuing civil penalties except under certain circumstances, were deemed to be inoperative to several State environmental programs administered by the Department of Ecology, including the CAA program. In reliance on this determination, EPA believes that the conflict between the Act and the requirements for EPA approval of Ecology's CAA programs has been addressed by rendering inoperative those portions of the Act that conflicted with Ecology's required enforcement authorities.

its July 31, 1998, letter, Ecology included the delegation orders to be signed by the local agencies and Ecology. These orders outline this redelegation process. Ecology signed the orders for each agency on August 4, 1998, and NWAPA, PSAPCA, and SWAPCA signed these orders on August 11, 1998, August 14, 1998, and August 12, 1998, respectively. As described in these orders, the effective date of the orders is the same as the effective date of this rule. Therefore, the delegation to these agencies via Ecology will cause no delay in this delegation to NWAPA, PSAPCA, and SWAPCA.

II. EPA Action

A. Delegation of specific standards

In this action, under the authority of CAA section 112(l)(5) and 40 CFR 63.91, EPA is promulgating direct final approval of Ecology's request, on behalf of NWAPA, PSAPCA, and SWAPCA, for program approval and delegation of authority to implement and enforce specific 40 CFR Parts 61 and 63 subparts, as listed in the tables at the end of this rule. Consistent with RCW 70.94.860, EPA is delegating this authority to Ecology for the purpose of redelegating to NWAPA, PSAPCA, and SWAPCA.

With this delegation (and redelegation from Ecology) NWAPA, PSAPCA, and SWAPCA will have primary implementation and enforcement responsibility, but EPA retains the right, pursuant to CAA section 112(l)(7), to enforce any applicable emission standard or requirement under CAA section 112. In addition, EPA does not delegate any authorities that require implementation through rulemaking in the **Federal Register**, or where Federal overview is the only way to ensure national consistency in the application of the standards or requirements of CAA section 112. Specifically, the EPA Administrator has the authority to approve certain changes to, or make decisions under, certain requirements in the General Provisions. This authority is in 40 CFR Part 63, Subpart A. EPA is granting NWAPA, PSAPCA, and SWAPCA some of these authorities, and is retaining other authorities, as explained below.

In a memorandum from John Seitz, Office of Air Quality Planning and Standards, dated July, 10, 1998, entitled, ''Delegation of 40 CFR Part 63 General Provisions Authorities to State and Local Air Pollution Control Agencies,'' EPA clarified which of the authorities in the General Provisions may and may not be delegated to state and local agencies under 40 CFR Part 63, Subpart E. Such delegations, as authorized, would enable the state or local agency to carry out the Administrator's responsibilities in Subpart A. In delegating these authorities, EPA is granting NWAPA, PSAPCA, and SWAPCA the authority to make decisions which are not likely to be nationally significant or to alter the stringency of the underlying standard. The intent is that these agencies will make decisions on a source-by-source basis, *not* on a source category-wide basis.

EPA, Region X, has determined that NWAPA, PSAPCA, and SWAPCA have sufficient resources and expertise to implement certain sections of the General Provisions, and EPA is promulgating direct final authority for these sections. Listed below are the Part 63, Subpart A, sections that EPA is delegating to NWAPA, PSAPCA, and SWAPCA. Also, listed in the footnotes of the Parts 61 and 63 delegation tables at the end of this rule are the authorities which cannot be delegated to any state or local agency; which EPA therefore retains.[2]

Part 63, Subpart A, General Provisions Authorities Which EPA Is Delegating to NWAPA, PSAPCA, and SWAPCA

Section	Authorities
63.1	Applicability Determinations.
63.6(e)	Operation and Maintenance Requirements—Responsibility for Determining Compliance.
63.6(f)	Compliance with Non-Opacity Standards—Responsibility for Determining Compliance.
63.6(h) [except 63.6(h)(9)]	Compliance with Opacity and Visible Emissions Standards—Responsibility for Determining Compliance.
63.7(c)(2)(i) and (d)	Approval of Site-Specific Test Plans.
63.7(e)(2)(i)	Approval of Minor Alternatives to Test Methods.
63.7(e)(2)(ii) and (f)	Approval of Intermediate Alternatives to Test Methods.
63.7(e)(2)(iii)	Approval of Shorter Sampling Times and Volumes When Necessitated by Process Variables or Other Factors.
63.7(e)(2)(iv) and (h) (2), (3)	Waiver of Performance Testing.
63.8(c)(1) and (e)(1)	Approval of Site-Specific Performance Evaluation (monitoring) Test Plans.
63.8(f)	Approval of Minor Alternatives to Monitoring.
63.8(f)	Approval of Intermediate Alternatives to Monitoring.
63.9 and 63.10 [except 63.10(f)]	Approval of Adjustments to Time Periods for Submitting Reports.

In delegating 40 CFR 63.9 and 63.10, ''Approval of Adjustments to Time Periods for Submitting Reports,'' these three agencies have the authority to approve adjustments to the timing that reports are due, but do not have the authority to alter the contents of the reports. For Title V sources, semiannual and annual reports are required by Part 70 and nothing herein changes that requirement.

Certain General Provisions authorities are automatically granted to NWAPA, PSAPCA, and SWAPCA as part of their Part 70 operating permits program approval (regardless of whether the operating permits program approval is interim or final). These are 40 CFR 63.6(I)(1), ''Extension of Compliance with Emission Standards,'' and 63.5(e) and (f), ''Approval and Disapproval of Construction and Reconstruction.''[3]

Additionally, for 40 CFR 63.6(I)(1), NWAPA, PSAPCA, and SWAPCA do not need to have been delegated a particular standard or have issued a Part 70 operating permit for a particular source to grant that source a compliance extension.

EPA is also promulgating direct final approval of PSAPCA Regulation I, Article 6, and Regulation III, Appendix A; and, SWAPCA Regulation 400–091, –110, –111, –112, –113, and –114 under the authority of section 112(l) of the Act

[2] For authorities which are not addressed in this rulemaking and not identified in any Part 61 or 63 Subparts as authorities that cannot be delegated, the agencies may assume that the authorities in question are delegated.

[3] Sections 112(I) (1) and (3) state that ''Extension of Compliance with Emission Standards'' and ''Approval and Disapproval of Construction and Reconstruction'' can be implemented by the ''Administrator (or a State with a permit program approved under Title V).'' EPA interprets that this authority does not require delegation through subpart E and, instead, is automatically granted to States as part of their Part 70 operating permits program approval.

in order to recognize these regulations as federally enforceable for purposes of establishing potential-to-emit limitations.

After a state or local agency has been delegated the authority to implement and enforce a NESHAP, the delegated agency (in this case, NWAPA, PSAPCA, and SWAPCA) becomes the primary point of contact with respect to that NESHAP. Pursuant to 40 CFR 63.9(a)(4)(ii) and 63.10(a)(4)(ii), EPA Region X waives the requirement that notifications and reports for delegated standards be submitted to EPA in addition to NWAPA, PSAPCA, and SWAPCA. Therefore, notifications and reports required by the NESHAPs must be submitted to NWAPA, PSAPCA, and SWAPCA, and sources within those jurisdictions will not need to send a copy to EPA.

In delegating the authority to implement and enforce these rules and in granting a waiver of EPA notification requirements, EPA requires that these delegated agencies input all source information into the Aerometric Information Retrieval System (AIRS) for both point and area sources. This information must be entered into the AIRS system by September 30, 1999, and must be updated by September 30 every year thereafter. Additionally, these delegated agencies must also report to EPA, Region X, all MACTRAX information upon request, which is typically semiannually. (MACTRAX provides summary data for each implemented NESHAP that EPA uses to evaluate the Air Toxics Program.) EPA also expects NWAPA, PSAPCA, and SWAPCA to provide any additional compliance related information to EPA, Region X, as agreed upon in the Compliance Assurance Agreement.

Finally, in receiving delegation for specific General Provisions authorities, NWAPA, PSAPCA, and SWAPCA must submit to EPA, Region X, copies of determinations issued pursuant to these authorities. Such determinations include: applicability determinations (63.1); approval/disapprovals of construction and reconstruction [63.5 (e) and (f)]; approval/disapprovals of compliance extensions [63.6(I)(1)]; approval of shorter sampling times and volumes [63.7(e)(2)(iii)]; waiver of performance testing [63.7(e)(2)(iv) and (h)(2), (3)]; approval of adjustments to time periods for submitting reports (63.9 and 63.10); approvals/disapprovals of minor [63.7(e)(2)(I)] or intermediate [63.7(e)(2)(ii) and (f)] alternative test methods; and approvals/disapprovals of minor or intermediate alternative monitoring methods [63.8(f)]. NWAPA, PSAPCA, and SWAPCA must also forward to EPA, Region X, copies of any notifications received pursuant to 63.6(h)(7)(ii) pertaining to the use of a continuous opacity monitoring system. Additionally, EPA's Emission Measurement Center of the Emissions Monitoring and Analysis Division must receive copies of any approved intermediate changes to test methods or monitoring. (For definitions of *major, intermediate* and *minor* alternative test methods or monitoring methods, see the July 10, 1998, memorandum from John Seitz, referenced above.) NWAPA, PSAPCA, and SWAPCA should forward these intermediate test methods or monitoring changes via mail or facsimile to: Chief, Source Categorization Group A, U.S. EPA (MD–19), Research Triangle Park, NC 27711, Facsimile telephone number: (919) 541–1039.

B. Delegation Mechanism for Future Standards

Under the authority of CAA section 112(l)(5) and 40 CFR 63.91, EPA is promulgating direct final approval of NWAPA, PSAPCA, and SWAPCA's mechanism for streamlining future delegation of those federal NESHAP regulations that are adopted unchanged into local law. In this respect, NWAPA, PSAPCA, and SWAPCA will only need to send a letter of request to Ecology, and Ecology will forward that request to EPA for those future NESHAP regulations which the local agencies have adopted by reference. EPA will respond to this request by sending a letter back to Ecology (and sending a copy to the local air agency) delegating the NESHAP standards requested. Consistent with RCW 70.94.860, Ecology will forward the letter to the local agency, thus redelegating the future NESHAPs to that agency. No further formal response from Ecology or the local agency will be necessary, and if no negative response is received from Ecology or the local agency within 10 days, the delegation becomes final. A notice of the delegation will be published in the **Federal Register** to inform the public that the delegation has taken place and to indicate where source notifications and reports should be sent. Furthermore, NWAPA, PSAPCA, and SWAPCA shall update their incorporations by reference of 40 CFR Parts 61 and 63 standards and request updated delegation annually, as current standards are revised and new standards are promulgated.

C. Opportunity for Public Comment

The public was provided the opportunity to comment on the proposed interim approval of the request for delegation of certain 40 CFR Parts 61 and 63 standards, as apply to Part 70 sources, on February 16, 1996 (*see* 61 FR 6184). EPA received public comments on that proposal and responded to them in the August 26, 1996, **Federal Register** (*see* 61 FR 43675). The public has not been given an opportunity to comment on requests submitted since the February 16, 1996, **Federal Register** and on delegation of these standards as they apply to non-Part 70 sources. However, the Agency views the approval of these requests as a noncontroversial action and anticipates no adverse comments. Therefore, EPA is publishing this direct final rule without prior proposal. However, in the Proposed Rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal for this action should relevant adverse comments be filed. This action will be effective February 1, 1999 without further notice unless the Agency receives relevant adverse comments by December 31, 1998.

If EPA receives such comments, then it will publish a timely withdrawal in the **Federal Register** informing the public that this direct final rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this rule. Any parties interested in commenting on this rule should do so at this time. If no such comments are received, the public is advised that this rule will be effective on February 1, 1999 and no further action will be taken on the proposed rule.

III. Summary of Action

Pursuant to the authority of CAA section 112(l) of the Act and 40 CFR Part 63 subpart E, EPA is promulgating direct final approval of Ecology's request, on behalf of NWAPA, PSAPCA, and SWAPCA, for program approval and delegation of authority to implement and enforce specific 40 CFR Parts 61 and 63 federal NESHAP regulations (as apply to both Part 70 and non-Part 70 sources) which have been adopted into local law. EPA is delegating this authority to Ecology for the purpose of redelegating it to NWAPA, PSAPCA, and SWAPCA. Additionally, EPA is promulgating direct final approval of the mechanism by which NWAPA, PSAPCA, and SWAPCA will receive delegation of future NESHAP regulations that are adopted unchanged into local law; and is waiving the requirement for sources to send copies of notifications and

reports to EPA. Finally, EPA is promulgating direct final approval of PSAPCA and SWAPCA's potential-to-emit regulations as federally enforceable.

IV. Administrative Requirements

A. Executive Orders 12866 and 13045

The Office of Management and Budget (OMB) has exempted this regulatory action from review under Executive Order (E.O.) 12866, entitled ''Regulatory Planning and 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. Executive Order 12875

Under E.O. 12875, 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 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 written communications from the governments, and a statement supporting the need to issue the regulation. In addition, E.O. 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.''

This rule does not create a 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 E.O. 12875 do not apply to this rule.

C. Executive Order 13084

Under E.O. 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.''

This 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 E.O. 13084 do not apply to this rule.

D. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. 600 *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact of any rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify 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 government entities with jurisdiction over populations of less than 50,000.

Delegation of authority to implement and enforce unchanged federal standards under section 112(l) of the CAA does not create any new requirements but simply transfers primary implementation authorities to the State (or local) agency. Therefore, because this action does not impose any new requirements, I certify that it does not have a significant impact on any small entities affected.

E. Unfunded Mandates

Under Section 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated annual 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.

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

F. 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).

G. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 1, 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

40 CFR Part 61

Environmental protection, Air pollution control, Arsenic, Asbestos, Benzene, Beryllium, Hazardous substances, Mercury, Reporting and recordkeeping requirements, Vinyl Chloride.

40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Reporting and recordkeeping requirements.

Dated: October 29, 1998.

Chuck Clarke,

Regional Administrator, Region X.

Title 40, chapter I, parts 61 and 63 of the Code of Federal Regulations is amended as follows:

PART 61—[AMENDED]

1. The authority citation for Part 61 continues to read as follows:

Authority: 42 U.S.C. 7401, 7412, 7413, 7414, 7416, 7601 and 7602.

Subpart A—General Provisions

2. Section 61.04 is amended in paragraph (a) by revising the ''Region X'' address; by revising paragraph (b)(WW)(ii), (iii), and (vii), by removing paragraph (b)(WW)(viii); and by designating the existing paragraph (c) and table as (c)(8), adding a new (c) introductory text, adding and reserving paragraphs (c) (1) through (7) and (9), and by adding paragraph (c)(10) to read as follows:

§ 61.04 Address.

(a) * * *

Region X (Alaska, Idaho, Oregon, Washington), Director, Office of Air Quality, U.S. Environmental Protection Agency, 1200 Sixth Avenue (OAQ–107), Seattle, WA 98101.

(b) * * *

(WW)(i) * * *

(ii) Northwest Air Pollution Authority (NWAPA), 1600 South Second Street, Mount Vernon, WA 98273–5202.

Note: For a table listing NWAPA's delegation status, see paragraph (c)(10) of this section.

(iii) Puget Sound Air Pollution Control Agency (PSAPCA), 110 Union Street, Suite 500, Seattle, WA 98101–2038.

Note: For a table listing PSAPCA's delegation status, see paragraph (c)(10) of this section.

* * * * *

(vii) Southwest Air Pollution Control Authority (SWAPCA), 1308 NE 134th Street, Vancouver, WA 98685–2747.

Note: For a table listing SWAPCA's delegation status, see paragraph (c)(10) of this section.

* * * * *

(c) The following tables list, by Region, the specific Part 61, National Emission Standards for Hazardous Air Pollutants that have been delegated to state and local agencies.

(1)a–(7) [Reserved].

(8) * * *

(9) (Reserved)

(10) The following table lists the specific Part 61 standards that have been delegated unchanged to state and local air pollution control agencies in Region X. The (X) symbol is used to indicate each subpart that has been delegated.

DELEGATION STATUS FOR PART 61 STANDARDS—REGION X

Subpart	ADEC [1]	IDEQ [2]	ODEQ [3]	LRAPA [4]	Ecology [5]	BCAA [6]	NWAPA [7]	OAPCA [8]	PSAPCA [9]	SCAPCA [10]	SWAPCA [11]	YRCAA [12]
A[13] General Provisions							X		X		X	
B Radon from Underground Uranium Mines												
C Beryllium							X		X		X	
D Beryllium Rocket Motor Firing							X		X		X	
E Mercury							X		X		X	
F Vinyl Chloride							X		X		X	
H Emissions of Radionuclides other than Radon from Dept of Energy facilities												
I Radionuclides from Federal Facilities other than Nuclear Regulatory Commission Licensees and not covered by Subpart H												
J Equipment Leaks of Benzene							X		X		X	
K Radionuclides from Elemental Phosphorus Plants												
L Benzene from Coke Recovery							X		X		X	
M Asbestos							X		X		X	
N Arsenic from Glass Plants							X		X		X	
O Arsenic from Primary Copper Smelters							X		X		X	
P Arsenic from Arsenic Production Facilities							X		X		X	
Q Radon from Dept of Energy facilities												
R Radon from Phosphogypsum Stacks												
T Radon from Disposal of Uranium Mill Tailings												
V Equipment Leaks							X		X		X	
W Radon from Operating Mill Tailings												
Y Benzene from Benzene Storage Vessels							X		X		X	
BB Benzene from Benzene Transfer Operations							X		X		X	
FF Benzene Waste Operations							X		X		X	

[1] Alaska Department of Environmental Conservation
[2] Idaho Division of Environmental Quality
[3] Oregon Department of Environmental Quality
[4] Lane Regional Air Pollution Authority
[5] Washington Department of Ecology
[6] Benton Clean Air Authority
[7] Northwest Air Pollution Authority (5/14/98)
[8] Olympic Air Pollution Control Authority
[9] Puget Sound Air Pollution Control Agency (7/1/97)
[10] Spokane County Air Pollution Control Authority
[11] Southwest Air Pollution Control Authority (8/1/96)
[12] Yakima Regional Clean Air Authority
[13] Authorities which may not be delegated include: 40 CFR 61.04(b); 61.12(d)(1); 61.13(h)(1)(ii) for approval of major alternatives to test methods; 61.14(g)(1)(ii) for approval of major alternatives to monitoring; 61.16; 61.53(c)(4); any sections in the subparts pertaining to approval of alternative standards (i.e., alternative means of emission limitations), or approval of major alternatives to test methods or monitoring; and all authorities identified in the subparts (i.e., under "Delegation of Authority") that cannot be delegated.

Note to paragraph (c)(10): Dates in parenthesis indicate the effective date of the federal rules that have been adopted by and delegated to the state or local air pollution control agency. Therefore, any amendments made to these delegated rules after this effective date are not delegated to the agency.

PART 63—[AMENDED]

1. The authority citation for Part 63 continues to read as follows:

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

Subpart E—Approval of State Programs and Delegation of Federal Authorities

2. Section 63.13 is amended in paragraph (a) by revising the ''Region X'' address to read as follows:

§ 63.13 Addresses of State air pollution control agencies and EPA Regional Offices.

(a) * * *

EPA Region X (Alaska, Idaho, Oregon, Washington), Director, Office of Air Quality, 1200 Sixth Avenue (OAQ–107), Seattle, WA 98101.

* * * * *

3. Section 63.99 is amended by adding and reserving paragraphs (a)(29) through (a)(46), and adding (a) (47) to read as follows:

§ 63.99 Delegated Federal Authorities.

(a) * * *

(29)–(46) [Reserved]

(47) Washington.

(i) The following table lists the specific Part 63 standards that have been delegated unchanged to state and local air pollution control agencies in Washington. The (X) symbol is used to indicate each subpart that has been delegated.

DELEGATION STATUS FOR PART 63 STANDARDS—WASHINGTON

Subpart		Ecology[1]	BCAA[2]	NWAPA[3]	OAPCA[4]	PSAPCA[5]	SCAPCA[6]	SWAPCA[7]	YRCAA[8]
A	General Provisions[9]			X		X		X	
D	Early Reductions			X		X		X	
F	HON-SOCMI			X		X		X	
G	HON-Process Vents			X		X		X	
H	HON-Equipment Leaks			X		X		X	
I	HON-Negotiated Leaks			X		X		X	
L	Coke Oven Batteries			X		X		X	
M	Perc Dry Cleaning			X		X		X	
N	Chromium Electroplating			X		X		X	
O	Ethylene Oxide Sterilizers			X		X		X	
Q	Industrial Process Cooling Towers			X		X		X	
R	Gasoline Distribution			X		X		X	
T	Halogenated Solvent Cleaning			X		X		X	
U	Polymers and Resins I			X		X			
W	Polymers and Resins II-Epoxy			X		X		X	
X	Secondary Lead Smelting			X		X		X	
Y	Marine Tank Vessel Loading			X		X		X	
CC	Petroleum Refineries			X		X		X	
DD	Off-Site Waste and Recovery			X		X		X	
EE	Magnetic Tape Manufacturing			X		X		X	
GG	Aerospace Manufacturing & Rework			X		X		X	
II	Shipbuilding and Ship Repair			X		X		X	
JJ	Wood Furniture Manufacturing Operations			X		X		X	
KK	Printing and Publishing Industry			X		X		X	
OO	Tanks—Level 1			X		X			
PP	Containers			X		X			
QQ	Surface Impoundments			X		X			
RR	Individual Drain Systems			X		X			
VV	Oil-Water Separators and Organic-Water Separators.			X		X			
JJJ	Polymers and Resins IV			X		X		X	

[1] Washington Department of Ecology
[2] Benton Clean Air Authority
[3] Northwest Air Pollution Authority (5/14/98)
[4] Olympic Air Pollution Control Authority
[5] Puget Sound Air Pollution Control Agency (7/1/97)
[6] Spokane County Air Pollution Control Authority
[7] Southwest Air Pollution Control Authority (8/1/96)
[8] Yakima Regional Clean Air Authority
[9] Authorities which may not be delegated include: 40 CFR 63.6(g); 63.6(h)(9); 63.7(e)(2)(ii) and (f) for approval of major alternatives to test methods; 63.8(f) for approval of major alternatives to monitoring; 63.10(f); and all authorities identified in the subparts (i.e., under ''Delegation of Authority'') that cannot be delegated. For definitions of minor, intermediate, and major alternatives to test methods and monitoring, see memorandum from John Seitz, Office of Air Quality Planning and Standards, dated July, 10, 1998, entitled, ''Delegation of 40 CFR Part 63 General Provisions Authorities to State and Local Air Pollution Control Agencies.''

Note to paragraph (a)(47): Dates in parenthesis indicate the effective date of the federal rules that have been adopted by and delegated to the state or local air pollution control agency. Therefore, any amendments made to these delegated rules after this effective date are not delegated to the agency.

[FR Doc. 98–31240 Filed 11–30–98; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICE

42 CFR Part 50

Rin 0930–2A00

Simplification of Grant Appeals Process

AGENCY: Health and Human Services Department.

ACTION: Final rule.

SUMMARY: Pursuant to 42 CFR part 50, subpart D, the Indian Health Service (IHS) and the Substance Abuse and Mental Health Services Administration (SAMHSA) (formerly, the Alcohol, Drug Abuse and Mental Health Administration) have provided an informal level of appeal on those grant related disputes subject to the departmental appeal procedures codified at 45 CFR part 16.[1] The Department of Health and Human Services is amending its regulations to remove IHSA and ADAMHA (now SAMHSA) from the list of agencies to which those informal appeal procedures apply and thus permit aggrieved grantees direct access to the Departmental Appeals Board and that Board's original jurisdiction.

DATES: The regulation is effective December 31, 1998.

FOR FURTHER INFORMATION: For the Indian health Service, Ms. M. Kay Carpentier, (301) 443–5204; for the Substance Abuse and Mental Health Services Administration, Thomas M. Reynolds. (301) 443–0179.

SUPPLEMENTARY INFORMATION: The notice of proposed rulemaking (NPRM) was published in the **Federal Register** on February 25, 1998 (Vol. 63, No. 37, pages 9499–9500). That Notice proposed to amend 42 CFR part 50, subpart D, to eliminate the requirement that grantees must exhaust their appeal rights at the IHS or SAMHSA level prior to bringing a grant dispute before the Departmental Appeals Board. Accordingly, this proposed change would permit affected grantees immediate access to the Departmental Appeals Board. No comments were received.

Consequently, the Department is amending 42 CFR part 50, subpart D, to remove IHS and ADAMHA (now SAMHSA) from the list of agencies to which the regulations apply as proposed by the NPRM. As a result, grantees wishing to appeal IHS's and SAMHSA's eligible adverse determinations will be entitled to appeal such determinations directly to the Departmental Appeals Board. In addition, 42 CFR part 50, subpart D, is revised to reflect organizational changes in the Department, particularly that pertaining to the public Health Service.

Economic Impact

This rule does not have cost implications for the economy of $100 million or otherwise meet the criteria for a major rule under Executive Order 12291, and therefore does not require a regulation impact analysis. Further, this regulation will not have a significant impact on a substantial number of small entities, and therefore does not require a regulatory flexibility analysis under the Regulatory Flexibility Act of 1980.

Regulatory Evaluation

This final rule is not a significant regulatory action under section 3(f) of the Executive Order 12866 and does not require an assessment of the potential costs and benefits under section 6(a)(3) of that Order and so has been exempted from review by the Office of Management and Budget under that Order.

Paperwork Reduction Act

There are no new paperwork requirements subject to the Office of Management and Budget approval under the Paperwork Reduction Act of 1980.

List of Subjects in 42 CFR Part 50

Administrative practice and procedure, Grant programs—Health, Health care.

Approved: November 20, 1998.

Donna E. Shalala,

Secretary.

For the reasons set forth in the preamble, sub part D of part 50 of Title 52 of the Code of Federal Regulations is amended as follows:

PART 50—[AMENDED]

1. The authority citation for part 42, Subpart D, continues to read as follows:

Authority: Sec. 215, Public Health Service Act, 58 Stat. 690 (42 U.S.C. 216); 45 CFR 16.3(c).

2. Section 50.401 is revised to read as follows:

§ 50.401 What is the purpose of this subpart?

This subpart establishes an informal procedure for the resolution of certain postaward grant and cooperative agreement disputes within the agencies and offices identified in § 50.402.

3. Section 50.402 is revised to read as follows:

§ 50.402 To what programs do these regulations apply?

This subpart applies to all grant and cooperative agreement programs, except block grants, which are administered by the National Institutes of Health; the Health Resources and Services Administration; the Centers for Disease Control and Prevention; the Agency for Toxic Substances and Disease Registry; the Food and Drug Administration; and the Office of the Assistant Secretary for Public Health and Science. For purposes of this regulation, the entities are hereinafter referred to as ''agencies.''

4. The third sentence of § 50.403 is revised to read as follows:

§ 50.403 What is the policy basis for these procedures?

* * * This subpart provides such an informal preliminary procedure for resolution of disputes in order to preclude submission of cases to the Departmental Appeals Board before an agency identified in § 50.402 has had an opportunity to review decisions of its officials and to settle disputes with grantees.

5. In § 50.404, paragraph (a) introductory text and the first sentence of paragraph (b) are revised to read as follows:

§ 50.404 What disputes are covered by these procedures?

(a) These procedures are applicable to the following adverse determinations under discretionary project grants and cooperative agreements (both referred to in this subpart as grants) issued by the agencies identified at § 50.402;

* * * * *

(b) A determination subject to this subpart may not be reviewed by the review committee described in § 50.405 unless an officer or employee of the agency has notified the grantee in writing of the adverse determination.

* * *

6. In § 50.405, the second sentence is removed and the first sentence is revised to read as follows:

[1] Section 161 of the ADAMHA Reorganization Act, Pub. L. 102–321 (July 10, 1992), provides that references in any regulations to ADAMHA shall be deemed to refer to SAMHSA and, accordingly, the informal level of appeal was available to SAMHSA's grantees.

§ 50.405 What is the structure of review committees?

The head of the agency, or his or her designee, shall appoint review committees to review adverse determinations made by officials for programs under their jurisdiction. * * *

7. § 50.406, paragraphs (a), (c), (d) and (g) and the first sentence of (e) are revised to read as follows:

§ 50.406 What are the steps in the process?

(a) A grantee with respect to whom an adverse determination described in § 50.404(a) above has been made and who desires a review of that determination must submit a request for such review to the head of the appropriate agency or his or her designee no later than 30 days after the written notification of the determination is received, except that if the grantee shows good cause why an extension of time should be granted, the head of the appropriate agency or his or her designee may grant an extension of time.

* * * * *

(c) When a request for review has been filed under this subpart with respect to an adverse determination, no action may be taken by the awarding agency pursuant to such determination until the request has been disposed of, except that the filing of the request shall not affect any authority which the agency may have to suspend assistance or otherwise to withhold or defer payments under the grant during proceedings under this subpart. This paragraph does not require the awarding agency to provide continuation funding during the appeal process to a grantee whose noncompeting continuation award has been denied.

(d) Upon receipt of a request for review, the head of the agency or his or her designee will make a decision as to whether the dispute is reviewable under this subpart and will promptly notify the grantee and the office responsible for the adverse determination of this decision. If the head of the agency or his or her designee determines that the dispute is reviewable, he or she will forward the matter to the review committee appointed under § 50.405.

(e) The agency involved will provide the review committee appointed under § 50.405 with copies of all relevant background materials (including applications(s), award(s), summary statement(s), and correspondence) and any additional pertinent information available. * * *

* * * * *

(g) The review committee may, at its discretion, invite the grantee and/or the agency staff to discuss the pertinent issues with the committee and to submit such additional information as the committee deems appropriate.

* * * * *

[FR Doc. 98–31869 Filed 11–30–98; 8:45 am]

BILLING CODE 4162–20–M

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

45 CFR Parts 2500, 2501, 2502, 2503, 2504, 2505, and 2506

RIN 3045–AA20

Removal of Regulations for the Former Commission for National and Community Service

AGENCY: Corporation for National and Community Service.

ACTION: Final rule.

SUMMARY: The Corporation for National and Community Service hereby removes obsolete regulations. These regulations are related to the programs of its predecessor agency, the Commission on National and Community Service, and are no longer needed. The part numbers of the removal regulations are being reserved for future Corporation for National and Community Service regulations.

DATES: The removal of these regulations is effective on December 31, 1998.

FOR FURTHER INFORMATION CONTACT: Mr. Douglas H. Hilton, (202) 606–5000, ext. 396.

SUPPLEMENTARY INFORMATION: The National and Community Service Act of 1990, Public Law 101–610, 104 Stat. 3127, created the Commission on National and Community Service and authorized a number of programs to provide federal financial assistance to organizations that conducted national service programs. Pursuant to Public Law 101–610, the Commission adopted regulations to implement its programs as 45 C.F.R. Parts 2500, to 2506.

Subsequently the National and Community Service Trust Act of 1993, Public Law 103–82, 107 Stat. 785, amended the 1990 Act by: substituting new provisions replacing the programs originally authorized under the 1900 Act; creating the Corporation for National and Community Service to carry out the new programs; and transferring the functions and personnel of the Commission to the Corporation. The Corporation has published its own regulations implementing national service programs as authorized under the 1993 amendments to the 1990 Act. Because the Corporation does not implement programs under the terms of the original 1990 Act and former Commission regulations, these regulations are being removed. However, the part numbers for those regulations are being reserved for future Corporation regulations.

List of Subjects

45 CFR Part 2500

Grant programs—social programs, Volunteers.

45 CFR Part 2501

Elementary and secondary education, Grant programs—social programs, Volunteers, Youth.

45 CFR Part 2502

Colleges and universities, Grant programs—social programs, Volunteers.

45 CFR Part 2503

Grant programs—social programs, Natural resources, Volunteers, Youth.

45 CFR Part 2504

Community action programs, Grant programs—social programs, Volunteers.

45 CFR Part 2505

Community development, Grant programs—social programs, Volunteers.

45 CFR Part 2506

Administrative practice and procedure, Grant programs—social programs, Reporting and recordkeeping requirements, Volunteers.

PARTS 2500 THROUGH 2506 [REMOVED AND RESERVED]

For reasons stated in the preamble, the Corporation for National and Community Service, under the authority of 43 U.S.C. 12501 *et seq.*, hereby amends 45 CFR Chapter XXV by removing and reserving Parts 2500, 2501, 2502, 2503, 2504, 2505, and 2506.

Dated: November 25, 1998.

Kenneth L. Klothen,

General Counsel.

[FR Doc. 98–31971 Filed 11–30–98; 8:45 am]

BILLING CODE 6050–28–U

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 538

[Docket No. NHTSA–98–3429]

RIN 2127–AF37

Minimum Driving Range for Dual Fueled Electric Passenger Automobiles

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This rule establishes a minimum driving range of 7.5 miles for dual fueled electric passenger automobiles, otherwise known as hybrid electric vehicles (HEVs), when operating on the EPA urban cycle and a minimum driving range of 10.2 miles on the EPA highway cycle. The purpose of establishing the range is to meet statutory requirements intended to encourage the production of HEVs. An HEV which meets the range would qualify to have its fuel economy calculated according to a special procedure that would facilitate the efforts of its manufacturer to comply with the corporate average fuel economy standards.

DATES: This final rule is effective February 1, 1999. Petitions for reconsideration must be submitted by January 16, 1999.

ADDRESSES: Petitions for reconsideration should be submitted to the Administrator, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Mr. P.L. Moore, Motor Vehicle Requirements Division, Office of Market Incentives, National Highway Traffic Safety Administration, 400 Seventh Street SW, Washington, DC 20590, (202) 366–5222.

SUPPLEMENTARY INFORMATION:

I. Background

A. Alternative Motor Fuels Act of 1988

Section 6 of the Alternative Motor Fuels Act of 1988 amended the fuel economy provisions of the Motor Vehicle Information and Cost Savings Act (Cost Savings Act) by adding a new section 513, ''Manufacturing Incentives for Automobiles.'' Section 513 contained incentives for the manufacture of vehicles designed to operate on alcohol or natural gas, including dual fuel vehicles, i.e., vehicles capable of operating on one of those alternative fuels and either gasoline or diesel fuel.

Section 513 provided that dual fuel vehicles meeting specified criteria qualify for special treatment in the calculation of their fuel economy for purposes of the corporate average fuel economy (CAFE) standards. The fuel economy of a qualifying vehicle is calculated in a manner that results in a relatively high fuel economy value, thus encouraging its production as a way of facilitating a manufacturer's compliance with the CAFE standards. One of the qualifying criteria for passenger automobiles was to meet a minimum driving range, which was to be established by NHTSA.

NHTSA was required to establish two minimum driving ranges, one for ''dual energy'' (alcohol/gasoline or diesel fuel) passenger automobiles when operating on alcohol, and the other for ''natural gas dual energy'' (natural gas/gasoline or diesel fuel) passenger automobiles when operating on natural gas. In establishing the driving ranges, NHTSA was to consider the purposes of the Alternative Motor Fuels Act, consumer acceptability, economic practicability, technology, environmental impact, safety, driveability, performance, and any other factors deemed relevant.

The Alternative Motor Fuels Act and its legislative history made it clear that the driving ranges were to be low enough to encourage the production of dual fuel passenger automobiles, yet not so low that motorists would be discouraged by a low driving range from actually fueling their vehicles with the alternative fuels.

B. Energy Policy Act of 1992

The Energy Policy Act of 1992 amended section 513 of the Cost Savings Act to expand the scope of the alternative fuels it promotes. The amended section provided incentives for the production of vehicles using, in addition to alcohol and natural gas, liquified petroleum gas, hydrogen, coal derived liquid fuels, fuels (other than alcohol) derived from biological materials, electricity (including electricity from solar energy), and any fuel NHTSA determines, by rule, is substantially not petroleum and would yield substantial energy security benefits and substantial environmental benefits.

Section 513 continued to provide incentives for the production of dual fuel vehicles, i.e., vehicles that operate on one of a now expanded list of alternative fuels, including electricity, and on gasoline or diesel fuel. NHTSA notes that some statutory terminology was changed by the 1992 amendments. Among other things, the terms ''dual energy'' and ''natural gas dual energy'' were dropped, and the terms ''alternative fueled automobile,'' ''dedicated automobile,'' and ''dual fueled automobile'' were added.

Section 513 also continued to require dual fueled passenger automobiles to meet specified criteria, including meeting a minimum driving range, in order to qualify for the special treatment in the calculation of their fuel economy for purposes of the CAFE standards.

The 1992 amendments necessitate amending Part 538. The agency must establish a minimum driving range for the expanded scope of dual fueled vehicles. Minimum driving range standards for all dual energy passenger automobiles except electric vehicles were established by a final rule issued on March 21, 1996. (61 FR 14507)

On July 5, 1994, the Cost Savings Act was revised and codified ''without substantive change.'' The provisions formerly found in section 513 of the Cost Savings Act are now at 49 U.S.C. 32901, 32905, and 32906. In setting the minimum driving range for dual energy electric passenger automobiles, NHTSA is required by 49 U.S.C. 32901(c)(3) to consider the purposes set forth in section 3 of the Alternative Motor Fuels Act of 1988 as amended by the 1992 Energy Policy Act:

(1) To encourage the development and widespread use of methanol, ethanol, natural gas, other gaseous fuels, and electricity as transportation fuels by consumers; and

(2) To promote the production of alternatively fueled motor vehicles.

Section 32901(c)(3) also requires that the agency consider consumer acceptability, economic practicability, technology, environmental impact, safety, drivability, performance, and other relevant factors in setting a minimum driving range.

C. Regulatory Background

To aid the agency in relating the data on driving range for dual fueled electric vehicles to the unique characteristics of dual fueled passenger automobiles, NHTSA published a Request for Comments in the **Federal Register** (59 FR 48589) on September 22, 1994. In that document, the agency posed a number of questions on the use of dual fueled electric passenger automobiles relating to the determination of a driving range that would serve the purposes of the Alternative Motor Fuels Act and the Energy Policy Act.

NHTSA published a notice of proposed rulemaking (NPRM) on January 3, 1997 (62 FR 375). Based on

NHTSA's review of comments in response to the Request for Comments, a review of current literature, studies of current industry capabilities, an assessment of the available technology, and existing statutory requirements, the agency proposed to set the minimum driving range for HEVs, even though operating solely on electricity, at 17.7 miles—the range required to complete one EPA urban/highway cycle under the current Federal Test Procedure (FTP).

The NPRM stated the agency's view that setting a minimum driving range at 17.7 miles would ensure that HEVs will have sufficient driving range to meet the needs of consumers while also encouraging HEV development. NHTSA tentatively concluded that a 17.7 mile minimum range would not be so stringent as to foreclose the development of vehicles relying on new technologies or entry into the market without unduly large expenditures of capital resources. The proposed range was considered to be sufficient to meet the needs of many vehicle users. The agency also noted that setting the minimum driving range at 17.7 miles would allow the use of EPA test procedures, where one complete highway and urban cycle consists of 17.7 miles.

The NPRM also indicated that the proposed minimum driving range contemplated operation of the vehicle solely on electric power when some hybrid designs under consideration are full-time hybrids. In these vehicles, electric and internal combustion engines are designed to complement each other and may not have sufficient power alone to adequately propel the vehicle. NHTSA also observed that other designs in which the vehicle may be operated on electric power alone may not have sufficient range to meet the proposed 17.7 mile minimum range. The agency tentatively concluded that calculation of the fuel economy of a dual fueled automobile under Section 513 of the Cost Savings Act (now 49 U.S.C. 32905) requires that the vehicle be operated solely on the alternative fuel and, as set forth in 49 U.S.C. 32904(c), have its energy consumption measured through use of the EPA combined urban and highway cycle. In the NPRM, NHTSA indicated its tentative view that this statutory requirement compelled a minimum driving range specifying electric-only operation for a distance equivalent to one EPA cycle.

D. Hybrid Electric Vehicle Driving Range Requirements

NHTSA received comments regarding driving range proposed in the NPRM from Toyota, Mercedes Benz, the American Automobile Manufacturers Association (AAMA) and Jeffrey J. Ronning. In addition, the agency received comments from the Department of Energy (DOE) in response to a draft NPRM which NHTSA had forwarded to DOE for review.

Toyota expressed opposition to the proposed 17.7 mile electric-only minimum driving range. The company stated that such a range will limit the development of HEVs by forcing increased battery volume. This increased battery volume, in Toyota's view, would drive up costs and make HEVs less attractive to consumers. Toyota also indicated that the proposed range would force an emphasis on the employment of batteries and electricity in comparison to other configurations in which fuel powered engines and batteries are used together. Toyota further suggested that the minimum driving range should be set at zero in order to promote the maximum development of new technologies.

The American Automobile Manufacturers Association (AAMA) also suggested that the minimum driving range for HEVs be set at zero because any other driving range would serve as a disincentive for the development of HEVs. The AAMA submission argued that the use of an electric-only mode of operation for measuring driving range would provide an advantage to vehicles capable of driving on electricity only. As some hybrid designs would not have this capability but may also be able to recharge their batteries from an external source, AAMA contends that a driving range greater than zero would unnecessarily restrict development of hybrids that would otherwise be eligible for CAFE incentives. AAMA further suggested that if NHTSA concludes that it must set a driving range greater than zero, that HEVs with an all electric range should be required to meet only 7.5 miles on the urban cycle and 10.2 miles on the highway cycle in two separate tests with charging allowed prior to each test. For vehicles that do not have the capability to complete this suggested test cycle on electric power, AAMA suggested that an alternative test procedure for measuring range be developed.

Mercedes-Benz also opposed the proposed 17.7 mile minimum driving range. In its comments, Mercedes advocated that no minimum driving range be set in the final rule and that doing otherwise would limit the ability of manufacturers to introduce promising designs and configurations. Mercedes also agreed with the agency's view that section 32905 requires that alternative fueled vehicles be operated solely on an alternative fuel to calculate fuel economy and that 49 U.S.C. § 32904(c) requires the use of a combined urban and highway cycle that is 55% urban and 45% highway. The company argued, however, that the selection of the 17.7 mile EPA cycle ignores the provisions in § 32904(c) allowing fuel economy calculations to be based on procedures giving comparable results to the EPA cycle. In Mercedes' view, a fuel economy test comparable to the existing EPA cycle which does not require a vehicle to travel 17.7 miles could be developed. Therefore, Mercedes contended that the agency's determination that a 17.7 mile driving range must be used to measure fuel economy was incorrect. Mercedes also argued that the agency's preliminary finding that the 17.7 mile range was appropriate for meeting consumer needs and expectations is unsupported by any facts.

Mr. Jeffrey J. Ronning, an engineer with experience in the development of automotive electric propulsion systems, supported the proposed 17.7 mile range. Mr. Ronning indicated that the proposed range would foster development of ''electric dominant hybrids'' as opposed to ''combustion dominant hybrids.'' Mr. Ronning described ''electric dominant hybrids'' as vehicles with a battery range of about 70 miles, which use 1/6th of the petroleum of a conventional vehicle and operate with zero emissions in urban and local use. Such vehicles, Mr. Ronning argues, are superior in terms of energy independence, environmental benefits and technological feasibility.

The Department of Energy (DOE) submitted comments generally applicable to driving range. DOE noted that it has not specified a minimum driving range in its HEV development programs. In DOE's view, electric and conventional power sources employed in HEVs are intended to complement each other and are often not sized to propel the vehicle alone. Batteries pose specific difficulties in that they are heavy and take up large amounts of space. Many HEV designs, according to DOE, use smaller batteries that are ill suited to the task of providing propulsion. DOE cautioned that setting a minimum driving range at too high a level will force the use of larger batteries and limit the development of alternative technologies.

DOE suggested that, if the legislative scheme made such an option possible, NHTSA should establish a sliding scale that would set the minimum driving range in inverse proportion to the fuel economy of an HEV when compared to

that of conventional vehicles. Under this scheme, an HEV with fuel economy three times greater than a conventional vehicle achieving 26.5 mpg would only be required to have a range of 5 miles on electric power alone. HEVs with fuel economy equivalent to conventional vehicles would be required to have a range of 35 miles. In DOE's view, such a sliding scale would reward those designs that achieved the highest fuel economy while ensuring that maximum flexibility be provided to HEV developers.

DOE also urged NHTSA to consider data showing that a range of 10 miles would satisfy 77 percent of daily vehicle trips in setting a driving range. Thus, according to DOE, a modest driving range would satisfy consumer needs.

DOE further suggested that NHTSA consider an alternative test procedure to the EPA cycle and suggested that the draft Society of Automotive Engineers (SAE) Hybrid Vehicle Test Procedure (SAE J1711) be used as a guide to developing such a test. The use of the electric-only mode of operation for specifying driving range and measuring fuel economy, in DOE's view, operates on the assumption that an HEV must ''be charged from the grid'' or derive its electrical energy from a source other than its conventional petroleum fuel engine to qualify for the incentives contained in Chapter 329. DOE believes that HEVs may not have this capability and also may be designed so that the operator may not have control over the mode of operation. Therefore, DOE stated, a fuel economy test using a single mode of operation may be wholly inappropriate for HEVs.

II. Analysis of Comments

Hybrid electric vehicle technology is still in its infancy. Developers of these vehicles are pursuing a variety of configurations, including vehicles which use both conventional and alternative fuels simultaneously. A number of HEV designs include vehicles in which the alternative fuel used (electricity) is generated solely by the petroleum fueled engine incorporated into the vehicle. These hybrid designs are not intended to rely on the alternative fuel to propel the vehicle for an appreciable distance or under all anticipated driving conditions. Instead, the alternative fuel propulsion system is designed to either supplement the conventional fuel powerplant or to work in conjunction with that powerplant when demand for energy is relatively high.

Two commenters, DOE and AAMA, indicated that the selection of an electric-only mode of operation for determining driving range is inconsistent with current developments in HEV technology. DOE noted that HEVs may not even provide operators with the option of selecting a particular power source. Instead, the vehicle itself will determine when to use its conventional or electric propulsion system. AAMA argued that a dual fueled automobile that uses electricity as one of its fuels should not be restricted by the requirement that it be capable of operating only on electricity in order to qualify for CAFE incentives.

The comments of DOE and AAMA raise the issue of whether an HEV that uses electricity and petroleum fuel simultaneously can qualify for CAFE incentives under the Cost Savings Act and the subsequent EPACT amendments. Section 32901(a)(2) defines an alternative fuel vehicle as either a dedicated vehicle or a dual fueled vehicle. Dedicated vehicles are defined in Section 32901(a)(7) as automobiles that operate only on an alternative fuel. Dual fueled vehicles are defined in Section 32901(a)(8) as follows:

(8) ''dual fueled automobile'' means an automobile that—

(A) is capable of operating on alternative fuel and on gasoline or diesel fuel;

(B) provides equal or superior energy efficiency, as calculated for the applicable model year during fuel economy testing for the United States Government, when operating on alternative fuel as when operating on gasoline or diesel fuel;

(C) for model years 1993–1995 for an automobile capable of operating on a mixture of an alternative fuel and gasoline or diesel fuel and if the Administrator of the Environmental Protection Agency decides to extend the application of this subclause, for an additional period ending not later than the end of the last model year to which section 32905(b) and (d) of this title applies, provides equal or superior energy efficiency, as calculated for the applicable model year during fuel economy testing for the Government, when operating on a mixture of alternative fuel and gasoline or diesel fuel containing exactly 50 percent gasoline or diesel fuel as when operating on gasoline or diesel fuel; and

(D) for a passenger automobile, meets or exceeds the minimum driving range prescribed under subsection (c) of this section.

Examination of this Section compels the conclusion that Congress intended that, for the purposes of Chapter 329's incentive program, dual fueled vehicles are, with one limited exception, vehicles operating either on an alternative fuel or a petroleum fuel but not on a mixture of the two. Subsection (A) describes a vehicle that operates on a petroleum or alternative fuel but not a mixture of both. Subsection (B) limits dual fuel vehicles to those vehicles that offer equal or superior energy efficiency when operating on an alternative fuel, thereby indicating that the two modes of operation are exclusive. Subsection (C) indicates that vehicles operating on a mixture of alternative fuel and gasoline or diesel fuel may only be considered as dual fueled automobiles for the 1993–1995 model years (unless extended by the Administrator of the Environmental Protection Agency to the 2004 model year) when such vehicles offer equal or superior energy efficiency when operating on a 50/50 mix of alternative fuel and diesel fuel or gasoline. Therefore, the statutory text of Section 32901(A)(8) indicates that Congress did not intend to make incentives available for dual fueled vehicles operating on a mix of fuels except under the limited circumstances enunciated in 32901(a)(8)(C). As the period set by Congress in which such vehicles could be considered as dual fueled vehicles has expired and the EPA has not extended this period by regulation, NHTSA concludes that under Chapter 329 a dual fueled vehicle is one that is capable of operating on either an alternative fuel or gasoline or diesel fuel but not a mixture of both simultaneously.

HEVs that are not capable of operating on electric power alone cannot, under Chapter 329, be said to be dual fueled vehicles. Similarly, HEVs capable of operation in an electric-only mode but incapable of recharging their batteries from an external source are not dual fueled automobiles; a vehicle which is entirely dependent on a petroleum fuel for its motive power, regardless of whether electricity is used in the powertrain, is powered by petroleum. NHTSA concludes, therefore, that in order to qualify as a dual fueled vehicle under Chapter 329 an HEV must be capable of electric-only operation and must have the capability to recharge its batteries from an external source.

Sections 32901(c) and 32905 of Chapter 329 require the Secretary of Transportation to establish a minimum driving range for dual fueled passenger automobiles when operating on an alternative fuel. NHTSA does not agree with those commenters who suggest that the minimum driving range for HEV's, when operating on electricity alone, be set at zero. If the agency were to establish a minimum driving range of zero miles for HEV's, as some commenters suggest, such a driving range would be inconsistent with the Congressional command that a minimum driving range be established. While the EPACT amendments expressly relieved electric powered dual

fueled passenger automobiles from the 200 mile minimum range requirement imposed on other dual fuel passenger automobiles, Congress did not eliminate the range requirement altogether. Setting a minimum driving range of zero miles would result in a range requirement having no practical effect. Furthermore, as discussed in the NPRM, an HEV must be capable of some meaningful operation in the electric-only mode to allow measurement of its fuel economy when operating on that alternative fuel.

Mercedes argued against NHTSA's tentative conclusion that the proposed 17.7 mile range was compelled by sections 32904(c) and 32905. While agreeing that a combined urban/highway cycle must be used to determine the fuel economy of an HEV, Mercedes stated that section 32904(c) does not require the use of the established EPA test cycle. Noting that section 32904(c) enables the Administrator of the EPA to use an alternative procedure or procedures ''that give comparable results,'' Mercedes suggests that manufacturers propose an alternative procedure that gives such comparable results so that HEVs need not have an electric-only range sufficient to complete one EPA driving cycle.

The agency agrees with Mercedes' contention that section 32904(c) authorizes the use of a fuel economy test other than the established EPA test cycle if such an alternative test provides comparable results. If such an alternative test existed, it might well be used to measure the fuel economy of HEVs. However, despite the suggestions made by DOE and Mercedes, the agency has determined that there is no test that is as yet sufficiently developed to measure the fuel economy of HEV's and provide comparable results to the existing EPA test. The (SAE) Hybrid Vehicle Test Procedure (SAE J1711) has been under development for several years and remains in draft form. The SAE procedure, as it presently exists, relies on the current EPA urban and highway cycles and proposes an electric-only mode of operation as one test option. As Chapter 329 requires that HEVs must be dual fueled vehicles capable of operation in an electric-only mode to qualify for CAFE incentives, use of the SAE procedure would not eliminate the need for a passsenger automobile to travel a minimum distance—equivalent to one EPA urban cycle and one EPA highway cycle or both—to determine its electric-only fuel economy.

Mercedes also suggests that in the event that HEVs are unable to complete the EPA driving cycle that manufacturers be afforded the opportunity to propose an alternative procedure that gives comparable results. NHTSA concludes that any test procedure for measuring HEV fuel economy must be uniform and applicable to all manufacturers. The SAE test, which is being developed but is not yet final, is an example of a uniform industry standard. Such a test might possess the uniformity required to serve as a standard for all vehicles in a certain class. The SAE test or any other industry developed test would not, however, necessarily be appropriate for measuring fuel economy for the purposes of the CAFE incentive program. Lastly, section 32904(c) directs that fuel economy testing be conducted by the EPA Administrator rather than the prospective beneficiaries of the incentive program.

The lack of an acceptable test procedure for determining electric-only fuel economy precludes consideration of the sliding scale minimum driving range suggested by DOE. Regardless of whether NHTSA has the authority to set the minimum driving range for HEVs along a range of values determined by the vehicle's measured fuel economy, the lowest minimum range suggested by DOE, 5 miles, would not be sufficient to allow fuel economy testing in the electric-only mode of operation.

NHTSA has concluded that the lack of any available test procedure other than the existing EPA urban/highway test requires that the minimum driving range for HEV's be set at a distance that will allow use of this test. In its comments, AAMA suggested that if a range other than zero miles is set, an HEV with an electric-only range should be required to have a range equivalent to 7.5 miles while traveling on the EPA urban cycle and 10.2 miles while traveling on the EPA highway cycle, with charging allowed prior to each test. NHTSA concurs with this view. Setting the minimum driving range at 7.5 miles, or one EPA urban cycle, for urban driving and 10.2 miles, or one EPA highway cycle, for highway driving, while allowing the vehicle to recharge prior to attempting each test, will allow manufacturers maximum flexibility in developing HEV's while satisfying the considerations set forth in section 32901(c)(3).

In the agency's view, setting a minimum driving range at 7.5 miles for urban use and 10.2 miles for highway use will provide incentives for manufacturers to develop HEVs while ensuring that these vehicles will meet the basic needs of consumers. According to the 1990 National Personal Transportation Survey (NPTS), a 6 to 10 mile range would be adequate for 77% of daily vehicle trips and 32% of daily vehicle miles traveled. Therefore, even with a range of 10.2 miles or 7.5 miles when operating on electricity alone, an HEV would be adequate for most of the daily vehicle trips taken by consumers.

III. Final Rule

The agency is modifying its earlier proposal to establish a minimum driving range of 17.7 miles for HEVs when operating on electricity alone. A review of the comments submitted in response to that proposal indicates that HEV technology has not yet reached a point where vehicles can attain driving ranges even remotely comparable to those attainable by other alternative fuel vehicles. The agency is, however, rejecting the arguments of those commenters seeking to have the minimum driving range set at zero miles.

NHTSA notes that HEV's currently in development and in production outside the United States often use electric and internal combustion power either simultaneously or alone depending on specific needs at certain points while the vehicle is being driven. In these HEVs, the driver does not control when a particular power source is used nor is the vehicle intended to be operated on one power source alone for extended periods during normal operation.

The incentives contained in Chapter 329 to encourage the development of dual fuel vehicles are not applicable to these HEVs. The language and structure of the incentive provisions in Chapter 329 make it clear that the incentive program was intended to foster the development of vehicles that may operate on petroleum or an alternative fuel depending on the mode selected by the operator. There is no indication in the legislative history of the Alternative Motor Fuels Act that Congress at any time considered applying the Act to a vehicle that operates on petroleum at all times rather than being able to operate on the alternate fuel alone.

While HEVs, regardless of their configuration, appear to further many of the goals of the incentive program, the absence of provisions applicable to HEV's under the existing statutory scheme obliges NHTSA to restrict the availability of those incentives to vehicles that are capable of operating independently on electric power that is not generated by an on-board petroleum fueled engine. As the incentive program requires that the vehicle's fuel economy while operating on an alternative fuel must be measured by use of the EPA test procedure or its equivalent, any vehicle

qualifying for the incentive program must be capable of having its fuel economy measured while operating on an alternative fuel. NHTSA has concluded that at this time there is no fuel economy test available for measuring the fuel economy of HEV's while operating on electricity alone other than the existing EPA test cycle. Completion of this cycle normally requires that a vehicle travel two circuits totaling 17.7 miles—7.5 miles in an urban portion and 10.2 miles in the highway portion.

In the January 3, 1997, NPRM, the agency proposed that the minimum driving range for HEVs be set at 17.7 miles—the equivalent of one urban and one highway cycle. NHTSA has concluded, based on the comments submitted in response to the NPRM and the state of HEV development at this time, that this 17.7 mile range requirement is too stringent. Accordingly the agency has concluded that the driving range be set at the absolute minimum possible under existing test procedures by specifying a range that allows HEVs to be fully charged prior to completion of one EPA urban or highway cycle. Therefore, the minimum driving range established by this final rule is 7.5 miles while traveling on the EPA urban cycle and 10.2 miles while traveling on the EPA highway cycle, with charging allowed prior to each test.

This final rule also establishes a petition process by which manufacturers may apply for exemption from the minimum range requirement. These provisions remain unchanged from those contained in the agency's earlier proposal.

IV. Regulatory Impacts

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This notice has not been reviewed under Executive Order 12866. NHTSA has considered the impact of this rulemaking action and has determined that the action is not ''significant'' under the Department of Transportation's regulatory policies and procedures. In this final rule, the agency is setting the minimum driving range for all dual fueled electric passenger vehicles at one EPA urban cycle after recharging and one EPA highway cycle after recharging. None of these changes will result in an additional burden on manufacturers. They do not impose any mandatory requirements but implement statutory incentives to encourage the manufacture of alternative fuel vehicles. For these reasons, NHTSA believes that any impacts on manufacturers are so minimal as not to warrant preparation of a full regulatory evaluation.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (Public Law 96–354) requires each agency to evaluate the potential effects of a final rule on small businesses. Establishment of a minimum driving range for HEVs affects motor vehicle manufacturers, few of which are small entities. The Small Business Administration (SBA) has set size standards for determining if a business within a specific industrial classification is a small business. The Standard Industrial Classification code used by the SBA for Motor Vehicles and Passenger Car Bodies (3711) defines a small manufacturer as one having 1,000 employees or less.

Very few single stage manufacturers of motor vehicles within the United States have 1,000 or fewer employees. Those that do are not likely to have sufficient resources to design, develop, produce and market an HEV. For this reason, NHTSA believes that this final rule would not have a significant impact on any small business. Moreover, production of passenger automobiles with the minimum ranges that are established by this regulation would be voluntarily undertaken in order to achieve beneficial CAFE treatment of those vehicles. Therefore, no significant costs are imposed on any manufacturers or other small entities.

C. National Environmental Policy Act.

The agency has also analyzed this rule for the purpose of the National Environmental Policy Act, and determined that it would not have any significant impact on the quality of the human environment. The minimum driving range established for HEVs in this rule is set at the lowest level possible to accommodate the present state of HEV technology and the existing statutory framework. It is anticipated that this may encourage continued development of HEVs. HEVs are, however, not being produced or imported at this time and it is not possible to determine the degree to which the establishment of the minimum driving range in this final rule will have on future production of HEVs.

D. Paperwork Reduction Act

The procedures in this final rule for passenger automobile manufacturers to petition for lower driving ranges are considered to be information collection requirements as that term is defined by the Office of Management and Budget (OMB) in 5 CFR part 1320. The information collection requirements for part 538 will be submitted to the OMB, pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

E. Executive Order 12612 (Federalism) and Unfunded Mandates Act

NHTSA has analyzed this final rule in accordance with the principles and criteria contained in E.O. 12612, and has determined that this rule would not have significant federalism implications to warrant the preparation of a Federalism Assessment.

In issuing this final rule establishing a minimum driving range for HEVs, the agency notes, for the purposes of the Unfunded Mandates Act, that this rule facilitates the granting of incentives to manufacturers choosing to produce qualified HEVs. The rule does not impose any costs.

F. Civil Justice Reform

This final rule does not have any retroactive effect. Under 49 U.S.C. 30103, whenever a Federal motor vehicle safety standard is in effect, a State may not adopt or maintain a safety standard applicable to the same aspect of performance which is not identical to the Federal standard, except to the extent that the state requirement imposes a higher level of performance and applies only to vehicles procured for the State's use. 49 U.S.C. 30161 sets forth a procedure for judicial review of final rules establishing, amending or revoking Federal motor vehicle safety standards. That section does not require submission of a petition for reconsideration or other administrative proceedings before parties may file suit in court.

List of Subjects in 49 CFR Part 538

Administrative practice and procedure, Fuel economy, Motor vehicles, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, amend part 538 of title 49 of the Code of Federal Regulations as follows:

PART 538—MANUFACTURING INCENTIVES FOR ALTERNATIVE FUEL VEHICLES

1. The authority citation for part 538 continues to read:

Authority: 49 U.S.C. 32901, 32905, and 32906; delegation of authority at 49 CFR 1.50.

2. Amend § 538.5 by adding paragraph (b) to read as follows:

§ 538.5 Minimum driving range.

* * * * *

(b) The minimum driving range that a passenger automobile using electricity as an alternative fuel must have in order to be treated as a dual fueled automobile pursuant to 49 U.S.C. 32901(c) is 7.5 miles on its nominal storage capacity of electricity when operated on the EPA urban test cycle and 10.2 miles on its nominal storage capacity of electricity when operated on the EPA highway test cycle.

3. Revise § 538.6 to read as follows:

§ 538.6 Measurement of driving range.

The driving range of a passenger automobile model type not using electricity as an alternative fuel is determined by multiplying the combined EPA urban/highway fuel economy rating when operating on the alternative fuel, by the nominal usable fuel tank capacity (in gallons), of the fuel tank containing the alternative fuel. The combined EPA urban/highway fuel economy rating is the value determined by the procedures established by the Administrator of the EPA under 49 U.S.C. 32904 and set forth in 40 CFR part 600. The driving range of a passenger automobile model type using electricity as an alternative fuel is determined by operating the vehicle in the electric-only mode of operation through the EPA urban cycle on its nominal storage capacity of electricity and the EPA highway cycle on its nominal storage capacity of electricity. Passenger automobile types using electricity as an alternative fuel that have completed the EPA urban cycle after recharging and the EPA highway cycle after recharging shall be deemed to have met the minimum range requirement.

4. Add § 538.7 to read as follows:

§ 538.7 Petitions for reduction of minimum driving range.

(a) A manufacturer of a model type of passenger automobile capable of operating on both electricity and either gasoline or diesel fuel may petition for a reduced minimum driving range for that model type in accordance with paragraphs (b) and (c) of this section.

(b) Each petition shall:

(1) Be addressed to: Administrator, National Highway Traffic Safety Administration, 400 Seventh Street SW, Washington, DC 20590.

(2) Be submitted not later than the beginning of the first model year in which the petitioner seeks to have the model type treated as an electric dual fueled automobile.

(3) Be written in the English language.

(4) State the full name, address, and title of the official responsible for preparing the petition, and the name and address of the petitioner.

(5) Set forth in full data, views, and arguments of the petitioner, including the information and data specified in paragraph (c) of this section, and the calculations and analyses used to develop that information and data. No documents may be incorporated by reference in a petition unless the documents are submitted with the petition.

(6) Specify and segregate any part of the information and data submitted under this section that the petitioner wishes to have withheld from public disclosure in accordance with part 512 of this chapter.

(c) Each petitioner shall include the following information in its petition:

(1) Identification of the model type or types for which a lower driving range is sought under this section.

(2) For each model type identified in accordance with paragraph (c)(1) of this section:

(i) The driving range sought for that model type.

(ii) The number of years for which that driving range is sought.

(iii) A description of the model type, including car line designation, engine displacement and type, electric storage capacity, transmission type, and average fuel economy when operating on:

(A) Electricity; and

(B) Gasoline or diesel fuel.

(iv) An explanation of why the petitioner cannot modify the model type so as to meet the generally applicable minimum range, including the steps taken by the petitioner to improve the minimum range of the vehicle, as well as additional steps that are technologically feasible, but have not been taken. The costs to the petitioner of taking these additional steps shall be included.

(3) A discussion of why granting the petition would be consistent with the following factors:

(i) The purposes of 49 U.S.C. chapter 329, including encouraging the development and widespread use of electricity as a transportation fuel by consumers, and the production of passenger automobiles capable of being operated on both electricity and gasoline/diesel fuel;

(ii) Consumer acceptability;

(iii) Economic practicability;

(iv) Technology;

(v) Environmental impact;

(vi) Safety;

(vii) Driveability; and

(viii) Performance.

(d) If a petition is found not to contain the information required by this section, the petitioner is informed about the areas of insufficiency and advised that the petition will not receive further consideration until the required information is received.

(e) The Administrator may request the petitioner to provide information in addition to that required by this section.

(f) The Administrator publishes in the **Federal Register** a notice of receipt for each petition containing the information required by this section. Any interested person may submit written comments regarding the petition.

(g) In reaching a determination on a petition submitted under this section, the Administrator takes into account:

(1) The purposes of 49 U.S.C. chapter 329, including encouraging the development and widespread use of alternative fuels as transportation fuels by consumers, and the production of alternative fuel powered motor vehicles;

(2) Consumer acceptability;

(3) Economic practicability;

(4) Technology;

(5) Environmental impact;

(6) Safety;

(7) Driveability; and

(8) Performance.

(h) If the Administrator grants the petition, the petitioner is notified in writing, specifying the reduced minimum driving range, and specifying the model years for which the reduced driving range applies. The Administrator also publishes a notice of the grant of the petition in the **Federal Register** and the reasons for the grant.

(i) If the Administrator denies the petition, the petitioner is notified in writing. The Administrator also publishes a notice of the denial of the petition in the **Federal Register** and the reasons for the denial.

Issued on: November 24, 1998.

Ricardo Martinez,

Administrator.

[FR Doc. 98–31779 Filed 11–30–98; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 960318084–8274–04; I.D. 071596C]

RIN 0648–AG55

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Naval Activities

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

ACTION: Final rule.

SUMMARY: NMFS, upon application from the U.S. Department of the Navy (U.S. Navy), issues regulations to govern the unintentional take of a small number of marine mammals incidental to shock testing the USS SEAWOLF submarine in the offshore waters of the U.S. Atlantic coast. Issuance of regulations governing unintentional incidental takes in connection with particular activities is required by the Marine Mammal Protection Act (MMPA) when the Secretary of Commerce (Secretary), after notice and opportunity for comment, finds as here, that such takes will have a negligible impact on the species and stocks of marine mammals and will not have an unmitigable adverse impact on the availability of them for subsistence uses. These regulations do not authorize the Navy's proposed activity, such authorization is provided by 10 U.S.C. 2366, and is not within the jurisdiction of the Secretary. Rather, these regulations authorize the unintentional incidental take of marine mammals in connection with such activities and prescribe methods of taking and other means of effecting the least practicable adverse impact on the species and its habitat, and on the availability of the species for subsistence uses.

DATES: Effective May 1 through September 30 of any single year between the years 2000 and 2004, inclusive.

ADDRESSES: Copies of the application, Biological Opinion, Incidental Take Statement (ITS) and a list of the references used in this document may be obtained by writing to Michael Payne, Chief, Marine Mammal Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3226 or by telephoning the contact listed under the section **FOR FURTHER INFORMATION CONTACT**.

Comments regarding the burden-hour estimate or any other aspect of the collection of information requirement contained in this rule should be sent to the preceding address and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: NOAA Desk Officer, Washington, DC 20503.

A copy of the final environmental impact statement (FEIS) may be obtained from Will Sloger, U.S. Navy, at (803) 820–5797.

FOR FURTHER INFORMATION CONTACT: Kenneth R. Hollingshead, NMFS, (301) 713–2055.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs NMFS to allow, upon request, the incidental, but not intentional, taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and regulations are issued.

Permission may be granted for a period of 5 years or less if NMFS finds that the taking will have a negligible impact on the species or stock(s) of marine mammals and will not have an unmitigable adverse impact on the availability of these species for subsistence uses and that regulations are prescribed setting forth the permissible methods of taking and the requirements pertaining to the monitoring and reporting of such a taking.

Summary of Request

On June 7, 1996, NMFS received an application for an incidental, small take exemption under section 101(a)(5)(A) of the MMPA from the U.S. Navy to take marine mammals incidental to shock testing the USS SEAWOLF submarine off the U.S. Atlantic coast in 1997. The USS SEAWOLF is the first of a new class of submarines being acquired by the Navy. In accordance with 10 U.S.C. 2366, each new class of ships constructed for the Navy cannot proceed beyond initial production until realistic survivability testing of the ship and its components are completed. Realistic survivability testing means testing for vulnerability in combat by firing munitions likely to be encountered in combat. This testing and assessment are commonly referred to as ''Live Fire Test & Evaluation (LFT&E).'' Because realistic testing by detonating torpedoes or mines against a ship's hull could result in the loss of a multi-billion dollar Navy asset, the Navy has established an LFT&E program consisting of computer modeling, component and surrogate testing, and shock testing the entire ship. Together, these components complete the survivability testing as required by 10 U.S.C. 2366.

The shock test component of LFT&E is a series of underwater detonations that propagate a shock wave through a ship's hull under deliberate and controlled conditions. Shock tests simulate near misses from underwater explosions similar to those encountered in combat. Shock testing verifies the accuracy of design specifications for shock testing ships and systems, uncovers weaknesses in shock sensitive components that may compromise the performance of vital systems, and provides a basis for correcting deficiencies and upgrading ship and component design specifications. While computer modeling and laboratory testing provide useful information, they cannot substitute for shock testing under realistic, offshore conditions. To minimize cost and risk to personnel, the first ship in each new class is shock tested and improvements are applied to later ships of the class.

The Navy proposes to shock test the USS SEAWOLF by detonating a single 4,536–kg (10,000–lb) explosive charge near the submarine once per week over a 5-week period between May 1 and September 30, 2000, off Mayport, FL, although scheduling delays may postpone the detonation into a future year. Detonations would occur 30 m (100 ft) below the ocean surface in a water depth of 152 m (500 ft). The USS SEAWOLF would be underway at a depth of 20 m (65 ft) at the time of the test. For each test, the submarine would move closer to the explosive so the submarine would experience a more severe shock.

The Mayport site is located on the continental shelf off Georgia and northeast Florida. The Mayport site is the U.S. Navy's preferred location for the shock trial because of an observed low abundance of marine mammals at that site. However, because there is still a potential impact to marine mammals, the Navy has requested NMFS to grant an exemption under section 101(a)(5)(A) of the MMPA that would authorize the incidental taking and issue regulations governing the take.

Comments

On August 2, 1996 (61 FR 40377), NMFS published a proposed rule to issue an incidental small take exemption under the MMPA to take a small number of marine mammals incidental to shock testing the USS SEAWOLF submarine in the offshore waters of the U.S. Atlantic coast in 1997. A correction notice on the proposed regulations was published on August 23, 1996 (61 FR 43517). During the 45-day comment period, NMFS received 5 letters (Marine Mammal Commission (MMC), Humane Society of the United States (HSUS), Defenders of Wildlife (DoW), People for the Ethical Treatment of Animals (PETA) and one private citizen) commenting on the proposed rule. Comments contained in these letters are addressed under the Comments and Responses section. Comments regarding issues other than the contents of the proposed rule have been addressed in the FEIS prepared by the U.S. Navy.

On March 11, 1997, the U.S. Navy submitted a petition to NMFS amending its June 7, 1996, application and requesting a modification to the proposed regulations for an incidental small take exemption under the MMPA to take a small number of marine mammals incidental to shock testing the USS SEAWOLF submarine in the offshore waters of the U.S. Atlantic coast in 1997. The petition states that the U.S. Navy, for reasons unrelated to the environment, will not be able to conduct the shock trial from April 1, 1997, through September 30, 1997, and requests that the period of effectiveness for the regulations and the shock trial be extended until 1999. No modification to the proposed seasonal restriction (which would prohibit any marine mammal takings from October 1 through March 31 at the Norfolk site and from October 1 through April 30 at the Mayport site) to protect marine mammal and sea turtle species is requested. Because section 101(a)(5)(A) of the MMPA provides for small take authorizations to be effective for periods up to 5 years, NMFS believed that granting this request to modify the effective date of the proposed rule was warranted, the requested modification was proposed on April 22, 1997 (62 FR 19553). During the 30-day comment period, no comments were received. Subsequent to that action, the U.S. Navy informed NMFS that the shock test would be delayed until the year 2000 or beyond.

Comments and Responses

General Concerns

Comment 1: PETA believes that accepting the proposed rule would set a dangerous precedent for other entities to apply for similar legal exceptions and would make a mockery of current measures which are designed to protect marine mammals from harm.

Response: NMFS disagrees. The MMPA provides authority under section 101(a)(5)(A) for the taking of small numbers of marine mammals while conducting lawful activities provided the taking is having no more than a negligible impact on marine mammals and provided regulations are prescribed setting forth permissible methods of taking and other means of effecting the least practicable impact on marine mammal species and their habitat. The U.S. Navy first applied for a small take authorization on May 13, 1993, under section 101(a)(5)(A) of the MMPA. That application resulted in a final authorization to incidentally take small numbers of marine mammals during the shock trial of the USS JOHN PAUL JONES in 1994 (59 FR 5111, February 3, 1994). Monitoring that shock trial indicated that no marine mammals were seriously injured or killed and only a few dolphins were potentially harassed. The small take application for the incidental take of marine mammals for the USS SEAWOLF follows, and improves upon, the mitigation and monitoring protocols established during the earlier shock trial.

Comment 2: Three commenters (HSUS, PETA, citizen) recommended NMFS adopt the no action alternative and not issue a small take authorization to the U.S. Navy.

Response: NMFS wishes to make clear that the Navy conducts ship shock tests under the authority of 10 U.S.C. 2366. The Navy does not require NMFS authorization to conduct these tests. However, under the MMPA, the taking of marine mammals is prohibited unless authorized by exemption or permit. Since there is a possibility that marine mammals may be unintentionally taken (harassed, injured or killed) incidental to the ship shock trial, the Navy applied to NMFS for a small take authorization under section 101(a)(5)(A) of the MMPA. Thus, it is the taking of marine mammals incidental to the Navy's ship shock tests that NMFS is authorizing, not the shock trial itself. Unless scientific evidence contradicts NMFS' preliminary determination (61 FR 40377, August 2, 1996) that the ship shock trial is likely to result in only small numbers of marine mammals being taken and that this taking would have no more than a negligible impact on marine mammal stocks (provided the recommended mitigation and monitoring are conducted), a small take authorization is appropriate.

Comment 3: DoW questions the need for shock testing with the advent of computer modeling and sophisticated model simulations. With billions of dollars already spent on engineering and design for the vessel, this mode of testing seems dated. If testing is necessary, then DoW recommends the Navy moderate the size of the charge rather than the distance (between the charge and the submarine). DoW also recommends the Navy should investigate the use of ''shaped'' charges similar to those used for building demolition to direct more of the shockwave towards the vessel and less into the surrounding environment.

Response: According to the Navy, data from previous shock tests and wartime experience have been incorporated into computer models which are used to help predict the survivability of SEAWOLF-class submarines. Modeling however, is only one of three components of the SEAWOLF LFT&E program which together provide the data necessary to assess the SEAWOLF's survivability. The components are computer modeling and analysis, component and surrogate testing, and a shock test of the entire ship. Computer modeling and component testing on machines or in surrogates do not provide adequate information to assess the survivability of the submarine in accordance with 10 U.S.C. 2366. In addition, combat experience has demonstrated that computer models and component testing, while helpful, cannot predict the broad range of complex failure mechanisms which could occur inside sophisticated electronic components or complex mechanical systems.

Unfortunately, smaller charges and shaped charges do not energize the entire submarine at the desired level of shock intensity. According to the Navy, the use of smaller charges would require many more detonations to excite the entire submarine to the desired level.

Comment 4: DoW believes NMFS did not provide adequate notice of public meetings and opportunity for hearings. In addition, they believe that the title published in the *Federal Register* was insufficiently detailed to elicit response. A secondary, descriptive title would have been very helpful.

Response: The U.S. Navy's proposal to shock test the USS SEAWOLF off the U.S. East Coast has been noted in the *Federal Register* and the following newspapers on at least three occasions: Washington Post, Beaches Leader, Florida Times Union, Southeastern Georgian and Virginian Pilot. NMFS and the Navy first notified the public and held scoping meetings in Silver Spring, MD, Norfolk, VA and Atlantic Beach, FL in March, 1995. These meetings were announced in the above newspapers and in the *Federal Register*. The notice of availability of the draft environmental impact statement (DEIS) was published by the Environmental Protection Agency in the *Federal Register* on June 14, 1996 (61 FR 30233); a copy of the DEIS was mailed to DoW and a number of other interested organizations. The publication of the proposed rule by NMFS on August 2, 1996 (61 FR 40377) announced the schedule for public meetings under the National Environmental Policy Act (NEPA) and the MMPA. The comment period on the DEIS was reopened (61 FR 40204, August 1, 1996) until September 17, 1996 to incorporate the comments expected from these meetings. A widely distributed press release on the Navy proposal was also issued on August 2, 1996, by NOAA, two weeks prior to public hearings in mid-August, 1996.

NOAA press releases are also available to the public through the NOAA Homepage. As a result, NMFS believes the general public has had ample opportunity to review and prepare comments prior to the MMPA/NEPA public meetings and an additional period of time afterwards to submit written comments.

The title of the proposed action published in the *Federal Register* is limited to the title of the codified part (Taking and Importing of Marine Mammals) and the subpart (Taking Marine Mammals Incidental to Naval Activities). Secondary descriptive titles are not authorized by the Office of the Federal Register.

Comment 5: DoW finds the site selection for the shock trial to be problematic. They note that the coastal areas in Florida, particularly those within the euphotic zone are some of the most productive biologically. Any detonations of the magnitude described in the notice would therefore not only affect marine mammals, but could have devastating effects on local ecosystems and food chains. This could have profound implications on the eastern recreational and commercial fisheries.

Response: The environmental impacts of the shock trial on the Florida east coast ecosystems have been described in the DEIS prepared as part of this action. Readers are encouraged to refer to that document or the recently released FEIS for an analysis of environmental and economic impacts (see **ADDRESSES**).

Comment 6: The MMC recommends that NMFS carefully examine the data, assumptions, and methods used to estimate the numbers of animals that might be killed, injured or harassed to ensure that the estimates appropriately reflect any possible sources of error or bias. Recognizing that if the take is greater than authorized the Navy would be required to stop testing before completion, even though the effects on marine mammal distribution, abundance and productivity would still be negligible, the MMC further recommends that the number of animals authorized to be taken be increased if, after further examination, it is determined that (1) the present estimates do not adequately reflect possible sources of error and bias and (2) the possible effects on the distribution, size, and productivity of the potentially affected species and population stocks would remain negligible.

Response: NMFS believes that the U.S. Navy used the best scientific information available in making its assessment of the potential impact on marine mammals from the detonation of 5 explosive charges. In addition to using documented sources (e.g., CETAP, stranding records), the Navy conducted monthly aerial marine mammal surveys of the two preferred geographic areas for a period of 6 months. This survey was repeated at Mayport in 1997. The resulting estimate of the number of marine mammals that might potentially be harassed, injured or killed is provided in Tables 4–5 and 4–6 of the FEIS. It should be noted that the U.S. Navy reviewed this concern as part of its NEPA review, and, for reasons stated in response to Comment 7, these take levels have been modified from the proposed rule and DEIS. A more detailed response to this concern can be found in the FEIS (please refer to comment H4 in Appendix H). Also, a complete description of the methodology used by the Navy, and adopted by NMFS for this exercise, can be found in the FEIS.

For discussion on the comment that the Navy would be required to stop testing before completion if the take is greater than authorized, please refer to comment 12.

Comment 7: The MMC notes that the Navy has introduced a new criterion—acoustic discomfort—for determining how and how many animals may be harassed by anthropogenic sounds in the marine environment. The MMC therefore recommends that NMFS take such steps as necessary to ensure that (1) the estimates of the numbers of marine mammals that potentially could be taken by harassment are in fact, overestimates, rather than underestimates; and (2) the planned monitoring program is adequate to verify that any disruption of vital behavior is momentary and that no more than the authorized number of animals are harassed.

Response: As explained in detail in the FEIS, previous determinations for explosives were based on peak pressure. However, several sources recognize that peak pressure may not be the best basis for predicting the effects of impulsive noise, such as underwater explosives, on marine mammals (e.g., Richardson *et al.* 1995). In terms of mammal hearing, a better measure may be total energy received in 1/3–octave frequency bands (i.e., the approximate filter bandwidth of the hearing system) within the integration time of the ear. As pulsed sound sources with differing peak pressures could deliver the same energy over a certain time period, the acoustic harassment criterion can be improved over the standard 160 dB (re 1 μPa @ 1 m) used previously during shock testing the USS JOHN PAUL JONES and other explosive detonation events.

The 160–dB criterion is based on a behavioral response which may be of questionable biological significance in the context of a *single* acoustic pulse. In the case of a continuous source (e.g., industrial noise) or repeated transient sources (e.g., seismic pulses), avoidance by a marine mammal could result in changes to migration, feeding, or reproduction patterns that could affect the energetics of both individuals and populations. However, in the context of a single, brief pulse from a detonation, a momentary startle response causing an animal to dive or momentarily change course or speed is not likely to affect either the individual or the population. Such a minor response is well within the range of normal behaviors that an animal might exhibit at any time in response to other animals or other environmental stimuli. As a result, NMFS does not normally consider these simple, singular, reflex actions (e.g., alert, startle, dive response to a stimulus) by marine mammals to be sufficient on their own to warrant an incidental harassment authorization. On the other hand, NMFS does not concur with statements made by the Navy in response to a different rulemaking that the term ''harassment'' in the MMPA should be limited to changes in behavioral patterns of a magnitude that reflect an adverse reaction on the part of the animals such as intense fear or pain or behavior that is likely to harm the animal or its offspring. By statutory definition, the *de minimus* level (for Level B harassment) should be less intrusive on the animal than suggested by the Navy.

Therefore, the information provided in the FEIS supports the Navy's selection of temporary threshold shift (TTS) as a harrasment criterion for shock testing the USS SEAWOLF. NMFS concurs. TTS is being used as a measure of quantifiable harassment, as TTS may also result in behavior reflecting an adverse reaction, and TTS meets the definition of both Level A and Level B harassment definitions found in the MMPA. On a cellular level, TTS could be considered a very slight ''injury'' in the sense of damage to hair cells in the ear and because TTS is temporary hearing loss, it could lead to a temporary disruption of behavioral patterns as specified in the statutory definition of Level B harassment. For additional information please refer to the FEIS, in particular, Appendix E. Based upon information provided in Appendix E, a dual criterion for acoustic harassment has been developed: (1) an energy-based TTS criterion of 182 dB re 1 uPa^2-sec derived

from experiments with bottlenose dolphins (Ridgway *et al.* (1997), and (2) 12 lbs/in^2 (psi) peak pressure cited by Ketten (1995) as associated with a ''safe outer limit for the 10,000 lb charge for minimal, recoverable auditory trauma'' (i.e., TTS). The harassment range therefore is the minimum distance at which neither criterion is exceeded. Using the 182 dB (energy) criterion separate harassment ranges were calculated for odontocetes and mysticetes based on their differing sensitivity to low frequencies. For the Mayport area, the harassment range is predicted to be 15.7 km (8.5 nautical miles (nm)) for odontocetes and 23.5 km (12.7 nm) for mysticetes. Estimated take levels based upon the above criterion for Mayport can be found in Tables 4–5 and 4–6 of the FEIS. For a single detonation at Mayport about 358 marine mammals could be harassed; for five detonations, 1,788 animals could be harassed. Because the U.S. Navy will seek a site for detonation that has the lowest real-time abundance of marine mammals, these numbers should be regarded as upper limits. The species most likely affected at Mayport are the bottlenose dolphin, Risso's dolphin, Atlantic spotted dolphin, and the *Stenella* spp.

NMFS has concerns that focusing monitoring efforts on the possibility that there may be more than a momentary disturbance of one or more marine mammals located either inside or outside the acoustic harassment zone would result in diminished monitoring within the safety zone where, with lowered detection effort, marine mammals might be seriously injured or killed. Because aircraft safety precludes more than one survey aircraft being within the area at any one time (a second aircraft will be held in reserve ashore), and because the survey aircraft will operate (after completion of aerial monitoring) in a circular holding pattern 4.6 km (2.5 nm) from the site to ensure no marine mammals enter the safety zone, there will be limited opportunity to observe marine mammal behavior at the instant of detonation. Furthermore, it is unclear whether stationing an aircraft in the area beyond the acoustic harassment zone would provide meaningful scientific results. Based on current scientific information, the low frequency of the explosive would potentially affect only marine mammals with the ability to detect low frequency sounds, mainly mysticete and sperm whales. Other than sperm whales, these species are not expected off Mayport, FL during the summer. To accommodate MMC concerns however, the Navy plans to locate and monitor any marine mammals, including behavioral changes, found inside the acoustic harassment zone for a period of 48 hours post-detonation, as detailed in the FEIS.

Comment 8: The MMC recommends NMFS (1) consider whether monitoring and comparing marine mammal vocalizations before and after detonation of charges would provide a reasonable means for validating the apparent assumption that any disruption of behavior beyond the ''acoustic discomfort'' range will be momentary; and (2) if judged reasonable, require that the monitoring program be reviewed accordingly.

Response: The Marine Mammal Acoustic Tracking System will be employed during the ship shock trial to acoustically detect marine mammals that are within the safety zone to avoid injury or death of these animals as a result of the detonation. Acoustic monitoring will therefore focus primarily on marine mammals vocalizing within the safety and buffer zone and secondarily on animals outside those zones prior to detonation. Unfortunately, for security reasons, recordings of vocalizing marine mammals after detonation cannot be made, either inside or outside the acoustic harassment zone. Therefore, the suggested experiment cannot be conducted.

Comment 9: HSUS recommends that post-detonation monitoring continue for a period of time no less than 4 weeks after the final detonation in order to account for animals who may not experience an immediately observable negative impact.

Response: NMFS believes that 4-week post-detonation surveys would be an unnecessary imposition on the U.S. Navy that would not provide the public with meaningful information on the impact of explosions on marine mammal populations. First, NMFS believes that any marine mammals that might be killed by a detonation and sink would resurface within 1 week of their demise. Second, marine mammals that are injured might not remain in the same area of the detonations after the shock trial is completed. This would require the U.S. Navy to conduct extensive aerial and ship surveys over a large area of the East Coast to locate injured and deceased marine mammals. Finally, a cause-and-effect relationship between dead marine mammals and the ship shock trial is not likely to be evident by external examination (but see comment 10).

NMFS will require the U.S. Navy to conduct post-detonation surveys for marine mammals a minimum of 48 hours and a maximum of 1 week following each detonation. In addition, the U.S. Navy will be coordinating follow-up investigations with local stranding networks.

Comment 10: HSUS recommends that the U.S. Navy fund necropsy efforts of stranding networks for a period of one year in an attempt to account for long-term impacts that result in mortality. HSUS recommends this measure be a required element in the monitoring scheme in 50 CFR 216.165.

Response: In the Navy's FEIS, the Navy states that the stranding networks will be requested to forward tissue samples from stranded marine mammals and sea turtles to the Armed Forces Institute of Pathology (AFIP) for analysis. The U.S. Navy will fund necropsy sample analyses by the AFIP for one year following the last detonation. This recommendation has been incorporated as a monitoring requirement under 50 CFR 216.165.

Comment 11: The MMC recommends that the Letter of Authorization (LOA) make clear that the authorization is automatically revoked if marine mammals are taken in ways or numbers not authorized. The HSUS recommends that § 216.166(b) be amended to require the LOA be suspended or revoked (without prior notice or opportunity for public comment).

Response: Prior to revocation of an LOA, NMFS must satisfy the statutory notice and comment requirement of section 101(a)(5)(B). However, under section 101(a)(5)(C) of the MMPA, the notice and comment requirements do not apply prior to suspending an LOA due to emergency conditions that pose a significant risk to the well-being of the marine mammal stock. While, section 101(a)(5)(B), allows NMFS to withdraw (revoke) or ''suspend for a time certain'' an LOA, subsequent to notice and comment, section 101(a)(5)(C) does not waive the notice and comment requirement where NMFS seeks to withdraw the authorization. Conditions for suspension or withdrawal of an LOA are described in 50 CFR 216.106 of this part.

Comment 12: The HSUS recommends that if the incidental take limits in 50 CFR 216.161(c) are exceeded, or if more than 1 mortality or serious injury of a threatened or endangered species occurs (and this should include all affected sea turtle species as well), then the LOA should be immediately suspended or revoked. The Navy would then have to make its findings governing the SEAWOLF based on the results of the tests conducted at that time.

Response: Please see the response to comment 11. The serious injury or death

of even 1 marine mammal listed under the ESA is prohibited by the regulations governing the incidental take of marine mammals during the SEAWOLF shock trial (50 CFR 216.161(c)). However, the serious injury or death of these listed species, or the taking of any marine mammal species after the harassment, injury or mortality quota(s) is (are) reached will not necessarily result in the suspension of the LOA. Suspension of an LOA will occur (1) if NMFS determines that additional takings are having, or may have, a more than negligible impact on the marine mammal stock(s); or (2) all quotas (harassment, injury and death) have been reached. Nevertheless, any taking that is in excess of the respective quota is prohibited and therefore a violation of the MMPA.

The incidental taking of sea turtles is authorized under an ITS as part of a Biological Opinion issued to the U.S. Navy under section 7 of the Endangered Species Act, not under the MMPA. Under that authority, the taking of listed species in excess of the take limits provided in the ITS (including the taking of endangered marine mammals) requires a reinitiation of consultation under section 7. Information on sea turtle incidental take levels can be found in Appendix G of the FEIS.

Comment 13: HSUS recommends that 50 CFR 216.163(c) only apply if the take is within the limits specified in 50 CFR 216.161(c).

Response: While 50 CFR 216.163 of the proposed rule did not contain a paragraph (c), the incidental take authority provided in § 216.163(a) applies until all the quotas contained in § 216.161(c) are reached provided all other terms, conditions, and requirements of the regulations and LOA are complied with. However, should these quotas be reached, NMFS presumes that should the U.S. Navy decide to continue their shock trial without a marine mammal authorization, the mitigation described in § 216.163(b) would be continued by the U.S. Navy to ensure additional takings did not occur.

Comment 14: The MMC recommends that the reporting requirement be revised to require that the results of the monitoring program be provided to NMFS following each of the five tests, rather than 120 days after the last test.

Response: NMFS disagrees. Submission of a written report after each test is not warranted because of the potential delay in notifying NMFS of takings, which in turn may result in a delay in the next shock test while NMFS evaluates the data and discusses its findings with the Navy. NMFS intends to require instead that the U.S. Navy notify NMFS, immediately upon discovery, that a marine mammal has been sighted by the post-detonation monitoring team, that either may have been seriously injured or killed as a result of the detonation, or is determined to have been within the safety zone at the time of detonation. If post-test surveys determine that an injurious or lethal take of a marine mammal has occurred, the test procedure and the monitoring methods will be reviewed with NMFS and appropriate changes must be made, if at all possible, prior to conducting the next detonation.

Description of Habitat and Marine Mammals Affected by Shock Testing the USS SEAWOLF

A description of the U.S. Atlantic coast environment, its marine life and marine mammal abundance, distribution and habitat can be found in the draft and FEIS on this subject and is not repeated here. Additional information on Atlantic coast marine mammals can be found in Blaylock *et al.* (1995). These documents are available upon request (see **ADDRESSES**).

Summary of Potential Impacts

Potential impacts to the marine mammal species known to occur in these areas from shock testing include both lethal and non-lethal injury, as well as harassment. Death or injury may occur as a result of the explosive blast, and harassment may occur as a result of non-injurious physiological responses to the explosion-generated shockwave and its acoustic signature. The Navy believes it is very unlikely that injury will occur from exposure to the chemical by-products released into the surface waters, and no permanent alteration of marine mammal habitat would occur. While the Navy does not anticipate any lethal takes would result from these detonations, theoretical calculations indicate that the Mayport site has the potential to result in up to 1 lethal take, 5 injurious takes, and 1,788 harassment takes. Detailed descriptions on the definitions of take categories; calculation of ranges for potential mortality, injury, and harassment; incidental take calculations; and impacts on marine mammal habitat can be found in the Navy application and the FEIS, which are available upon request (see **ADDRESSES**).

Summary of Proposed Mitigation and Monitoring Measures

The Navy's proposed action includes mitigation and monitoring that would minimize risk to marine mammals and sea turtles. As recently revised, the Navy would:

(1) Through pre-detonation aerial surveys, select a test area with potentially, the lowest number of marine mammals and turtles;

(2) monitor the area visually (aerial and shipboard monitoring) and acoustically before each test and postpone detonation if (a) any marine mammal, sea turtle, large sargassum raft or large concentration of jellyfish is visually detected within a safety zone of 3.7 km (2.0 nm), (b) any marine mammal is acoustically detected within a safety zone of 4.3 km (2.35 nm), or (c) any large fish school, or flock of seabirds is detected within a safety zone of 1.85 km (1 nm);

(3) monitor the area visually (aerial and shipboard monitoring) and acoustically before each test and postpone detonation if any marine mammal or sea turtle is within a buffer zone of an additional 1.85 km (1.0 nm) buffer zone, unless the marine mammals are on a course within the buffer zone that is taking them away from the 3.7 km (2.0 nm) safety zone, except that no detonation will occur if a listed marine mammal is detected within the buffer zone, and subsequently cannot be detected, until sighting and acoustic teams have searched the area for 2.5 hours (approximately 3 times the typical large whale dive duration). If a northern right whale is seen, the shot will not occur until the animal is positively reacquired outside the buffer zone and at least one additional aerial monitoring of the safety range and buffer zone shows that no other right whales are present;

(4) delay detonation if the sea state exceeds 3 (i.e., whitecaps on 33 to 50 percent of surface; 0.6 m (2 ft) to 0.9 m (3 ft) waves), or the visibility is not 5.6 km (3 nm) or greater, and the ceiling is not 305 m (1,000 ft) or greater;

(5) no detonations would occur earlier than 3 hours after sunrise or later than 3 hours prior to sunset to ensure adequate daylight for pre- and post-detonation monitoring; and

(6) monitor the area for 48 hours after each detonation, and for 7 days following the last detonation, to find and treat any injured animals. If post-detonation monitoring shows that marine mammals or sea turtles were killed or injured as a result of the test, or if any marine mammals or sea turtles were observed in the safety range immediately after a detonation, testing would be halted until procedures for subsequent detonations could be reviewed and changed as necessary.

Detailed descriptions of the measures for mitigation and monitoring the shock

test can be found in the FEIS (chapter 5), which is available upon request (see **ADDRESSES**).

Reporting

Within 120 days of the completion of shock testing, the Navy is required to submit a final report to NMFS. This report must include the following information: (1) Date and time of each of the detonations; (2) a detailed description of the pre-test and post-test activities related to mitigating and monitoring the effects of explosives detonation on marine mammals and their populations; (3) the results of the monitoring program, including numbers by species/stock of any marine mammals noted injured or killed as a result of the detonations and numbers that may have been harassed due to undetected presence within the safety zone; and (4) results of coordination with coastal marine mammal/sea turtle stranding networks.

Changes From the Proposed Rule

NMFS has modified the final rule as follows:

1. The regulations specify that the incidental taking is authorized for the waters off Mayport, FL (i.e., a negligible impact determination has not been made for the Norfolk, VA site).
2. Amended the incidental harassment levels to reflect the change from an acoustic discomfort criterion to one based upon TTS.
3. Harbor seals (*Phoca vitulina*) have been removed from the list of authorized species for taking since it is remote that one would be off the Florida coast in mid-summer.
4. Modified detonation postponement criteria in § 216.163 for certain marine mammals present in the buffer zone based on swimming speeds and dive durations.
5. Modified post-detonation criteria in 50 CFR 216.163(b)(3) to require that if post-test surveys determine that any marine mammals are in the safety range immediately after a detonation, the test procedure and the monitoring methods must be reviewed and appropriate changes must be made prior to conducting the next detonation.
6. Requires the U.S. Navy to conduct during the first detonation, and provide a report on, prior to the second detonation, the attenuation of the sound pressure levels of the HBX1 explosive charge. Based upon the results of this test, the monitoring and safety zones described in the LOA, may be modified accordingly.
7. Reporting requirements have been modified to indicate that reports must be submitted to the Regional Administrator, NMFS and a new definition for ''Administrator, Southeast Region'' has been added.
8. A final report on results of necropsies of stranded marine mammals funded by the U.S. Navy is now required to be submitted to NMFS no later than 18 months after completion of shock testing the USS SEAWOLF.
9. Minor, nontechnical, changes have been made to the regulations for clarification and ease of understanding.

Conclusions

While NMFS believes that detonation of five 4,536–kg (10,000–lb) charges may affect some marine mammals, the latest abundance and seasonal distribution estimates indicate that such taking will have a negligible impact on the populations of marine mammals inhabiting the waters of the U.S. Atlantic Coast. NMFS concurs with the U.S. Navy that impacts can be mitigated by mandating a conservative safety range for marine mammal exclusion, incorporating aerial, shipboard, and acoustic survey monitoring efforts in the program both prior to, and after detonation of explosives, and provided detonations are not conducted whenever marine mammals are either detected within the safety zone, or may enter the safety zone at the time of detonation, or if weather and sea conditions preclude adequate aerial surveillance.

NEPA

On June 14, 1996 (61 FR 30232), the Environmental Protection Agency noted the availability for public review and comment a DEIS prepared by the U.S. Navy under NEPA on this action. NMFS is a cooperating agency as defined by the Council on Environmental Quality regulations (40 CFR 1501.6) and in this regard submitted comments on the DEIS to the U.S. Navy on October 9, 1996. The U.S. Navy responded to NMFS' concerns on December 11, 1996. NMFS has reviewed the Navy's response and the FEIS and concludes that its comments and suggestions have been satisfactorily addressed. As a result, NMFS hereby adopts the Navy FEIS as its own as provided by 40 CFR 1506.3. Because NMFS' comments have been addressed satisfactorily, NMFS finds that it is unnecessary to either prepare its own NEPA documentation nor to recirculate the Navy FEIS for additional comments.

Endangered Species Act (ESA)

NMFS has consulted with the Navy under section 7 of the ESA for this shock trial. As the required mitigation measures, as well as monitoring, will be conducted as described, the shock trial is expected to provide adequate protection for listed species. As a result, NMFS has determined that the activity, while not likely to jeopardize the continued existence of those endangered or threatened species under the jurisdiction of NMFS, may adversely affect certain sea turtle species. A copy of the Biological Opinion and Incidental Take Statement resulting from this consultation is available upon request (see **ADDRESSES**).

Classification

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

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Small Business Administration, when this rule was proposed, that, if adopted, this rule would not have a significant economic impact on a substantial number of small entities as described in the Regulatory Flexibility Act. If implemented, this rule will affect only the U.S. Navy, and an undetermined number of contractors providing services related to the shock trial, including the monitoring of impacts on marine mammals. Although the U.S. Navy, by definition, is not a small business, some of the affected contractors may be small businesses. The economic impact on these small businesses is dependent upon the award of contracts for such services. The economic impact cannot be determined with certainty, but will either be beneficial or have no effect, directly or indirectly, on small businesses. As such, a regulatory flexibility analysis is not required.

This rule contains collection-of-information requirements subject to the provisions of the Paperwork Reduction Act (PRA). This collection has been approved previously by OMB under section 3504(b) of the PRA. The control number used by OMB is 0648–0151. 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.

The reporting burden for this collection is estimated to be approximately 80 hours, including the time for gathering and maintaining the data needed, and completing and reviewing the collection of information. It does not include time for monitoring the activity by observers. Send comments regarding these reporting

burden estimates or any other aspect of the collections of information, including suggestions for reducing the burdens, to NMFS and OMB (see **ADDRESSES**)

A list of the references used in this document may be obtained from NMFS (see **ADDRESSES**).

List of Subjects in 50 CFR Part 216

Administrative practice and procedure, Imports, Indians, Marine mammals, Penalties, Reporting and recordkeeping requirements, Transportation.

Dated: November 23, 1998.

Andrew A. Rosenberg,

Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

For reasons set forth in the preamble, 50 CFR part 216 is amended as follows:

PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

1. The authority citation for part 216 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

2. In § 216.3, a new definition for ''Administrator, Southeast Region'' is added in alphabetical order to read as follows:

§ 216.3 Definitions.

* * * * *

Administrator, Southeast Region means Administrator, Southeast Region, National Marine Fisheries Service, 9721 Executive Center Drive, St. Petersburg, FL 33702–2432.

* * * * *

3. Subpart O is added to read as follows:

Subpart O—Taking of Marine Mammals Incidental to Shock Testing the USS SEAWOLF by Detonation of Conventional Explosives in the Offshore Waters of the U.S. Atlantic Coast

Sec.
216.161 Specified activity, geographical region and incidental take levels.
216.162 Effective dates.
216.163 Permissible methods of taking; mitigation.
216.164 Prohibitions.
216.165 Requirements for monitoring and reporting.
216.166 Modifications to the Letter of Authorization.
216.167—216.169 [Reserved]

Subpart O—Taking of Marine Mammals Incidental to Shock Testing the USS SEAWOLF by Detonation of Conventional Explosives in the Offshore Waters of the U.S. Atlantic Coast

§ 216.161 Specified activity, geographical region, and incidental take levels.

(a) Regulations in this subpart apply only to the incidental taking of marine mammals specified in paragraph (b) of this section by U.S. citizens engaged in the detonation of conventional military explosives within the waters of the U.S. Atlantic Coast offshore Mayport, FL for the purpose of shock testing the USS SEAWOLF.

(b) The incidental take of marine mammals under the activity identified in paragraph (a) of this section is limited to the following species: Blue whale (*Balaenoptera musculus*); fin whale (*B. physalus*); sei whale (*B. borealis*); Bryde's whale (*B. edeni*); minke whale (*B. acutorostrata*); humpback whale (*Megaptera novaeangliae*); northern right whale (*Eubalaena glacialis*); sperm whale (*Physeter macrocephalus*); dwarf sperm whale (*Kogia simus*); pygmy sperm whale (*K. breviceps*); pilot whales (*Globicephala melas, G. macrorhynchus*); Atlantic spotted dolphin (*Stenella frontalis*); Pantropical spotted dolphin (*S. attenuata*); striped dolphin (*Stenella coeruleoalba*); spinner dolphin (*S. longirostris*); Clymene dolphin (*S. clymene*); bottlenose dolphin (*Tursiops truncatus*); Risso's dolphin (*Grampus griseus*); rough-toothed dolphin (*Steno bredanensis*); killer whale (*Orcinus orca*); false killer whale (*Pseudorca crassidens*); pygmy killer whale (*Feresa attenuata*); Fraser's dolphin (*Lagenodelphis hosei*); harbor porpoise (*Phocoena phocoena*); melon-headed whale (*Peponocephala electra*); northern bottlenose whale (*Hyperoodon ampullatus*); Cuvier's beaked whale (*Ziphius cavirostris*), Blainville's beaked whale (*Mesoplodon densirostris*); Gervais' beaked whale (*M. europaeus*); Sowerby's beaked whale (*M. bidens*); True's beaked whale (*M. mirus*); common dolphin (*Delphinus delphis*); and Atlantic white-sided dolphin (*Lagenorhynchus acutus*).

(c) The incidental take of marine mammals identified in paragraph (b) of this section is limited to a total of 1 mortality, 5 injuries and 1,788 harassment takes for detonations in the area described in paragraph (a) of this section, except that the taking by serious injury or mortality for species listed in paragraph (b) of this section that are also listed as threatened or endangered under § 17.11 of this title, is prohibited.

§ 216.162 Effective dates.

Regulations in this subpart are effective May 1 through September 30 of any single year between the years 2000 and 2004, inclusive.

§ 216.163 Permissible methods of taking; mitigation.

(a) Under a Letter of Authorization issued pursuant to § 216.106, the U.S. Navy may incidentally, but not intentionally, take marine mammals by harassment, injury or mortality in the course detonating five 4,536 kg (10,000 lb) conventional explosive charges within the area described in § 216.161(a), provided all terms, conditions, and requirements of these regulations and such Letter of Authorization are complied with.

(b) The activity identified in paragraph (a) of this section must be conducted in a manner that minimizes, to the greatest extent possible, adverse impacts on marine mammals and their habitat. When detonating explosives, the following mitigation measures must be utilized:

(1) If marine mammals are observed within the designated safety zone prescribed in the Letter of Authorization, or within the buffer zone prescribed in the Letter of Authorization and on a course that will put them within the safety zone prior to detonation, detonation must be delayed until marine mammals are either no longer within the safety zone or are on a course within the buffer zone that is taking them away from the safety zone, except that no detonation will occur if a marine mammal listed as threatened or endangered under § 17.11 of this title is detected within the buffer zone and subsequently cannot be detected until such time as sighting and acoustic teams have searched the area for 2.5 hours (approximately 3 times the typical large whale dive duration). If a northern right whale is seen within the safety or buffer zone, detonation must not occur until the animal is positively reacquired outside the buffer zone and at least one additional aerial monitoring of the safety range and buffer zone shows that no other right whales are present.

(2) If weather and/or sea conditions as described in the Letter of Authorization preclude adequate aerial surveillance, detonation must be delayed until conditions improve sufficiently for aerial surveillance to be undertaken.

(3) If post-test surveys determine that an injurious or lethal take of a marine mammal has occurred, or if any marine mammals are observed in the safety range immediately after a detonation, the test procedure and the monitoring methods must be reviewed by NMFS in

consultation with the Navy and appropriate changes made prior to conducting the next detonation.

§ 216.164 Prohibitions.

Notwithstanding takings authorized by § 216.161(b) and by a Letter of Authorization issued under § 216.106, the following activities are prohibited:

(a) The taking of a marine mammal that is other than unintentional.

(b) The violation of, or failure to comply with, the terms, conditions, and requirements of this part or a Letter of Authorization issued under § 216.106.

(c) The incidental taking of any marine mammal of a species not specified in this subpart.

§ 216.165 Requirements for monitoring and reporting.

(a) The holder of the Letter of Authorization is required to cooperate with the National Marine Fisheries Service and any other Federal, state or local agency monitoring the impacts of the activity on marine mammals. The holder must notify the Administrator, Southeast Region at least 2 weeks prior to activities involving the detonation of explosives in order to satisfy paragraph (g) of this section.

(b) The holder of the Letter of Authorization must designate qualified on-site individuals, as specified in the Letter of Authorization, to record the effects of explosives detonation on marine mammals that inhabit the Atlantic Ocean test area.

(c) The Atlantic Ocean test area must be surveyed by marine mammal biologists and other trained individuals, and the marine mammal populations monitored, approximately 3 weeks prior to detonation, 48–72 hours prior to a scheduled detonation, on the day of detonation, and for a period of time specified in the Letter of Authorization after each detonation. Monitoring shall include, but not necessarily be limited to, aerial, shipboard, and acoustic surveillance sufficient to ensure that no marine mammals are within the designated safety zone nor are likely to enter the designated safety zone immediately prior to, or at the time of, detonation.

(d) Under the direction of a certified marine mammal veterinarian, examination and recovery of any dead or injured marine mammals will be conducted. Necropsies will be performed and tissue samples taken from any dead animals. After completion of the necropsy, animals not retained for shoreside examination will be tagged and returned to the sea. The occurrence of live marine mammals will also be documented.

(e) The holder of the Letter of Authorization is required to measure during the first detonation, and provide a report on, prior to the second detonation, the attenuation of the sound pressure levels of the HBX1 explosive charge. Measurements must be made at a number of distances from the detonation sufficient to verify the model predictions for the 3.7 km (2 nm) safety zone. Based upon the results of this test, the monitoring and safety zones described in the Letter of Authorization, may be modified accordingly.

(f) Activities related to the monitoring described in paragraphs (c) and (d) of this section, or in the Letter of Authorization issued under § 216.106, including the retention of marine mammals, may be conducted without the need for a separate scientific research permit. The use of retained marine mammals for scientific research other than shoreside examination must be authorized pursuant to subpart D of this part.

(g) In coordination and compliance with appropriate Navy regulations, at its discretion, the National Marine Fisheries Service may place observer(s) on any ship or aircraft involved in marine mammal reconnaissance, or monitoring either prior to, during, or after explosives detonation in order to monitor the impact on marine mammals.

(h) A final report must be submitted to the Administrator, Southeast Region, no later than 120 days after completion of shock testing the USS SEAWOLF. This report must contain the following information:

(1) Date and time of all detonations conducted under the Letter of Authorization.

(2) A description of all pre-detonation and post-detonation activities related to mitigating and monitoring the effects of explosives detonation on marine mammal populations.

(3) Results of the monitoring program, including numbers by species/stock of any marine mammals noted injured or killed as a result of the detonation and numbers that may have been harassed due to presence within the designated safety zone.

(4) Results of coordination with coastal marine mammal/sea turtle stranding networks.

(i) A final report on results of necropsies of stranded marine mammals funded by the U.S. Navy must be submitted to the Director, Office of Protected Resources, no later than 18 months after completion of shock testing the USS SEAWOLF.

§ 216.166 Modifications to the Letter of Authorization.

(a) In addition to complying with the provisions of § 216.106, except as provided in paragraph (b) of this section, no substantive modification, including withdrawal or suspension, to the Letter of Authorization issued pursuant to § 216.106 and subject to the provisions of this subpart shall be made until after notice and an opportunity for public comment.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 216.161(b), or that significantly and detrimentally alters the scheduling of explosives detonation within the area specified in § 216.161(a), the Letter of Authorization issued pursuant to § 216.106 may be substantively modified without prior notice and an opportunity for public comment. A notice will be published in the **Federal Register** subsequent to the action.

[FR Doc. 98–31993 Filed 11–30–98; 8:45 am]

BILLING CODE 3510–22–F

Proposed Rules

Federal Register
Vol. 63, No. 230
Tuesday, December 1, 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.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97–ANE–36–AD]

Airworthiness Directives; MT-Propeller Entwicklung GMBH Model MTV–3–B–C Propellers

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes to revise an existing airworthiness directive (AD), applicable to MT-Propeller Entwicklung GMBH Model MTV–3–B–C propellers, that currently requires initial and repetitive dye penetrant or eddy current inspections for cracks in the propeller hub, and rework of the propeller hub or replacement with a new model propeller hub. This action would allow the repetitive dye penetrant inspections to be performed on-wing as opposed to at approved propeller repair stations, and to mark B–050 propeller hubs that have been modified in accordance with the current AD or this revision. This proposal is prompted by issuance of a revised service bulletin that describes procedures for on-wing inspections. The actions specified by the proposed AD are intended to prevent propeller hub cracks, which could result in propeller blade separation and possible loss of control of the aircraft.

DATES: Comments must be received by February 1, 1999.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 97–ANE–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.

The service information referenced in the proposed rule may be obtained from MT-Propeller Entwicklung GMBH, Airport Straubing-Wallmuhle, D–94348 Atting, Germany; telephone (0 94 29) 84 33, fax (0 94 29) 84 32, Internet: ''propeller@aol.com''. 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: Terry Fahr, Aerospace Engineer, Boston Aircraft Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (781) 238–7155, 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 97–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. 97–ANE–36–AD, 12 New England Executive Park, Burlington, MA 01803–5299.

Discussion

On September 26, 1997, the Federal Aviation Administration (FAA) issued AD 97–21–01, Amendment 39–10154 (62 FR 52225, October 7, 1997), applicable to MT-Propeller Entwicklung GMBH Model MTV–3–B–C propellers, to require initial and repetitive dye penetrant or eddy current inspections for cracks in the propeller hub, and rework of the propeller hub or replacement with a new model propeller hub. That action was prompted by reports of cracks in the propeller flange area of the hub detected during overhaul. That condition, if not corrected, could result in propeller hub cracks, which could result in propeller blade separation and possible loss of control of the aircraft.

Since the issuance of that AD, MT-Propeller Entwicklung GMBH issued Service Bulletin (SB) No. 12C, dated April 3, 1998, that describes procedures for optional on-wing inspections. The FAA has revised the compliance section of this proposed rule to clarify when on-wing inspections are permissible.

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 revise AD 97–21–01 to allow repetitive dye penetrant inspections to be performed on-wing as opposed to at approved propeller repair stations, and to mark B–050 propeller hubs that have been modified in accordance with the current AD or this revised AD.

There are approximately 122 propellers of the affected design in the worldwide fleet. The FAA estimates that 57 propellers installed on aircraft of U.S. registry would be affected by this proposed AD, that it would take approximately 5 work hours per propeller to accomplish the proposed actions, 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 $17,100.

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 39–10154 (62 FR 52225, October 7, 1997), and by adding a new airworthiness directive, to read as follows:

MT-Propeller Entwicklung GMBH: Docket No. 97–ANE–36–AD. Revises AD 97–21–01, Amendment 39–10154.

Applicability: MT-Propeller Entwicklung GMBH Model MTV–3–B–C/L250–21 propellers. These propellers are installed on but not limited to Sukhoi 29 aircraft.

Note 1: This airworthiness directive (AD) applies to each propeller 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 propellers 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 propeller hub cracks, which could result in propeller blade separation and possible loss of control of the aircraft, accomplish the following:

(a) Within 50 hours time in service (TIS) after the effective date of this AD, accomplish the following:

(1) Perform an initial dye penetrant or eddy current inspection of propeller hub, part number (P/N) B–050 or A–909–A, in accordance with paragraph (a) of MT-Propeller Entwicklung GMBH Service Bulletin (SB) No. 12C, dated March 4, 1998. The dye penetrant inspection may be done on-wing, but the eddy current inspection must be performed in an FAA-approved propeller repair station.

(2) If cracks are found, prior to further flight, remove the existing propeller hub and replace with a serviceable propeller hub.

(3) Rework propeller hubs, P/N B–050, by chamfering the hub bore to 0.08 inch x 45 degrees (for further information, see Detail Y of MT-Propeller Entwicklung GMBH SB No. 12C, dated March 4, 1998). Mark hubs that have been reworked in accordance with AD 97–21–01, or this revised AD, with the letters SB12C using a metal impression stamp (1/8 inch round bottom characters) above the propeller hub serial number and part number, located in the transition area between propeller blades 1 and 2 and the pitch change cylinder.

(b) Thereafter, perform dye penetrant or eddy current inspections, in accordance with paragraph (a) of MT-Propeller Entwicklung GMBH Service Bulletin (SB) No. 12C, dated March 4, 1998. The dye penetrant inspection may be done on-wing, but the eddy current inspection must be performed in an FAA-approved propeller repair station:

(1) For propellers with hubs, P/N B–050, inspect at intervals not to exceed 50 hours TIS, or 6 months since last inspection, whichever occurs first.

(2) For propellers with hubs, P/N A–909–A, inspect at intervals not to exceed 200 hours TIS, or 12 months since last inspection, whichever occurs first.

(3) If cracks are found, prior to further flight, remove the existing propeller hub and replace with a serviceable propeller hub.

(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, Boston Aircraft Certification Office. Operators shall submit their requests through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Boston Aircraft Certification Office.

Note 2: Information concerning the existence of approved alternative methods of compliance with this airworthiness directive, if any, may be obtained from the Boston Aircraft Certification Office.

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

Issued in Burlington, Massachusetts, on November 23, 1998.

David A. Downey,

Assistant Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 98–31859 Filed 11–30–98; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 926

[SPATS No. MT–019–FOR]

Montana Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: Office of Surface Mining Reclamation and Enforcement (OSM) is announcing receipt of a proposed amendment to the Montana regulatory program (hereinafter, the ''Montana program'') under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The proposed amendment consists of Montana's 1998 Vegetation Guidelines which are required by the Administrative Rules of Montana (ARM) at 26.24.726(1). The amendment is intended to revise the Montana program to be consistent with the corresponding Federal regulations.

DATES: Written comments must be received by 4:00 p.m., [m.s.t.] December 31, 1998. If requested, a public hearing on the proposed amendment will be held on December 28, 1998. Requests to present oral testimony at the hearing must be received by 4:00 p.m., [m.s.t.] on December 16, 1998.

ADDRESSES: Written comments should be mailed or hand delivered to Guy Padgett, Director, Casper Field Office, at the address listed below.

Copies of the Montana program, the proposed amendment, and all written comments received in response to this document will be available for public review at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. Each requester may receive one free

copy of the proposed amendment by contacting OSM's Casper Field Office.

Guy Padgett, Director, Casper Field Office, Office of Surface Mining Reclamation and Enforcement, 100 East ''B'' Street, Federal Building, Room 2128, Casper, Wyoming 82601–1918, Telephone: (307) 261–6550

Steve Welch, Chief, Industrial and Energy Minerals Bureau, Montana Department of Environmental Quality, 1520 E. Sixth Ave., P.O. Box 200901, Helena, MT 59620–0901, Telephone: (406) 444–4964

FOR FURTHER INFORMATION CONTACT: Guy Padgett, Telephone: (307) 261–6550. *Internet address:* gpadgett@osmre.gov.

SUPPLEMENTARY INFORMATION:

I. Background on the Montana Program

On April 1, 1980, the Secretary of the Interior conditionally approved the Montana program. General background information on the Montana program, including the Secretary's findings, the disposition of comments, and conditions of approval of the Montana program can be found in the April 1, 1980, **Federal Register** (45 FR 21560). Subsequent actions concerning Montana's program and program amendments can be found at 30 CFR 926.15, 926.16, and 926.30.

II. Proposed Amendment

By letter dated November 4, 1998, Montana submitted a proposed amendment to its program pursuant to SMCRA (30 U.S.C. 1201 *et seq.*) (Administrative Record No. MT–16–01). Montana submitted the proposed amendment in response to a March 29, 1990, letter (Administrative Record No. MT–6–13) that OSM sent to Montana in accordance with 30 CFR 732.17(c), and in response to a subsequent required program amendment at 30 CFR 926.16(i). The proposed amendment contains the 1998 Vegetation Guidelines in which Montana proposes to meet the requirements of ARM 26.4.726(1) regarding acceptable field and laboratory methods.

Specifically, Montana proposes to address sampling methods by requiring a range site map with community descriptions, production sampling, the estimation of percent cover by one of four methods, the measurement of vegetation density, and documentation of the premine condition. The Guidelines provide the requirements for reference areas, as well as the levels of technical standards. Also in the Guidelines is a list of normal husbandry practices which meet the criteria established in ARM 17.24.725. Specifications for the grazing management plan are given. Phase III bond release evaluations are described with respect to: (1) hypothesis testing for production, cover, and density; and (2) evaluations not requiring hypothesis testing, such as diversity, utility, season of use, the 80/60 rule, and predominantly native composition. Appendix A contains statistical formulas for determining sample adequacy; Levene's test for homogeneity of variances; the one-sample, one-sided t test; the one-sided t test for two independent samples; the one-sample, one-sided sign test; the one-sided Mann-Whitney test for two independent samples; the Satterthwaite correction; and data transformation. Appendix B contains a list of rules addressing vegetation and land use requirements. Appendix C contains a list of Montana range plants.

III. Public Comment Procedures

In accordance with the provisions of 30 CFR 732.17(h), OSM is seeking comments on whether the proposed amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If the amendment is deemed adequate, it will become part of the Montana program.

1. Written Comments

Written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of the commenter's recommendations. Comments received after the time indicated under **DATES** or at locations other than the Casper Field Office will not necessarily be considered in the final rulemaking or included in the Administrative Record.

2. Public Hearing

Persons wishing to testify at the public hearing should contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4:00 p.m., [m.s.t.] December 16, 1998. Any disabled individual who has need for a special accommodation to attend a public hearing should contact the individual listed under **FOR FURTHER INFORMATION CONTACT**. The location and time of the hearing will be arranged with those persons requesting the hearing. If no one requests an opportunity to testify at the public hearing, the hearing will not be held.

Filing of a written statement at the time of the hearing is requested as it will greatly assist the transcriber. Submission of written statements in advance of the hearing will allow OSM officials to prepare adequate responses and appropriate questions.

The public hearing will continue on the specified date until all persons scheduled to testify have been heard. Persons in the audience who have not been scheduled to testify, and who wish to do so, will be heard following those who have been scheduled. The hearing will end after all persons scheduled to testify and persons present in the audience who wish to testify have been heard.

3. Public Meeting

If only one person requests an opportunity to testify at a hearing, a public meeting, rather than a public hearing, may be held. Persons wishing to meet with OSM representatives to discuss the proposed amendment may request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings will be open to the public and, if possible, notices of meetings will be posted at the locations listed under **ADDRESSES**. A written summary of each meeting will be made a part of the Administrative Record.

IV. Procedural Determinations

1. Executive Order 12866

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review).

2. Executive Order 12988

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 (Civil Justice Reform) and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

3. National Environmental Policy Act

No environmental impact statement is required for this rule since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program

provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

4. Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

5. Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal that is the subject of this rule is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

6. Unfunded Mandates

This rule will not impose a cost of $100 million or more in any given year on any governmental entity or the private sector.

List of Subjects in 30 CFR Part 926

Intergovernmental relations, Surface mining, underground mining.

Dated: November 23, 1998.

Russell F. Price,

Acting Regional Director, Western Regional Coordinating Center.

[FR Doc. 98–31914 Filed 11–30–98; 8:45 am]

BILLING CODE 4310–05–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9 and 90

[FRL–6195–2]

RIN 2060–AE29

Phase 2 Emission Standards for New Nonroad Spark-Ignition Engines At or Below 19 Kilowatts

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; Notice of Availability.

SUMMARY: The Environmental Protection Agency (EPA) is publishing notice of the availability for public review information received by the Agency following the publication of its Notice of Proposed Rulemaking (NPRM) for new nonroad spark-ignition (SI) engines at or below 19 kilowatts (25 horsepower). These engines are used principally in lawn and garden equipment, both in nonhandheld applications such as lawnmowers, and also in handheld applications such as trimmers and chainsaws. The NPRM was published in the **Federal Register** on January 27, 1998, and the close of the comment period for the NPRM was March 13, 1998. The additional information received since the publication of the NPRM relates to whether final standards more stringent than those contained in the NPRM would be achievable by the regulated industry.

The additional information cited in this document was gathered in response to the NPRM. This additional notice of availability is not required, but is intended to inform the public of information included in the rulemaking record upon which EPA may rely when adopting the final program. Due to the short deadline for a final rulemaking, EPA is not reopening the comment period on the NPRM, but will endeavor to review and place in the docket any comments submitted in response to this document, to the extent time allows.

ADDRESSES: Materials relevant to this rulemaking are contained in EPA Air and Radiation Docket, Attention Docket No. A–96–55, Room M–1500 (mail code 6102), 401 M Street, SW, Washington, DC 20460. These materials may be viewed from 8:00 a.m. until 5:30 p.m. weekdays. The docket may also be reached by telephone at (202) 260–7548. As provided in 40 CFR part 2, a reasonable fee may be charged by EPA for photocopying.

FOR FURTHER INFORMATION CONTACT: Robert Larson, Office of Mobile Sources, Engine Programs and Compliance Division, (734) 214–4277, larson.robert@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: This document contains two sections. The first section provides background on the pending small SI engine rulemaking. The second section contains a listing of relevant information available in the docket for the pending rulemaking made available to the Agency since the publication of the NPRM.

I. Background

On January 27, 1998, EPA issued a NPRM proposing a second phase of regulations to control emissions from new nonroad SI engines at or below 19 kilowatts (25 horsepower) (''small SI engines'') (63 FR 3950). This action was preceded by a March 27, 1997, Advanced Notice of Proposed Rulemaking (62 FR 14740). EPA solicited comment on virtually all aspects of the NPRM. The public comment period for the NPRM closed March 13, 1998.

EPA held a public hearing on February 11, 1998, and the oral testimony and written material provided at that hearing have been added to the docket for this rule. This information was supplemented by more extensive documentation provided as written comment to the NPRM, which is also included in the docket for this rule.[1] At the public hearing, in response to a request by the Engine Manufacturers Association (EMA) to extend the comment period so as to allow written comments to reflect the information provided at a March 26, 1998, hearing of the California Air Resources Board (ARB) concerning its rules impacting many of these same engines, EPA committed to also consider all publicly available information of which EPA was informed and which was provided to the State of California for their deliberations. This information regarding the recently adopted small engine standards by the State of California has also been incorporated in the docket.[2]

Section 213(a)(3) of the Clean Air Act requires EPA's standards to achieve the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available, giving appropriate consideration to cost, lead time, noise, energy and safety factors. The NPRM contained lengthy discussion of the proposed standards, the expected costs of their implementation, and the potential costs and benefits of adopting more stringent standards such as those that were under consideration by the California ARB. In the NPRM, EPA explicitly asked for comment regarding the level of the proposed standards and the impacts and timing for implementing more stringent standards, so as to allow it to establish the most appropriate standards in the final rule. In particular, EPA requested comment on the impacts and timing for

[1] A listing of these items is in Section II.A. of this document.

[2] A listing of these items is in Section II.B. of this document.

implementing emission standards that would require the same types of technology as anticipated by proposed rules under consideration at that time by the California ARB.

After the close of the comment period and upon reviewing the information supplied during the comment period, EPA determined that it was desirable to get further details regarding the technological feasibility, cost and lead time implications of meeting standards more stringent than those contained in the NPRM. EPA's NPRM already contained estimates of the costs and feasibility of more stringent standards. Some commenters had charged that, based on these discussions, EPA's proposed standards would not satisfy the stringency requirements of Clean Air Act Section 213(a)(3). For the purpose of gaining additional information on feasibility, cost and lead time implications of more stringent standards, EPA had several meetings, phone conversations, and written correspondence with specific engine manufacturers, with industry associations representing those manufacturers, with representatives of state regulatory associations, and with members of Congress. Summaries of those meetings, phone conversations, and written correspondence have also been placed in the docket.[3] EPA also sought information relating to the impact on equipment manufacturers, if any, of changes in technology potentially required to meet more stringent standards than were contained in the NPRM. Summaries of this information have been placed in the docket.[4] Additionally, EPA received numerous comments on the NPRM requesting closer harmonization with the compliance program provisions adopted by the State of California. In some cases, EPA also discussed these harmonization issues with manufacturers to improve the Agency's understanding of the needs and benefits to the industry of such harmonization; when applicable, these conversations are also noted in the meeting documentation provided to the docket.[5]

Finally, EPA received numerous pieces of correspondence, much of it after the formal comment period closed, from representatives of the model airplane and related hobbyist community. This correspondence has also been included in the docket and will be considered by EPA in developing its final rule.[6]

As EPA has stated on prior occasions, in adopting the final small SI engine rule EPA intends to consider all relevant information that becomes available. This includes information received during the comment period on an NPRM, and, to the extent possible, important information which becomes available after the formal NPRM comment period has concluded. Regarding the small SI engine rulemaking, to the extent that post-NPRM information has expanded or updated the knowledge of the Agency regarding technological feasibility, production lead time estimates for incorporating improved designs, cost to manufacturers, cost to consumers and similar factors, it is reasonable to expect that the improved information may result in changing assessments of how the pending rule can best achieve regulatory goals compared to what had been expected at the time of the NPRM. This is especially true in the case of a rulemaking concerning an industry, like small SI engines, that is undergoing relatively rapid technological achievement.

II. Summary of Information Available in Docket to This Rule

The following is a listing of information received by EPA after the publication of the NPRM that is available in the docket to the pending rulemaking, EPA Air Docket #A–96–55. This listing may be incomplete, as new material may be added to the docket, and may have already been added following signature of this document but before its publication in the **Federal Register**. Readers may wish to review docket materials for information other than that specifically identified in this document.

A. Oral and Written Comment Submitted During the Comment Period to the NPRM

Oral testimony was presented on behalf of 8 individuals or organizations at the February 11, 1998, public hearing. The docket contains a transcript of the hearing and a listing of hearing attendees (Items IV–F–01 and IV–F–02), as well as copies of written materials presented at the hearing (Item IV–D–28). In addition, written comments from 22 individuals or organizations were submitted to the docket (Items IV–D–01 through IV–D–22) by the close of the comment period.

B. Information Relating to the California ARB Small Off-Road Engine Program

The California ARB issued a Mail-Out (#MSC 98–02) on January 27, 1998, noticing a March 26, 1998, Public Hearing to Consider Amendments to the Small Off-Road Engine Regulations, and containing the staff proposal and report on this topic (Item IV–G–06). At the March 26, 1998, Public Hearing, California ARB staff made available a modified version of the regulation portion of Mail-Out 98–02, which staff proposed to the Board at the hearing (Item IV–G–07). The California ARB staff presentation made at the hearing, as well as written materials submitted in response to the hearing notice are also contained in the docket (Items IV–G–05, and Item IV–D–27). Finally, on March 9, 1998, the Portable Power Equipment Manufacturers Association (PPEMA) forwarded to EPA the ''PPEMA Proposal for ARB Tier II Emissions Regulations'' (Item IV–D–23).

C. Summaries of Meetings, Phone Conversations, and Correspondence Received by the Agency Regarding Programs for Nonhandheld and Handheld Engines

First, summaries of substantive correspondence, conversations, or meetings with nonhandheld engine manufacturers or industry associations representing those manufacturers, including EMA, Tecumseh Products, Briggs & Stratton, Honda, and Kohler, between May 1998 and September 1998, regarding topics such as standards and implementation dates for Class I engines, in-use verification testing and compliance, useful life definitions, a technology to reduce emissions on OHV engines, and Class I and II Phase 2 Final Regulations, are contained in the docket (see Items IV–C–01, IV–C–02, IV–D–25, IV–D–26, IV–E–15, IV–E–16, IV–E–19, IV–E–25. IV–E–44, IV–E–45, IV–E–46, IV–E–48, IV–E–49, IV–E–53, IV–E–54, IV–E–57, IV–E–59, IV–E–60, IV–E–63, IV–E–64, and IV–G–26).

Second, summaries of substantive correspondence, conversations, or meetings with handheld engine manufacturers or industry associations representing those manufacturers, including PPEMA, John Deere, Poulan, McCulloch, Dolmar, Tanaka, and Stihl, between June 1998 and September 1998, regarding topics such as a PPEMA proposal for Phase 2 standards and effective dates, including Phase 3 standards in the Phase 2 final rule, standards for handheld engines that would skip Phase 2 levels and go directly to Phase 3 levels, appropriate emission standards for commercial

[3] A listing of these items is in Section II.C. of this document.

[4] A listing of these items is in Section II.D. of this document.

[5] A listing of these items is in Section II.C. of this document.

[6] A listing of these items is in Section II.E. of this document.

products, a technology for reducing handheld 2-stroke emissions, and Phase 2 handheld engine emission standard feasibility, are contained in the docket (see Items IV–C–03, IV–E–09, IV–E–11 through IV–E–14, IV–E–17, IV–E–18, IV–E–20, IV–E–21, IV–E–23, IV–E–26, IV–E–40, IV–E–43, IV–E–50, IV–E–51, IV–E–56, IV–E–62, IV–E–65, IV–E–66, IV–G–22, IV–G–27, and IV–G–28).

Third, summaries of separate discussions held between EPA and Honda, American Suzuki Motor Corporation, and Tecumseh Products concerning the displacement cutoff for an additional nonhandheld class are contained in the docket (see Items IV–E–24, IV–E–52).

Fourth, summaries of a September 16, 1998 telephone conversation between EPA and Tom Cackette (California Air Resources Board) and a September 17, 1998 telephone conversation between EPA and Jason Grumet (NESCAUM) regarding the development of final Phase 2 regulations for small engines is contained in the docket (see Items IV–E–61 and IV–E–22).

Fifth, summaries of correspondence between EPA and members of Congress, including Representative Jo Ann Emerson and three colleagues to EPA, regarding pending Phase 2 regulations for small SI engines, Senator Herb Kohl to EPA on behalf of constituent Cliff Feldmann, President of the Auger and power Equipment Manufacturers Association (APEMA), Representative Frank Lucas to EPA on behalf of constituent Mr. Dick Roberts, a member of the Auger and Power Equipment Manufacturers Association (APEMA), are contained in the docket, (Items IV–C–06, IV–C–05 and IV–C–04).

Finally, summaries of substantive correspondence, conversations, or meetings with other individuals or organizations, including May 20, 1998 information from and September 3, 1998 meeting with Boswell Energy Systems regarding a technology for reducing emissions from small SI engines and June 22, 1998 correspondence from Autonnic Research to EPA regarding the Autonnic Maintenance Alert Meters, June 16, 1998 meeting and October 20 telephone conversations between EPA, Pyrotek Inc. and others regarding Spark Plug Technology for Emission Reductions for Small SI Engines At or Below 19 kW, and correspondence from MECA to EPA regarding catalytic technology for small SI nonroad engines, are contained in the docket (Items IV–D–24, IV–E–07, IV–G–13, IV–E–42 and IV–E–41, and IV–G–25).

D. Information on the Impact of More Stringent Standards on Equipment Manufacturers

EPA sought information on the impact on equipment manufacturers, if any, of changes in technology potentially required to meet more stringent standards than were contained in the NPRM. Summaries of substantive correspondence received or conversations or meetings held regarding the impact of standards on equipment manufacturers are contained in the docket (see Items IV–E–27 through IV–E–39, IV–E–52, IV–E–55, IV–E–58 , IV–E–67, and IV–G–20).

E. Correspondence from Representatives of the Model Airplane and Hobbyist Community

EPA received numerous pieces of correspondence before and after the close of the comment period on the NPRM from representatives of the model airplane and related hobbyist community (Items IV–D–07; IV–G–08 through IV–G–12; IV–G–14 through IV–G–19; IV–G–21; IV–G–23, and IV–G–24).

Dated: November 20, 1998.

Robert Perciasepe,

Assistant Administrator, Office of Air and Radiation.

[FR Doc. 98–32001 Filed 11–30–98; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 61 and 63

[FRL–6187–7]

Approval of the Clean Air Act, Section 112(l), Delegation of Authority to Three Local Air Agencies in Washington

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pursuant to section 112(l) of the 1990 Clean Air Act (CAA), the state of Washington Department of Ecology (Ecology) requested program approval and delegation of authority for three local agencies in Washington to implement and enforce locally-adopted hazardous air pollutant (HAP) regulations which adopt by reference the federal National Emission Standards for Hazardous Air Pollutants (NESHAP) contained within 40 CFR Parts 61 and 63, as these regulations apply to all sources (i.e., both Part 70 and non-Part 70 sources). On behalf of these agencies, Ecology also requested approval of a mechanism by which these agencies will receive delegation of future NESHAPs; and requested that EPA waive its notification requirements such that sources will only need to send notifications and reports to the delegated local agencies. Additionally, Ecology also requested approval of certain local air agency potential-to-emit limiting regulations which would then be recognized as federally enforceable. The local air agencies that would be implementing and enforcing these regulations are: the Northwest Air Pollution Authority (NWAPA); the Puget Sound Air Pollution Control Agency (PSAPCA); and the Southwest Air Pollution Control Authority (SWAPCA) collectively referred to as ''NWAPA, PSAPCA, and SWAPCA.''

In the Rules section of this **Federal Register**, EPA is promulgating direct final approval of Ecology's request, on behalf of NWAPA, PSAPCA, and SWAPCA, for program approval and delegation of authority to implement and enforce specific 40 CFR Parts 61 and 63 federal NESHAP regulations which have been adopted into local law (as apply to both Part 70 and non-Part 70 sources). EPA is delegating these programs to Ecology for the purpose of redelegating them to NWAPA, PSAPCA, and SWAPCA, consistent with Ecology's statute, the Revised Code of Washington (RCW) 70.94.860. Additionally, EPA is promulgating direct final approval of the mechanism by which NWAPA, PSAPCA, and SWAPCA will receive delegation of future NESHAP regulations that are adopted unchanged into local law; and is waiving the requirement for sources to send copies of notifications and reports to EPA. Finally, EPA is promulgating direct final approval of PSAPCA and SWAPCA's potential-to-emit regulations as federally enforceable.

EPA is taking direct final action without prior proposal because the Agency views this as a noncontroversial action and anticipates no adverse comments. A detailed rationale for this approval is set forth in the direct final rule. If no relevant adverse comments are received in response to this action, no further activity is contemplated in relation to this action. If EPA receives relevant adverse comments, the direct final rule will not take effect and all public comments will be addressed in a subsequent final rule based on this proposed action. The EPA will not institute a second comment period on this action. Any parties interested in commenting should do so at this time.

DATES: Comments must be received in writing by December 31, 1998.

ADDRESSES: Written comments must be submitted to Doug Hardesty at the

Region X office listed below. Copies of the requests for delegation and other supporting documentation are available for public inspection at the following location: U.S. Environmental Protection Agency, Region X, Office of Air Quality (OAQ–107), 1200 Sixth Avenue, Seattle, WA, 98101.

FOR FURTHER INFORMATION CONTACT: Andrea Wullenweber, US EPA, Region 10 (OAQ–107), 1200 Sixth Avenue, Seattle, WA, 98101, (206) 553–8760.

SUPPLEMENTARY INFORMATION:

This document concerns delegation of unchanged NESHAPs to the Northwest Air Pollution Authority, the Puget Sound Air Pollution Control Agency, and the Southwest Air Pollution Control Agency. For further information, please see the information provided in the direct final action which is located in the Rules section of this **Federal Register**.

Authority: 42 U.S.C. 7401–7671q.

Dated: October 28, 1998.

Chuck Clarke,

Regional Administrator, Region X.

[FR Doc. 98–31241 Filed 11–30–98; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[AD–FRL–6190–5]

RIN 2060–AF26

National Emission Standards for Hazardous Air Pollutants: Publicly Owned Treatment Works

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed rulemaking; notice of public hearing.

SUMMARY: A proposed rule for the publicly owned treatment works (POTW) source category is required to implement section 112 of the Clean Air Act as amended (Act) and reflects the Administrator's determination that POTW sources emit hazardous air pollutants (HAP) identified on the EPA's amended list of 188 HAP. The primary HAP emitted by these sources include xylenes, methylene chloride, toluene, ethyl benzene, chloroform, tetrachloroethylene, benzene, and naphthalene.

The emission standards that the EPA is proposing with today's notice would require control for HAP emissions from each new or reconstructed POTW treatment plant which is a major source of HAP. The standards would also require each existing and new POTW treatment plant that treats specific industrial waste streams from an industrial user, for the purpose of allowing that industrial user to comply with another National Emission Standard for Hazardous Air Pollutants (NESHAP), to meet the treatment and control requirements of the relevant NESHAP. The EPA is not proposing any standard for publicly owned sewage and wastewater collection systems at this time, because sufficient information is not available at present to determine the amount of HAP emissions from such systems or to evaluate the practicality of controlling such emissions.

Although section 112(e)(5) of the Act required the EPA to promulgate a maximum achievable control technology (MACT) standard for POTW by November 15, 1995, the EPA was unable to collect and evaluate the necessary information to meet that deadline. Under the separate schedule for promulgation of MACT standards established by the EPA pursuant to sections 112(e)(1) and (e)(3), the EPA was required to promulgate a MACT standard for POTW by November 15, 1997. However, because the EPA was unable to meet that deadline as well, the MACT ''hammer'' date may eventually apply to the POTW source category. Under section 112(j)(2), the MACT ''hammer'' date is the date by which affected facilities will be required to apply for a case-by-case MACT emission limitation if the EPA has not promulgated a generally applicable MACT standard. This date is May 15, 1999.

DATES: Comments. Comments must be received on or before January 15, 1999.

Public Hearing. A public hearing will be held, if requested, to provide interested persons an opportunity for oral presentation of data, views, or arguments concerning the proposed standards for POTW sources. If anyone contacts the EPA requesting to speak at a public hearing by December 16, 1998, a public hearing will be held on December 31, 1998.

ADDRESSES: *Comments.* Comments should be submitted (in duplicate, if possible) to: Air and Radiation Docket and Information Center (6102), (LE–131), Attention, Docket No. A–96–46, U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460. The EPA requests that a separate copy of comments also be sent to Mr. Robert B. Lucas (see **FOR FURTHER INFORMATION CONTACT** for address). Comments and data may also be submitted electronically by following the instructions below. No confidential business information (CBI) should be submitted through e-mail.

Electronic comments can be sent directly to the EPA at: A-and-R-Docket@epamail.epa.gov. Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted on disk in WordPerfect in 5.1 file format or ASCII file format. All comments and data submitted in electronic form must note the docket number A–96–46. Electronic comments on this proposed rule may be filed online at many Federal Depository Libraries.

Public Hearing: If requested, the public hearing will be held in Research Triangle Park, North Carolina, beginning at 9:30 a.m. Persons interested in attending a public hearing should contact JoLynn Collins, (919) 541–5671, Waste and Chemical Processes Group (MD-13) to determine whether a hearing will be held and to obtain information on the exact location.

Request to Speak at a Hearing. Persons wishing to make an oral presentation at a hearing must notify Jo Lynn Collins, Waste and Chemical Processes Group (MD–13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone (919) 541–5671.

Docket. The official record for this rulemaking will be compiled under docket number A–96–46, (including comments and data submitted electronically as described above). All materials in the docket (including a printed version of each electronic comment), excluding any portion of any materials claimed by the submitter as confidential business information, will be available for inspection and copying from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The public docket for this rulemaking is located at the address in **ADDRESSES** at the beginning of this document. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: For information concerning the proposed standards, contact Mr. Robert B. Lucas, Waste and Chemical Processes Group, Emission Standards Division (MD–13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone (919) 541–0884; facsimile (919) 541–0246; e-mail lucas.bob@epamail.epa.gov.

SUPPLEMENTARY INFORMATION:

Regulated Entities. Entities potentially regulated by this action are publicly owned treatment works. Regulated categories and entities include:

Category	Examples of regulated entities
Industry	Not affected.
Federal government.	Sewerage Systems (SIC 4952), Sewage Treatment Facilities (NAICS 22132).
State/local/tribal government.	Sewerage Systems (SIC 4952), Sewage Treatment Facilities (NAICS 22132), Municipal Wastewater Treatment Facilities, Publicly Owned Treatment Works.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that the Agency is now aware could potentially be regulated by this action. Other types of entities not listed in the table also could be regulated. To determine whether your facility or company is regulated by this action, you should carefully examine the applicability criteria in section III.A of this document and in § 63.1580 of the proposed rule. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Internet. The text of today's notice also is available on the EPA's web site on the Internet under recently signed rules at the following address: http://www.epa.gov/ttn/oarpg/rules.html. The EPA's Office of Air and Radiation (OAR) homepage on the Internet also contains a wide range of information on the air toxics program and many other air pollution programs and issues. The OAR's homepage address is: http://www.epa.gov/oar/.

Electronic Access and Filing Addresses. The official record for this rulemaking, as well as the public version, has been established for this rulemaking under Docket No. A–96–46 (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 confidential business information (CBI), is available for inspection from 8 a.m. to 5:30 p.m., Monday through Friday, excluding legal holidays. The official rulemaking record is located at the address in **ADDRESSES** at the beginning of this document.

Electronic comments can be sent directly to the EPA's Air and Radiation Docket and Information Center at: ''A-and-R-Docket@epamail.epa.gov.'' Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted on disks in WordPerfect in 5.1 file format or ASCII file format. All comments and data in electronic form must be identified by the docket number (A–96–46). No CBI should be submitted through electronic mail. Electronic comments on this proposed rule may be filed online at many Federal Depository Libraries. This proposal is available on the technology transfer network (TTN) on the EPA's electronic bulletin boards. The TTN provides information and technology exchange in various areas of air emissions control. The service is free and may be accessed via the TTN web site at http://www.epa.gov/ttn/oarpg.

The following outline is provided to aid in reading the preamble to today's proposal.

I. Background
A. Requirements of Section 112 of the Clean Air Act
B. Source Category Description
C. Overview of HAP Emissions from POTW
D. Stakeholder and Public Participation
II. Description of HAP Sources and Controls
A. Summary of Available Information
B. Hazardous Air Pollutant Types
C. Hazardous Air Pollutant Sources
D. Estimated Hazardous Air Pollutant Emissions
E. Hazardous Air Pollutant Control Options
III. Proposed Approach for Source Category Subcategorization
IV. Determination of MACT
A. MACT for Existing Sources in the Non-Industrial POTW Treatment Plants Subcategory
B. MACT for New Sources in the Non-Industrial POTW Treatment Plants Subcategory
C. MACT for Existing Sources in the Industrial POTW Treatment Plants Subcategory
D. MACT for New Sources in the Industrial POTW Treatment Plants Subcategory
V. Solicitation of Comments
A. Pretreatment
B. Wastewater Collection Systems
VI. Administrative Requirements
A. Docket
B. Paperwork Reduction Act
C. Executive Order 12866
D. Regulatory Flexibility Act
E. Unfunded Mandates
F. Executive Order 13045
G. National Technology Transfer and Advancement Act
H. Executive Order 12875: Enhancing the Intergovernmental Partnership
I. Executive Order 13084: Consultation and coordination with Indian Tribal Governments

I. Background

A. Requirements of Section 112 of the Clean Air Act

Section 112 of the Act addresses stationary sources of HAP. Section 112(b) of the Act, as amended, lists 188 chemicals, compounds, or groups of chemicals as HAP. The EPA is directed by section 112 to regulate the emissions of HAP from stationary sources by establishing national emission standards.

The statute requires the EPA to establish standards to reflect the maximum degree of reduction in HAP emissions through application of MACT to major sources. Section 112(a)(1) of the Act defines a major source as:

> * * * any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential-to-emit, considering controls, in the aggregate 10 tons per year (tpy) or more of any HAP or 25 tpy or more of any combination of HAP.

Section 112(d)(3) prescribes a minimum level of control for major sources of HAP, referred to as the MACT floor.

Section 112(e)(5) of the Act required the EPA to promulgate a MACT standard for publicly owned treatment works by November 15, 1995. The EPA was unable to gather and evaluate the necessary information to meet that deadline. Another deadline for promulgation of the POTW MACT standard of November 15, 1997, was established separately by the EPA when it included the POTW standard in the seven-year group in the schedule for MACT standards established pursuant to sections 112 (e)(1) and (e)(3). Under section 112(j)(2) (the ''MACT hammer''), if the EPA fails to promulgate a POTW MACT standard by November 15, 1997, major sources in the POTW category would be required to submit within 18 months thereafter (by May 15, 1999) an application for a permit which would impose MACT requirements on a case-by-case basis. Although the EPA was unable to meet the deadline for a POTW standard established by section 112(e)(5), the EPA intends to promulgate a final MACT standard applicable to this source category before any obligation for facilities to file an application under section 112(j)(2) can arise.

B. Source Category Description

The EPA's initial list of categories of major sources of HAP emissions, established under section 112(c)(1) of the Act, included POTW. This list was published on July 16, 1992 (57 FR 31576).

Section 112(e)(5) of the Act defines POTW by referring to the definition of treatment works in title II of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act. As set forth in section 212(2), 33 U.S.C. 1292(2), treatment works include the wastewater treatment units themselves, as well as intercepting sewers, outfall sewers, sewage collection systems,

pumping, power, and other equipment. Thus, any of these types of facilities which are publicly owned may be a POTW. The wastewater collected, transmitted, and treated by such POTW may be generated by industrial, commercial, and/or domestic sources.

C. Overview of HAP Emissions from POTW

Some POTW are estimated by the EPA to be major sources of HAP emissions. The primary HAP constituents currently associated with POTW sources include xylenes, methylene chloride, toluene, ethyl benzene, chloroform, tetrachloroethylene, benzene, and naphthalene. There are potential adverse health impacts associated with exposure to these HAP. For example, exposure to methylene chloride adversely affects the central nervous system and results in increased liver and lung cancer in animals, and benzene is a known human carcinogen.

The HAP emitted by POTW originate in wastewater streams discharged by industrial, commercial, and other facilities to the POTW for treatment. Hazardous air pollutants present in wastewater entering POTW treatment plants can biodegrade, adhere to sewage sludge, volatilize to the air, or pass through (remain in the discharge) to receiving waters. Within the POTW category, wastewater treatment units are the most likely source for HAP emissions, but wastewater collection systems (including transport systems) may also have emissions.

The EPA has assessed available information regarding HAP emissions from POTW and currently-used add-on controls. The information supports nationwide requirements for treatment and controls at a subcategory of POTW treatment plants. This subcategory includes POTW treatment plants that treat specific industrial waste streams for the purpose of allowing an industrial user to comply with another NESHAP. The information also supports nationwide requirements for add-on controls at new or reconstructed POTW treatment plants. For detailed information on these requirements see section IV. (Determination of MACT) of today's proposal.

Today's proposal addresses only the wastewater treatment portion of publicly owned treatment works. At this time, insufficient information is available for the EPA to determine whether publicly owned wastewater collection systems are themselves major sources of HAP and whether HAP emissions from such systems can be effectively controlled. The EPA is asking the public for additional information on emissions and controls for wastewater collection systems, as well as the use of pretreatment to reduce emissions (see section V.A., Pretreatment, of today's proposal). The EPA is also asking if today's proposal makes clear the difference between POTW treatment plants and publicly owned treatment works. All information collected as a result of this solicitation will be included in the docket.

D. Stakeholder and Public Participation

As prescribed in section 112(n)(3) of the Act:

> The Administrator may conduct, in cooperation with the owners and operators of publicly owned treatment works, studies to characterize emissions of hazardous air pollutants emitted by such facilities, to identify industrial, commercial and residential discharges that contribute to such emissions and to demonstrate control measures for such emissions. When promulgating any standard under this section applicable to publicly owned treatment works, the Administrator may provide for control measures that include pretreatment of discharges causing emissions of hazardous air pollutants and process or product substitutions or limitations that may be effective in reducing such emissions.

During the development of the proposed standards, representatives of POTW and sanitation districts were extensively consulted. The EPA has been working with a trade association known as the Association of Metropolitan Sewerage Agencies (AMSA) for approximately six years. During that time, the AMSA members assisted the EPA in identifying, gathering, and assessing available information regarding HAP emissions from POTW, arranging site visits, and providing technical review. In addition, State and local agencies assisted in data gathering and technical review. A database comprising information supplied by the AMSA was used in the evaluation of HAP emissions and emissions control for POTW. Estimates of organic HAP emissions from model sources were developed by the EPA based on information supplied by the AMSA, including most of the modeling inputs used for the EPA WATER8 emissions estimation model (see section II.D., Estimated Hazardous Air Pollutant Emissions, of today's proposal).

The AMSA is an organization that comprises 150 member agencies representing approximately 450 POTW sources that each treat 37.9 thousand cubic meters per day (cmpd) (10 million gallons per day (MGD)) or more. Of the 193 largest cities in the nation, 110 (approximately 60 percent) are represented. The POTW sources associated with these 110 cities treat approximately 49.2 million cmpd (13,000 MGD), and serve approximately 100 million people (out of the 175 million people in the nation that have sewer service).

II. Description of HAP Sources and Controls

A. Summary of Available Information

There are approximately 15,600 publicly owned treatment works nationwide that receive and treat approximately 113.6 million cmpd (30,000 MGD) of domestic, commercial, and industrial wastewater. These POTW range in size from less than 0.4 thousand cmpd to greater than 1.9 million cmpd (less than 0.1 to greater than 500 MGD). However, the majority of these facilities (approximately 80%) treat less than 3.8 thousand cmpd (less than one MGD).

The EPA has reviewed the general literature, conducted site visits, and conducted studies resulting in the development of model wastewater treatment facilities and model waste streams for this source category. In addition, the EPA has interacted with State and local agencies. The most comprehensive information obtained to date has been supplied by the AMSA, as a result of surveys of their members.

The AMSA conducted two separate surveys of their members within the last four years. During 1992–1993, the AMSA surveyed approximately 200 member agencies with well over 300 POTW under their jurisdiction. This survey requested facilities to provide data on liquid phase compounds that could possibly volatilize in the treatment process. In 1994, the AMSA conducted a national survey of over 100 member agencies representing many of the largest POTW in the nation. This survey requested influent monitoring data, with corresponding flow rate through the facilities for the sampling day(s). This data was collected for calendar years 1993 and 1994 for 108 compounds identified by the EPA as potentially being present in wastewater. The information provided to the EPA as a result of these two surveys has been reviewed and analyzed, and is the primary basis for the Agency's conclusions thus far regarding HAP emissions from POTW treatment plants and emission controls.

B. Hazardous Air Pollutant Types

The primary HAP associated with POTW sources include xylenes, methylene chloride, toluene, ethyl benzene, chloroform, tetrachloroethylene, benzene, and naphthalene. These primary HAP have

the highest concentrations in the influent waste stream, according to data provided to the EPA by the AMSA. In addition, emissions estimation modeling indicates that these primary HAP would be emitted from wastewater treatment units when the compounds are present in the influent at significant concentrations and when treatment units are uncontrolled for air emissions. Most of these primary HAP are discharged to the collection system by industrial sources.

C. Hazardous Air Pollutant Sources

Hazardous air pollutants present in wastewater entering POTW treatment plants can biodegrade, adhere to sewage sludge, volatilize to the air, or remain in the discharge to receiving waters. Wastewater treatment processes have traditionally been designed to remove solids and degrade organic matter to meet effluent guidelines, and the fate of HAP in wastewater has not been a design consideration. Chemical properties of each individual HAP, along with the design of POTW treatment plants, determine whether the HAP volatilizes to the atmosphere, or is eliminated through another means. Hazardous air pollutants may be shifted from one medium to another (to the air through volatilization or to sludge through adsorption), or destroyed through biodegradation. In addition, volatilization of HAP may occur in the wastewater collection system prior to reaching the POTW treatment plant.

Typical wastewater treatment is a combination of physical, chemical, and biological processes designed to remove suspended solids and organic matter from solution. Publicly owned treatment works include wastewater collection systems, treatment units, and outfall or disposal units. Although wastewater treatment at most POTW use similar processes, such as settling processes and biological treatment, no two facilities are identical. Each facility differs in design and operation due to varying conditions such as flow, composition of the influent wastewater, and the environmental conditions and treatment requirements of the system. Treatment processes may also differ among facilities.

Different levels of treatment that a POTW treatment plant may employ include primary, secondary, and advanced treatment. In general, primary treatment refers to physical operations to remove floating and settleable solids. Secondary treatment refers to the use of biological processes, in addition to primary processes, to remove organic matter. Advanced treatment refers to the use of additional combinations of unit operations and processes to remove specific constituents such as nitrogen or phosphorous not removed by prior processes.

A typical POTW consists of a collection system, a series of processes that remove solids, organics, and other pollutants from the wastewater, and a series of processes for managing and treating sludge. In general, most HAP releases at these facilities occur from kinetic stripping caused by turbulent wastewater flow, aeration stripping caused by the addition of air to wastewater, or evaporation. Emissions occur at the first treatment units with both turbulent flow and exposure to the atmosphere. Some POTW have wastewater collection systems that meet these criteria. For other POTW, emissions may not occur until the first open treatment units (i.e., headworks, primary clarifiers, and biotreatment units).

As the waste stream passes through each stage of treatment, the mass of organics is reduced, and thus the potential for emissions of organics is also reduced. Therefore, the potential HAP emissions from advanced treatment, chlorination and dechlorination, sludge digesters, and sludge dewatering are expected to be comparably small. Although the HAP chlorine is used to disinfect treated wastewater prior to discharge, facilities control chlorine feed by monitoring chlorine demand. As a result, minimal free chlorine is available to be emitted. Thus chlorine emissions are expected to be extremely low.

In addition to the wastewater treatment processes at a POTW, other sources of HAP emissions, such as sewage sludge incinerators, may be co-located at the same site. Sewage sludge incineration will be regulated under section 129 of the Act, and will be included in the source category Other Solid Waste Incinerators, that is scheduled for promulgation in the year 2000. Combustion sources at POTW will also be regulated, under section 112, as part of the Industrial Combustion Coordinated Rulemaking. Although these other sources may be regulated separately from POTW, HAP emissions from any source co-located at the same site must be included when determining if the POTW is a major source.

D. Estimated Hazardous Air Pollutant Emissions

Of the approximately 15,600 publicly owned wastewater treatment facilities nationwide, only six facilities have been identified thus far as potential major sources of HAP emissions (see section III., Proposed Approach for this Source Category, of today's proposal, for a description of the determination of major sources). Through the use of emission modeling, these six POTW treatment plants are estimated to emit a total of 245 megagrams per year (Mg/yr) of HAP. The average estimated emissions of HAP from each of these POTW treatment plants is 41 Mg/yr.

The EPA acknowledges that there are uncertainties inherent in any estimate of HAP emissions for sources as diverse as those in the POTW source category. However, the EPA believes that the engineering judgments and methodologies used in developing the HAP emissions estimates for this source category are reasonable given the available information. Documentation of the EPA's analysis is available for public inspection in the docket supporting this rulemaking (see **ADDRESSES** for further information on the docket). The EPA used the emissions estimation model WATER8 to estimate emissions from POTW, and believes it provides an accurate representation of emissions. However, the EPA requests comment on the use of the WATER8 model for determination of emissions from wastewater treatment processes.

E. Hazardous Air Pollutant Control Options

Two different control options, add-on controls (i.e., covers or covers vented to a control device) and pretreatment (i.e., source control), may be utilized by POTW treatment plants. Existing add-on controls are typically used at POTW treatment plants to control odors and are not designed and operated to provide HAP emission reduction. Pretreatment is typically required of industrial users of POTW treatment plants to limit discharge of pollutants that might inhibit treatment operations at the facility or cause exceedences of the outfall discharge requirements by allowing certain compounds to pass through the treatment process in the water phase. Typically, existing add-on controls and pretreatment programs are not designed to prevent emission of HAP, although some incidental reduction may be achieved. Add-on controls and pretreatment programs are discussed further in the following paragraphs.

Add-on controls. Some POTW treatment plants have covers on their existing treatment units. These covers are typically either: (1) Vented using a high ventilation rate (e.g., 12 or more air changes per hour); (2) vented using a low ventilation rate; or (3) not vented. When the high ventilation rates are used, the effectiveness of the covers at suppressing emissions is greatly

diminished, if not negated, by the increased air flow across the surface of the wastewater in the process. When the low ventilation rates are used, or the treatment unit is not vented, emissions from the treatment unit covered may be suppressed. Some equipment described by personnel at the POTW as ''covers'' are actually walkway grates placed over open channels designed to prevent personnel from falling into the treatment unit, and provide no air emission control.

Typically, not all processes at a POTW treatment plant are covered. For example, some facilities cover only the screening unit. While the cover provides suppression of emissions from the treatment unit covered, it is likely that the suppressed emissions are released from the uncovered physical processes downstream. Therefore, even though suppression of the emissions in the covered treatment unit reduces emissions from that treatment unit, the suppressed emissions likely occur from the next physical process in the wastewater treatment. Thus, the covered treatment unit results in only a very small, if any, overall emission reduction from the POTW treatment plant. Using the WATER8 emissions estimation model, the EPA has estimated emissions from the six identified major POTW treatment plants. The results of this modeling indicate that overall emission reduction due to these covers is minimal (less than one percent).

The covers used at existing POTW treatment plants are sometimes vented to odor control devices. Odor control devices currently in use include caustic scrubbers and granulated activated carbon (GAC) adsorption units. Caustic scrubbers are used to remove sulfur compounds by venting process emissions through a caustic water solution. Recent studies indicate that these odor control devices have little, if any, effect on removing the HAP of concern for POTW treatment plants. In addition, the AMSA has indicated, and the EPA concurs, that caustic scrubbers are ineffective at HAP emission reduction.

Properly designed, operated, and maintained GAC adsorption units have been demonstrated to achieve at least a 95% reduction in HAP and volatile organic compound (VOC) emissions in some applications. According to the AMSA, however, GAC installed at POTW treatment plants (with one identified exception) are designed and operated for the purpose of odor control. Such GAC adsorption units have much less frequent replacement or regeneration of the carbon than GAC adsorption units designed for HAP control and, as a result, provide no effective overall HAP emission reduction. Therefore, the EPA has concluded that GAC adsorption units in place and operated for the purpose of odor control at POTW treatment plants are ineffective at reducing HAP emissions.

The one exception identified is a POTW treatment plant where GAC adsorption units have been installed at the facility and are operated and maintained, at the expense of a petroleum refinery, to reduce risk from benzene emissions associated with refinery wastewater. This exception is discussed in section III (Source Category Subcategorization) of today's proposal.

Pretreatment. The pretreatment program is authorized by the Clean Water Act. Regulations at 40 CFR 403.8(a) require all POTW that have a total design flow greater than five MGD and receiving pollutants from industrial users which pass through or interfere with the operation of the POTW or are otherwise subject to pretreatment standards to establish pretreatment programs. POTW agencies establish programs of pretreatment requirements for the industrial users discharging to their POTW. The programs must include the legal authority to allow the agencies to control the concentration of pollutants entering the POTW treatment plants. Such pollutants, if not limited in the POTW influent, may cause treatment process inhibition (e.g., adversely affecting the biotreatment organisms or present a safety/health concern to facility workers). They may also cause the facility to exceed its outfall discharge requirements by allowing certain compounds to ''pass-through'' the treatment process and be discharged in the outfall waters at concentrations greater than permitted allowances. Finally, these pollutants can reduce sludge quality and limit sludge disposal options.

The AMSA and representatives of State and local agencies, in meetings with the EPA, have recommended pretreatment as the preferred method for reducing HAP emissions from POTW treatment plants. Pretreatment would reduce HAP emissions from POTW treatment plants by reducing the concentration of HAP entering the facilities. Pretreatment would also reduce HAP emissions from the wastewater collection systems between the source and the POTW treatment plants. Studies of HAP emissions from wastewater collection systems indicate that such losses could be significant.

The EPA's review of available information regarding pretreatment has revealed little substantive data on its effectiveness at reducing HAP emissions. However, the EPA believes that pretreatment for HAP may be a viable means to further reduce HAP emissions from POTW. Examples of pretreatment for HAP include reduction of HAP at the source (e.g., industrial process modifications; substitution of HAP compound with a non-HAP compound) or physical/chemical treatment of the waste stream prior to discharge from the industrial/commercial facility (e.g., steam stripping). For certain POTW, pretreatment could reduce HAP emissions from both the collection system and the POTW treatment plant. However, information available to the EPA on the use of pretreatment to control HAP emissions from POTW is insufficient to propose any regulatory action at this time. The EPA intends to investigate the potential for HAP emission reduction as a result of pretreatment, based on information received as a result of today's proposal (see section V., Solicitation of Comments, of today's proposal).

III. Proposed Approach for Source Category Subcategorization

As prescribed in section 112(d) of the Act, the level of control for existing major sources shall be no less stringent than:

> * * * the average emission limitation achieved by the best performing 12 percent of the existing sources . . . for categories and subcategories with 30 or more sources, or . . . the average emissions limitation achieved by the best performing five sources . . . for categories or subcategories with fewer than 30 sources.

This minimum level of control is referred to as the ''MACT floor.'' The MACT floor level for new major sources:

> * * * shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source.

After determining any applicable MACT floor for each category or subcategory, the EPA then adopts a MACT standard for that category or subcategory which reflects the maximum degree of reduction in emissions of HAP which is achievable, taking into consideration the cost of achieving such emission reduction and any non-air quality health and environmental impacts and energy requirements.

The MACT floors and MACT standards for a source category are based on available information. As prescribed in section 112(n)(3) of the Act (see section I.D., Stakeholder and Public Participation, of today's proposal), the EPA utilized information provided by the AMSA to assist in

determining MACT for this source category. As discussed in section II.A. (Summary of Available Information) of today's proposal, the AMSA provided the EPA with data received from some of its members. The AMSA identified a group of 19 POTW treatment plants from which they believed potential major sources could be identified. These 19 facilities were identified by the AMSA because they had influent HAP loadings of more than 10 tpy for a single constituent or more than 25 tpy for a combination of constituents, or because the AMSA believed they had the ability to be potential major sources based on knowledge and professional judgment. Based on a modeling of these 19 POTW treatment plants, only six are potential major sources. The EPA based its determination of the MACT floor for this source category on these six sources.

Of the six potential major sources identified, one POTW treatment plant is substantially different from the others. Until recently, the EPA believed that this source was used by a petroleum refinery to treat benzene-containing wastes to meet their obligations under the National Emission Standard for Benzene Waste Operations (40 CFR Part 61, Subpart FF). Based on new information from the POTW, the EPA recently learned that the POTW controls benzene emissions in response to the California Air Toxics Information and Assessment Act of 1987 (AB2588) (see section IV., Determination of MACT, of today's proposal), rather than in response to the Benzene Waste Operations NESHAP.

Although the EPA is not at this time aware of any instance where an industrial user uses a POTW treatment plant to comply with emission reductions required by any other NESHAP, the EPA believes that such dischargers may exist now or in the future. Over the years, many industries have used POTW treatment plants designed to treat industrial wastewater along with the municipal wastewater. As NESHAP that require the control of HAP emissions from wastewater are promulgated, industrial users may elect, where it is permissible under the NESHAP, to comply with these standards through off-site treatment of their wastewater at POTW rather than by adding emission controls to on-site industrial wastewater treatment plants. When an industrial user elects to utilize controls installed and operated at POTW to comply with another NESHAP (e.g., carbon adsorbers operated in a manner that controls HAP emissions, closed conveyance of wastewater between processes, operation of leak detection and repair programs), these controls will likely be considerably more stringent than those which would otherwise be typical at POTW treatment plants not treating regulated industrial waste streams. In such instances, the POTW would operate the controls as the agent of the industrial user, who would in turn be responsible for compliance with the other NESHAP. By establishing a subcategory for POTW treatment plants that treat regulated industrial waste streams, the EPA will also be able to directly enforce compliance by POTW with the wastewater provisions of any corresponding industrial NESHAP when off-site wastewater treatment is used.

Currently, many chemical plants are deciding how to comply with the wastewater provisions of the Hazardous Organic NESHAP (40 CFR Part 63, Subpart G), and some may elect to add air pollution controls to a POTW treatment plant providing off-site treatment. As more NESHAP are promulgated, more of these industrial POTW treatment plants are likely to be identified.

Therefore, the EPA intends to establish the following two subcategories for the POTW source category: (1) The industrial POTW treatment plants subcategory, that would include POTW treatment plants where treatment of a specific industrial waste stream discharged to the facility is expressly required to comply with the requirements of another NESHAP, and (2) the non-industrial POTW treatment plants subcategory, that would include all remaining POTW treatment plants that do not meet the characteristics of an industrial POTW treatment plant.

The industrial POTW treatment plants subcategory would include only those POTW treatment plants that are treating a specific regulated industrial waste stream to allow an industrial user to comply with another NESHAP. Such facilities would be determined on an individual basis. The industrial POTW treatment plants subcategory would not include POTW treatment plants that accept industrial waste for treatment from an industrial user whose waste is not specifically regulated under another NESHAP. Examples of POTW that would not be in the industrial POTW treatment plants subcategory, as proposed, would include POTW treatment plants that accept waste from local manufacturing facilities whose waste is typically characterized as a permitted industrial discharge by the POTW's source control program.

IV. Determination of MACT

As prescribed in section 112(d) of the Act, the MACT floor for existing sources in each subcategory within the POTW source category is determined by the average emissions limitation achieved by the best performing five sources, because fewer than 30 major sources have been identified within each subcategory. For the non-industrial POTW treatment plants subcategory, only six potential major sources have been identified. The MACT floor was determined for existing sources from the average emission reduction attributed to the controls among the five best performing sources of the six potential major sources.

During the development of this proposed rule, no major source has been identified which would be included in the proposed industrial POTW treatment plants subcategory. Therefore, in determining MACT for existing sources in this subcategory, the EPA has not identified any corresponding MACT floor. The MACT standard for existing sources in the industrial POTW treatment plants subcategory will be equivalent to the control requirements specified by the applicable NESHAP for the specific regulated industrial waste streams discharged to the facility.

As prescribed in section 112(d)(3) of the Act, the maximum degree of reduction in emissions that is deemed achievable for new sources in a category or subcategory shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source, as determined by the Administrator. For the non-industrial POTW treatment plants subcategory, the best performing source has been identified based on a review of emission controls in place at the six identified potential major sources. In addition, the EPA may consider technology that has been demonstrated at one or more similar facilities in identifying the best controls for new sources.

The EPA has identified one POTW treatment plant that has covered all wastewater treatment units up to, but not including, the secondary influent pumping station. In addition, the air in the headspace of the bar screens, grinders, grit chambers, and aerated distribution channels is ducted to control devices which use activated carbon to remove hazardous air pollutants. Therefore, the MACT floor for new sources in the non-industrial POTW treatment plants subcategory was determined based on the controls at the one identified best performing source.

For the industrial POTW treatment plants subcategory, the MACT floor for new sources was determined based on the emission controls at the best performing source in the non-industrial POTW treatment plants subcategory. MACT for new sources in this category was determined to be the MACT floor as defined for non-industrial POTW treatment plants, or the emission controls which would be imposed by the appropriate industrial NESHAP, whichever is more stringent.

The Agency has discretion to use its best engineering judgment in collecting and analyzing the data, and in assessing the data's comprehensiveness, accuracy, and variability, to determine which sources achieve the best average emission reductions. The term ''average,'' as it pertains to MACT floor determinations, is not defined in section 112 of the Act. Therefore, the Agency has discretion in determining the appropriate ''average'' (i.e., mean, mode, median, or some other measure of central tendency) in each category or subcategory of HAP sources (59 FR 29196).

A description of the MACT floor and MACT determinations for the treatment portion of existing and new sources in the POTW subcategories is presented in the following subsections. The EPA believes that, in addition to the add-on controls considered in determining the MACT floor, there are opportunities for controlling HAP emissions from POTW through pretreatment. However, as described in section II.E. (Hazardous Air Pollutant Control Options) of today's notice, information available to the EPA thus far on pretreatment programs at individual POTW is insufficient to propose any action regarding the use of pretreatment for the purpose of HAP emission reduction from POTW.

A. MACT for Existing Sources in the Non-Industrial POTW Treatment Plants Subcategory

Based on information available to the EPA on HAP emissions from wastewater to date, the EPA believes there are fewer than 30 potential major sources in the non-industrial POTW treatment plants subcategory. Therefore, the MACT floor for this subcategory would be based on the average emissions limitation achieved by the best performing five sources of the identified potential major sources.

Six potential major sources have been identified in the non-industrial POTW treatment plants subcategory (see section III., Proposed Approach for this Source Category, of today's proposal). The information provided by the AMSA on the six potential major sources was reviewed to determine the extent of controls currently in operation for each stage of wastewater treatment at the POTW treatment plant (i.e., headworks, primary clarification, high purity oxygen activated sludge, and conventional activated sludge).

Of the five potential major sources considered to be the best controlled, one POTW treatment plant reduces HAP emissions with covers on all treatment units up to and including the aerated distribution channels following the primary clarifiers. In addition, all covered treatment units, except the primary clarifiers, have headspace ducted to a two-stage control device. The control device combines a first-stage caustic scrubber to remove odors, with second-stage activated carbon adsorption which removes hazardous air pollutants. Plant operators replace carbon monthly based on routine monitoring for benzene breakthrough. Two other POTW treatment plants have various configurations including treatment units in highly ventilated buildings, treatment units covered with open grates, and open treatment units, none of which provide any HAP emission reduction. Neither of these two sources have treatment units with air emission controls. Finally, the two remaining sources have no covers on their wastewater treatment units up to and including the aerated distribution channels following the primary clarifiers.

All of the five best-controlled potential major sources utilize conventional activated sludge processes, which are either diffused air or mechanically mixed activated sludge. None of these processes are controlled for air emissions. Two of the five best-controlled potential major sources also utilize high purity oxygen activated sludge. Neither of these processes have air pollution control devices.

Computation of an arithmetic average of the performance among the one POTW treatment plant with HAP emission controls and the four POTW treatment plants without controls would be meaningless because there is no continuum of performance among the sources. The EPA has discretion in determining the appropriate ''average'' in each category or subcategory. Computation of an arithmetic average, or mean, is not appropriate in this case because the average emission reduction calculated from one well-controlled facility and four uncontrolled facilities does not correspond to any treatment technology. Therefore, a measure of central tendency other than the mean must be used to determine the MACT floor. On the basis of either the median or the mode, the MACT floor would be no control. Therefore, based on this rationale, the MACT floor for existing sources in the non-industrial POTW treatment plants subcategory is no additional control for HAP emissions.

In addition to the MACT floor analysis, the EPA has evaluated the available options for HAP control at existing sources in the non-industrial POTW treatment plants subcategory. Although pretreatment by dischargers may be a viable option for controlling HAP emissions, the EPA has not identified any additional emission controls which could be installed at the POTW treatment plants themselves which would achieve meaningful HAP reductions at a reasonable cost. Therefore, the EPA is not proposing any MACT requirements for existing sources in this subcategory.

B. MACT for New Sources in the Non-Industrial POTW Treatment Plants Subcategory

Of the five best-controlled potential major sources considered in the MACT floor determination for the non-industrial POTW treatment plants subcategory, one source clearly has the best controls in place. This POTW installed controls to reduce benzene emissions and to lower risk as part of a good neighbor policy in response to the California Air Toxics Information and Assessment Act of 1987 (AB2588). This source has covers on all wastewater treatment units up to, but not including, the secondary influent pumping station. In addition, this source uses a closed-vent system to duct the headspace of all covered treatment units, except primary clarifiers, to granular activated carbon control devices which are effective at reducing HAP emissions. This source sets the MACT floor and is the basis for the MACT standard for new or reconstructed sources in the non-industrial POTW treatment plants subcategory.

C. MACT for Existing Sources in the Industrial POTW Treatment Plants Subcategory

Because the EPA has not at this time identified any sources in this proposed subcategory, determination of a MACT floor for this subcategory is not feasible. Any existing source in this subcategory will be a POTW treatment plant which installs and operates specific HAP controls because it receives from an industrial user a waste stream which requires controls pursuant to another NESHAP. The industrial facility discharging the waste stream to the POTW is responsible for compliance with the emission control requirements

of the industrial NESHAP, and the POTW may be considered its agent for purposes of such compliance. A POTW receiving regulated waste streams from multiple sources would need to install and operate controls which meet all requirements of the NESHAP applicable to the sources. In the case of conflicting NESHAP requirements, the more stringent of the requirements will apply. This proposed standard would establish an equivalent MACT control requirement directly applicable to affected sources in the industrial POTW treatment plants subcategory.

D. MACT for New Sources in the Industrial POTW Treatment Plants Subcategory

New sources within the industrial POTW treatment plants subcategory would be new or reconstructed POTW treatment plants receiving from an industrial user a waste stream subject to another NESHAP where the discharger has elected to comply with the NESHAP by utilizing off-site treatment. As in the case of existing sources in this subcategory, the EPA is proposing to establish a parallel control requirement directly applicable to new and reconstructed sources in the industrial POTW treatment plants subcategory.

As noted earlier, the control requirements for new and reconstructed sources cannot be less stringent than the emission control that is achieved in practice by the best controlled similar source. There is no logical reason why new or reconstructed sources in the industrial subcategory cannot achieve emission reductions at least as great as those for other new or reconstructed POTW treatment plants. Accordingly, the MACT floor for new or reconstructed industrial POTW treatment plants is based on the same source as was utilized for new or reconstructed sources in the non-industrial category. In order to assure that control requirements are at least equivalent to those established by the applicable industrial NESHAP, the MACT standard proposed for new or reconstructed sources in the industrial POTW treatment plants subcategory is the HAP controls required by the specific NESHAP applicable to the industrial user, or the control requirement(s) for new sources in the non-industrial POTW treatment plants subcategory (see section IV.B., MACT for New Sources in the Non-Industrial POTW Treatment Plants Subcategory, of today's proposal), whichever is more stringent.

V. Solicitation of Comments

Comments are specifically requested on two aspects of today's proposal, pretreatment and wastewater collection systems, as described in the following paragraphs. The Agency has determined that it needs more information on these two aspects to assist in defining the importance of their effect on HAP emissions from POTW. Information received as a result of this solicitation will be reviewed, analyzed, and summarized by the EPA. If the EPA receives information indicating that its original conclusions regarding HAP emissions and controls are substantially incorrect, the EPA will review its current proposal in light of such information. In addition to information received as a result of this solicitation, the EPA intends to provide information that has been reviewed and analyzed during the proposal development process thus far (e.g., emissions estimation models, emissions control techniques) as guidance on the reduction of HAP emissions from POTW.

A. Pretreatment

The pretreatment program is authorized by the Clean Water Act. Regulations at 40 CFR 403.8(a) require all POTW that have a total design flow greater than five MGD and that receive pollutants from industrial users which pass through or interfere with the operation of the POTW or are otherwise subject to pretreatment standards to establish pretreatment programs. Industry representatives and State and local agency representatives have indicated that pretreatment is the preferred means of HAP emissions control for POTW. The use of pretreatment processes to control HAP emissions from POTW would control HAP emissions from wastewater collection systems, in addition to HAP emissions from POTW treatment plants. Further, additional information on pretreatment practices by industry may also give some insight concerning future HAP emissions from POTW.

The EPA is soliciting quantitative data on the effectiveness of pretreatment program implementation in reducing overall HAP loading to POTW (including wastewater collection systems); the effectiveness of pretreatment in reducing emissions of HAP from POTW (including wastewater collection systems); the cost of implementing and operating an effective pretreatment program; observed trends in industrial HAP discharges via wastewater; and any other information relevant in the assessment of POTW HAP emissions as they are affected by pretreatment programs.

B. Wastewater Collection Systems

Wastewater collection systems have been identified as significant sources of HAP emissions from certain POTW. However, little information is currently available to the EPA regarding these systems.

The EPA is soliciting quantitative data on the design and operation of wastewater collection systems, and scientifically supported data on the measurement or estimation of emissions from wastewater collection systems; information on industry trends to reduce or eliminate HAP emissions; and any other information relevant to the assessment of POTW collection system HAP emissions.

VI. Administrative Requirements

A. Docket

The docket number for this action is A–96–46. The principal purposes of the docket are: (1) To allow interested parties a means to identify and locate documents so that they can effectively participate in the rulemaking process; and (2) to serve as the record in case of judicial review (except for interagency review materials) [section 307(d)(7)(A) of the Act]. This docket contains copies of the supporting information considered by the EPA in the development of this proposal. The docket is available for public inspection at the EPA's Air and Radiation Docket and Information Center, the location of which is given in the **ADDRESSES** section of this proposal.

B. 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, 44 U.S.C. 3501 *et seq.* An Information Collection Request (ICR) document has been prepared by EPA (ICR No. 1891.01) and a copy may be obtained from Sandy Farmer by mail at OPPE Regulatory Information Division; U.S. Environmental Protection Agency (2137); 401 M St., S.W.; Washington, DC 20460, by email at farmer.sandy@epamail.epa.gov, or by calling (202) 260–2740. A copy may also be downloaded off the internet at http://www.epa.gov/icr.

Generally, respondents are required to submit one-time reports of (1) start of construction for new facilities and (2) anticipated and actual start-up dates for new facilities. For sources constructed or reconstructed after the effective date

of the relevant standard, the regulation requires that the source submit an application for approval of construction or reconstruction. The application is required to contain information on the air pollution control that will be used for each potential HAP emission point.

For POTW facilities, the public reporting and recordkeeping burden is estimated to average 41 hours per respondent per year. This estimate includes time for preparing and submitting notices, preparing and submitting demonstrations and applications, reporting releases, gathering information, and preparing and submitting reports. No capital costs are anticipated.

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, OPPE 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., N.W., Washington, DC 20503, marked ''Attention: Desk Officer for EPA.'' Include the ICR number in any correspondence. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after December 1, 1998, a comment to OMB is best assured of having its full effect if OMB receives it by December 31, 1998. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Executive Order 12866

Under Executive Order 12866 [58 FR 5173 (October 4, 1993)], the EPA must determine whether this regulatory action would be ''significant'' and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The criteria set forth in section one of the Executive Order for determining whether a regulation is a significant rule are as follows: (1) It is likely to have an annual effect on the economy of $100 million or more, or adversely and materially affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal government communities; (2) it is likely to create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) it is likely to materially alter the budgetary impact of entitlements, grants, user fees or loan programs, or the rights and obligations of recipients thereof; or (4) it is likely to raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The OMB has deemed this regulatory action significant and has requested review of this proposed rulemaking package. Therefore, the EPA submitted this action to OMB for review. Changes made in response to OMB suggestions or recommendations are documented in the public record.

D. Regulatory Flexibility Act

The EPA's findings in this section are the result of the statutory requirements of the Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act.

This proposed rule would impose no new requirements on existing industrial or non-industrial POTW treatment plants or new industrial POTW treatment plants. The EPA is uncertain whether any new non-industrial POTW treatment plants would be of sufficient size to be subject to this rule, but the number of affected sources would be very small in any case. Therefore, the EPA finds that this proposed rule would not have a significant impact on a substantial number of small entities. As such, neither a formal Initial Regulatory Flexibility Analysis nor a detailed small business analysis is necessary. Therefore, I certify that this action will not have a significant economic impact on a substantial number of small entities.

E. Unfunded Mandates

Pursuant to sections 202, 203, and 205 of the Unfunded Mandates Reform Act of 1995 (Unfunded Mandates Act), signed into law on March 22, 1995, the EPA has determined that the action proposed today would 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. Therefore, the requirements of the Unfunded Mandates Act do not apply to this action.

F. Executive Order 13045

Executive Order 13045, ''Protection of Children from Environmental Health and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that the EPA determines: (1) ''economically significant'' as defined under Executive Order 12866; and (2) the environmental health or safety risk addressed by the rule has a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonable feasible alternatives considered by the Agency. This proposed rule is not subject to Executive Order 13045 because it does not involve decisions on environmental health risks or safety risks that may disproportionately affect children.

G. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (the NTTAA), Pub. L. No. 104–113, § 12(d) (15 U.S.C. 272 note), directs the 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, business practices, etc.) that are developed or adopted by voluntary consensus standard bodies. The NTTAA requires the EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking includes technical standards and requirements for taking measurements. Consequently, the EPA searched for applicable voluntary consensus standards by

searching the National Standards System Institute (NSSN) database. The NSSN is an automated service provided by the American National Standards Institute for identifying available national and international standards.

The EPA searched for methods and tests required by this proposed rule, all of which are methods or tests previously promulgated. The proposed rule includes methods that measure: (1) vapor leak detection (EPA Method 21); (2) volatile organic compound concentration in vented gas stream (EPA Method 18); (3) volumetric flow rate of the vented gas stream (EPA Methods 2, 2A, 2C, or 2D); and (4) sampling site location (Method 1 or 1A). These EPA methods are found in Appendix A to parts 60, 63, and 136.

Except for EPA Methods 2 and 2C (Appendix A to part 60), no other potentially equivalent methods for the methods and tests in the proposal were found in the NSSN database search. The EPA identified one Chinese (Taiwanese) National Standard (CNS) which may potentially be an equivalent method to EPA Methods 2 and 2C. The CNS method is CNS K9019 for measuring velocity and flow rates in stack gases.

However, the EPA does not believe that CNS K9019 is a voluntary consensus method. It is unlikely that CNS K9019 was considered by industry groups or national standards setting organizations because it was not developed in the U.S. and there is no available information about it in the U.S.

To confirm EPA's belief, the EPA is asking for comment on whether any U.S. industry has adopted CNS K9019 as a voluntary consensus method. The EPA is also asking for comment on whether any potential voluntary consensus methods exist that could be allowed in addition to the methods in the proposal. Methods submitted for evaluation should be accompanied with a basis for the recommendation, including method validation data and the procedure used to validate the candidate method (if a method other than Method 301, 40 CFR part 63, Appendix A was used).

H. Executive Order 12875: Enhancing the Intergovernmental Partnership

Under Executive Order 12875, the 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, or EPA consults with those governments. If the EPA complies by consulting, Executive Order 12875 requires EPA to provide to the Office of Management and Budget a description of the extent of the 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 the 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.''

The EPA has concluded that this rule may create a mandate on local governments and that the Federal government will not provide the funds necessary to pay the direct costs incurred by local governments in complying with the mandate. Today's rule does not create a mandate on State or tribal governments, or impose any enforceable duties on these entities. State, local, and tribal governments will have the responsibility to carry out this rule by incorporating it into permits and enforcing it, as delegated. They will collect permit fees that pay for the costs of applying the rule.

In developing this rule, the EPA consulted with these governments to enable them to provide meaningful and timely input in the development of this rule. As discussed in section I.D., consultation opportunities included presumptive MACT partnerships, stakeholder meetings, and participation on the internal working group that prepared the proposed standards. State and local regulatory agencies are expected to be in favor of this proposal. Some representatives of local governments have expressed concerns about the emission models and testing used to determine area source status. The EPA will continue to work with them to resolve their concerns.

Under this proposed rule, new air pollution control requirements are imposed only on new non-industrial POTW treatment plants. Representatives of local governments have told the EPA that a new non-industrial major POTW treatment plant is not likely to be built within the next five years. Should such a facility be built, it would likely recover any costs of air pollution controls through increased user fees applied to the industries responsible for the discharge of hazardous air pollutants to the sewer system. Under any scenario, the EPA believes that the health and environmental benefits of this proposed rule outweigh any potential costs to local government entities.

I. Executive Order 13084: Consultation and Coordination With Indian Tribal Governments

Under Executive Order 13084, the 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, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to 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 the 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 the EPA to develop an effective process permitting elected officials 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. Today's rule would impose no new requirements on existing industrial or non-industrial POTW treatment plants or new industrial POTW treatment plants. The EPA is uncertain whether any new non-industrial POTW treatment plants would be of sufficient size to be subject to this rule, but the number of affected sources would be very small in any case and would not be located in the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply.

List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Pretreatment, Publicly owned treatment works, Reporting and recordkeeping requirements.

Dated: November 12, 1998.

Carol M. Browner,

Administrator.

Chapter I, part 63 of the Code of Federal Regulations is proposed to be amended as follows:

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

1. The authority citation for part 63 continues to read as follows:

Authority: Secs. 101, 112, 114, 116, and 301 of the Clean Air Act (42 U.S.C. 7401, *et seq.*, as amended by Pub. L. 101–549, 104 Stat. 2399).

2. Part 63 is amended by adding subpart VVV to read as follows:

Subpart VVV—National Emission Standards for Hazardous Air Pollutants From Publicly Owned Treatment Works

Applicability

Sec.
63.1580 Am I subject to this subpart?
63.1581 How will the EPA determine if I am in compliance with this subpart?
63.1582 Does the regulation distinguish between different types of POTW treatment plants?

Industrial POTW Treatment Plant Description and Requirements

63.1583 What are the characteristics of an industrial POTW treatment plant?
63.1584 What are the emission points and control requirements for an industrial POTW treatment plant?
63.1585 When do I have to comply?
63.1586 How does an industrial POTW treatment plant demonstrate compliance?

Non-industrial POTW Treatment Plants Requirements

63.1587 What are the emission points and control requirements for a non-industrial POTW treatment plant?
63.1588 When do I have to comply?
63.1589 What inspections must I conduct?
63.1590 What records must I keep?
63.1591 What reports must I submit?

General Requirements

63.1592 What are my notification requirements?
63.1593 Which General Provisions apply to my POTW treatment plant?
63.1594 Who enforces this subpart?

Additional Information

63.1595 How do I determine if my POTW treatment plant is a major source of HAP emissions?
63.1596 Are there any other ways for me to control HAP emissions from my POTW treatment plant?
63.1597 List of definitions.
Table 1 to subpart VVV—List of Hazardous Air Pollutants of Concern for Subpart VVV
Table 2 to subpart VVV—Applicability of 40 CFR part 63 General Provisions to Subpart VVV

Subpart VVV—National Emission Standards for Hazardous Air Pollutants From Publicly Owned Treatment Works

Applicability

§ 63.1580 Am I subject to this subpart?

(a) You are subject to this subpart if:

(1) You own or operate a new or existing publicly owned treatment works (POTW); and

(2) Your POTW treatment plant is a major source of HAP emissions. Major source means that stationary sources at your POTW treatment plant emit or have the potential to emit a single hazardous air pollutant (HAP) of concern (see Table 1. List of Hazardous Air Pollutants of Concern for Subpart VVV, of this subpart) at a rate of 10 tons or more per year or any combination of HAP of concern at a rate of 25 or more tons per year; or

(3) Your POTW treatment plant is an area source that increases its emissions of (or its potential to emit) HAP such that it is a major source of HAP emissions.

Note 1 to paragraph (a) of this section: Section 63.1595 presents the procedures for determining if a POTW treatment plant is a major source of HAP emissions. Though this subpart addresses only wastewater emissions, the determination should consider emissions from all stationary sources at the facility, including sewage sludge incinerators, stationary internal combustion engines, boilers, and turbines.

Note 2 to paragraph (a) of this section: To determine if your POTW treatment plant is a major source due solely to wastewater emissions, you need to understand industrial loadings of HAP into your sewer system. Publicly owned treatment works treatment plants which treat mostly high-strength industrial wastewater can be major sources with a daily flow rate as low a 4 million gallons per day (MGD). Publicly owned treatment works treatment plants with low concentrations of HAP in their influent may not be major sources (due to wastewater emissions) even with a flow rate of 300 MGD.

(b) If your POTW treatment plant is not a major source then you are not subject to this subpart, and as such:

(1) You do not have to notify the Administrator that you are an area source.

(2) You do not have to apply for a title V permit under 40 CFR Part 70. However, your State has the option to require you to apply for such a permit.

Note to paragraph (b) of this section: Although you are not required to maintain any records of your determination that you are not a major source, if your POTW treatment plant is unique (e.g., you are very close to the 25/10 tpy criteria defining a major source, your influent waste stream contains a high percentage of industrial waste, you have a fairly high average annual flow rate) it may be to your advantage to maintain such a record in case the EPA or your State authority requests proof of your major source determination.

§ 63.1581 How will the EPA determine if I am in compliance with this subpart?

(a) If you fail to comply with any or all of the provisions of this subpart, you will be considered in violation of this regulation. For example, failure to perform any or all of the following, specified in § 63.1589 of this subpart, would be a violation: failure to visually inspect the cover on your treatment unit; failure to repair a defect on a treatment unit in use within the specified time period; or failure to report a delay in repair.

(b) The Administrator will determine compliance with this subpart by reviewing your records or inspecting your POTW treatment plant.

(c) Your POTW treatment plant may be exempted from compliance with this regulation if the President determines that it is in the national security interests of the United States to do so. This exemption may last for up to two years at a time, and may be extended for additional periods of up to two years each.

§ 63.1582 Does the subpart distinguish between different types of POTW treatment plants?

Yes, the subpart divides all POTW treatment plants into two subcategories. A POTW treatment plant which does not meet the characteristics of an industrial POTW treatment plant belongs in the non-industrial POTW treatment plant subcategory. These terms are defined in § 63.1597 List of Definitions, of this subpart.

Industrial POTW Treatment Plant Description and Requirements

§ 63.1583 What are the characteristics of an industrial POTW treatment plant?

(a) Your POTW treatment plant is an industrial POTW treatment plant if wastewater treatment at your POTW treatment plant enables an industrial user to comply with the treatment requirements of its own national emission standards for hazardous air pollutants (NESHAP). Industrial POTW treatment plant is defined in § 63.1597 of this subpart.

(b) If, in the future, you begin accepting a specific industrial waste stream for treatment at your POTW treatment plant to enable an industrial user to comply with the treatment requirements of another NESHAP(s), then your POTW treatment plant will be considered an industrial POTW treatment plant.

(c) If your POTW treatment plant accepts one or more specific regulated industrial waste streams as part of compliance with one or more other NESHAPs then you are subject to all the requirements of each appropriate NESHAP for each waste stream, as described in the following section. In the case of conflicting NESHAP requirements, the more stringent of the requirements will apply.

§ 63.1584 What are the emission points and control requirements for an industrial POTW treatment plant?

(a) The emission points and control requirements for an existing industrial POTW treatment plant are specified in the appropriate NESHAP(s) for the industrial user(s) (see above). For example, an existing industrial POTW treatment plant which provides treatment for a facility subject to subpart FF of this part, the National Emission Standard for Benzene Waste Operations, must meet the treatment and control requirements specified in § 61.348(d)(4).

(b) The emission points and control requirements for a new or reconstructed industrial POTW treatment plant that is a major source of HAP emissions are also specified in the appropriate NESHAP(s) for the industrial user(s), or in § 63.1587, whichever is more stringent. Reconstruction is defined in § 63.1597 of this subpart.

§ 63.1585 When do I have to comply?

(a) *Existing industrial POTW treatment plant.* If you have an existing industrial POTW treatment plant, the appropriate NESHAP(s) for the industrial user(s) will set your compliance date(s). For example, an industrial POTW treatment plant providing treatment for chemical plants regulated by the Hazardous Organic NESHAP will have to comply by April 22, 1999.

(b) *New industrial POTW treatment plant.* If you have a new industrial POTW treatment plant, you must be in compliance as soon as you begin accepting the waste stream(s) for treatment. If, in the future, you begin accepting a specific regulated industrial waste stream(s) for treatment, you must be in compliance by the time specified in the appropriate NESHAP(s) for the industrial user(s).

§ 63.1586 How does an industrial POTW treatment plant demonstrate compliance?

(a) An existing industrial POTW treatment plant demonstrates compliance by operating treatment and control devices which meet all requirements specified in the appropriate industrial NESHAP(s). Requirements may include performance tests, routine monitoring, recordkeeping, and reporting.

(b) A new or reconstructed industrial POTW treatment plant that installs controls required by the appropriate industrial NESHAP(s), demonstrates compliance by operating treatment and control devices which meet all requirements specified in the appropriate industrial NESHAP(s). A new or reconstructed industrial POTW treatment plant that installs controls specified by § 63.1587, demonstrates compliance by meeting all requirements in §§ 63.1588 through 63.1592.

Non-industrial POTW Treatment Plant Requirements

§ 63.1587 What are the emission points and control requirements for a non-industrial POTW treatment plant?

There are no control requirements for an existing non-industrial POTW treatment plant. The control requirements for a new or reconstructed non-industrial POTW treatment plant that is a major source of HAP emissions are covers on the emission points up to, but not including the secondary influent pumping station. These emission points are treatment units that include, but are not limited to, influent waste stream conveyance channels, bar screens, grit chambers, grinders, pump stations, aerated feeder channels, primary clarifiers, primary effluent channels, and primary screening stations. In addition, all covered units, except primary clarifiers, must have the air in the headspace ducted to a control device in accordance with § 63.693, the standards for closed-vent systems and control devices in subpart DD. Reconstructed is defined in § 63.1597 of this subpart.

(a) Covers must be tightly fitted and designed and operated to minimize exposure of the waste to the atmosphere. This includes, but is not limited to, the absence of visible cracks, holes, or gaps in the roof sections or between the roof and the separator wall; broken, cracked, or otherwise damaged seals or gaskets on closure devices; and broken or missing hatches, access covers, caps, or other closure devices.

(b) If waste is in a treatment unit, each opening must be maintained in a closed, sealed position, unless plant personnel are present and conducting waste sampling or removal, or equipment inspection, maintenance, or repair.

(c) If a treatment unit is not equipped with a closed-vent system and control device, it must be designed to operate with minimal ventilation (e.g., at or near zero) of the airspace under the cover to reduce both air emissions and energy consumption.

(d) You must operate and maintain your POTW treatment plant at all times to minimize HAP emissions.

§ 63.1588 When do I have to comply?

If your POTW treatment plant began construction on or after December 1, 1998, and your POTW treatment plant is a major source of HAP emissions, you must comply with all provisions of this subpart either immediately upon startup, or by the date of promulgation of this subpart, whichever date is later.

§ 63.1589 What inspections must I conduct?

If your treatment units are required to have covers, you must conduct the following inspections:

(a) You must visually check the cover and its closure devices for defects that could result in air emissions. Defects include, but are not limited to, visible cracks, holes, or gaps in the roof sections or between the roof and the separator wall; broken, cracked, or otherwise damaged seals or gaskets on closure devices; and broken or missing hatches, access covers, caps, or other closure devices.

(b) You must perform an initial inspection at start-up with follow-up inspections at least once per year.

(c) In the event that you find a defect on a treatment unit in use, you must repair the defect within 45 days. If you cannot repair within 45 days, you must notify the EPA or the designated State authority and report the reason for the delay and the date you expect to complete the repair. If you find a defect on a treatment unit not being used, you must repair the defect before using the treatment unit.

(d) If you own or operate a control device used to meet the requirements for § 63.1587, you must comply with the inspection and monitoring requirements of § 63.695(c).

§ 63.1590 What records must I keep?

(a) You must prepare and maintain the following records:

(1) A record for each treatment unit inspection required by § 63.1589(b) of this subpart. You must include the following information: a treatment unit identification number (or other unique identification description as selected by you) and the date of inspection.

(2) For each defect detected during inspections required by § 63.1589(b) of this subpart, you must record the following information: the location of the defect, a description of the defect, the date of detection, the corrective action taken to repair the defect, and the date the repair to correct the defect is completed.

(3) In the event that repair of the defect is delayed, in accordance with the provisions of § 63.1589(c) of this subpart, you must also record the reason for the delay and the date you expect to complete the repair.

(4) If you own or operate a control device used to meet the requirements for § 63.1587, you must comply with the recordkeeping requirements of § 63.696 (a), (b), (g), and (h).

(b) [Reserved]

§ 63.1591 What reports must I submit?

(a)(1) You must submit to the Administrator a notification of compliance status, signed by the responsible official who must certify its accuracy, attesting to whether your POTW treatment plant has complied with this regulation. This notification must be submitted before a title V permit is issued to you, and each time a notification of compliance status is required under this subpart. The notification must list—

(i) The methods that were used to determine compliance;

(ii) The results of any monitoring procedures or methods that were conducted;

(iii) The methods that will be used for determining continuing compliance;

(iv) The type and quantity of HAP emitted by your POTW treatment plant;

(v) A description of the air pollution control equipment (or method) for each emission point; and

(vi) Your statement that your POTW treatment plant has complied with this regulation.

(2) You must send this notification before the close of business on the 60th day following the completion of the relevant compliance demonstration activity specified in this regulation.

(b) After you have been issued a title V permit, you must comply with all requirements for compliance status reports contained in your title V permit, including reports required under this subpart. After you have been issued a title V permit, and each time a notification of compliance status is required under this subpart, you must submit the notification of compliance status to the appropriate permitting authority, as described in § 63.1591(d) of this subpart, following completion of the relevant compliance demonstration activity specified in this regulation.

(c) You must comply with the delay of repair reporting required in § 63.1589(c).

(d) If your State has not been delegated authority you must submit reports to your Regional Office of the EPA. If your State has been delegated authority you must submit reports to your delegated State authority and you must send a copy of each report submitted to the State to your Regional Office of the EPA. Your Regional Office may waive this requirement for any reports at its discretion.

(e) You may apply to the Administrator for a waiver of recordkeeping and reporting requirements if you believe your source is already in compliance with this standard. This application must accompany the compliance status report required under § 63.1592 of this subpart, or your title V permit. The application must include whatever information you consider useful to convince the Administrator that a waiver of recordkeeping and reporting is warranted.

(f) If you own or operate a control device used to meet the requirements for § 63.1587, you must submit the reports required by § 63.697(b), including a notification of performance tests, a performance test report, a startup, shutdown, and malfunction report, and a summary report.

General Requirements

§ 63.1592 What are my notification requirements?

(a) If your State has not been delegated authority you must submit notifications to the appropriate Regional Office of the EPA. If your State has been delegated authority you must submit notifications to your State and a copy of each notification to the appropriate Regional Office of the EPA. The Regional Office may waive this requirement for any notifications at its discretion.

(b) You must notify the Administrator in writing when your POTW treatment plant becomes subject to this standard. The notification, which must be submitted not later than 120 calendar days after the effective date of this standard (or within 120 calendar days after your POTW treatment plant becomes subject to the relevant standard), must provide the following information:

(1) Your name and address;

(2) The address (i.e., physical location) of your POTW treatment plant;

(3) An identification of this standard as the basis of the notification and your POTW treatment plant's compliance date; and

(4) A brief description of the nature, size, design, and method of operation of your POTW treatment plant, including its operating design capacity and an identification of each point of emission for each HAP, or if a definitive identification is not yet possible, a preliminary identification of each point of emission for each HAP.

§ 63.1593 Which General Provisions apply to my POTW treatment plant?

The General Provisions (40 CFR Part 63, subpart A) are NESHAP that apply to owners and operators of major sources of HAP emissions in all the source categories, including the POTW source category. Table 2 of this subpart lists the General Provisions which apply to POTW treatment plants.

§ 63.1594 Who enforces this subpart?

If the Administrator has delegated authority to your State, then the State enforces this subpart. If the Administrator has not delegated authority to your State, then the EPA Regional Office enforces this subpart.

§ 63.1595 How do I determine if my POTW treatment plant is a major source of HAP emissions?

(a)(1) If your POTW treatment plant is co-located with another major source of HAP emissions (e.g., a sewage sludge incinerator) then your POTW treatment plant is subject to this subpart.

(2) If your POTW treatment plant has total emissions (or potential emissions) of less than 10 tpy of any single HAP compound, or less than 25 tpy of any combination of HAP compounds, and it is co-located with one or more additional sources that also have total emissions (or potential emissions) of less than 10 tpy of any single HAP compound, or less than 25 tpy of any combination of HAP compounds, but together all sources have total emissions (or potential emissions) of 10 tpy or greater of any single HAP compound, or 25 tpy or greater of any combination of HAP compounds, then your POTW treatment plant and the other source are subject to this subpart.

(b) If your POTW treatment plant has total emissions (or potential emissions) of 10 tpy or greater of any single HAP compound, or 25 tpy or greater of any combination of HAP compounds, then your POTW treatment plant is a major source of HAP emissions. You may use the following methods, as a tiered approach, to determine if your POTW treatment plant meets or exceeds these emission limitations.

(1) If your POTW treatment plant's annual average wastewater throughput multiplied by the annual average HAP concentration of all HAP compounds present in the influent is 25 tpy or greater, or the annual average wastewater throughput multiplied by the annual average influent concentration of any single HAP compound in the influent is 10 tpy or

greater, then you are a major source of HAP emissions.

(2) You may use the emission factors provided in Table 1 of this subpart, to conservatively estimate emissions from your POTW treatment plant. Multiply your POTW treatment plant's annual average wastewater throughput by the annual average HAP concentration of each HAP compound in the influent by the compound-specific fraction emitted (f_e) value to calculate estimated emissions of each HAP compound from your POTW treatment plant. If the estimated emissions are 10 tpy or greater of any single HAP compound, or 25 tpy or greater of any combination of HAP compounds, then your POTW treatment plant is a major source of HAP emissions.

(3) You may utilize an approved fate model to determine emissions from your POTW treatment plant. The EPA has approved the fate model entitled Wastewater Treatment Compound Property Processor and Air Emissions Estimator, commonly known as WATER8, for determination of emissions from wastewater treatment processes. If the results of applying WATER8 to your POTW treatment plant indicate that your emissions are 10 tpy or greater of any single HAP as compound, or 25 tpy or greater of any combination of HAP compounds, then your POTW treatment plant is a major source of HAP emissions. In the event that your POTW treatment plant's emissions have already been determined using another fate model, you may be able to use the results from that modeling effort as an initial screening tool to determine if your POTW treatment plant is a major source of HAP emissions. However, if there is any ambiguity concerning your POTW treatment plant's status as a major source of HAP emissions, the EPA will rely exclusively on the use of emissions estimates generated using WATER8.

(c) If you use your average influent wastewater HAP concentration and flow to determine if you are a major source, you may determine the HAP concentration of your influent waste stream using either direct measurement or knowledge of your waste stream. Your average annual wastewater flow must be determined as specified in your NPDES permit.

(1) To use direct measurement to determine your influent HAP concentration, you must collect samples of your influent waste stream that represent the complete range of HAP compositions and quantities that occur in your waste stream during the entire averaging period. You must collect each sample in accordance with the requirements specified in ''Test Methods for Evaluating Solid Waste, Physical/Chemical Methods,'' EPA Publication No. SW–846, and insure that minimum loss of organics throughout the sample collection and handling process occurs and that sample integrity is maintained. You must prepare and analyze each collected sample in accordance with the requirements of Method 305 in 40 CFR part 63, appendix A or Method 25D in 40 CFR part 60, appendix A.

(2) To use your knowledge of the waste stream to determine the average HAP concentration you must prepare and record sufficient information that documents the basis for that knowledge. Examples of information that may be used as the basis for knowledge of the waste stream include: samples analyzed using test methods other than Method 305 or Method 25, such as EPA Methods 600 and 8000; industrial pretreatment/source control permit information, including compliance sampling and analysis; species-specific HAP chemical test data for the waste stream from previous testing still applicable to the current operations; or other previous test data.

(i) If you use test data as the basis for knowledge of the waste stream, then you must document the test method, sampling protocol, and the means by which sampling variability and analytical variability are accounted for in the determination of the HAP concentration. For example, you may use HAP concentration test data that are validated in accordance with Method 301 in appendix A of 40 CFR part 63 as the basis for knowledge of the waste stream.

(ii) If you use species-specific HAP chemical concentration test data as the basis for knowledge of the waste stream you must adjust the test data results to the corresponding total HAP concentration value that would be reported had the samples been analyzed using Method 305 in the appendix to 40 CFR part 63, subpart G.

(d) If you make any changes or modifications to your POTW treatment plant that could cause your HAP emissions (or potential HAP emissions) to increase you must consider those changes or modifications when determining if your POTW treatment plant is a major source. Such changes may include, but are not limited to:

(1) If at any time you add new equipment to your POTW treatment plant or implement a process change, the added equipment or process change is considered an integral part of your POTW treatment plant and must be considered when determining if your POTW treatment plant is a major source;

(2) If you expand your existing POTW treatment plant by adding a new treatment line within a contiguous area and under common control, the new treatment line is considered an integral part of your existing POTW treatment plant and must be considered when determining if your POTW treatment plant is a major source; or

(3) If you reconstruct your POTW treatment plant (as defined in § 63.1597 List of Definitions, of this regulation) then you must comply with the requirements for a new or reconstructed POTW treatment plant in this subpart.

§ 63.1596 Are there any other ways for me to control HAP emissions from my POTW treatment plant?

(a) You may request permission to use an alternative means of emission limitation to control HAP emissions from your plant. You must collect, verify, and submit to the Administrator information demonstrating that the alternative achieves emission reductions which are at least equivalent to the reductions which would be achieved under this subpart.

(b) If it appears that the alternative means of HAP emission limitation will achieve a reduction in HAP emissions at least equivalent to the reduction in HAP emissions from your source achieved under this regulation, the Administrator will propose to amend this subpart to permit you to use the alternative means for purposes of compliance with this subpart. Such an amendment may include specific requirements for operation and maintenance as a condition of the permission. Any amendment to permit you to use an alternative means of emission limitation will be adopted only after notice and an opportunity for comment.

§ 63.1597 List of definitions.

Affected Source means a stationary POTW treatment plant that is regulated by this standard.

Area Source means any stationary source of HAP that is not a major source.

Cover means a device that prevents or reduces air pollutant emissions to the atmosphere by forming a continuous barrier over the waste material managed in a treatment unit. A cover may have openings (such as access hatches, sampling ports, gauge wells) that are necessary for operation, inspection, maintenance, and repair of the treatment unit on which the cover is used. A cover may be a separate piece of equipment which can be detached and removed from the treatment unit or

a cover may be formed by structural features permanently integrated into the design of the treatment unit. The cover and its closure devices must be made of suitable materials that will minimize exposure of the waste material to the atmosphere, to the extent practical, and will maintain the integrity of the equipment throughout its intended service life.

HAP means hazardous air pollutant.

Industrial User means a non-domestic source introducing any pollutant or combination of pollutants into a POTW. Industrial users can be commercial or industrial facilities whose wastes enter local sewers.

Industrial POTW Treatment Plant means a POTW treatment plant that accepts one or more specific regulated industrial waste streams for treatment that enables an industrial user to comply with the treatment requirements of its own NESHAP. For example, an industry discharges its benzene-containing waste to the POTW treatment plant for treatment to comply with 40 CFR part 61, subpart FF, the National Emission Standard for Benzene Waste Operations. This definition does not include POTW treatment plants that accept industrial waste for treatment from an industrial user whose waste is not specifically regulated under another NESHAP. Examples include POTW treatment plants that accept waste from industries, such as local manufacturing facilities, typically characterized as a significant industrial user by the POTW treatment plant in the POTW's approved pretreatment program.

Non-industrial POTW Treatment Plant means a POTW treatment plant as defined by this § 63.1597 of this subpart that does not meet the definition of an industrial POTW treatment plant as defined by this § 63.1597 of this subpart.

Publicly Owned Treatment Works (POTW) means a treatment works as defined by section 112(e)(5) of the Clean Air Act, which is owned by a State or municipality (as defined by section 502(4) of the Clean Water Act). This definition includes any intercepting sewers, outfall sewers, sewage collection systems, pumping, power, and other equipment. The wastewater treated by these facilities are generated by industrial, commercial, and domestic sources.

POTW Treatment Plant means a treatment works as defined by section 112(e)(5) of the Clean Air Act, which is owned by a State or municipality (as defined by section 502(4) of the Clean Water Act), with the exception that this definition includes ONLY the facilities, units, and processes used to treat municipal wastewater from the time it is discharged from the collection system to begin treatment until treatment is completed. This definition DOES NOT include any sewage collection and conveyance systems, intercepting sewers, or outfall sewers.

Reconstruction means the replacement of components of an affected or a previously unaffected stationary source such that:

(1) The fixed capital cost of the new components exceeds 50 percent of the fixed capital cost that would be required to construct a comparable new source; and

(2) It is technologically and economically feasible for the reconstructed source to meet the relevant standard(s) established by the Administrator (or a State) pursuant to section 112 of the Act. Upon reconstruction, an affected source, or a stationary source that becomes an affected source, is subject to relevant standards for new sources, including compliance dates, irrespective of any change in emissions of HAP from that source.

Treatment Works or Treatment Unit(s) means any devices and systems located at a POTW treatment plant that is used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature, or necessary to recycle or reuse water at the most economical cost over the estimated life of the works; extensions, improvements, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and any works, including site acquisition of the land that will be an integral part of the treatment process (including land used for storage of treated wastewater in land treatment systems prior to land application) or is used for ultimate disposal of residues resulting from such treatment. In addition, ''treatment works'' means any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste, including storm water runoff, or industrial waste.

Waste and Wastewater means a material, or spent or used water or waste, generated from residential, industrial, commercial, mining, or agricultural operations or from community activities that contains dissolved or suspended matter, and that is discarded, discharged, or is being accumulated, stored, or physically, chemically, thermally, or biologically treated in a publicly owned treatment works.

You (including other possessive pronouns such as I, my, our, your) means an owner or operator of a POTW treatment plant.

TABLE 1 TO SUBPART VVV.—LIST OF HAZARDOUS AIR POLLUTANTS OF CONCERN FOR SUPART VVV

CAS No.	Chemical name	Fraction emitted(f_e)
75070	Acetaldehyde	0.2099
75058	Acetonitrile	0.0878
107028	Acrolein	0.1328
107131	Acrylonitrile	0.1130
107051	Allyl chloride	0.9552
71432	Benzene (including benzene from gasoline)	0.7729
100447	Benzyl chloride	0.1873
92524	Biphenyl	0.0999
75252	Bromoform	0.2300
106990	1,3-Butadiene	0.9924
75150	Carbon disulfide	0.9643
56235	Carbon tetrachloride	0.9628
43581	Carbonyl sulfide	0.3401
108907	Chlorobenzene	0.3386
67663	Chloroform	0.7485
126998	Chloroprene	0.6644
98828	Cumene	0.8481
3547044	DDE	0.1128

TABLE 1 TO SUBPART VVV.—LIST OF HAZARDOUS AIR POLLUTANTS OF CONCERN FOR SUPART VVV—Continued

CAS No.	Chemical name	Fraction emitted(f_e)
334883	Diazomethane	0.0739
132649	Dibenzofurans	0.2125
106467	1,4-Dichlorobenzene(p)	0.5492
542756	1,3-Dichloropropene	0.7174
119904	3,3′-Dimethoxybenzidine	0.4736
121697	N,N-Dimethylaniline	0.0885
106898	Epichlorohydrin (1-Chloro-2,3-epoxypropane)	0.0966
106887	1,2-Epoxybutane	0.4049
140885	Ethyl acrylate	0.2299
100414	Ethyl benzene	0.7986
75003	Ethyl chloride (Chloroethane)	0.9633
106934	Ethylene dibromide (Dibromoethane)	0.3134
107062	Ethylene dichloride (1,2-Dichloroethane)	0.4363
151564	Ethylene imine (Aziridine)	0.6887
75218	Ethylene oxide	0.1944
75343	Ethylidene dichloride (1,1-Dichloroethane)	0.7142
0	Glycol ethers[a]	0.0591
76448	Heptachlor	0.2064
118741	Hexachlorobenzene	0.1340
87683	Hexachlorobutadiene	0.7761
77474	Hexachlorocyclopentadiene	0.6313
67721	Hexachloroethane	0.7643
110543	Hexane	0.9998
74839	Methyl bromide (Bromomethane)	0.9165
74873	Methyl chloride (Choromethane)	0.9125
71556	Methyl chloroform (1,1,1-Trichloroethane)	0.3848
78933	Methyl ethyl ketone (2-Butanone)	0.2357
74884	Methyl iodide (Iodomethane)	0.6365
108101	Methyl isobutyl ketone (Hexone)	0.3142
80626	Methyl methacrylate	0.0679
1634044	Methyl tert butyl ether	0.3498
75092	Methylene chloride (Dichloromethane)	0.7593
91203	Naphthalene	0.2248
79469	2-Nitropropane	0.1561
75445	Phosgene	0.9739
1336363	Polychlorinated biphenyls[b] (Aroclors)	0.0241
123386	Propionaldehyde	0.1235
78875	Propylene dichloride (1,2-Dichloropropane)	0.5914
75569	Propylene oxide	0.5101
100425	Styrene	0.8462
96093	Styrene oxide	0.0718
79345	1,1,2,2-Tetrachloroethane	0.1870
127184	Tetrachloroethylene (Perchloroethylene)	0.9693
108883	Toluene	0.7382
8001352	Toxaphene (chlorinated camphene)	0.6473
120821	1,2,4-Trichlorobenzene	0.3248
79005	1,1,2-Trichloroethane	0.3848
79016	Trichloroethylene	0.9197
121448	Triethylamine	0.1025
540841	2,2,4-Trimethylpentane	0.9999
108054	Vinyl acetate	0.4541
593602	Vinyl Bromide	0.9149
75014	Vinyl chloride	0.9958
75354	Vinylidene chloride (1,1-Dichloroethylene)	0.9737
1330207	Xylenes (isomers and mixture)	0.7241
95476	o-Xylenes	0.7085
108383	m-Xylenes	0.7787
106423	p-Xylenes	0.7856

Key:
[a] Ethylene glycol dimethyl ether is the glycol ether of concern.
[b] The following PCB's are of concern: PCB 1221, PCB 1232, PCB 1242, PCB 1248, and PCB 1254.

TABLE 2 TO SUBPART VVV.—APPLICABILITY OF 40 CFR PART 63 GENERAL PROVISIONS TO SUBPART VVV

General provisions reference	Applicable to subpart VVV	Comment
§ 63.1		APPLICABILITY.
§ 63.1(a)(1)	Yes	Terms defined in CAAA.
§ 63.1(a)(2)	Yes	General applicability explanation.

TABLE 2 TO SUBPART VVV.—APPLICABILITY OF 40 CFR PART 63 GENERAL PROVISIONS TO SUBPART VVV—Continued

General provisions reference	Applicable to subpart VVV	Comment
§ 63.1(a)(3)	Yes	Cannot diminish a stricter NESHAP.
§ 63.1(a)(4)	Yes	Not repetitive. Doesn't apply to 112(r).
§ 63.1(a)(5)	No	Section reserved.
§ 63.1(a)(6)–(8)	Yes	Contacts and authorities.
§ 63.1(a)(9)	No	Section reserved.
§ 63.1(a)(10)	Yes	Time period definition.
§ 63.1(a)(11)	Yes	Postmark explanation
§ 63.1(a)(12)–(14)	Yes	Time period changes. Regulation conflict. Force and effect of subpart A.
§ 63.1(b)(1)	Yes	Initial applicability determination of subpart A.
§ 63.1(b)(2)	Yes	Operating permits by States.
§ 63.1(b)(3)	No	Subpart VVV specifies recordkeeping of records of applicability determination.
§ 63.1(c)(1)	Yes	Requires compliance with both subpart A and subpart VVV.
§ 63.1(c)(2)(I)	Yes	State options regarding Title V permit.
§ 63.1(c)(2) (ii)–(iii)	No	State options regarding Title V permit.
§ 63.1(c)(3)	No	Section reserved.
§ 63.1(c)(4)	Yes	Extension of compliance.
§ 63.1(c)(5)	No	Subpart VVV addresses area sources becoming major due to increase in emissions.
§ 63.1(d)	No	Section reserved.
§ 63.1(e)	Yes	Title V permit before a relevant standard is established.
§ 63.2	Yes	DEFINITIONS.
§ 63.3	Yes	UNITS AND ABBREVIATIONS.
§ 63.4		PROHIBITED ACTIVITIES AND CIRCUMVENTION.
§ 63.4(a)(1)–(3)	Yes	Prohibits operation in violation of subpart A.
§ 63.4(a)(4)	No	Section reserved.
§ 63.4(a)(5)	Yes	Compliance dates.
§ 63.4(b)	No	Circumvention discussion not applicable to Subpart VVV.
§ 63.4(c)	Yes	Severability.
§ 63.5		CONSTRUCTION AND RECONSTRUCTION.
§ 63.5(a)(1)	Yes	Construction and reconstruction.
§ 63.5(a)(2)	Yes	New source—effective dates.
§ 63.5(b)(1)	Yes	New sources subject to relevant standards.
§ 63.5(b)(2)	No	Section reserved.
§ 63.5(b)(3)	Yes	No new major sources w/out Administrator approval.
§ 63.5(b)(4)	Yes	New major source notification.
§ 63.5(b)(5)	Yes	New major sources must comply.
§ 63.5(b)(6)	Yes	New equipment added considered part of major source.
§ 63.5(c)	No	Section reserved.
§ 63.5(d)(1)	Yes	Implementation of 112(I)(2)—application of approval of new source construction.
§ 63.5(d)(2)	Yes	Application for approval of construction for new sources listing and describing planned air pollution control system.
§ 63.5(d)(3)	Yes	Application for reconstruction.
§ 63.5(d)(4)	Yes	Administrator may request additional information.
§ 63.5(e)	Yes	Approval of reconstruction.
§ 63.5(f)(1)	Yes	Approval based on State review.
§ 63.5(f)(2)	Yes	Application deadline.
§ 63.6		COMPLIANCE WITH STANDARDS AND MAINTENANCE REQUIREMENTS.
§ 63.6(a)	Yes	Applicability of compliance with standards and maintenance requirements.
§ 63.6(b)	Yes	Compliance dates for new and reconstructed sources.
§ 63.6(c)	Yes	Compliance dates for existing sources apply to existing industrial POTW treatment plants.
§ 63.6(d)	No	Section reserved.
§ 63.6(e)	Yes	Operation and maintenance requirements apply to new sources.
§ 63.6(f)	Yes	Compliance with nonopacity emission standards applies to new sources.
§ 63.6(g)	Yes	Use of alternative nonopacity emission standard applies to new sources.
§ 63.6(h)	No	POTW treatment plants do not typically have visible emissions.
§ 63.6(i)	Yes	Extension of compliance with emission standards applies to new sources.
§ 63.6(j)	No	Subpart VVV addresses the Presidential exemption from compliance with emission standards.
§ 63.7		PERFORMANCE TESTING REQUIREMENTS.
§ 63.7(a)	Yes	Performance testing is required for new sources.
§ 63.7(b)	Yes	New sources must notify the Administrator of intention to conduct performance testing.
§ 63.7(c)	Yes	New sources must comply with quality assurance program requirements.
§ 63.7(d)	Yes	New sources must provide performance testing facilities at the request of the Administrator.
§ 63.7(e)	Yes	Requirements for conducting performance tests apply to new sources.
§ 63.7(f)	Yes	New sources may use an alternative test method.
§ 63.7(g)	Yes	Requirements for data analysis, recordkeeping, and reporting associated with performance testing apply to new sources.
§ 63.7(h)	Yes	New sources may request a waiver of performance tests.
§ 63.8		MONITORING REQUIREMENTS.
§ 63.8(a)	Yes	Applicability of monitoring requirements.
§ 63.8(b)	Yes	Monitoring shall be conducted by new sources.
§ 63.8(c)	Yes	New sources shall operate and maintain continuous monitoring systems (CMS).
§ 63.8(d)	Yes	New sources must develop and implement a CMS quality control program.

TABLE 2 TO SUBPART VVV.—APPLICABILITY OF 40 CFR PART 63 GENERAL PROVISIONS TO SUBPART VVV—Continued

General provisions reference	Applicable to subpart VVV	Comment
§ 63.8(e)	Yes	New sources may be required to conduct a performance evaluation of CMS.
§ 63.8(f)	Yes	New sources may use an alternative monitoring method.
§ 63.8(g)	Yes	Requirements for reduction of monitoring data.
§ 63.9		NOTIFICATION REQUIREMENTS.
§ 63.9(a)	Yes	Applicability of notification requirements.
§ 63.9(b)	Yes	Initial notification requirements.
§ 63.9(c)	Yes	Request for extension of compliance with subpart VVV.
§ 63.9(d)	Yes	Notification that source is subject to special compliance requirements as specified in § 63.6(b)(3) and (4).
§ 63.9(e)	Yes	Notification of performance test.
§ 63.9(f)	No	POTW treatment plants do not typically have visible emissions.
§ 63.9(g)	Yes	Additional notification requirements for sources with continuous emission monitoring systems.
§ 63.9(h)	Yes	Notification of compliance status when the source becomes subject to subpart VVV.
§ 63.9(i)	Yes	Adjustments to time periods or postmark deadlines or submittal and review of required communications.
§ 63.9(j)	Yes	Change of information already provided to the Administrator.
§ 63.10		RECORDKEEPING AND REPORTING REQUIREMENTS.
§ 63.10(a)	Yes	Applicability of notification and reporting requirements.
§ 63.10(b)	Yes	General recordkeeping requirements.
§ 63.10(c)	Yes	Additional recordkeeping requirements for sources with continuous monitoring systems.
§ 63.10(d)	Yes	General reporting requirements.
§ 63.10(e)	Yes	Additional reporting requirements for sources with continuous monitoring systems.
§ 63.10(f)	Yes	Waiver of recordkeeping and reporting requirements.
§ 63.11		FLARES AS A CONTROL DEVICE.
§ 63.11(a) & (b)	Yes	If a new source uses flares to comply with the requirements of subpart VVV, the requirements of § 63.11 apply.
§ 63.12	Yes	STATE AUTHORITY AND DESIGNATION.
§ 63.13	Yes	ADDRESSES OF STATE AIR POLLUTION CONTROL AGENCIES AND EPA REGIONAL OFFICES.
§ 63.14	Yes	INCORPORATION BY REFERENCE.
§ 63.15	Yes	AVAILABILITY OF INFORMATION AND CONFIDENTIALITY.

[FR Doc. 98–31399 Filed 11–30–98; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 260, 261, 262, 264, 268, 269 and 271

[FRL–6195–4]

RIN 2050–AE22

Requirements for Management of Hazardous Contaminated Media (HWIR-media)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Partial withdrawal of proposed rule.

SUMMARY: For the reasons set out in the HWIR-media final rule, officially titled ''Hazardous Remediation Waste Management Requirements (HWIR-media)'' published in the **Federal Register** of November 30, 1998, and the Phase IV LDR final rule, official titled ''Land Disposal Restrictions Phase IV: Final Rule Promulgating Treatment Standards for Metal Wastes and Mineral Processing Wastes; Mineral Processing Secondary Materials and Bevill Exclusion Issues; Treatment Standards for Hazardous Soils, and Exclusion of Recycled Wood Preserving Wastewaters; Final Rule'' (63 FR 28556 (May 26, 1998)) this document withdraws all portions of the HWIR-media proposed rule (61 FR 18780 (April 29, 1996)) except those that were finalized in the above two final rules, or on which action was expressly deferred (i.e., the Treatability Sample Exclusion Rule, that EPA requested comments on expanding in the HWIR-media proposal at 61 FR 18817), in those documents.

ADDRESSES: Supporting materials are available for viewing in the RCRA Information Center (RIC), located at Crystal Gateway I, First Floor, 1235 Jefferson Davis Highway, Arlington, VA. The Docket Identification Number is F–98–MHWF–FFFFF. The RIC is open from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays. To review docket materials, it is recommended that the public make an appointment by calling (703) 603–9230. The public may copy a maximum of 100 pages from any regulatory docket at no charge. Additional copies cost $0.15/page. The index and some supporting materials are available electronically. See the **SUPPLEMENTARY INFORMATION** section for information on accessing them.

FOR FURTHER INFORMATION CONTACT: For general information, contact the RCRA Hotline at (800) 424–9346 or TDD (800) 553–7672 (hearing impaired). In the Washington, DC, metropolitan area, call (703) 412–9810 or TDD (703) 412–3323.

For more detailed information on specific aspects of this rulemaking, contact Michael Fitzpatrick, Office of Solid Waste 5303W, U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460, (703) 308–8411, fitzpatrick.mike@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: The index and supporting materials are available on the Internet. Follow these instructions to access the information electronically:

WWW:http://www.epa.gov/epaoswer/hazwaste/id/hwirmdia.htm

As discussed in the HWIR-media final rule, officially titled ''Hazardous Remediation Waste Management Requirements (HWIR-media)'' published in the **Federal Register** of November 30, 1998, EPA decided to promulgate only selected elements of the HWIR-media proposal, rather than go forward with a more comprehensive approach as proposed.

Although EPA conducted a lengthy outreach process before developing the HWIR-media proposal and made every effort to balance the concerns and interests of various stakeholder groups, public comment on the proposal made it clear that stakeholders fundamentally

disagree on many remediation waste management issues.

EPA agreed with commenters' concerns that the Bright Line approach would be too difficult to implement, and that a Bright Line that would satisfy commenters who wanted the Bright Line levels to consist of very conservative levels would not sufficiently reform the system to remove the existing barriers to efficient, protective remediation waste management. EPA has concluded that pursuing broader regulatory reform would be a time-and resource-intensive process that would most likely result in a rule that would provoke additional years of litigation and associated uncertainty. This uncertainty would be detrimental to the program and have a negative effect on ongoing and future cleanups. Based on these conclusions, the Agency has decided not to finalize either the Bright Line or the Unitary Approach, and recognizes that a purely regulatory response will not solve all of the remediation waste management issues that HWIR-media was designed to solve.

While EPA believes the elements finalized in the final HWIR-media rule published in the **Federal Register** of November 30, 1998 along with the retention of the CAMU rule, will improve remediation waste management and expedite cleanups, the Agency is also convinced that additional reform is needed to expedite the cleanup program, especially to provide greater flexibility for non-media remediation wastes like remedial sludges, address certain statutory permitting provisions, and more appropriate treatment requirements for remediation wastes (for example, treatment that focuses on ''principal threats'' rather than all underlying hazardous constituents). Therefore, the Agency continues to support appropriate, targeted legislation to address application of RCRA Subtitle C land disposal restrictions, minimum technological and permitting requirements to remediation waste and will continue to participate in discussions on potential legislation. If legislation is not forthcoming, the Agency may reexamine its approach to remediation waste regulation and may take additional administrative action.

The elements finalized in the final HWIR-media rule published in the **Federal Register** of November 30, 1998 are:

1. streamlined permitting for treating, storing and disposing of remediation wastes generated at cleanup sites and the elimination of the requirement for facility-wide corrective action at remediation-only facilities;

2. a variation on the proposed remediation piles, called staging piles, modified in response to public comments;

3. a RCRA exclusion for dredged materials managed under Clean Water Act (CWA) or Marine Protection Research and Sanctuaries Act (MPRSA) permits; and

4. streamlined procedures for State authorization.

EPA also finalized, in a separate document (63 FR 28604 (May 26, 1998)), the LDR treatment standards specific to hazardous contaminated soil that were proposed in the HWIR-media proposal. EPA is deferring action on the Treatability Sample Exclusion Rule, that EPA requested comments on expanding in the HWIR-media proposal at 61 FR 18817.

EPA is withdrawing all other portions of the proposal, such as:

1. the proposal under the ''Bright Line'' option to distinguish between lower- and higher-risk contaminated media and give regulatory agencies the flexibility to exempt lower-risk contaminated media from RCRA requirements, and all other comprehensive options discussed in the preamble to the proposed rule (such as the ''Unitary Approach'');

2. the ''Category 2'' proposal for streamlined authorization, and;

3. the portion of the proposal that would have withdrawn the Corrective Action Management Unit or ''CAMU'' rule.

Existing areas of flexibility for managing remediation waste, such as the contained-in and AOC policies, and site-specific land disposal restrictions treatability variances, continue to be available.

Authority: 42 U.S.C. 6912(a), 6921, 6924, 6926, and 6927.

Dated: November 23, 1998.

Timothy Fields, Jr.,

Acting Assistant Administrator, Office of Solid Waste and Emergency Response.

[FR Doc. 98–32000 Filed 11–30–98; 8:45 am]

BILLING CODE 6560–50–P

GENERAL SERVICES ADMINISTRATION

41 CFR Part 101–35

RIN 3090–AG79

User Fees; Network Registration Services

AGENCY: Office of Governmentwide Policy, GSA.

ACTION: Proposed rule.

SUMMARY: This proposed rule establishes fees for registration services provided by GSA to Government agencies and commercial organizations in order to provide and maintain unique global names and network addresses for X.400 Private Management Domains (PMRD) and the X.500 Organizational Units (OU), Administrative Authority Identifiers (AAI) and Internet .GOV Domain names.

DATES: Comments must be submitted February 1, 1999 to be considered in the formulation of the final rule.

ADDRESSES: Written comments should be sent to Mr. Jack L. Finley, Director, Center for Electronic Messaging Technologies (TOT), General Services Administration, 1800 F Street, NW, Suite G–222, Washington DC 20405. E-mail comments may be sent to jack.finley@fed.gov.

FOR FURTHER INFORMATION CONTACT: Mr. Jack L. Finley, 202–501–3932.

SUPPLEMENTARY INFORMATION:

A. Background

The Open Systems Interconnection (OSI) Reference Model uses naming hierarchies in order to provide global unambiguous identities. The International Organization for Standardization (ISO) defines two major naming hierarchies or ''trees.'' The ISO 3166 Codes for the Representation of Names of Countries assigns the United States with an alpha-2 code of US and a numeric code of 840. The American National Standards Institute (ANSI) has assigned the Federal Government with the alpha code of ''GOV'' and the numeric code of 101.

Another ISO naming structure is ISO 6523, Structure for the Identification of Organizations. The British Standards Institute (under ISO authority) has issued an International Code Designator (ICD) of 0005 to the National Institute of Standards and Technology (NIST). The NIST has delegated the responsibility of managing and administering the ICD of 0005 to the GSA. The NIST has also delegated to GSA the authority for the namespace ''U.S. Government'' as an organization domain subordinate to country level of ''US'' for the purposes of Governmentwide Directories (X.500/LDAP).

X.400 PRMD

The GOSIP standard is based on the Open Systems Interconnection (OSI) profile, which incorporate several series of international protocol standards. The X.400 series define a protocol for electronic Messaging Handling Systems (MHS). Top level Management Domains (MD) are assigned and delegated into

Administrative Management Domains (ADMD) and subordinately Private Management Domain (PRMD). The GSA assigns the PRMDs for the U.S. Government using a prefix of the characters ''GOV+'' followed by the assigned name. For example, a PRMD for the Department of Transportation may be shown as P=GOV+DOT. The service provided by GSA allows government to use unique PRMD names, regardless of the ADMD provider.

X.500/LDAP

The International Telecommunication Union Telecommunication Standardization Sector (ITU–T) issued a X.500 Series of Recommendations for distributed directory services. The GSA has developed a governmentwide X.500 schema for a Distributed Information Tree (DIT). Under C=US, O=U.S. Government, agencies may establish a directory container as an Organizational Unit (OU). The GSA also provides operational Directory Support Services at the C=US level to public entities in cooperation with ANSI. Services include root Directory Systems Agents (DSA) with links to other Top Level Domains (TLD). The Lightweight Directory Access Protocol (LDAP) servers will also require registration services and operational services to connect with the distributed X.500 DSAs.

Object Identifier (OID)

In the context of this document, an arc is a point where branches of the hierarchical tree are connected together and to the superior reference. The GSA is responsible for registration of technical objects identifiers under the arc joint-iso-ccitt(2) country(16) us(840) organization(1) us-government(101) as well as (joint-iso-ccitt(2) countries(16) usa(840) US Government). There is a second US branch of the OID tree, 1.2.840 (iso(1) member-bodies(16) usa(840) US Government(101), but new registrations are made under the 2.16.840.1.101 arc. Typical use of Object Identifiers (OID) is to identify attributes and object classes that are not currently described in OSI standards.

NSAP AAI

Globally unique network addresses are important in communicating across various networks. The GOSIP V2 profile established a method of assigning Network Service Access Point (NSAP) addresses using the ICD 47 0005 (ISO 6523) under the authority of the NIST. The administration and registration of the ICD is delegated to the GSA. The octet following the ICD is 80 to indicate that the remaining octets are in the GOSIP V2 format. An Administrative Authority Identifier (AAI) consisting of three octets are delegated to organizations in order to complete the assignments of network addresses. Thus, a registration for a GOSIP NSAP AAI will be:

47 0005 80 NNNNNN (where N is assigned by GSA)

The organization may use the remaining octets to further define according to their requirements.

INTERNET .GOV and FED.US DOMAIN NAMES

The National Science Foundation (NSF) has delegated to GSA through the Federal Networking Council (FNC), the authority to manage and administer the GOV (dot-gov) domain used by Internet Domain Name Service (DNS). The GSA is also providing second-level domain registrations in the GOV domain (e.g. Fed.gov). Similarly, the GSA is providing second-level domain registrations in the fed.us domain under authority from the Internet Assigned Numbers Authority (IANA). Internet registration services are limited to Federal, State, and local Government organizations. GSA is not responsible for and will not charge fees for any further delegation of a domain name assigned to an agency. For example, if USDA were to register usda.fed.us, the registrations such as region1.usda.fed.us would be the responsibility of the domain manager for USDA.

B. E.O. 12866

GSA has determined that this proposed rule is not a significant regulatory action for the purposes of Executive Order 12866 of September 30, 1993.

C. Regulatory Flexibility Act

The 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.*

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed regulation does not impose recordkeeping or information collection requirements, or the collection of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget (OMB) under 44 U.S.C. 501, *et seq.* This rule is also exempt from Congressional review prescribed under 5 U.S.C. 801 since it relates solely to agency management and personnel.

List of Subjects in 41 CFR Part 101–35

Archives and records, Computer technology, Government property management.

Therefore, it is proposed that 41 CFR 101–35 be amended as follows:

PART 101–35—TELECOMMUNICATIONS MANAGEMENT POLICY

1. The authority citation for part 101–35 continues to read as follows:

Authority: 40 U.S.C. 486(c) and 31 U.S.C. 9701.

2. Subpart 101–35.7 is added to read as follows:

Subpart 101–35.7—Network Address Registration

Sec.
101–35.701 Scope of subpart.
101–35.702 Registration services.
101–35.703 Procedures for using GSA's registration services.
101–35.704 Fee schedule.
101–35.705 Method of payment.

Subpart 101–35.7—Network Address Registration

§ 101–35.701 Scope of subpart.

This subpart addresses registration services provided by GSA to Government agencies and the public.

§ 101–35.702 Registration services.

(a) The National Institute of Standards and Technology (NIST) Department of Commerce has designated GSA as the Government Open Systems Interconnection Profile (GOSIP) Address Registration Authority for unique naming assignments of X.400 Private Management Domains (PRMD), X.500 Organizational Units (OU) and Network Service Access Point (NSAP) Administrative Authority Identifiers (AAI). (See FIPS PUB 146–2, Section 5.2.1.) GOSIP registration is limited to government agencies, with the exception of NSAP AAI's, which may be used by commercial organizations to identify private Asynchronous Transfer Mode (ATM) networks.

(b) For purposes of global interoperability, GSA will operate an X.500/LDAP Directory Service at the ''country=US'' level and at the ''O=U.S. Government'' level. Federal Agencies may link operational directories to the ''O=U.S. Government'' and Commercial organizations may link ''country=US'' level in accordance with the fees set forth in section 101–35.704.

(c) The National Science Foundation (NSF) has delegated to GSA through the Federal Networking Council (FNC), the authority to manage and administer the

GOV (dot-gov) domain used by Internet Domain Name Service (DNS). The GSA is also providing second-level domain registrations in the GOV domain (e.g. Fed.gov). Similarly, the GSA is providing second-level domain registrations in the fed.us domain under authority from the Internet Assigned Numbers Authority (IANA). Internet registration services are limited to Federal, State, and local Government organizations. GSA is not responsible for and will not charge fees for any further delegation of a domain name assigned to an agency. For example, if USDA were to register usda.fed.us, the registrations such as region1.usda.fed.us would be the responsibility of the domain manager for USDA.

§ 101–35.703 Procedures for using GSA's registration services.

Individuals or organizations who wish to register or would like more information should contact the registration officials at GSA by sending an e-mail message to *registration@fed.gov* or by web access at http://registration.fed.gov.

§ 101–35.704 Fee schedule.

GSA will assess Government agencies and commercial organizations nominal fees to cover the cost of registration and other services as listed in the table below. The fees are based on anticipated costs for providing the services and are consistent with industry charges.

Service	Set-up	Recurring (Annual)
(a) Network Address Registration (GOSIP)	$1000.00	$500.00
(b) Government-wide Directory Operation (X.500/LDAP)	1000.00	500.00
(c) Domain Name Registration	250.00	50.00

Note to 101–35.704. Set-up fees may be waived at the discretion of the GSA. When levied, set-up fees include annual fee for one year.

§ 101–35.705 Method of payment.

GSA will invoice registrants according to the fee schedule in section 101–35.704. Government registrations must be paid by credit card (IMPACT). Commercial organizations are encouraged to pay by credit card. All other payments should be made to GSA Registration Services, 1800 F Street NW, Suite G–222, Washington, DC 20405.

Dated: July 30, 1998.

G. Martin Wagner,

Associate Administrator for Governmentwide Policy.

[FR Doc. 98–31828 Filed 11–30–98; 8:45 am]

BILLING CODE 6820–34–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0, 73 and 76

[MM Docket No. 98–204, FCC 98–305]

Revision of Broadcast and Cable EEO Rules and Policies

AGENCY: Federal Communications Commission.

ACTION: Proposed rules.

SUMMARY: In this *Notice of Proposed Rule Making* (NPRM), the Commission proposes new broadcast and cable Equal Employment Opportunity (EEO) rules and policies. The NPRM proposes to retain the existing ban on discrimination and to promulgate recruitment-oriented outreach rules. The proposed EEO rules make clear that broadcasting and cable entities, including multichannel video programming distributors, are not required to employ a staff that reflects the racial or other composition of the community or to use racial preferences in hiring. The NPRM also proposes to streamline the Commission's broadcast EEO requirements, while, at the same time, maintaining an effective broadcast EEO program. These proposals include the possibility of granting administrative relief to small broadcasters and crediting joint recruitment efforts. Finally, the NPRM terminates the Commission's EEO streamlining proceeding in MM Docket No. 96–16, 60 FR 9964, March 12, 1996, with the exception of the one petition for reconsideration filed in that docket, which will now be considered in this proceeding. The intended effect of the NPRM is to invite comments on all aspects of the Commission's proposals and on the Commission's belief that it has the statutory authority to retain the anti-discrimination provisions of its broadcast EEO rule.

DATES: Comments are due January 19, 1999; reply comments are due February 18, 1999. Written comments by the public on the proposed information collections are due January 19, 1999. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed information collections on or before February 1, 1999.

ADDRESSES: Federal Communications Commission, Office of the Secretary, 445 12th Street, SW, Washington, D.C. 20554. Comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room C–1804, 445 12th Street, SW, Washington, DC 20554, or via the Internet to jboley@fcc.gov, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725—17th Street, N.W., Washington, DC 20503 or via the Internet to fain__t@al.eop.gov.

FOR FURTHER INFORMATION CONTACT: Hope Cooper or Kathy Harvey, Mass Media Bureau, Enforcement Division. (202) 416–1450. For additional information concerning the information collections, contact Judy Boley at 202–418–0214, or via the Internet at jboley@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making in MM Docket No. 98–204, adopted November 19, 1998, and released November 20, 1998.

The complete text of this NPRM, which was adopted in MM Docket No. 98–204, is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW., Washington, DC, and also may be purchased from the Commission's copy contractor, International Transcription Services, Inc., at 202–857–3800, 1231 20th Street, NW, Washington, D.C. 20037.

Synopsis of Notice of Proposed Rule Making

1. The NPRM proposes and requests comments regarding new broadcast and cable EEO rules and policies consistent with the D.C. Circuit's decision in *Lutheran Church—Missouri Synod* v. *FCC*, 141 F.3d 344 (D.C. Cir. 1998) (*Lutheran Church*), rehearing denied, September 15, 1998. In *Lutheran Church*, the D.C. Circuit held that the Commission's broadcast EEO program requirements were unconstitutional because they pressured stations to maintain a workforce reflecting the racial composition of their communities, thus inducing them to grant illegal hiring preferences on the basis of race. The court also remanded the case back to the Commission to determine whether it had the authority to promulgate its ban on employment discrimination, which was not invalidated.

2. The NPRM proposes new broadcast and cable EEO rules which ensure non-discrimination in employment and broad dissemination of recruitment information. None of the proposals

create an incentive to hire on the basis of race or gender. In fact, the proposed rules remove all references to any comparison to minority and female labor force statistics, including sections concerning evaluation of employment profile and job turnover. One proposal would require entities to recruit for each vacancy with a certain number of national and/or local sources, including minority and female sources. The Commission believes that this kind of approach would ensure that all qualified potential applicants are informed of, and have an opportunity to apply for, vacancies. Another proposal would leave to an entity's good faith discretion what methods it would use to ensure broad dissemination of vacancy information. In order to provide guidance to entities, the proposed rules also clearly describe what records of EEO efforts must be kept by broadcast and cable entities, and detail how an entity should analyze its EEO program.

3. The NPRM also proposes to reinstate the preexisting EEO requirement that broadcasters file an Annual Employment Report, but with the understanding that the Report's data would only be used to monitor industry employment trends.

4. The NPRM retains the Commission's prohibition against employment discrimination and details the Commission's statutory authority to promulgate an employment non-discrimination rule as well as EEO program requirements. Specifically, the NPRM outlines the Commission's belief that Congress has ratified the Commission's authority to adopt broadcast EEO rules; that equal employment of minorities and women furthers the Commission's public interest goal of diversity of programming; and that the statutory goal of fostering minority and female ownership in the provision of commercial spectrum-based services, as directed by Section 309(j) of the Communications Act, is furthered by EEO requirements. With respect to broadcasters, the NPRM proposes modifying the anti-discrimination prohibition so that religious radio broadcasters may establish religious belief or affiliation as a *bona fide* occupational qualification for all station employees.

5. The NPRM notes the Commission's intent to limit undue administrative burdens on broadcasters generally, and particularly on those licensees of smaller stations and other distinctly situated broadcasters, consistent with maintaining an effective EEO program. Specifically, the NPRM invites comment on whether and, if so, how the Commission can reduce undue burdens on stations with small staffs or those located in small markets. Options include exempting qualifying stations from EEO reporting and recordkeeping requirements entirely; or permitting qualifying stations the option of attending a minimum number of recruiting events annually, such as job fairs, in lieu of vacancy specific recruitment. Further, the NPRM invites comment on how to award credit for licensees generally who participate in joint recruitment efforts and minority training and internship programs. Finally, the NPRM terminates the Commission's EEO streamlining proceeding in MM Docket No. 96–16 (with the exception of the one petition for reconsideration filed in that docket, which will now be considered in this proceeding) because MM Docket No. 96–16 concerned the provisions of our EEO Rule invalidated by the Court.

6. The NPRM invites comments on all aspects of the Commission's proposals and on the Commission's belief that it has the statutory authority to retain the anti-discrimination provisions of its broadcast EEO rule.

Initial Paperwork Reduction Act of 1995 Analysis

This NPRM contains proposed information collection. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and OMB to comment on the information collections contained in this NPRM, as required by the Paperwork Reduction Act of 1995, Public Law No. 104–13. Public and agency comments are due at the same time as other comments on this NPRM; OMB comments are due 60 days from date of publication of this NPRM in the **Federal Register**. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

This NPRM contains proposals that are proposed to affect the following existing information collections that collectively make up the Commission's EEO program.

Rules: 47 CFR 73.2080 and 76.75
Form Numbers: FCC 395–A, FCC 395–B, FCC 395–M, FCC 396, FCC 396–A
Respondents: Businesses or other for-profit, Not-for-profit institutions

These estimates represent the existing burden as currently approved by OMB under the individual OMB approval numbers.

OMB Approval Number: 3060–0212
Title: Section 73.2080 Equal Employment Opportunity Program
Number of Respondents: 15,290
Estimated Time Per Response: 52 hours
Total Annual Burden: 679,744.

OMB Approval Number: 3060–0349
Title: Section 76.73/76.75—Cable TV EEO Policy and Programs
Number of Respondents: 5,600
Estimated time per response: 2,125 cable employment units/MVPD with 6 or more employees will have an average burden of 52 hours/year; 3,475 cable employment units/MVPD with fewer than 6 employees will have an average burden of 8 hours/year
Total annual burden: 138,300 hours.

OMB Approval Number: 3060–0095
Title: Annual Employment Report—Cable Television (FCC 395–A)
Number of Respondents: 2,564
Estimated time per response: 1.75 hours/form; 0.25/certification; 2.417 hours/supplemental information sheet
Total annual burden: 4,683 hours.

OMB Approval Number: 3060–0390
Title: Broadcast Station Annual Employment Report (FCC 395–B)
Number of Respondents: 14,000
Estimated Time Per Response: 0.88 hours per report
Total Annual Burden: 12,320 hours.

OMB Approval Number: 3060–0574
Title: MVPD Annual Employment Report (FCC 395–M)
Number of Respondents: 155
Estimated time per response: 1.75 hours/form; 0.25/certification; 2.417 hours/supplemental information sheet
Total annual burden: 233 hours.

OMB Approval Number: 3060–0113
Title: Broadcast Equal Employment Opportunity Program Report (FCC 396)
Number of Respondents: 235
Estimated Time Per Response: 3.0 hours per report
Total Annual Burden: 705 hours.

OMB Approval Number: 3060–0120
Title: Broadcast Equal Employment Opportunity Model Program Report (FCC 396–A)
Number of Respondents: 2,068
Estimated Time Per Response: 1.0 hours per report
Total Annual Burden: 2,068 hours.

Needs and Uses: This rulemaking proceeding is initiated to obtain comments concerning the

Commission's proposed EEO rules and policies that would be consistent with the D.C. Circuit's decision in *Lutheran Church*. This rulemaking proposes a new broadcasting EEO program rule and to change the Commission's cable EEO program rules emphasizing recruitment outreach programs. These information collections are necessary to monitor industry trends and to ensure that broadcast stations and cable entities do not engage in discriminatory practices and afford equal employment opportunity.

Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (RFA), the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this NPRM. *See* 5 U.S.C. 603. [The RFA, *see* 5 U.S.C. 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Public Law No. 104–121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).] Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. *See* 5 U.S.C. 603(a). In addition, the NPRM and IRFA (or summaries thereof) will be published in the **Federal Register**. *See id.*

A. Need for, and Objectives of, the Proposed Rule Changes

The D.C. Circuit court in *Lutheran Church* held that the Commission's EEO minority outreach requirements for broadcasters were unconstitutional and remanded to the Commission to determine whether we have authority to enforce an employment non-discrimination rule. The NPRM seeks comment on proposed new EEO rules and policies for broadcast and cable entities, including multichannel video programming distributors (MVPDs), that are designed to be consistent with the *Lutheran Church* decision. We also request comment on our statutory authority to retain the anti-discrimination prong of our EEO rules. We invite comment on EEO rules which seek to ensure that broadcast stations and cable entities do not engage in discriminatory practices. In addition, our proposed rules would require broadcasters and cable entities to establish and maintain an EEO program designed to provide equal opportunity for minorities and women. Another proposal would grant administrative relief to small entities based on various criteria. One of the criteria proposed involves the number of employees at a station, *e.g.*, if a station has 10 or fewer full-time employees, it would be entitled to relief. The Commission's earlier attempt at implementing a similar proposal was declared arbitrary and capricious by the court in *Office of Communications of the United Church of Christ* v. *FCC*, 560 F.2d 529, 532 (2nd Cir. 1977) because the Commission had failed to provide a reasoned justification for departing from its prior precedent. Therefore, the Commission requests that commenters who favor this proposal provide ample evidence as to why this type of station deserves this type of relief. To accomplish the goals set forth, the NPRM proposes: (1) to initiate a new broadcasting EEO program rule and to change the Commission's cable EEO program rules, that would emphasize recruitment outreach and provide that entities are not to use racial, ethnic, or gender preferences in hiring; and (2) to permit administrative relief to small entities that meet proposed qualifying factors.

B. Legal Basis

Authority for the actions proposed in this NPRM may be found in Sections 1, 4(i), 4(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 634 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 554.

C. Recording, Recordkeeping, and Other Compliance Requirements

The NPRM proposes that broadcasters and cable entities be required to retain records to demonstrate that they have recruited for each hire. Such recordkeeping may include: listings of recruiting sources utilized for each vacancy; copies of all advertisements, bulletins and letters announcing vacancies; and compilations totaling the race, ethnic origin, and gender of all applicants generated by each recruiting source according to vacancy.

D. Description and Estimate of the Number of Small Entities to Which the Rules Would Apply

1. *Definition of a ''Small Business''*

The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules. 5 U.S.C. 604(a)(3). Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions. 5 U.S.C. 601(6). The RFA, 5 U.S.C. 601(3), generally defines the term ''small business'' as having the same meaning as the term ''small business concern'' under the Small Business Act, 15 U.S.C. 632. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). Pursuant to 4 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.'' While we tentatively believe that the SBA's definition of ''small business'' greatly overstates the number of radio and television broadcast stations that are small businesses and is not suitable for purposes of determining the impact of the proposals on small television and radio stations, for purposes of this NPRM, we utilize the SBA's definition in determining the number of small businesses to which the rules would apply. We reserve the right, however, to adopt a more suitable definition of ''small business'' as applied to radio and television broadcast stations or other entities subject to the rules proposed in this NPRM and to consider further the issue of the number of small entities that are radio and television broadcasters or other small media entities in the future. *See Report and Order* in MM Docket No. 93–48 (*Children's Television Programming*), 11 FCC Rcd 10660, 10737–38 (1996), 61 FR 43981, August 12, 1996, *citing* 5 U.S.C. 601(3). The new rules would apply to broadcast stations and cable entities, including multichannel video programming distributors (MVPDs).

2. *Issues in Applying the Definition of a ''Small Business''*

We could not precisely apply the foregoing definition of ''small business'' in developing our estimates of the number of small entities to which the rules will apply. Our estimates reflect our best judgments based on the data available to us.

An element of the definition of ''small business'' is that the entity not be dominant in its field of operation. We are unable at this time to define or

quantify the criteria that would establish whether a specific radio or television station is dominant in its field of operation. Accordingly, the following estimates of small businesses to which the new rules will apply do not exclude any radio or television station from the definition of a small business on this basis and are therefore overinclusive to that extent. An additional element of the definition of ''small business'' is that the entity must be independently owned and operated. We could not fully apply this criterion, and our estimates of small businesses to which the rules may apply may be overinclusive to this extent. The SBA's general size standards are developed taking into account these two statutory criteria. This does not preclude us from taking these factors into account in making our estimates of the numbers of small entities.

With respect to applying the revenue cap, the SBA has defined ''annual receipts'' specifically in 13 CFR 121.104, and its calculations include an averaging process. We do not currently require submission of financial data from licensees that we could use in applying the SBA's definition of a small business. Thus, for purposes of estimating the number of small entities to which the rules apply, we are limited to considering the revenue data that are publicly available, and the revenue data on which we rely may not correspond completely with the SBA definition of annual receipts.

Under SBA criteria for determining annual receipts, if a concern has acquired an affiliate or been acquired as an affiliate during the applicable averaging period for determining annual receipts, the annual receipts in determining size status include the receipts of both firms. 13 CFR 121.104(d)(1). The SBA defines affiliation in 13 CFR 121.103. In this context, the SBA's definition of affiliate is analogous to our attribution rules. Generally, under the SBA's definition, concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both. 13 CFR 121.103(a)(1). The SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists. 13 CFR 121.103(a)(2). Instead of making an independent determination of whether television stations were affiliated based on SBA's definitions, we relied on the databases available to us to provide us with that information.

3. *Estimates Based on Census Data*

The rules proposed in this NPRM will apply to television and radio stations. The Small Business Administration defines a television broadcasting station that has no more than $10.5 million in annual receipts as a small business. 13 CFR 121.201, Standard Industrial Code (SIC) 4833. Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92–S–1, Appendix A–9 (1995). Included in this industry are commercial, religious, educational, and other television stations. Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials. *Id.* Separate establishments primarily engaged in producing taped television program materials are classified under another SIC number. *Id.*; SIC 7812 (Motion Picture and Video Tape Production); SIC 7922 [Theatrical Producers and Miscellaneous Theatrical Services (producers of live radio and television programs)].

There were 1,509 full-service television stations operating in the nation in 1992. FCC News Release No. 31327, Jan. 13, 1993; Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, Appendix A–9. That number has remained fairly constant as indicated by the approximately 1,584 operating full-service television broadcasting stations in the nation as of October 1998. FCC News Release, Broadcast Station Totals as of October 30, 1998 (released November 18, 1998). For 1992 [1] the number of television stations that produced less than $10.0 million in revenue was 1,155 establishments. (The amount of $10 million was used to estimate the number of small business establishments because the relevant Census categories stopped at $9,999,999 and began at $10,000,000. No category for $10.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.) Thus, the proposed rules will affect approximately 1,584 television stations; approximately 77%, or 1,219 of those stations are considered small businesses. (We use the 77 percent figure of TV stations operating at less than $10 million for 1992 and apply it to the 1998 total of 1,584 TV stations to arrive at stations categorized as small businesses.) These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television affiliated companies. We recognize that the proposed rules may also affect minority and women owned stations, some of which may be small entities. In August 1998, minorities owned and controlled 32 (2.6%) of 1,209 commercial television stations in the United States. *Minority Commercial Broadcast Ownership in the United States*, U.S. Dep't. of Commerce, National Telecommunications and Information Administration, The Minority Telecommunications Development Program (MTDP) (August 1998). (MTDP considers minority ownership as ownership of more than 50% of a broadcast corporation's stock, voting control in a broadcast partnership, or ownership of a broadcasting property as an individual proprietor. *Id.* The minority groups included in this report are Black, Hispanic, Asian, and Native American.) According to the U.S. Bureau of the Census, in 1987 women owned and controlled 27 (1.9%) of 1,342 commercial and non-commercial television stations in the United States. *See* Comments of American Women in Radio and Television, Inc. in MM Docket No. 94–149 and MM Docket No. 91–140, at 4 n.4 (filed May 17, 1995), *citing* 1987 Economic Censuses, *Women-Owned Business*, WB87–1, U.S. Department of Commerce, Bureau of the Census, August 1990 (based on 1987 Census). After the 1987 Census report, the Census Bureau did not provide data by particular communications services (four-digit Standard Industrial Classification (SIC) Code), but rather by the general two-digit SIC Code for communications (#48). Consequently, since 1987, the U.S. Census Bureau has not updated data on ownership of broadcast facilities by women, nor does the FCC collect such data. However, the Commission recently amended its Annual Ownership Report Form 323 to require information on the gender and race of broadcast license owners in future filings. *See 1998 Biennial Regulatory Review—Streamlining of Mass Media Applications, Rules and Processes, Report and Order*, MM Docket No. 98–43 (adopted October 22, 1998).

[1] Census for Communications' establishments are performed every five years ending with a ''2'' or ''7''. *See* Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, *supra* note 53, III.

The proposed rule changes would also affect radio stations. The SBA defines a radio broadcasting station that has no more than $5 million in annual receipts as a small business. 13 CFR 121.201, SIC 4832. A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public. Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, Appendix A–9. Included in this industry are commercial, religious, educational, and other radio stations. *Id.* Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included. *Id.* However, radio stations which are separate establishments and are primarily engaged in producing radio program material are classified under another SIC number. *Id.* The 1992 Census indicates that 96 percent (5,861 of 6,127) of radio station establishments produced less than $5 million in revenue in 1992. The Census Bureau counts multiple radio stations located at the same facility as one establishment. Therefore, each co-located AM/FM combination counts as one establishment. Official Commission records indicate that 11,334 individual radio stations were operating in 1992. FCC News Release No. 31327, Jan. 13, 1993. As of October 1998, official Commission records indicate that 12,448 radio stations are currently operating. FCC News Release, Broadcast Station Totals as of October 30, 1998 (released November 18, 1998).

The proposed rule changes would also affect small cable entities, including MVPDs. SBA has developed a definition of a small entity for cable and other pay television services, which includes all such companies generating $11 million or less in annual receipts. 13 CFR 121.201 (SIC 4841). This definition includes cable system operators, closed circuit television services, direct broadcast satellite services (DBS), multipoint distribution systems (MDS), satellite master antenna systems, and subscription television services. According to the Bureau of the Census, there were 1,423 such cable and other pay television services generating less than $11 million in revenue that were in operation for at least one year at the end of 1992. 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D, SIC 4841 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration). We discuss these services to provide a more succinct estimate of small entities:

Cable Systems: The Commission has developed, with SBA's approval, its own definition of small cable system operators. Under the Commission's rules, a ''small cable company'' is one serving fewer than 400,000 subscribers nationwide. 47 CFR 67.901(3). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of $100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration,* 10 FCC Rcd 6393 (1995), 60 FR 544919, September 15, 1995. Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable companies at the end of 1995. Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995). Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the rules proposed herein.

The Communications Act also contains a definition of a small cable system operator, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenue in the aggregate exceeds $250,000,000.'' 47 U.S.C. 543(m)(2). The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $520 million in the aggregate. 47 CFR 76.1403(b) (SIC 4833). Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1,450. Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995). Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

MDS: The Commission has defined ''small entity'' for purposes of the auction of MDS as an entity that, together with its affiliates, has average gross annual revenues that are not more than $40 million for the preceding three calendar years. 47 CFR 21.961(b)(1). This definition of a small entity in the context of MDS auctions has been approved by the SBA. *See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding,* MM Docket No. 94–31 and PP Docket No. 93–253, Report and Order, 10 FCC Rcd 9589 (1995), 60 FR 36524, July 17, 1995. The Commission completed its MDS auction in March 1996 for authorizations in 493 basic trading areas (BTAs). Of 67 winning bidders, 61 qualified as small entities. (One of these small entities, O'ahu Wireless Cable, Inc., was subsequently acquired by GTE Media Ventures, Inc., which did not qualify as a small entity for purposes of the MDS auction.)

MDS also includes licensees of stations authorized prior to the auction. The SBA has developed a definition of small entities for pay television services, which includes all such companies generating $11 million or less in annual receipts. 13 CFR 121.201. This definition includes multipoint distribution systems, and thus applies to MDS licensees and wireless cable operators which did not participate in the MDS auction. Information available to us indicates that there are 832 of these licensees and operators that do not generate revenue in excess of $11 million annually. Therefore, for purposes of this IRFA, we find there are approximately 892 small MDS providers as defined by the SBA and the Commission's auction rules, and some of these providers may be subject to our amended EEO rules.

DBS: As of October 1997, there were nine DBS licensees, some of which were not in operation. The Commission does not collect annual revenue data for DBS and, therefore, is unable to ascertain the number of small DBS licensees that could be impacted by these proposed rules. Although DBS services requires a great investment of capital for operation, we acknowledge that there are several new entrants in this field that may not yet have generated $11 million in annual receipts, and therefore may be categorized as small businesses, if independently owned and operated.

An alternative way to classify small entities is by the number of employees. We estimate that the total number of full-service broadcast stations with 4 or

fewer employees is 5,186. We base this estimate on a compilation of 1997 Broadcast Station Annual Employment Reports (FCC Form 395–B), performed by staff of the Equal Employment Opportunity Branch, Mass Media Bureau, FCC. Similarly, we estimate that in 1997, the total number of cable employment units with six or more full-time employees was 2,750, and that 1,900 cable employment units employed fewer than six full-time employees. Also, in 1997, the total number of other MVPDs employing six or more full-time employees was 725, and 225 such MVPDs employed less than six full-time employees.

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

This NPRM solicits comment on a variety of alternatives discussed herein. Any significant alternatives presented in the comments will be considered. As an example, the NPRM requests comment on whether we should grant administrative relief to stations with small staffs or in small markets. Finally, the NPRM seeks comment on whether to raise the employment threshold for EEO reporting and recordkeeping requirements. This change may create a new definition of small business requiring approval from the SBA before doing so.

F. Federal Rules that Overlap, Duplicate, or Conflict with the Proposed Rules

The proposed rules do not overlap, duplicate or conflict with any other rules.

List of Subjects

47 CFR Part 0

Organization and functions (Government agencies)

47 CFR Part 73

Radio, Equal employment opportunity, Reporting and recordkeeping requirements, Television

47 CFR Part 76

Cable television, Equal employment opportunity, Reporting and recordkeeping requirements

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

Proposed Rule Changes

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR parts 0, 73 and 76 as follows:

PART 0—COMMISSION ORGANIZATION

1. The authority citation for part 0 continues to read as follows:

Authority: Secs. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

2. Section 0.283 is amended by revising paragraph (b)(1)(iii) to read as follows:

§ 0.283 Authority delegated.

* * * * *

(b) * * *

(1) * * *

(iii) present documented allegations of failure to comply with the Commission's Equal Employment Opportunity rules and policies.

* * * * *

PART 73—RADIO BROADCAST SERVICES

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

Authority: 47 U.S.C. 154, 303, 334 and 336.

4. Section 73.2080 is revised as follows:

§ 73.2080 Equal employment opportunities (EEO).

(a) *General EEO policy.* Equal opportunity in employment shall be afforded by all licensees or permittees of commercially or noncommercially operated AM, FM, TV or international broadcast stations (as defined in this part) to all qualified persons, and no person shall be discriminated against in employment by such stations because of race, color, religion, national origin, or sex. Religious radio broadcasters may establish religious belief or affiliation as a job qualification for all station employees. However, they cannot discriminate on the basis of race, color, national origin or gender from among those who share their religious affiliation or belief. For purposes of this rule, a religious broadcaster is a licensee which is, or is closely affiliated with, a church, synagogue, or other religious entity, including a subsidiary of such an entity.

(b) *General EEO program requirements.* Each broadcast station shall establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practice. Under terms of its program, a station shall:

(1) Define the responsibility of each level of management to ensure a vigorous enforcement of its policy of equal opportunity, and establish a procedure to review and control managerial and supervisory performance;

(2) Inform its employees and recognized employee organizations of the positive equal employment opportunity policy and program and enlist their cooperation;

(3) Communicate its equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race, color, religion, national origin, or sex, and solicit their recruitment assistance on a continuing basis;

(4) Conduct a continuing program to exclude all unlawful forms of prejudice or discrimination based upon race, color, religion, national origin, or sex from its personnel policies and practices and working conditions; and

(5) Conduct a continuing review of job structure and employment practices and adopt positive recruitment, job design, and other measures needed to ensure genuine equality of opportunity to participate fully in all organizational units, occupations, and levels of responsibility.

(c) *Specific EEO program requirements.* Each broadcast station shall establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity and non-discrimination in every aspect of station employment policy and practice. Under the terms of its program, a station must:

(1) Recruit for every job vacancy in its operation. A job filled by an internal promotion is not considered a vacancy for which recruitment is necessary. Religious radio broadcasters who establish religious affiliation as a bona fide occupational qualification for a job position are not required to comply with these recruitment requirements with respect to that job position only, but will be expected to make reasonable, good faith efforts to recruit minorities and women who are qualified based on their religious affiliation. Nothing in this section shall be interpreted to require a broadcaster to grant preferential treatment to any individual or group based on race, color, ethnic origin, religion, or gender.

(2) Analyze its efforts to recruit, hire and promote without discrimination on the basis of race, ethnic origin, color, religion, and gender and address any difficulties encountered in implementing its equal employment opportunity program. As part of its license renewal application, a station shall submit a statement detailing its analysis of such efforts for the 12 months prior to license expiration. Analysis should occur on an ongoing

basis. A station's analysis shall include measures taken to:

(i) Disseminate its equal employment opportunity program to job applicants and employees;

(ii) Review seniority practices to ensure that such practices are non-discriminatory;

(iii) Examine rates of pay and fringe benefits for employees having the same duties, and eliminating any inequities based upon race, ethnic origin, color, religion, or sex discrimination;

(iv) Assess the productivity of recruiting sources;

(v) Utilize media for recruitment purposes in a manner that will contain no indication, either explicit or implicit, of a preference for one race, ethnic origin, color, religion or sex over another;

(vi) Offer promotions of qualified minorities and women in a nondiscriminatory fashion to positions of greater responsibility;

(vii) Where union agreements exist, cooperate with the union or unions in the development of programs to assure qualified minority persons or women of equal opportunity for employment, and include an effective non-discrimination clause in new or renegotiated union agreements; and

(viii) Avoid the use of selection techniques or tests that have the effect of discriminating against qualified minority groups or women.

(3) Retain records to prove that it has satisfied the requirements of (c)(1) and (c)(2) of this section. Such recordkeeping shall include:

(i) Listings of recruiting sources utilized for each vacancy and the date the vacancy was filled;

(ii) Dated copies of all advertisements, bulletins and letters announcing vacancies; and

(iii) Compilations totaling the race, ethnic origin, and gender of all applicants generated by each recruiting source according to vacancy.

(d) *Mid-term review for television broadcast stations.* The Commission will conduct a mid-term review of the employment practices of each broadcast television station four years following the station's most recent license expiration date as specified in § 73.1020 of this part. Television licensees are required to submit a narrative statement, as described in paragraph (c)(2) of this section, four months before the date specified in the previous sentence.

(e) *Enforcement.* The Commission will review a station's EEO program at renewal time and may conduct random audits, including on-site audits, throughout the license term to enforce this rule.

(f) *Sanctions.* The Commission may impose appropriate sanctions for any violation of this rule.

PART 76—CABLE TELEVISION SERVICE

5. The authority citation for part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 552, 554, 556, 558, 560, 561, 571, 572, 573.

6. Section 76.75 is amended by revising paragraphs (b), (c) and (f) and by adding paragraph (g) to read as follows:

§ 76.75 EEO program requirements.

* * * * *

(b) Recruit for every job vacancy in its operation. A job filled by an internal promotion is not considered a vacancy for which recruitment is necessary. Nothing in this section shall be interpreted to require a cable entity to grant preferential treatment to any individual or group based on race, ethnic origin, color, or gender.

(c) Retain records to prove that it has satisfied the requirements of (b) and (f) of this section. Such recordkeeping shall include:

(1) Listings of recruiting sources utilized for each vacancy and the date the vacancy was filled;

(2) Dated copies of all advertisements, bulletins and letters announcing vacancies; and

(3) Compilations totaling the race, ethnic origin, and gender of all applicants generated by each recruiting source according to vacancy.

* * * * *

(f) Analyze its efforts to recruit, hire, promote and use services without discrimination on the basis of race, ethnic origin, color, religion, and gender and explain any difficulties encountered in implementing its equal employment opportunity program. As part of its Form 395–A/395–M supplemental investigation, an employment unit shall submit a statement detailing its analysis of such efforts for the previous 12 months. Analysis should occur on an ongoing basis. A unit's analysis shall include measures taken to:

(1) Where union agreements exist, cooperate with the union or unions in the development of programs to assure qualified minority persons or women of equal opportunity for employment, and include an effective non-discrimination clause in new or renegotiated union agreements;

(2) Review seniority practices to ensure that such practices are non-discriminatory;

(3) Examine rates of pay and fringe benefits for employees having the same duties, and eliminating any inequities based upon race, ethnic origin, color, religion, age, or sex discrimination;

(4) Assess the productivity of recruiting sources;

(5) Utilize media for recruitment purposes in a manner that will contain no indication, either explicit or implicit, of a preference for one race, ethnic origin, color, religion, age, or sex over another; and

(6) Avoid the use of selection techniques or tests that have the effect of discriminating against qualified minority groups or women.

(g) The Commission may impose appropriate sanctions for cable entities not found to be in compliance with paragraphs (b), (c), or (f) of this section.

[FR Doc. 98–32013 Filed 11–30–98; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[I.D. 111998B]

Fisheries of the Northeastern United States; Northeast Multispecies Fishery, Atlantic Sea Scallop Fishery, and Atlantic Salmon Fishery; Fishery Management Plan (FMP) Amendments to Designate Essential Fish Habitat (EFH)

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

ACTION: Notice of availability of an omnibus amendment to FMPs; request for comments.

SUMMARY: NMFS announces that the New England Fishery Management Council (NEFMC) has submitted for review and approval by the Secretary of Commerce (Secretary) an omnibus amendment that includes Amendment 11 to the Northeast Multispecies FMP, Amendment 9 to the Atlantic Sea Scallop FMP, and Amendment 1 to the Atlantic Salmon FMP. The document also includes Amendment 1 to the Monkfish FMP prepared jointly by NEFMC and the Mid-Atlantic Fishery Management Council (MAFMC). Because MAFMC has not yet adopted Monkfish Amendment 1, the FMP amendment is not being considered for Secretarial approval at this time. Finally, the omnibus amendment includes the EFH components of the

Atlantic Herring FMP that is being developed by the NEFMC. The EFH information for Atlantic Herring will be incorporated by reference into the Atlantic Herring FMP when that FMP is submitted for Secretarial approval. These EFH provisions implement the requirements of section 303(a)(7) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The omnibus amendment describes and identifies EFH for the specified fisheries, discusses measures to address the effects of fishing on EFH, and identifies other actions for the conservation and enhancement of EFH. The amendment includes no new fishery management measures, so no regulations are proposed.

DATES: Public comments must be received on or before February 1, 1999.

ADDRESSES: Comments on this amendment should be sent to Jon C. Rittgers, Acting Regional Administrator, One Blackburn Drive, Gloucester, MA 01930–2298. Please mark the outside of the envelope: ''Comments on Essential Fish Habitat Amendment.''

Copies of the amendment and the environmental assessment are available from the Executive Director, New England Fishery Management Council, 5 Broadway, Saugus, MA 01906–1036.

FOR FURTHER INFORMATION CONTACT: Jonathan M. Kurland, Assistant Habitat Program Coordinator, 978–281–9204.

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Act requires that each Regional Fishery Management Council submit any FMP or FMP amendment it prepares to NMFS for review and approval, disapproval, or partial approval. The Magnuson-Stevens Act also requires that NMFS, upon receiving an FMP or FMP amendment, immediately publish a notice in the **Federal Register** that the FMP or amendment is available for public review and comment. Therefore, NMFS solicits comments on the approval, disapproval, or partial approval of these amendments.

The portions of the omnibus EFH amendment that NMFS presently is considering for approval would designate EFH in waters of the United States for 14 species of groundfish, as well as Atlantic sea scallops and Atlantic salmon. The MAFMC has not yet adopted Monkfish Amendment 1. Once adopted, the NEFMC will submit Amendment 1 for Secretarial review and a notice of availability will be published in the **Federal Register**. The omnibus amendment also includes the EFH components of the Atlantic Herring FMP that is being developed by NEFMC. The EFH information for herring will be incorporated by reference into the Atlantic Herring FMP when that FMP is submitted for Secretarial review and a notice of availability will be published in the **Federal Register**. NMFS will consider approval, disapproval, or partial approval of Amendment 1 to the Monkfish FMP and the EFH components of the Atlantic Herring FMP separately after their submission by the NEFMC, following separate notices of availability.

The omnibus amendment would also designate Habitat Areas of Particular Concern (HAPC) for Atlantic salmon and juvenile Atlantic cod in accordance with 50 CFR 600.815(a)(9). Although no new management measures are proposed for these HAPC, the Atlantic cod HAPC would be protected from potential adverse effects from fishing by maintaining the existing restrictions on fishing for the region known as Closed Area II on Georges Bank, pursuant to 50 CFR 648.81(b). In addition to the original rationale for implementing Closed Area II in 1994 (reducing overfishing of severely depleted groundfish stocks, as noted in the preamble to the emergency interim rule published in the **Federal Register** on December 12, 1994 (59 FR 63926)), under the omnibus amendment these management measures would be retained for habitat protection reasons.

NMFS solicits comments on the approval, disapproval, or partial approval on Amendment 11 to the Northeast Multispecies FMP, Amendment 9 to the Atlantic Sea Scallop FMP, and Amendment 1 to the Atlantic Salmon FMP. To be considered, comments must be received by close of business on February 1, 1999; that does not mean postmarked or otherwise transmitted by that date.

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

Dated: November 24, 1998.

Bruce C. Morehead,

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

[FR Doc. 98–31996 Filed 11–30–98; 8:45 am]

BILLING CODE 3510–22–F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[I.D. 112498A]

RIN 0648–AL52

Fisheries Off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Amendment 11

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

ACTION: Notice of availability of an amendment to a fishery management plan; request for comments.

SUMMARY: NMFS announces that the Pacific Fishery Management Council (Council) has submitted Amendment 11 to the Pacific Coast Groundfish Fishery Management Plan (FMP) for Secretarial review. The amendment was prepared with the intention of bringing the FMP into compliance with provisions of the Sustainable Fisheries Act (SFA) regarding overfishing, bycatch, essential fish habitat, and fishing communities. This action also is intended to improve the types and amounts of scientific information available for use in stock assessments and management of the Pacific coast groundfish fishery.

DATES: Comments on Amendment 11 must be received on or before February 1, 1999.

ADDRESSES: Comments on Amendment 11 or supporting documents should be sent to William Stelle, Administrator, Northwest Region, NMFS, Sand Point Way NE., BIN C15700, Seattle, WA 98115–0070; or to William Hogarth, Administrator, Southwest Region, NMFS, 501 West Ocean Boulevard, Suite 4200, Long Beach, CA 90802–4213.

Copies of Amendment 11 and the Environmental Assessment/ Regulatory Impact Review are available from Larry Six, Executive Director, Pacific Fishery Management Council, 2130 SW Fifth Ave., Suite 224, Portland, OR 97201.

FOR FURTHER INFORMATION CONTACT: Yvonne deReynier at 206–526–6140, Jim Morgan at 562–980–4000, or the Pacific Fishery Management Council at 503–326–6352.

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires that each Regional Fishery Management Council submit any amendment to an FMP to NMFS for review and approval,

disapproval, or partial approval. The Magnuson-Stevens Act also requires that NMFS, upon receiving an amendment, immediately publish a notice in the **Federal Register** that the amendment is available for public review and comment. NMFS will consider the public comments received during the comment period described above in determining whether to approve the amendment for implementation.

The SFA amended the requirements for FMPs in section 303(a) of the Magnuson-Stevens Act. The SFA established a 2-year deadline (October 11, 1998) by which each Regional Fishery Management Council had to submit amendments to NMFS to bring all the FMPs into compliance with the SFA/Magnuson-Stevens Act requirements.

Amendment 11 seeks to make the Pacific Coast Groundfish FMP consistent with the Magnuson-Stevens Act by: amending the FMP framework that defines ''optimum yield'' for setting annual groundfish harvest limits; setting framework control rules on defining rates of ''overfishing'' and levels at which managed stocks are considered ''overfished;'' defining Pacific Coast groundfish essential fish habitat; setting a bycatch management objective and a framework for bycatch reduction measures; establishing a management objective to take the importance of fisheries to fishing communities into account when setting groundfish management measures; providing authority within the FMP for the Council to require groundfish use permits for all groundfish users; authorizing the use of fish for compensation for private vessels conducting NMFS-approved research; removing jack mackerel from the fishery management unit; and updating FMP objectives, definitions and industry descriptions.

Public comments on Amendment 11 must be received by February 1, 1999 to be considered by NMFS in the decision to approve/disapprove Amendment 11. A proposed rule to implement Amendment 11 has been submitted for Secretarial review and approval. NMFS expects to publish and request public comment on proposed regulations to implement Amendment 11 in the near future.

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

Dated: November 25, 1998.

Gary C. Matlock,

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

[FR Doc. 98–32018 Filed 11–30–98; 8:45 am]

BILLING CODE 3510–22–F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[I.D. 111798A]

RIN 0648–AL89

Fisheries of the Exclusive Economic Zone Off Alaska; Revision of Definitions of Overfishing, Maximum Sustainable Yield, and Optimum Yield for the Crab and Scallop Fisheries

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

ACTION: Notice of availability; request for comments.

SUMMARY: The North Pacific Fishery Management Council (Council) has submitted for Secretarial review Amendment 7 to the Fishery Management Plan (FMP) for the Commercial King and Tanner Crab Fisheries in the Bering Sea/Aleutian Islands (BSAI crab FMP) and Amendment 6 to the FMP for the Scallop Fishery Off Alaska. These amendments would revise definitions of overfishing, maximum sustainable yield (MSY), and optimum yield (OY) for the crab and scallop fisheries. These actions are necessary to ensure that conservation and management measures continue to be based on the best scientific information available and are intended to advance the Council's ability to achieve, on a continuing basis, the OY from fisheries under its jurisdiction.

DATES: Comments on the amendments must be received by February 1, 1999.

ADDRESSES: Comments on these amendments should be submitted to Sue Salveson, Assistant Regional Administrator for Sustainable Fisheries, Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802-1668, Attn: Lori Gravel, or delivered to the Federal Building, 709 West 9th. Street, Juneau, AK. Copies of Amendment 7 to the BSAI Crab FMP, Amendment 6 to the Scallop FMP, and the Environmental Assessment prepared for each amendment are available from the North Pacific Fishery Management Council, 605 West 4th Ave., Suite 306, Anchorage, AK 99501–2252; telephone 907–271–2809.

FOR FURTHER INFORMATION CONTACT: Gretchen Harrington, 907-586-7228 or gretchen.harrington@noaa.gov.

SUPPLEMENTARY INFORMATION:

Background

The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires that each regional fishery management council submit each FMP or FMP amendment it prepares to NMFS for review and approval, disapproval, or partial approval. The Magnuson-Stevens Act also requires that NMFS, upon receiving an FMP or FMP amendment, immediately publish a document announcing that the FMP or FMP amendment is available for public review and comment. This action constitutes such notice for Amendment 7 to the FMP for the Bering Sea/Aleutian Islands King and Tanner Crabs and Amendment 6 to the FMP for the Scallop Fishery Off Alaska. NMFS will consider the public comments received during the comment period in determining whether to approve these FMP amendments.

Section 301 (a) of the Magnuson-Stevens Act establishes national standards for fishery conservation and management, and requires that all FMPs create management measures consistent with those standards. National standard 1 requires that conservation and management measures shall ''prevent overfishing while achieving, on a continuing basis, the optimum yield'' from fisheries in Federal waters. The Magnuson-Stevens Act, in section 303(a)(10), requires that each FMP specify objective and measurable criteria (status determination criteria) for identifying when stocks or stock complexes covered by the FMP are overfished and for rebuilding overfished stocks. Pursuant to section 301(b) of the Magnuson-Stevens Act, NMFS issued national standard guidelines (50 CFR 600.305) to provide comprehensive guidance for the development of FMPs and FMP amendments that comply with the national standards. The national standard guidelines require that when data are insufficient to estimate any of the determination criteria, the use of reasonable proxies is required.

The guidelines for national standard 1 (50 CFR 600.310) are based on the Magnuson-Stevens Act's definitions of ''optimum yield,'' ''overfishing,'' and ''overfished''; the requirement for the establishment of objective and measurable criteria for determining the status of a stock or stock complex; and the requirement for remedial action in the event that overfishing is occurring or that a stock or stock complex is overfished.

The guidelines identify the following components as objective and measurable criteria for determining the

status of the stock or stock complex to be defined in the FMP. First, MSY is established for the stock or stock complex. MSY is the largest long-term average catch or yield that can be taken from a stock or stock complex under prevailing ecological and environmental conditions. To achieve a long-term average catch approximating MSY, an MSY control rule is determined. The MSY control rule can be a harvest rate equal to a conservative estimate of natural mortality. The MSY stock size is then determined as the average size of the stock that would be achieved under the MSY control rule. MSY stock size is measured in terms of mature biomass, or a proxy thereof. MSY stock size is the minimum standard for a rebuilding target when a stock is considered overfished.

MSY, the MSY control rule, and MSY stock size are then used to determine the minimum stock size threshold (MSST) and maximum fishing mortality threshold (MFMT), which are used to determine whether a stock or stock complex is overfished. The MSST is the greater of one half the MSY stock size, or the minimum stock size at which rebuilding to the MSY level would be expected to occur within 10 years if the stock or stock complex were exploited at the MFMT. If the actual size of the stock in a given year falls below MSST, the stock is considered ''overfished.'' MFMT is defined by the MSY control rule and is expressed as the MSY fishing mortality rate, F_{msy} = M, a conservative estimate of the natural mortality value. Exceeding the MFMT for a period of 1 year or more constitutes overfishing.

The OY from a fishery provides a target harvest level and provides for rebuilding overfished stocks to a level consistent with producing MSY. OY equals the amount of fish that will provide the greatest overall benefit to the Nation. OY is based on MSY as reduced by relevant social, economic, and ecological factors. OY is calculated to determine the optimum harvest level over the long term. In the case of an overfished fishery, OY provides for rebuilding to a level consistent with producing the MSY for the fishery.

NMFS is required to notify the Council once NMFS determines that overfishing is occurring, a stock or stock complex is overfished, a stock or stock complex is approaching its MSST, or the rate or level of fishing mortality for a stock or stock complex is approaching MFMT. The Council then must take action to develop a rebuilding plan within 1 year. The Council may implement interim measures to reduce overfishing until the rebuilding plan is in place. The rebuilding plan can either be an FMP, an FMP amendment, or a proposed rule that accomplishes the purposes outlined in the national standard guidelines to end overfishing and rebuild the overfished stock or stock complex. Furthermore, the Council action must specify a time period for rebuilding the stock or stock complex that satisfies the Magnuson-Stevens Act.

In April 1998, the Council and its Advisory Panel (AP) and Scientific and Statistical Committee (SSC) reviewed a draft analysis of alternatives for revising the existing overfishing definitions. On May 1, 1998, NMFS published revised advisory guidelines to assist regional fishery management councils in updating FMPs for consistency with the Magnuson-Stevens Act. In June 1998, the Council took final action on amendments to bring the BSAI crab and scallop FMPs into compliance with the Magnuson-Stevens Act and the national standard guidelines (50 CFR 600.310). Each of these proposed amendments, if approved, would redefine overfishing, MSY, and OY based on the biology of the stock, the fishing history, and the quality of available data.

Bering Sea/Aleutian Islands King and Tanner Crabs

NMFS manages the king and Tanner crab fisheries in the Exclusive Economic Zone (EEZ) (3 to 200 miles offshore) of the Bering Sea and Aleutian Islands off Alaska under the BSAI crab FMP. The Council prepared this FMP pursuant to the Magnuson-Stevens Act. NMFS approved the FMP, and it became effective in 1989. It is a framework FMP that, with oversight from the Council and NMFS, defers management of the crab resources in the BSAI to the State of Alaska (State). The FMP contains three categories of management measures: (1) Specified Federal management measures that require an FMP amendment to change; (2) framework type management measures, with criteria set out in the FMP that the State must follow when implementing changes in State regulations; and (3) measures that are neither rigidly specified nor frameworked in the FMP and that may be freely adopted or modified by the State, subject to applicable Federal laws and review (explained in the BSAI crab FMP, available from the Council: see **ADDRESSES**).

Amendment 7 to the BSAI crab FMP would improve management of the BSAI crab fisheries by instituting conservation and management measures that would (1) prevent overfishing, (2) achieve OY on a continuing basis, and (3) update the BSAI crab FMP with new information.

Revised Definitions of OY, MSY, and Overfishing

Amendment 7 would establish criteria for estimating OY and overfishing levels for BSAI crab stocks. The BSAI Crab Plan Team developed these criteria based on species life history characteristics and trends in stock biomass estimates. OY, MSY, and threshold levels proposed in Amendment 7 were derived from definitions contained in the Magnuson-Stevens Act and the national standard guidelines.

MSY represents the average of sustainable yield (SY) over a suitable period of time, where SY is a fraction of the total mature biomass (male and female) for a given year. The BSAI Crab Plan Team estimated MSY from the best scientific information available. However, the scientific information required to determine MSY was not available for several BSAI crab stocks. In these cases, proxy stocks have been used to estimate MSY. Table 1 of the Environmental Assessment for Amendment 7 sets forth estimates of MSY for BSAI crab species (see **ADDRESSES**). The MSY control rule for king and Tanner crabs is the mature biomass of a stock, or proxy thereof, exploited at a fishing mortality rate equal to a conservative estimate of natural mortality, M, which is M=0.2 for all king crab species and M=0.3 for all Tanner crab species. For BSAI crab, the MSY stock size is the average mature biomass observed over the past 15 years, from 1983 to 1997.

Amendment 7, in establishing the MSY, allows the establishment of the threshold level of abundance below which the stock is considered overfished. Overfishing is defined for king and Tanner crab stocks in the BSAI as any rate of fishing mortality in excess of the MFMT for a period of 1 year or more. MFMT, defined by the MSY control rule, is expressed as the MSY fishing mortality rate, F_{msy} = M. The MSST is specified as one-half of the MSY stock size. If stock abundance falls below MSST, the stock is considered overfished and the guidelines specify that a rebuilding plan must be prepared for the stock.

These definitions are part of the FMP framework. The Crab Plan Team and the Council will review the definitions every 5 years or when environmental conditions indicate a regime shift. At that time, MSY can be recalculated to take into account changes in the environment, in which case MSY, OY,

and MSST would be changed in the FMP.

The State determines the allowable catch for the commercial crab fisheries by annually setting guideline harvest levels (GHLs) based on estimates of stock abundance. Annual establishment of crab GHLs is a ''category two'' management measure, which means the State determines the GHLs following criteria established in the FMP and with Federal oversight. Because they are based on crab abundance, GHLs can be set higher than MSY and the upper range of OY for a given fishing season, as long as the MSY and OY are not exceeded on a continuing basis. Therefore, in a year when stock abundance is higher than the MSY stock size, the GHL can exceed OY and MSY, without constituting overfishing. For example, if the Bristol Bay red king crab stock continues to rebuild as projected, the stock may be abundant enough to warrant a GHL higher than the MSY. If that occurs, the fleet would still be allowed to harvest the GHL in that year.

Currently, the Bering Sea *C. bairdi* Tanner crab spawning biomass is below the MSST and, hence, would be deemed ''overfished'' under Amendment 7. Estimated spawning biomass of Tanner crabs from the 1997 survey was 64.2 million lb (29,121 metric tons (mt)), well below the MSST of 94.8 million lb (43,001 mt). If Amendment 7 is approved by NMFS, the Council will be required to develop a rebuilding plan for this stock within 1 year.

Update the BSAI Crab FMP

The BSAI Crab FMP has never been updated from the original draft of January 24, 1989. Since that time, six FMP amendments have been approved, but the amendment language has not been included in the FMP text. The 1989 BSAI Crab FMP does not provide readers with a clear understanding of conservation and management measures that have been implemented for the BSAI crab fisheries. In addition, the 1989 FMP does not include catch data and other scientific information from the past 10 years. Other changes have also occurred, including changes to the Magnuson-Stevens Act and other laws, a Russian/U.S. boundary agreement, and development of a Federal/State Action Plan.

For these reasons, the Crab Plan Team and the Council have proposed revisions to the FMP to bring it up to date. These proposed changes were discussed and reviewed over the course of several public meetings that occurred during the period 1995–1998. Proposed changes would include incorporating previously approved FMP amendment language, updating figures, tables, and appendix language, editorial housekeeping changes, and adding language in accordance with requirements of the Magnuson-Stevens Act. New sections would be added to include an Executive Summary, a Federal/State Action Plan, the Alaska Board of Fisheries regulations on Category 2 petitions, Species Profiles, and Coastal Community Profiles.

Scallops

A Federal FMP for the scallop fishery was recommended by the Council in April 1995, and NMFS approved it on July 26, 1995. The FMP defers scallop management to the State because the State has managed the scallop fishery in the EEZ and in Alaskan State waters since the fishery began in 1968. The FMP covers all fisheries for weathervane scallops (*Patinopecten caurinus*), pink scallops (*Chlamys rubida*), spiny scallops (*Chlamys hastata*), rock scallops (*Crassadoma gigantea*), and all other scallop species in the waters off Alaska. Only weathervane scallops are harvested commercially at this time.

Amendment 6 is proposed to amend the scallop FMP by redefining overfishing, OY, and MSY, to bring the FMP into compliance with the Magnuson-Stevens Act. This amendment also would add information on State bycatch monitoring and reduction programs.

The Scallop Plan Team recommended definitions of MSY, OY, and overfishing for weathervane scallop stocks based on life history data and observed catch history. For the weathervane scallop stocks, biomass has not been estimated, age data from the fishery are lacking, and no comprehensive surveys have been conducted. Therefore, MSY can not be estimated based on scallop biomass.

MSY for weathervane scallops is based on the average catch from 1990–1997, excluding 1995, when the fishery was closed due to overfishing concerns. The 1990–1997 time frame reflects prevailing ecological conditions. OY is specified as a range extending from zero to MSY. The MSY control rule for weathervane scallops consists of a constant harvest rate equal to the estimated natural mortality rate of 0.13. MSY stock size is MSY divided by natural mortality. A MSST for weathervane scallops is established based on ½ MSY stock size. If the stock fell below this threshold, the stock would be considered overfished. Overfishing of weathervane scallop stocks is then defined as a fishing rate in excess of the natural mortality rate, $F_{overfishing}=M=0.13$. It should be noted that the current upper ends of the GHL ranges for each scallop management area, when combined, exceed the upper bound of OY.

In the future, better quantitative estimates of appropriate scallop yields by area may be generated based on analysis of observer data. Additional information on biomass and long-term potential yield of pink, spiny, and rock scallops also may be available in the future. At such time, MSY and OY would be re-estimated and the FMP amended.

Information on Bycatch

The Magnuson-Stevens Act emphasizes the importance of bycatch effects on achieving sustainable fisheries. National standard 9 mandates that conservation and management measures shall, to the extent practicable, (1) minimize bycatch and (2), to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.

Amendment 6 to the Scallop FMP identifies the following bycatch reduction and monitoring measures the State has implemented in accordance with national standard 9 of the Magnuson-Stevens Act: At-sea catch sampling, area closures, bycatch limits, and gear restrictions.

In 1993, the State implemented an observer program to monitor crab bycatch, as well as collect biological and fishery information on weathervane scallops in an effort to answer critical management questions. Efforts are underway to use data collected by observers to estimate abundance of scallops using a fishery-based stock assessment model. Other data are collected to define the biological season, define the time period of highest quality and quantity of product, gain insights into scallop recruitment and maturity, estimate the number and weight of discarded scallops, map scallop beds, determine the extent of bottom area dredged, and calculate catch per unit effort.

Observers collect bycatch data during the fishing season. Observers identify, count, and record the number of crab and Pacific halibut encountered, and collect information on the retained and discarded scallop catch. In addition to enumerating crab, carapace measurements, shell age, sex, injuries. and mortality are recorded. All Pacific halibut encountered are measured for length and examined for injuries and overall body condition. Management areas are closed by emergency order if established crab bycatch limits are reached.

The Council prepared an EA for each amendment that describes the

management background, the purpose and need for action, the management action alternatives, and the environmental and the socio-economic impacts of the alternatives. A copy of each EA can be obtained from the Council (see **ADDRESSES**).

The Director of the Alaska Fisheries Science Center, NMFS, has certified with reservations that the proposed definitions of overfishing comply with the provisions of the guidelines at 50 CFR 600.310(d)(5) that an overfishing definition must (1), have sufficient scientific merit, (2) are likely to result in effective Council action to protect the stock from closely approaching or reaching an overfished status, (3) provide a basis for objective measurement of the status of the stock against the criteria, and (4) are operationally feasible. The crab and scallop overfishing definitions satisfy criteria (1), (3), and (4). However, there is not enough information to determine if the overfishing definitions satisfy criterion (2). Data currently available for species covered by these FMPs are inadequate to determine whether the selected MSSTs are greater than the minimum stock size at which rebuilding to the MSY level would be expected to occur within 10 years if the stock or stock complex were exploited at the MFMT.

NMFS will consider the public comments received during the comment period in determining whether to approve Amendment 7 to the BSAI crab FMP or Amendment 6 to the Scallop FMP. To be considered, comments must be received by the close of business on the last day of the comment period specified in this NOA; that does not mean postmarked or otherwise transmitted by that date.

Dated: November 24, 1998.

Gary C. Matlock,

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

[FR Doc. 98–31997 Filed 1–30–98; 8:45 am]

BILLING CODE 3510–22–F

Notices

Federal Register
Vol. 63, No. 230
Tuesday, December 1, 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

Forest Service

Crystal Mountain Master Development Plan, Mt. Baker-Snoqualmie National Forest, Pierce County, Washington

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Forest Service, USDA, will prepare an environmental impact statement (EIS) for Crystal Mountain's proposal to update its Master Development Plan. The proposed development includes the replacement and addition of chairlifts and surface lifts; construction of an aerial tram; expansion of the snowmaking system; as well as the addition and expansion of parking areas, day lodges, overnight lodging and other related facilities, and utilities to support new ski and other recreation opportunities. The proposed action also includes watershed restoration projects that have been identified in the watershed.

The proposed action would increase the year-round recreational opportunities within the existing Special Use Permit Boundary (4,350 acres). Implementation of the proposed Master Development Plan would increase the skiers-at-one-time (SAOT) capacity from 7,150 to 10,990. If implemented, the resulting persons-at-one-time (PAOT) capacity of the resort would increase from 7,865 to 12,090.

DATES: Comments concerning the scope of this analysis should be in writing and postmarked by January 15, 1999.

ADDRESSES: Send written comments to Daniel T. Harkenrider, Acting Forest Supervisor, 21905 64th Avenue West, Mountlake Terrace, Washington 98043, Attention: Crystal Mountain Master Plan.

FOR FURTHER INFORMATION CONTACT: Larry Donovan, Winter Sports Specialist, Mt. Baker-Snoqualmie National Forest Supervisor's Office, 21905 64th Avenue West, Mountlake Terrace, Washington 98043–2278. Phone: (425) 744–3403. Internet: l.donovan/r6pnw__mbs@fs.fed.us.

SUPPLEMENTARY INFORMATION: Crystal Mountain has been operating under a Special Use Permit from the USDA Forest Service since it opened for business in 1962. Presently, alpine skiing/snowboarding and other four-season resort activities are provided to the public through a Special Use Permit administered by the Mt. Baker-Snoqualmie National Forest. The current Special Use Permit includes a requirement that an updated Master Development Plan be prepared, as most projects identified in the existing (1983) Master Development Plan have been developed.

The purpose (objective) of this project is an updated Master Plan for long range (10–15) years management and development of the Crystal Mountain Ski Area. The goal of the Master Plan will be to ensure the long-term economic viability of Crystal Mountain; maintain the competitive position of Crystal Mountain with other ski areas in the Puget Sound Basin; maintain and restore a healthy ecosystem; and be consistent with the Mt. Baker-Snoqualmie National Forest Plan.

The proposed action is the submitted 1998 Master Development Plan proposal. It includes: replacing three existing chair lifts; constructing seven new chair lifts, two new surface lifts, and an aerial tram, resulting in an additional of 265.8 acres of lift-served ski terrain. The tram provide improved four-season public access to the summit of Crystal Mountain. Also proposed: an expanded snowmaking system (from 30 acres of coverage to 249 acres); and increased night skiing (from 65 to 175 acres). The proposed action also includes the addition of 57,000 square feet of support facilities, including two on-mountain restaurants. Expansion of the existing Alpine Inn and construction of a new hotel would provide public lodging for an additional 690 overnight visitors. An additional base area (Bullion Basin) is proposed for development in a portion of the existing Parking Lot B. Overall parking would be expanded by 11–12 acres. New employee housing facilities are proposed, serving 285 employees. A new sewage treatment facility is also proposed; it would serve the Crystal Mountain ski area as well as other Forest Service Special Use Permit areas and private development in the watershed. In order to meet the increased snowmaking and domestic water consumption needs, several wells would be developed. The proposed action also includes watershed restoration projects as identified in the Silver Creek Watershed Condition Assessment. Implementation could begin in the summer of 2000 and would continue for approximately 10–15 years.

The site-specific environmental analysis provided by the Crystal Mountain Master Development Plan EIS will assist the Forest Supervisor in determining which improvements are needed to meet the goals and objectives, as stated above.

An environmental document will be produced which will display alternativers considered, including (1) no action, and (2) the proposed action. Three additional alternatives have been tentatively identified: (3) reduced expansion into the East Peak area; (4) no development in the North Country, South Country and East Peak Areas; and (5) reduced disturbance to riparian reserves. The EIS will analyze the direct, indirect, and cumulative effects of the alternatives. Past, present, and projected activities on both private and National Forest System lands will be considered. The EIS will disclose the effects of site-specific mitigation.

Comments from the public will be used to:

- Identify potential issues.
- Identify major issues to be analyzed in depth.
- Eliminate minor issues or those that have been covered by a previous environmental analysis, such as the Mt. Baker-Snoqualmie Land and Resource Management Plan.
- Identify alternatives to the proposed action.
- Identify potential environmental effects of the proposed action and alternatives.

Issues Identified as the result of internal scoping include:

- Consistency with the Forest Plan/ Aquatic Conservation Strategy Objectives;
- Maintenance of Visual Quality Objectives in Mount Rainier National Park and along the Pacific Crest Trail;
- Transportation impacts to Highway 410 and Crystal Mountain Boulevard;

• Increased access to ''Back Country'' terrain;

• Maintenance of snags, large downed wood and old growth habitat; and

• Maintenance of habitat for Threatened & Endangered, Sensitive and Survey & Manage species.

Scoping and public involvement are continuing. An initial scoping letter will be mailed on November 19, 1998. Two public scoping meetings will be held: December 8, 1998, from 6:00 PM to 9:00 PM, at the Seattle Sea-Tac Marriot Hotel, 3201 South 176th Street, Seattle, WA 98189; and December 9, 1998, from 5:30 PM - 9:00 PM at the Enumclaw Senior High School cafeteria, 226 Semanski South, Enumclaw, WA 98022. The information and comments received will be used in preparation of the draft EIS.

Comments received in response to this solicitation, including names and addresses of those who comment, will be considered part of the public record on this proposed action and will be available for public inspection. Comments submitted anonymously will be accepted and considered; however, those who submit anonymous comments will not have standing to appeal the subsequent decision under 36 CFR Parts 215 and 217. Additionally, pursuant to 7 CFR 1.27(d), any person may request the agency to withhold a submission from the public record by showing how the Freedom of Information Act (FOIA) permits such confidentiality. Persons requesting such confidentiality should be aware that, under the FOIA, confidentiality may be granted in only very limited circumstances, such as to protect trade secrets. The Forest Service will inform the requester of the agency's decision regarding the request for confidentiality, and where the request is denied, the agency will return the submission and notify the requester that the comments may be resubmitted with or without name and address within (30) days.

The draft EIS is expected to be filed in April 1999. Following release of the draft EIS, there will be a public comment period of at least 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register.**

The Forest Service believes that it is important to give reviewers notice at this early stage of several court rulings related to public participation in the environmental review process. First, reviewers of the draft EIS must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft EIS stage but that are not raised until after completion of the final EIS may be waived or dismissed by the courts. *City of Angoon* v. *Hodel,* 803 f.2d 1016, 1022 (9th Cir, 1986) and *Wisconsin Heritages, Inc.* v. *Harris,* 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final EIS.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft EIS should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft EIS. Comments may also address the adequacy of the draft EIS or the merits of the alternatives formulated and discussed in the EIS. (Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.)

The final EIS is scheduled to be completed in November 1999. In the final EIS, the Forest Service is required to respond to comments and responses received during the comment period that pertain to the environmental consequences discussed in the draft EIS and applicable laws, regulations, and policies considered in making the decision EIS and applicable laws, regulations, and policies considered in making the decision regarding this proposal. The lead agency is the Forest Service. The Forest Supervisor of the Mt. Baker-Snoqualmie National Forest is the responsible official. The responsible official will document the decision and the reasons for the decision in the Record of Decision. That decision will be subject to Forest Service appeal regulations 36 CFR Parts 215 or 251.

Dated: November 13, 1998.

Dennis E. Bschor,

Forest Supervisor.

[FR Doc. 98–31906 Filed 11–30–98; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Clean State Ecosystem Management Project, Nez Perce National Forest, Idaho County, Idaho

AGENCY: Forest Service, USDA.

ACTION: Revised Notice of Intent.

AUTHORIZATION: 40 CFR 1508.22.

SUMMARY: The Forest Service published a notice of intent to prepare an environmental impact statement for the Clean State Ecosystem Management Project in March 6, 1997 in the Federal Register (Vol. 62, No. 44, Page 10253–10254). Forest Service Policy mandates that a revised notice of intent (NOI) be filed when there is a major change is the information shown in the notice of intent. For the Clean State Ecosystem Management Project, there are two major changes:

1. *A delay of more than 6 months in filing either a draft for final EIS*

◆ The draft impact statement is anticipated to be done by May of 1999 with the final EIS to be published in July 1999. This will be a 12 month delay of the draft and final EIS from the original notice of intent.

2. *A change in the proposed action or the decision to be made.*

◆ The following actions have been removed from the Clean State Ecosystem Management Project proposed action:

◆ Modify existing fish structure in Slate Creek;

◆ Develop and enhance dispersed recreation sites; and

◆ Provide interpretive sites for the public.

DATES: Written comments and suggestions should be received by **Federal Register** to receive timely consideration in the preparation of the draft EIS.

ADDRESSES: Send written comments and suggestions, request for maps, or request to be placed on the mailing list to Jack Carlson, District Ranger, Salmon River Ranger District, Nez Perce National Forest, HC 01, Box 70, Whitebird, Idaho, 83554 or by e-mail at: cseis/r1__nezperce@fs.fed.us

FOR FURTHER INFORMATION CONTACT: Mike McGee or Marsha Hollander, Salmon River Ranger District, HC 01, Box 70, Whitebird, Idaho 83554. Phone (208) 839–2211 or by e-mail at: cseis/r1__nezpere@fs.fed.us

Dated: November 18, 1998.

Elayne M. Murphy,

Acting Forest Supervisor, Nez Perce National Forest.

[FR Doc. 98–31871 Filed 11–30–98; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Committee of Scientists Meeting

AGENCY: Forest Service, USDA.

ACTION: Notice.

SUMMARY: The Committee of Scientists will hold a public teleconference call on Tuesday, December 15, 1998. The teleconference call will begin at 1:00 p.m. and end at 4:00 p.m. (eastern standard time). The purpose of the telephone conference call is for the Committee of Scientists to continue discussion of its report and recommendation to the Secretary of Agriculture and the Chief of the Forest Service. The public is invited to attend this teleconference call and may be provided an opportunity to comment on the Committee of Scientists' deliberations during the teleconference, only at the request of the Committee.

DATES: The teleconference call will be held on Tuesday, December 15, 1998, from 1:00 p.m. to 4:00 p.m (eastern standard time).

ADDRESSES: The teleconference will be held at the USDA Forest Service headquarters, Auditor's Building, 201 14th Street, S.W., Washington, D.C., in the Roosevelt Conference Room and at all Regional Offices of the Forest Service, which are listed in the table under Supplementary Information.

Written comments on improving land and resource management planning may be sent to the Committee of Scientists, P.O. Box 2140, Corvallis, OR 97339. Also, the Committee may be accessed via the Internet at www.cof.orst.edu./org/scicomm/.

FOR FURTHER INFORMATION CONTACT:

For additional information concerning the teleconferences, contact Bob Cunningham, Designated Federal Office to the Committee of Scientists, by telephone (202) 205-1523.

SUPPLEMENTARY INFORMATION:

The public may attend the teleconference at the following field locations:

USDA Forest Service Regional Office Locations

Region 1, Northern Region, Federal Building, 200 E Broadway, Missoula, MT

Region 2, Rocky Mountain Region, 740 Simms St., Golden, CO

Region 3, Southwestern Region, Federal Building, 517 Gold Ave., SW., Albuquerque, NM

Region 4, Intermountain Region, Federal Building, 324 25th St., Ogden, UT

Region 5, Pacific Southwest Region, 630 Sansome St., San Francisco, CA

Region 6, Pacific Northwest Region, 333 SW 1st Ave., Portland, OR

Region 8, Southern Region, 1720 Peachtree Rd. NW, Atlanta, GA

Region 9, Eastern Region, 310 W. Wisconsin Ave, Room 500, Milwaukee, WI

Region 10, Alaska Region (office will open early), Federal Office Building, 709 W. 9th St., Juneau, AK

The Committee of Scientists was chartered to provide scientific and technical advice to the Secretary of Agriculture and the Chief of the Forest Service on improvements that can be made to the National Forest System land and resource management planning process (62 FR 43691; August 15, 1997). Notice of the names of the appointed Committee members was published December 16, 1997 (62 FR 65795).

Dated: November 25, 1998.

Paul Brouha,

Associate Deputy Chief, National Forest System.

[FR Doc. 98–31972 Filed 11–30–98; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

Opportunity to Comment on the Applicants for the Central Illinois (IL) Area

AGENCY: Grain Inspection, Packers and Stockyards Administration (GIPSA).

ACTION: Notice.

SUMMARY: GIPSA requests comments on the applicants for designation to provide official services in the geographic area assigned to Central Illinois Grain Inspection, Inc. (Central Illinois).

DATES: Comments must be postmarked, or sent by telecopier (FAX) by December 30, 1998.

ADDRESSES: Comments must be submitted in writing to USDA, GIPSA, Janet M. Hart, Chief, Review Branch, Compliance Division, STOP 3604, Room 1647–S, 1400 Independence Avenue, S.W., Washington, DC 20250–3604. Telecopier (FAX) users may send comments to the automatic telecopier machine at 202–690–2755, attention: Janet M. Hart. All comments received will be made available for public inspection at the above address located at 1400 Independence Avenue, S.W., during regular business hours.

FOR FURTHER INFORMATION CONTACT: Janet M. Hart, telephone 202–720–8525.

SUPPLEMENTARY INFORMATION: This action has been reviewed and determined not to be a rule or regulation as defined in Executive Order 12866 and Departmental Regulation 1512–1; therefore, the Executive Order and Departmental Regulation do not apply to this action.

In the October 1, 1998, **Federal Register** (63 FR 52678), GIPSA asked persons interested in providing official services in the Central Illinois area to submit an application for designation by October 30, 1998. There were two applicants: Central Illinois and Turner Grain Services, Inc. (Turner). Central Illinois applied for designation to provide official services in the entire area currently assigned to them. Turner applied for designation to provide official services in the western portion of the Central Illinois area: bounded on the North by Interstate 74; bounded on the East by Interstate 155; bounded on the South by Illinois Route 136 and the southern Tazewell County Line; and bounded on the West by the western Peoria County line north to Interstate 74.

GIPSA is publishing this notice to provide interested persons the opportunity to present comments concerning the applicants. Commenters are encouraged to submit reasons and pertinent data for support or objection to the designation of the applicants. All comments must be submitted to the Compliance Division at the above address. Comments and other available information will be considered in making a final decision. GIPSA will publish notice of the final decision in the **Federal Register**, and GIPSA will send the applicants written notification of the decision.

Authority: Pub. L. 94–582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*).

Dated: November 19, 1998.

Neil E. Porter,

Director, Compliance Division.

[FR Doc. 98–31748 Filed 11–30–98; 8:45 am]

BILLING CODE 3410–EN–P

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

Correction of the October 1, 1998, Federal Register Notice Extending Pilot Programs

AGENCY: Grain Inspection, Packers and Stockyards Administration (GIPSA).

ACTION: Notice correction.

SUMMARY: On October 1, 1998, GIPSA published in the **Federal Register**, a Notice extending three pilot programs, timely service, open season, and barge until September 30, 2000. The Notice inadvertently omitted referencing an earlier **Federal Register** Notice that reduced from 6 months to 3 months the period for which grain facilities had to have been without official services to qualify for the ''Open Season'' pilot program. GIPSA is correcting the October 1, 1998, **Federal Register** Notice by adding reference to the omitted earlier **Federal Register** Notice.

EFFECTIVE DATE: November 1, 1998.

ADDRESSES: USDA, GIPSA, Janet M. Hart, Chief, Review Branch, Compliance Division, STOP 3604, Room 1647–S, 1400 Independence Avenue, S.W., Washington, DC 20250–3604.

FOR FURTHER INFORMATION CONTACT: Janet M. Hart, at 202–720–8525.

SUPPLEMENTARY INFORMATION: The October 1, 1998, **Federal Register** (63 FR 52682) noted that the pilot program provisions would remain the same as announced in the September 27, 1995, and January 15, 1998, **Federal Registers**. A third **Federal Register** Notice that changed one of the ''open season'' pilot program's provisions was inadvertently omitted. That Notice, published on October 3, 1996 (61 FR 51674), reduced from 6 months to 3 months the period that facilities had to have been without official sample-lot or official weighing services to qualify.

GIPSA is publishing this notice to correct the omission.

Correction

In FR Doc. 98–26091, beginning on page 52683 (63 FR 52683) in the issue of Thursday, October 1, 1998, make the following correction:

1. On page 52683, in the second column, insert the following as the new second paragraph. ''The three pilot program provisions will remain the same as announced in the September 27, 1995, October 3, 1996, and January 15, 1998, **Federal Registers**.''

Authority: Pub. L. 94–582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*).

Dated: November 19, 1998.

Neil E. Porter,

Director, Compliance Division.

[FR Doc. 98–31749 Filed 11–30–98; 8:45 am]

BILLING CODE 3410–EN–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–808]

Chrome-Plated Lug Nuts From the People's Republic of China; Amendment of Final Results of Antidumping Duty Administrative Review

ACTION: Notice of Amendment to Final Results of the Antidumping Duty Administrative Review of Chrome-Plated Lug Nuts from the People's Republic of China.

AGENCY: Import Administration, International Trade Administration, U.S. Department of Commerce.

SUMMARY: On October 7, 1998, the Department of Commerce (the Department) published the final results of its administrative review of the antidumping order on chrome-plated lug nuts (lug nuts) from the People's Republic of China (PRC). *See Chrome-Plated Lug Nuts From the People's Republic of China; Final Results of Antidumping Duty Review*, 63 FR 53872 (October 7, 1998) (final results). The review covered the period September 1, 1996 through August 31, 1997.

We gave interested parties the opportunity to provide comments concerning ministerial errors. We received comments from Jiangsu Rudong Grease Gun Factory (Rudong) alleging a ministerial error. After considering this comment, we have amended the final results of the review.

EFFECTIVE DATE: December 1, 1998.

FOR FURTHER INFORMATION CONTACT: Thomas Gilgunn or Maureen Flannery, Antidumping/Countervailing Duty 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) 482–0648 and (202) 482–3020, respectively.

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. In addition, unless otherwise indicated, all citations to the Department's regulations are to the provisions codified at 19 CFR part 353 (April 1, 1997).

Scope of Review

The products covered by this review are one-piece and two-piece chrome-plated and nickel-plated lug nuts from the PRC. The subject merchandise includes chrome-plated and nickel-plated lug nuts, finished or unfinished, which are more than 11/16 inches (17.45 millimeters) in height and which have a hexagonal (hx) size of at least 3/4 inches (19.05 millimeters) but not over one inch (25.4 millimeters), plus or minus 1/16 of an inch (1.59 millimeters). The term ''unfinished'' refers to unplated and/or unassembled chrome-plated lug nuts. The subject merchandise is used for securing wheels to cars, vans, trucks, utility vehicles, and trailers. Excluded from the order are zinc-plated lug nuts, finished or unfinished, stainless steel capped lug nuts, and chrome-plated lock nuts.

The merchandise under review is currently classifiable under item 7318.16.00 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 is dispositive.

Amendment of Final Results

Rudong alleges that the Department made a clerical error in calculating the Indian inflation factor it applied to certain surrogate Indian data. In the preliminary results, Rudong states, for certain inputs the Department used surrogate Indian data obtained from the period September through December 1996. This surrogate Indian data was adjusted upwards by an average inflation index for the period of September through December 1996. In the final results, the Department extended its use of surrogate Indian data to include newly available data for the months of January through May 1997. Rudong contends that the Department should have therefore extended its inflation index to include inflation data for the months of January through May 1997.

We agree with Rudong. The Indian inflation index should cover the same period as the surrogate Indian data. Therefore, the Indian inflation index applied to steel wire rod data should be extended to include the months of January through May 1997. This affects the calculations of steel wire rod value as this is the only value for which the data period was expanded in the final results. As defined by section 751(h)

Act, the term ''ministerial error'' includes errors ''in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the [Department] considers ministerial.'' The Department's error in not extending the inflation index period when it expanded the data period was clearly an oversight of this nature. Therefore, we are amending the final results.

Amended Final Results of Review

We determine that the following dumping margins exist:

Manufacturer/exporter	Time period	Margin (percent)
Jiangsu Rudong, Grease Gun Factory	9/1/96–8/31/97	1.23
PRC-Wide rate	9/1/96–8/31/97	44.99

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Individual differences between export price and normal value (NV) may vary from the percentage stated above for Rudong. We have calculated importer-specific duty assessment rates for lug nuts by dividing the total dumping margins (calculated as the difference between NV and export price) for each importer/customer by the total number of units sold to that importer/customer. We will direct Customs to assess the resulting per-unit dollar amount against each unit of merchandise in each of the importer's/customer's entries during the review period. The Department will issue appraisement instructions directly to the Customs Service.

Furthermore, the following deposit rates will be effective upon publication of this notice of final results of review for all shipments of lug nuts from the PRC 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) for Rudong, which was found to merit a separate rate for the final results of this review, the cash deposit rate will be 1.23 percent; (2) for all other PRC exporters, the cash deposit rate will be the PRC-wide rate; and (3) for non-PRC exporters of subject merchandise from the PRC, the cash deposit rate will be the rate applicable to a PRC supplier of that exporter.

These deposit rates, when imposed, shall remain in effect until publication of the final results of the next administrative review.

This notice serves as a final reminder to importers of their responsibility under 19 CFR 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 subsequent assessment of double antidumping duties.

Notification to Interested Parties

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.306. See 63 FR 24391, 24403 (May 4, 1998). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This administrative review and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)) and 19 CFR 351.221.

Dated: November 23, 1998.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 98–31981 Filed 11–30–98; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–502]

Certain Welded Carbon Steel Pipes and Tubes From India; Amended Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, United States Department of Commerce.

ACTION: Notice of amended final results of antidumping duty administrative review.

SUMMARY: On July 22, 1998, the Department of Commerce published in the **Federal Register** (63 FR 39269) the amended final results of administrative review of the antidumping duty order on certain welded carbon steel pipes and tubes from India. The period of review is May 1, 1996 through April 30, 1997. Subsequent to the publication of the amended final results, we received a comment from the respondent alleging a ministerial error. After analyzing the comment submitted, we are amending our amended final results to correct the ministerial error. Based on the correction of the ministerial error, we have changed the margin for Rajinder Pipes Ltd. and Rajinder Steel, Ltd.

EFFECTIVE DATE: December 1, 1998.

FOR FURTHER INFORMATION CONTACT: Hermes Pinilla or Robin Gray, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–3477 or 482–4023, respectively.

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 to the Tariff Act by the Uruguay Round Agreements Act. In addition, unless otherwise indicated, all citations to the Department of Commerce's (the Department's) regulations are to 19 CFR Part 353 (April 1997).

SUPPLEMENTARY INFORMATION:

Background

On July 22, 1998, the Department published in the **Federal Register** (63 FR 39269) the amended final results of administrative review of the antidumping duty order on certain welded carbon steel pipes and tubes from India covering the period May 1, 1996 through April 30, 1997. After publication of the amended final results, we received a timely allegation from Rajinder Pipes Ltd. and Rajinder Steel, Ltd. (collectively called ''RSL'') that we had made a ministerial error. However, because RSL had filed a summons and complaint with the Court of International Trade (CIT), we did not issue amended final results of review reflecting the correction of the clerical error. In accordance with *Zenith Elec. Corp.* v. *United States*, 699 F. Supp. 296

(CIT 1988), *Aff'd* 884 F.2d 556 (Fed Cir. 1989), the Department may not amend an administrative result while it is under the CIT's exclusive jurisdiction unless it has leave of the CIT.

On November 2, 1998, pursuant to the order issued in *Rajinder Pipes Ltd.* v. *United States*, Court No. 98–07–02504, the CIT granted the Department leave to correct the clerical error in the calculation of RSL's weighted-average margin. Therefore, we are correcting the calculation, in accordance with section 751(h) of the Act.

Clerical-Error Allegation

RSL alleges that, while making corrections to the final results, the Department caused another clerical error to occur inadvertently. Specifically, RSL asserts that, after the Department corrected the clerical error regarding the home market credit-expense adjustment for direct sales, it did not deduct the excise duty when making comparisons to U.S. price.

We agree with RSL and have made the appropriate change in the margin program so that we have deducted excise duty from home market price before making a comparison to U.S. price. This was an inadvertent error in our computer programming.

Amended Final Results of Review

As a result of the amended margin calculations, the following weighted-average percentage margin exists for the period May 1, 1996, through April 30, 1997:

Manufacturer/exporter	Percentage margin
RSL	14.05

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. We have calculated, wherever possible, an exporter/importer-specific assessment rate for RSL's sales to the United States. We will also direct the Customs Service to collect cash deposits of estimated antidumping duties on all appropriate entries in accordance with the procedures discussed in the final results of review (63 FR 32825, 32833) and as amended by this notice. The amended deposit requirements are effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice and shall remain in effect until publication of the final results of the next administrative review.

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 353.26 to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

We are issuing and publishing this determination in accordance with sections 751(h) and 777(i) of the Act and 19 CFR 353.28(c).

Dated: November 18, 1998.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 98–31982 Filed 11–30–98; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–475–819]

Certain Pasta from Italy: Final Results of New Shipper Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Final Results of New Shipper Countervailing Duty Administrative Review.

SUMMARY: On Septmember 1, 1998, the Department of Commerce published in the **Federal Register** the preliminary results of its new shipper administrative review of the countervailing duty order on certain pasta from Italy for the period January 1, 1997, through December 31, 1997. We have now completed this review and determine the net subsidy to be 0.95 percent *ad valorem*. We will instruct the Customs Service to assess countervailing duties with respect to all shipments of the subject merchandise by Co. R. EX. S.r.L., the new shipper to this review, entered during this period.

EFFECTIVE DATE: December 1, 1998.

FOR FURTHER INFORMATION CONTACT: Vincent Kane or Sally Hastings, Office of AD/CVD Enforcement, Group I, Import Administration, U.S. Department of Commerce, Room 3099, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone (202) 482–2815 or 482–3464, respectively.

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 of Commerce (the Department) is conducting this administrative review in accordance with section 751(a) of the Act. All other references are to the Department's regulations codified at 19 CFR Part 351 *et seq.* Antidumping Duties; Countervailing Duties; Final Rule 62 FR 27296 (May 19, 1997), unless otherwise indicated.

SUPPLEMENTARY INFORMATION:

Background

On September 1, 1998, the Department published in the **Federal Register** (63 FR 46411) the preliminary results of the new shipper administrative review of the countervailing duty order on certain pasta from Italy. The Department has now completed this new shipper administrative review pursuant to section 751(a)(2)(B) of the Act, and in accordance with 19 CFR 351.214. We invited interested parties to comment on the preliminary results. We received no comments. The review covers CO.R.EX., an exporter of the subject merchandise, and CO.R.EX.'s subcontractor. (CO.R.EX. does not produce pasta but has a subcontractor produce pasta for it from semolina supplied by Co.R.EX.) This review covers 24 programs.

Scope of the Review

The merchandise under review consists of certain non-egg dry pasta in packages of five pounds (or 2.27 kilograms) or less, whether or not enriched or fortified or containing milk or other optional ingredients such as chopped vegetables, vegetable purees, milk, gluten, diastases, vitamins, coloring and flavorings, and up to two percent egg white. The pasta covered by this scope is typically sold in the retail market, in fiberboard or cardboard cartons or polyethyelen or polypropylene bags, of varying dimensions.

Excluded from the scope of this review are refrigerated, frozen, or canned pastas, as well as all forms of egg pasta, with the exception of non-egg dry pasta containing up to two percent egg white. Also excluded are imports of organic pasta from Italy that are accompanied by the appropriate certificate issued by one of the following agencies: Instituto Mediterraneo Di Certificazione, Bioagricoop Scrl pasta imported in kitchen display bottles of decorative glass, which are sealed with cork or paraffin and bound with raffia, is excluded from the scope of this review.

The merchandise under review is currently classified under item 1902.19.20 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheading is provided for convenience and customs purposes, or written description of the scope of this review is dispositive.

Furthermore, on July 30, 1998, the Department issued a scope ruling that multipacks consisting of six one-pound packages of pasta, which are shrink wrapped into a single package, are within the scope of the orders. (*See* July 30, 1998, letter from Susan H. Kunbach, Acting Deputy Assistant Secretary for Import Administration, to Barbara P. Sidari, Vice President, Joseph A. Sidari Company, Inc.)

Period of Review

The period of review (''POR'') for which we are measuring subsidies is calendar year 1997.

Subsidies Valuation Information

Benchmark for Long-term Loans and Discount Rate: The companies under review did not take out any long-term, fixed-rate, lira-denominated loans or other debt obligations which could be used as benchmarks in any of the years in which grants were received or government loans under investigation were given. In the *Final Affirmative Countervailing Duty Determination; Certain Stainless Steel Wire Rod from Italy,* 63 FR 87077 (July 29, 1998), the Department determined, based on information gathered during verification, that the Italian Bankers' Association (ABI) prime rate is the most suitable benchmark for long-term financing to Italian companies. Therefore, we used the Italian ABI prime rate increased by the average spread over the ABI prime rate charged by banks on loans to commercial customers as the benchmark for long-term loans and the discount rate.

Allocation Period: In *British Steel plc.* v. *United States,* 879 F. Supp. 1254, 1289 (CIT 1955), *aff'd in part and rev'd in part on other grounds,* 127 F.3d 1471 (Fed. Cir. 1997), the U.S. Court of International Trade (the Court) ruled against the allocation methodology for non-recurring subsidies that the Department had employed for the past decade, which 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 remand order, 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 July 4, 1996. *See British Steel plc* v. *United States,* 929 F. Supp 426, 439 (CIT 1996). Accordingly, the Department has applied this method to determine the appropriate allocation period in this review.

Consistent with our approach in the investigation segment of this proceeding, *Final Affirmative Countervailing Duty Determination: Certain Pasta (''Pasta'') from Italy* (61 FR 30288, June 14, 1996) (''*Pasta from Italy*''), we determined that the Law 64/86 grant received by CO.R.EX.'s subcontractor was non-recurring. For purposes of allocating the Law 64/86 grant, CO.R.EX.'s subcontractor submitted an AUL calculation based on depreciation and asset values of productive assets reported in its financial statements. This AUL was derived by dividing the sum of average gross book value of depreciable fixed assets over the past ten years by the average depreciation charges over this period. We found this calculation to be reasonable and consistent with our company-specific AUL objective. In this manner, we calculated an AUL for CO.R.EX.'s subcontractor. We have used this calculated AUL for the allocation period for the Law 64/86 industrial development grant, the only non-recurring subsidy received by respondents.

Analysis of Programs

I. Programs Conferring Subsidies

Based upon our analysis of the responses to our questionnaires and the record of this review, we determine the following:

Programs Previously Determined to Confer Subsidies

In the preliminary results, we found that the programs listed below conferred countervailable benefits on the subject merchandise. We did not receive any comments on these programs from interested parties. Our review of the record, however, has led us to modify the calculations for each of these programs. First, we revised the denominator used to calculate the subsidy rate for each of the programs listed below. For the preliminary results, we based the denominator on f.o.b. sales values calculated on the basis of estimates of inland freight charges. For these final results, we have used actual inland freight charges in calculating f.o.b. sales values. These revised f.o.b. sales values served as the denominators for calculating the subsidy rate for each of these programs.

Further, we corrected an error in the calculation of the discount rate used to allocate the benefit amount for a Law 64/86 industrial development grant to CO.R.EX.'s subcontractor and for the Law 341/95 consolidation loan received by CO.R.EX. For a further discussion of this correction, see Memorandum to File: Calculation Notes for Final Results, dated November 22, 1998 (a public version of which is on file in room B099 of the main Commerce Building).

As a result of the calculation changes described above, the subsidy rates for the programs listed below changed as follows:

A. Industrial Development Grants Under Law 64/86

The subsidy rate for this program decreased from 0.18 percent to 0.15 percent *ad valorem*.

B. Social Security Reductions and Exemptions

1. Sgravi Benefits

The subsidy rate for this program decreased from 0.01 percent to 0.00 percent *ad valorem*.

2. Fiscalizzazione Benefits

The subsidy rate for this program decreased from 0.06 percent to 0.04 percent *ad valorem*.

3. Law 407/90 Benefits

The subsidy rate for this program decreased from 0.06 percent to 0.04 percent *ad valorem*.

4. Law 863 Benefits

The subsidy rate for this program decreased from 0.03 percent to 0.01 percent *ad valorem*.

Program Determined in This Review to Confer Subsidies

In the preliminary results, we found that the program listed below conferred countervailable benefits on the subject merchandise. We did not receive any comments on this program from interested parties. Our review of the record, however, has led us to modify the calculations for this program, as described above in the section.

Programs Previously Determined to Confer Subsidies

Debt Consolidation Law 341/95

The subsidy rate for this program decreased from 0.93 percent to 0.88 percent *ad valorem*.

II. Programs Determined To Be Not Used

We determine that CO.R.EX. and its subcontractor did not apply for or

receive benefits under the following programs during the POR:

A. VAT Reductions
B. Export Credits Under Law 227/77
C. Capital Grants Under Law 675/77
D. Retraining Grants Under Law 675/77
E. Interest Contributions on Bank Loans Under Law 675/77
F. Interest Grants Financed by IRI Bonds
G. Preferential Financing for Export Promotion Under Law 394/81
H. Corporate Income Tax (IRPEG) Exemptions
I. European Agricultural Guidance and Guarantee Fund
J. Urban Redevelopment Under Law 181
K. Local Income Tax (ILOR) Exemptions
L. Industrial Development Loans Under Law 64/86
M. Export Marketing Grants Under Law 304/90
N. Lump-Sum Interest Payment Under the Sabatini Law for Companies in Southern Italy
O. Remission of Taxes on Export Credit Insurance under Article 33 of Law 227/77
P. European Social Fund
Q. European Regional Development Fund
R. Export Restitution Payments

We did not receive any comments on these programs from the interested parties and our review of the record has not led us to change our findings from the preliminary results.

Final Results of Review

For the period January 1, 1997 through December 31, 1997, we determine the net subsidy for CO.R.EX. to be 0.95 percent *ad valorem*. We will instruct the Customs Service to assess countervailing duties at this net subsidy rate on all entries of the subject merchandise from CO.R.EX. entered, or withdraw from warehouse, for consumption on or after January 1, 1997 and on or before December 31, 1997.

The Department also intends to instruct the Customs Service to collect a cash deposit of estimated countervailing duties of 0.95 percent of the f.o.b. invoice value on all shipments of the subject merchandise from CO.R.EX. entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this new shipper review. The cash deposit rates for all other producers/exporters remain unchanged from the last completed administrative review (see *Final Results of Countervailing Duty Administrative Review: Certain Pasta from Italy* 63 FR 35665 (August 14, 1998)).

This administrative review and notice are in accordance with sections 751(a)(2)(B) and 777(i)(1) of the Act and 19 CFR 351.214.

Dated: November 23, 1998.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 98–31983 Filed 11–30–98; 8:45 am]

BILLING CODE 3510–DS–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 111398E]

Eligibility To Participate in the 1999 Directed Pollock Fishery in the Bering Sea and Aleutian Islands Management Area and Eligibility To Be Considered for Disbursement of Funds Pursuant to the American Fisheries Act

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

ACTION: Solicitation of applications.

SUMMARY: NMFS invites owners of vessels that meet the requirements in either section 208(b)(8) or (e)(21) of the American Fisheries Act (AFA) to apply for eligibility to participate in the offshore directed pollock fishery in the Bering Sea and Aleutian Islands Management Area (BSAI) after January 1, 1999. Section 208(b)(8) requirements apply to catcher vessels that deliver to catcher/processors in the offshore component. Section 208(e)(21) requirements apply to catcher/processors in the offshore component. Owners of vessels that are not specifically named in section 208(b) or (e) must apply to participate in the offshore directed pollock fishery in the BSAI after January 1, 1999.

NMFS also invites owners of vessels that meet the requirements in either section 207(d)(2)(A) or (B) to apply for consideration of the disbursement of funds. If a contract for a cooperative pursuant to section 210(a) is filed by vessels listed in section 208(e), then vessels listed in section 208(e)(10) through (14) will receive the disbursement of funds. However, if no such contract is under section 208(b) or 208(e)(1) through (20) that provide applications will be considered for the disbursement of funds.

Vessel owners may use a single application for both purposes; however, applications for the disbursement of funds must be received by NMFS prior to December 15, 1998. This action is necessary to meet the statutory deadline of December 31, 1998, specified in the AFA and is intended to meet the objectives of the U.S. Congress for vessels participating in the directed pollock fishery in the BSAI.

DATES: Effective November 25, 1998.

ADDRESSES: Applications should be addressed to Philip J. Smith, Administrator, Restricted Access Management, Alaska Region. NMFS, 709 West 9th Street, Room 453, Juneau, AK 99801, or P.O. Box 21668, Juneau, AK 99802. Copies of the relevant portions of the AFA also are available at the above address. Comments regarding the collection of information burden can be sent to the above address and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503, Attention: NOAA Desk Officer.

FOR FURTHER INFORMATION CONTACT: John Lepore, 907–586–7228.

SUPPLEMENTARY INFORMATION:

1. General Information

The AFA, Pub. L. 105–277, was signed into law on October 21, 1998. Section 208 of the AFA specifies which vessels and processors are eligible to harvest pollock in the directed pollock fishery in the BSAI, either by directly naming the eligible vessels or processors, or by providing criteria to determine eligibility. Section 208(h) provides that in the event that the Secretary of Commerce (Secretary) is unable to make a final determination about the eligibility of a vessel under section 208(b)(8) or (e)(21) before January 1, 1999, such vessels, upon the filing of an application asserting eligibility, shall be eligible to participate in the directed pollock fishery in the BSAI pending a final determination by the Secretary.

2. Eligibility Under Section 208(b)(8) To Participate in the Directed Pollock Fishery in the BSAI

Section 208(b)(8) sets out three requirements that must be met by catcher vessels not specifically named in section 208(b)(1) through (7) in order for those vessels to deliver to catcher/processor vessels fish harvested in the directed pollock fishery after January 1, 1999. First, a catcher vessel must have delivered at least 250 metric tons (mt) of pollock in the directed pollock fishery in 1997. Second, at least 75 percent of the pollock harvested by a catcher vessel must have been delivered to a catcher/processor for processing by the offshore component. Third, a catcher vessel must be eligible to harvest pollock in the directed pollock fishery under the License Limitation Program (LLP) (63 FR 52642, October 1,

1998). For purposes of this action, a catcher vessel means a vessel that is used for harvesting fish and that does not process pollock onboard.

3. Eligibility Under Section 208(e)(21) To Participate in the Directed Pollock Fishery in the BSAI

Section 208(e)(21) sets out two requirements that must be met by catcher/processors not specifically named in section 208(e) for those vessels to participate in the directed pollock fishery after January 1, 1999. First, a catcher/processor must have harvested more than 2,000 mt of the pollock in the 1997 directed pollock fishery. Second, a catcher/processor must be eligible to harvest pollock in the directed pollock fishery under the LLP. Catcher/processors determined to be eligible under section 208(e)(21) will be prohibited from harvesting more than one-half of one percent of the pollock apportioned to the offshore component by section 206(b)(2). For purposes of this action, a catcher/processor means a vessel that is used for harvesting fish and processing that fish.

4. Temporary Eligibility To Participate in the Directed Pollock Fishery in the BSAI

Although the potential exists for NMFS, on behalf of the Secretary, to determine eligibility for catcher vessels based on the first two requirements in section 208(b)(8) and for catcher/processor vessels based on the first requirement in section 208(e)(21) by January 1, 1999, NMFS cannot determine the requirement of eligibility under the LLP until applications for the LLP are solicited and eligibility for that program is determined. NMFS anticipates that will not occur until late 1999. Because eligibility for the LLP cannot be determined before January 1, 1999, owners of vessels that qualify under section 208(b)(8) or (e)(21) will need to submit an application asserting eligibility to participate in the directed pollock fishery, as provided in section 208(h). If NMFS determines, based on a submitted application that a vessel does not meet the first two requirements in section 208(b)(8) or the first requirement in section 208(e)(21), an initial administrative determination (IAD) will be issued denying eligibility to participate in the 1999 directed pollock fishery in the BSAI. An applicant can appeal that IAD under 50 CFR 679.43.

5. Disbursement of Funds to Eligible Vessels

Section 207(d)(2) of the AFA provides that the Secretary shall pay by December 31, 1998, $5,000,000 to the owners of the catcher vessels eligible under section 208(b) and the catcher/processors eligible under section 208(e)(1) through (20), if a contract for a cooperative has not been filed by that date. This payment will be divided among the owner(s) of catcher vessels named in section 208(b)(1) through (7), catcher vessels for which an application has been submitted for eligibility under section 208(b)(8), and catcher/processor vessels named in section 208(e)(1) through (20). This apportionment will be based on the proportional amount of pollock harvested by each of these vessels in the 1997 directed pollock fishery minus any obligation to the Federal government that has not been satisfied by the owner(s) of any such vessels. If a contract for a cooperative is filed, only the named vessels in section 208(e)(10) through (14) will receive the disbursement.

To provide NMFS with time to meet the statutory deadline for the $5,000,000 disbursement, applications from owners of vessels that are eligible under section 207(d)(2) must be received by December 15, 1998, to be considered for the disbursement. Regardless of the status of the cooperative, the applications from owners of vessels that meet the requirements of section 208(b)(8) will be used to establish eligibility to participate in the 1999 directed pollock fishery.

6. Application Table

The following table provides a quick reference for who should apply.

Owners of the category of vessels set out below must apply if they wish to . . .	. . . Fish in 1999	. . . Receive payments
Catcher Vessels named in sections 208(b)(1) through (7)	NO	YES [1]
Catcher Vessels eligible based on criteria in sections 208(b)(8)	YES	YES [1]
Catcher/processor vessels named in sections 208(e)(1) through (20)	NO	YES [2]
Catcher/processor vessels eligible based on criteria in section 208(e)(21)	YES	N/A

[1] Will receive payment only if no contract has been filed under section 210(a).
[2] If contract is filed under section 210(a), only vessels listed in section 208(e)(10) through (14) will receive payment. If contract is not filed under section 210(a), $5,000,000 will be divided among vessels that are eligible under sections 208(b) and (e)(1) through (20) based on the amount of harvest of pollock in the directed pollock fishery by each such vessel in 1997 in such a manner as the Secretary deems appropriate.

7. Application Information

Applications must be submitted to NMFS (see **ADDRESSES**). Applications for payments under section 207(d)(2) must be received by December 15, 1998, to be considered for disbursement. Applications submitted to NMFS must contain: (1) the name of the vessel; (2) the owner(s) of the vessel; (3) the business address(es) and telephone and FAX number(s) of owner(s); (4) the section of the AFA under which the vessel is eligible to participate; (5) the amount of pollock harvested in the directed pollock fishery in the BSAI in 1997; and (6) evidence supporting the amount of pollock harvested in the directed pollock fishery in the BSAI in 1997. NMFS will review applications submitted pursuant to section 208(h) and will issue temporary permits so that vessels may participate in the 1999 directed pollock fishery pending a final determination of eligibility.

8. Eligibility Determination

Eligibility to participate in the directed pollock fishery pursuant to AFA does not confer any right of compensation, monetary or otherwise, to the owners of vessels named specifically in the AFA or owners who submit applications. When NMFS is able to determine the status of vessels under the LLP, the privilege to participate in the directed pollock fishery will be revoked if a vessel is not eligible to participate based on the requirements of the LLP.

9. Paperwork Reduction Act Requirements

Notwithstanding any other provisions of the law, no person is required to respond to, nor shall any 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 notice contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) and which has been approved by OMB under control number 0648–0366. Public reporting burden for this

collection of information is estimated to average 2 hours 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. Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS and OMB (see **ADDRESSES**)

Authority: Title II, Pub. L. 105–277.

Dated: November 25, 1998.

Gary C. Matlock,

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

[FR Doc. 98–31956 Filed 11–25–98; 3:05 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 112398C]

Mid-Atlantic Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The Mid-Atlantic Fishery Management Council (Council) and its Executive Committee, Law Enforcement Committee, Large Pelagics Committee, Comprehensive Management Committee and Tilefish Committee will hold public meetings.

DATES: The meetings will be held on Tuesday, December 15, 1998 to Thursday, December 17, 1998. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

ADDRESSES: This meeting will be held at the Radisson Hotel Philadelphia Airport, 500 Stevens Drive, Philadelphia, PA, telephone: 610–521–5900.

Council address: Mid-Atlantic Fishery Management Council, 300 S. New Street, Dover, DE 19904, telephone: 302–674–2331.

FOR FURTHER INFORMATION CONTACT: Christopher Moore, Ph.D., Acting Executive Director, Mid-Atlantic Fishery Management Council; telephone: 302–674–2331, ext. 16.

SUPPLEMENTARY INFORMATION: On Tuesday, December 15th, the Council will meet from 10:00 a.m. until 5:00 p.m. The Large Pelagics Committee will meet from 5:00–6:00 p.m. On Wednesday, December 16th, the Executive Committee will meet from 8:00–9:00 a.m. The Tilefish Committee and Law Enforcement Committee will meet simultaneously from 9:00–10:00 a.m. The Council, together with the Atlantic States Marine Fisheries Commission (ASMFC) will meet from 10:00 a.m. until 5:00 p.m. On Thursday, December 17th, the Comprehensive Management Committee will meet from 8:00–9:00 a.m. Council will meet from 9:00 a.m. until approximately 2:00 p.m.

Agenda items for this meeting are: Discussion and possible adoption of management measures for Atlantic mackerel, *Illex* and *Loligo* squids, and butterfish; review and adopt Amendment 1 to the Monkfish Fishery Management Plan (FMP) for Secretarial submission; review public comments and adopt the Spiny Dogfish FMP for Secretarial approval; review Highly Migratory Species (HMS) FMPs and make possible recommendations; develop plans for Tilefish FMP development for 1999; review Monitoring Committee recommendations and develop recommendations on summer flounder, scup, and black sea bass 1999 recreational management measures; discussion of commercial management measures for summer flounder, scup, and black sea bass; discuss plans for comprehensive management for 1999 and possible recommendation on scup discards; discuss law enforcement concerns regarding management measures for Mid-Atlantic FMPs; discussion and possible adoption of management measures for bluefish, species managed by the New England Council, and dolphin and wahoo, and other fishery management matters.

Although other issues not contained in this agenda may come before this Council for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in the agenda listed in this notice.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Joanna Davis at the Council (see **ADDRESSES**) at least 5 days prior to the meeting date.

Dated: November 24, 1998.

Richard W. Surdi,

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

[FR Doc. 98–31994 Filed 11–30–98; 8:45 am]

BILLING CODE 3510–22–F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D.112598A]

Endangered Species; Permits

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

ACTION: Notice of receipt of application for a scientific research permit (1187).

SUMMARY: Notice is hereby given that Stephen M.H. Connett, St. George's School, has applied in due form for a scientific research permit (1187) to take listed sea turtles.

DATES: Written comments or requests for a public hearing on this application must be received on or before December 31, 1998.

ADDRESSES: The application and related documents are available for review by appointment in the following offices:

Office of Protected Resources, F/PR3, NMFS, 1315 East-West Hwy., Room 13307, Silver Spring, MD 20910–3226 (301–713–1401); and Director, Northeast Region, NMFS, One Blackburn Drive, Gloucester, MA 01930–2298 (978–281–9250).

Written comments, or requests for a public hearing on this application should be submitted to the Chief, Endangered Species Division, Office of Protected Resources.

FOR FURTHER INFORMATION CONTACT: Michelle Rogers, Endangered Species Division, Office of Protected Resources, (301–713–1401).

SUPPLEMENTARY INFORMATION: Stephen M.H. Connett, St. George's School, requests a scientific research permit under the authority of the Endangered Species Act of 1973 (ESA) (16 U.S.C. 1531–1543) and NMFS regulations governing listed fish and wildlife permits (50 CFR parts 217–227).

Mr. Connett has requested a five-year scientific research permit to take 200 loggerhead (Caretta caretta), 300 green (Chelonia mydas), 200 hawksbill (Eretmochelys imbricata), 5 leatherback (Dermochelys coriacea), 5 Kemp's ridley (Lepidochelys kempii), and 5 olive ridley (Lepidochelys olivacea) sea turtles annually in the Northwestern Atlantic Ocean for the purpose of obtaining life history data on all turtles captured, and determining migratory behavior and habitat utilization of juvenile turtles captured on foraging grounds. Turtles will be captured by hand and/or dip net, weighed, measured, flipper tagged, tissue

sampled and released at the site of capture. This is a continuation of work permitted under scientific research permit 886, which expires on December 31, 1998.

Those individuals requesting a hearing should set out the specific reasons why a hearing on this particular application would be appropriate (see **ADDRESSES**). The holding of such hearing is at the discretion of the Assistant Administrator for Fisheries, NOAA. All statements and opinions contained in this application summary are those of the applicant and do not necessarily reflect the views of NMFS.

Dated: November 25, 1998.

Kevin Collins,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 98–31995 Filed 11–30–98; 8:45 am]

BILLING CODE 3510–22–F

CONSUMER PRODUCT SAFETY COMMISSION

Notification of Request for Approval of Information Collection Activity—Customer Satisfaction Surveys

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: In the August 11, 1998 **Federal Register** (63 FR 42832), the Consumer Product Safety Commission published a notice in accordance with provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) to announce the agency's intention to seek approval of surveys and other information-collection activities to determine the kind and quality of services CPSC customers want and customers' level of satisfaction with existing services. The Commission now announces that it has submitted to the Office of Management and Budget a request for approval of that collection of information.

CPSC will use the information it obtains in these surveys to improve its work on behalf of the American public. In addition, the CPSC Office of Planning and Evaluation will use information from the surveys to prepare sections of the agency's annual performance report (required by the Government Performance and Results Act (GPRA)). This information will provide measures of the quality and effectiveness of agency efforts related to three goals in its strategic plan (informing the public, industry services, and customer satisfaction).

CPSC will collect this information in several ways, using contractors and/or in-house staff. These ways include (1) Using CPSC's web site to solicit feedback on the level of satisfaction with CPSC's services, (2) using brief customer service follow-up queries (on-line) with samples of telephone hotline callers, (3) surveying a sample of firms using the Fast-Track Product Recall Program to assess their views and suggestions for improvements in the service aspects of the program, (4) including customer comment cards within the pages of the *Consumer Product Safety Review*, and (5) conducting mail surveys of state partners and samples of customers of the National Injury Information Clearinghouse. Fewer than 10 customer surveys or information collection activities a year would be conducted using this clearance.

Additional Information About the Request for Approval of Information Collection Activity

Title of information collection: Customer Satisfaction Surveys.

Type of request: Approval.

Frequency of collection: Occasional.

General description of respondents: (1) Persons telephoning the Hotline; (2) persons or companies contacting the National Injury Information Clearinghouse for information; (3) State representatives who work with CPSC on cooperative programs; (4) firms using CPSC's Fast-Track Product Recall Program; (5) small businesses that have contacted the CPSC's small business ombudsman; and (6) other individuals CPSC is providing information to, such as those through the CPSC's Office of Information and Public Affairs.

Estimated number of respondents: 1,550 per year.

Estimated average number of responses per respondent: One per year.

Estimated number of responses for all respondents: 1,550 per year.

Estimated number of hours per response: 1/30 hour each.

Estimated number of hours for all respondents: 51.7 per year.

Estimated cost of collection for all respondents: $620 per year.

Comments: Comments on this request for approval of an information collection activity should be submitted by December 31, 1998 to (1) Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for CPSC, Office of Management and Budget, Washington DC 20503; telephone: (202) 395–7340, and (2) the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207. Comments may be delivered to the Office of the Secretary, room 502, 4330 East-West Highway, Bethesda, Maryland 20814. 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.

Copies of this request for approval of an information collection activity are available from Robert Frye, Director, Office of Planning and Evaluation, Consumer Product Safety Commission, Washington, DC 20207; telephone: (301) 504–0416, extension 2264.

Dated: November 23, 1998.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

[FR Doc. 98–31857 Filed 11–30–98; 8:45 am]

BILLING CODE 6355–01–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Proposed Information Collection; Comment Request

AGENCY: Corporation for National and Community Service

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (hereinafter the ''Corporation''), 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 requirement on respondents can be properly assessed. Currently, the Corporation is soliciting comments concerning its proposed new AmeriCorps Application for Membership. This application will be used to screen and place applicants into the various AmeriCorps programs, and will replace the previously approved individual applications for the National Civilian Community Corps (NCCC) and Volunteers in Service to America (VISTA). Applicants will be able to use this single, new application to apply to any of the AmeriCorps programs, thereby eliminating the need for multiple applications should the individual wish to be considered for multiple programs, either concurrently or consecutively.

Copies of the information collection requests can be obtained by contacting the office listed below in the **ADDRESSES** section of this notice.

The Corporation is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Corporation, 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;
- Propose ways to enhance the quality, utility and clarity of the information to be collected; and
- Propose ways to 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 to the office listed in the **ADDRESSES** section by February 1, 1999.

ADDRESSES: Send comments to the Corporation for National and Community Service, Office of AmeriCorps Recruitment, 8th Floor, Attn: Ms. Susie Zimmerman, 1201 New York Avenue, N.W. Washington, D.C. 20525.

FOR FURTHER INFORMATION CONTACT: Ms. Susie Zimmerman, (202) 606–5000, ext. 104.

SUPPLEMENTARY INFORMATION:

I. Background

In the past, AmeriCorps*VISTA and AmeriCorps*NCCC required separate applications for their programs. A combined member application will gather similar data from applicants, including background information, educational history, skills and experience, and a motivational statement that AmeriCorps may use in evaluating the applicant's suitability for becoming a member and to place them in the most appropriate program(s) that match their skills and interests.

II. Current Action

The Corporation seeks approval of its new AmeriCorps Application for Membership. If approved, this application will streamline the process for applicants by enabling them to complete one application and be considered for multiple programs within AmeriCorps. This new application will also be more cost-effective for the government by providing a centralized information source and streamlined process for receiving applications and placing them into the proper programs.

Type of Review: New.

Agency: Corporation for National and Community Service.

Title: AmeriCorps Application for Membership.

OMB Number: None.

Agency Number: None.

Affected Public: Any individual interested in applying to become a member of AmeriCorps*NCCC, AmeriCorps*VISTA, or a state and local AmeriCorps program located throughout the United States.

Total Respondents: Approximately 60,000. (Approximately 40,000 individuals serve each year in AmeriCorps programs; (collection totals are inexact as the bulk of these completed applications are submitted to local programs and not back to the Corporation for National Service).

Frequency: An applicant need only complete the application once. Applicants may make copies of their completed forms; and submit copies (each, however, with an original signature) to several different AmeriCorps programs for consideration.

Average Time Per Response: 45 minutes.

Estimated Total Burden Hours: 45,000 hours (if 60,000 individuals complete the form per year).

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

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: November 24, 1998.

Kenneth L. Klothen,

General Counsel.

[FR Doc. 98–31851 Filed 11–30–98; 8:45 am]

BILLING CODE 6050–28–U

DEPARTMENT OF DEFENSE

Office of the Secretary

Proposed Collection; Comment Request

AGENCY: Office of the Assistant Secretary of Defense for Reserve Affairs.

ACTION: Notice.

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Assistant Secretary of Defense for Reserve Affairs announces the proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by March 1, 1999.

ADDRESSES: Written comments and recommendations on the proposed information collection should be sent to the Office of the Assistant Secretary of Defense for Reserve Affairs, Room 2D521, 1500 Pentagon, Washington, DC 20301–1500, ATTN: Mr. John Paul Galles, Special Assistant for Employer Support Metrics, Washington, DC or e-mail at jgalles@osd.pentagon.mil.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the above address, or call Mr. John Paul Galles at 703/695–1677, x137.

Title; Associated Form; and OMB Number: Employer Support of the Guard and Reserve Training and Service, A Survey of Employer Characteristics, Opinions, Attitudes and Behaviors; OMB Number: 0704–[to be determined].

Needs and Uses: The information collection requirement is necessary to learn about employer tolerance for leaves of absence caused by the departure of National Guard and Reserve members from their workplaces to attend military training or to provide military service. Increasingly, National Guard and Reserve members are being called upon to provide frequent and protracted service for national defense. As a result, they are increasingly absent from the workplaces of their full-time employers. In order to sustain and not to diminish employer support, it is important to learn about employer tolerance of absences due to Guard/Reserve obligations, and how such absences can be least disruptive to the employer when Guard and Reserve

members are called to training or service.

Affected Public: Employers, Managers, and Supervisors with employment oversight in businesses, both public and private.

Annual Burden Hours: 3600.

Number of Respondents: 7200.

Responses per Respondent: 1.

Average Burden Per Response: 30 minutes.

Frequency: Annually.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

Respondents are employers, managers and supervisors with hiring/firing authority within a diverse set of employers. They vary by size, type and location. Results gathered from this survey will provide military leadership with new and important information to help them plan and manage more effectively, with a better understanding of the limits to removing National Guard and Reserve members from their workplaces for military training and service. Without this survey, military leaders will continue to utilize Guard and Reserve members without knowing the impact of their demands on the employer population. Having a regular and consistent survey to learn about employer characteristics, opinions, attitudes and behavior will initially establish a baseline and, over time, indicate trends regarding employer tolerance of National Guard and Reserve member training and service.

Dated: November 24, 1998.

L.M. Bynum,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 98–31917 Filed 11–30–98; 8:45 am]

BILLING CODE 5000–04–M

DEPARTMENT OF DEFENSE

Inspector General

Privacy Act of 1974; System of Records

AGENCY: Inspector General, DoD.

ACTION: Notice to add a system of records.

SUMMARY: The Inspector General, DoD, proposes to add a system of records to its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This action will be effective without further notice on December 31, 1998, unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the Chief, FOIA/PA Office, Assistant Inspector General for Administration, Information Management, 400 Army Navy Drive, Room 405, Arlington, VA 22202-2884.

FOR FURTHER INFORMATION CONTACT: Ms. Shirley J. Landes at telephone (703) 604-9777

SUPPLEMENTARY INFORMATION: The Inspector General notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed system report, as required by 5 U.S.C. 522a(r) of the Privacy Act of 1974, as amended, was submitted on November 20, 1998, to the House Committee on Government Reform and Oversight, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, 'Federal Agency Responsibilities for Maintaining Records About Individuals,' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: November 24, 1998.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

CIG 17

SYSTEM NAME:

Voluntary Leave Transfer Program Records.

SYSTEM LOCATION:

Inspector General, Department of Defense, Personnel and Security Directorate, Employee Relations Division, 400 Army Navy Drive, Suite 512, Arlington, VA 22202-2884.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who have volunteered to participate in the leave transfer program as either a donor or a recipient.

CATEGORIES OF RECORDS IN THE SYSTEM:

Leave recipient records contain the individual's name, organization, office telephone number, Social Security Number, position title, grade, pay level, leave balances, number of hours requested, brief description of the medical or personal hardship which qualifies the individual for inclusion in the program, and the status of that hardship.

The file may also contain medical or physician certifications and agency approvals or denials.

Donor records include the individual's name, organization, office telephone number, Social Security Number, position title, grade, and pay level, leave balances, number of hours donated and the name of the designated recipient.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 6331 et seq., Leave; 10 U.S.C. 141, Inspector General; E.O. 9397 (SSN); and 5 CFR part 630.

PURPOSE(S):

The file is used in managing the DoD Inspector General Voluntary Leave Transfer Program. The recipient's name, position data, organization, and a brief hardship description are published internally for passive solicitation purposes. The Social Security Number is sought to effectuate the transfer of leave from the donor's account to the recipient's account.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552(a)(b)(3) as follows:

To the Department of Labor in connection with a claim filed by an employee for compensation due to a job-connected injury or illness; where leave donor and leave recipient are employed by different Federal agencies, to the personnel and pay offices of the Federal agency involved to effectuate the leave transfer.

The 'Blanket Routine Uses' set forth at the beginning of the OIG's compilation of systems of records notices also apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are stored in paper and computerized form.

RETRIEVABILITY:

Records are retrieved by name or Social Security Number.

SAFEGUARDS:

Records are accessed by custodian of the records or by persons responsible for servicing the record system in performance of their official duties. Records are stored in locked cabinets or rooms and are controlled by personnel screening and computer software.

RETENTION AND DISPOSAL:

Records are destroyed one year after the end of the year in which the file is closed.

SYSTEM MANAGER(S) AND ADDRESS:

Chief, Employee Relations Division, Office of the Inspector General, 400 Army Navy Drive, Suite 512, Arlington, VA 22202-2884.

NOTIFICATION PROCEDURES:

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Chief, Freedom of Information Act/Privacy Act Branch, Room 405, 400 Army Navy Drive, Arlington, VA 22202-2884.

Individual should provide full name and Social Security Number.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this system of records should address written inquires to the Privacy Act Officer at the address above.

Individual should provide full name and Social Security Number.

CONTESTING RECORD PROCEDURES:

The OIG's rules for accessing records, and for contesting contents and appealing initial agency determinations are published in 32 CFR part 312 and may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Information is provided primarily by the record subject; however, some data may be obtained from personnel and leave records.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 98–31916 Filed 11–30–98; 8:45 am]

BILLING CODE 5000–04–F

DEPARTMENT OF DEFENSE

Department of the Army

Reserve Officers' Training Corps (ROTC) Program Subcommittee

AGENCY: U.S. Army Cadet Command.

ACTION: Notice of meeting.

SUMMARY: In accordance with section 10(a)(2) of the Federal Advisory Committee Act (P.L. 92–463), announcement is made of the following committee meeting:

Name of Committee: Reserve Officers' Training Corps (ROTC) Program Subcommittee.

Dates of Meeting: 8 Feb 99 thru 9 Feb 99.

Place of Meeting: The Pentagon, Washington DC.

Time of Meeting: 08:30 to 1700 on 8 Feb 99 and 0830–1100 on 9 Feb 99.

Proposed Agenda: Review and discussion of the status of Army ROTC since the July 1998 meeting in Tacoma, WA.

FOR FURTHER INFORMATION CONTACT: Mr. Roger Spadafora, U.S. Army Cadet Command, ATCC–TE, Fort Monroe, Virginia 23651–5000; phone (757) 727–4595.

SUPPLEMENTARY INFORMATION:

1. The Subcommittee will review the significant changes in ROTC scholarships, missioning, advertising strategy, marketing, camps and on-campus training, the Junior High School Program and ROTC Nursing.

2. Meeting of the Advisory Committee is open to the public. Due to space limitations, attendance may be limited to those persons who have notified the Advisory Committee Management office in writing at least five days prior to the meeting of their intent to attend the meeting.

3. Any members of the public may file a written statement with the Committee before, during or after the meeting. To the extent that time permits, the Committee chairman may allow public presentations or oral statements at the meeting.

4. All communications regarding this Advisory committee should be addressed to Mr. Roger Spadafora, U.S. Army Cadet Command, ATCC–TE, Fort Monroe, Virginia 23651–5000, telephone number (757) 727–4595.

Gregory D. Showalter,

Army Federal Register Liaison Officer.

[FR Doc. 98–31949 Filed 11–30–98; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF DEFENSE

Department of the Army

Implementation of the Defense Table of Official Distances (DTOD) for Personal Property Shipments

AGENCY: Military Traffic Management Command, DoD.

ACTION: Final Notice (Policy Statement).

SUMMARY: The Department of Defense (DOD) has decided as a matter of procurement policy and internal agency procedures to change the distance calculation source used for transportation payments and audits in the DOD personal property program. Beginning on the effective dates listed below, DOD will use the Defense Table of Official Distances (DTOD) as the standard source for distance calculations worldwide. Carriers participating in the current International and Domestic household goods program must agree to be bound by DTOD mileage for payment and audit purposes. This policy decision is in furtherance of DOD's goal to use a single integrated, electronic distance calculation source for its transportation programs. On-going reengineering initiatives using mileage calculation as a basis for payment and audit will transition to DTOD at the earliest opportunity.

EFFECTIVE DATES: April 1, 1999 (international shipments) and May 1, 1999 (domestic shipments).

FOR FURTHER INFORMATION CONTACT: Mr. Alex Moreno, HQ, Military Traffic Management Command, ATTN: MTOP–T–PR, Room 625, 5611 Columbia Pike, Falls Church, VA 22041–5050, telephone (703) 681–6190, FAX: (703) 681–9681.

SUPPLEMENTARY INFORMATION: In furtherance of DOD's goal of making its transportation programs more standard and efficient, the DOD Comptroller tasked MTMC to find a commercially available, integrated, automated distance calculation source capable of supporting all DOD's transportation and travel-related requirements. After an extensive proof of concept and market analysis phase, MTMC contracted to acquire, install, integrate, and maintain a system (DTOD) adaptable to DOD's global transportation and travel mission responsibilities. DTOD, commercially known as PC*Miler by ALK Associates, will become the DOD standard, automated source for distance calculations worldwide. A notice of proposed implementation of DTOD in the DOD personal property program was published in the **Federal Register**, Vol. 63, No. 111, Pages 31761–31762, Wednesday, June 10, 1998. In response to this notice, numerous comments were submitted and were carefully considered in the decision to implement this policy change. Listed below are the comments and MTMC's response:

Comment 1: The cost to purchase and maintain a separate distance calculation product for DOD shipments is too high.

Response: MTMC is aware of the economic impact implementation of DTOD may have on personal property carriers, particularly small businesses. Therefore, MTMC did not mandate that carriers purchase and maintain DTOD in order to participate in the DOD personal property program. Instead, MTMC only requires that participating carriers agree to be bound by DTOD mileage for payment and audit purposes. MTMC believes that carriers may choose to adapt to the DTOD implementation in a variety of ways, to include:

a. Carriers not purchasing DTOD may rely on the payment process to identify the distances used for payment.

b. Carriers may subscribe to the DTOD-compliant commercial product (PC*Miler) through the Internet for an estimated price of $375 per 500 look-ups.

c. Carriers may purchase and install ALK's PC*Miler in a manner best suited to their own business strategies and computer operations.

d. Carriers may explore the possibility of acquiring hard copy versions of PC*Miler.

e. Carriers may rely on the comparison of variances between Rand McNally's Milemaker and ALK's PC*Miler distances for the 100 busiest traffic lanes. Copies of the comparison are available on request.

Additionally, MTMC is exploring automated methods of annotating all GBLs to reflect the DTOD distance.

Comment 2: Serving the commercial market and participating in the DOD personal property program will require them to purchase and maintain two different systems—one for DOD and another for commercial customers.

Response: MTMC does not require carriers to purchase PC*Miler and maintain two different distance systems. Carriers may continue to use the mileage software they are currently using. However, for DOD shipments, payment and audit will be based on the DTOD distance calculations. Carriers will have the options listed in Comment 1 or other options suited to each carrier's business strategy/business relationships and market situation.

Comment 3: No benefit to be gained by replacing the currently used distance calculation product, which does not need to be replaced.

Response: In response to the National Performance Review and other Government improvement initiatives, DOD has looked to find more economical and efficient ways to conduct its business processes. Currently, DOD uses several distance information sources and manual processes to support its various transportation programs. The result is a variance in distance computations produced by different products and a high cost to DOD for licensing and maintaining multiple sources. DOD's DTOD initiative will create a standard source within DOD for distance calculations worldwide and will reduce costs, increase efficiency, and help streamline the transportation payment and audit process. An electronic mileage system enables more accurate invoice processing, while reducing the expense of auditing and rebilling for both the Government and carriers. DOD believes these benefits clearly justify the costs associated with implementing DTOD.

Comment 4: DOD claims to favor use of commercial practices, but DTOD is a DOD-unique product and not the commercial standard in the household goods industry.

Response: DTOD is a commercial product and is, therefore, consistent with commercial business practices. DTOD is based on ALK's PC*Miler, which is a commercial off-the-shelf product modified to include the DOD standard point of location codes (SPLCs) and several locations within CONUS and overseas. While DOD recognizes that Rand McNally is the mileage basis for the household goods industry's commercial tariff, DOD points out that its personal property program is a separate system not directly tied to the mileage sources used in the commercial market. Use of DTOD will move DOD closer to a single, automated, and widely used commercial standard for all its various transportation programs. DTOD and PC*Miler will be subject to the same version control process and will feature delivery systems compatible with current commercial usage for like products.

Comment 5: PC*Miler provides premium features that are not needed by small businesses.

Response: A basic (no frills) PC*Miler will be made available on the Internet for an estimated price of $375 per 500 look-ups. It will contain the necessary information for mileage verification.

Comment 6: PC*Miler's routing system ignores the reality of the Alaska transportation network.

Response: MTMC is currently working with representatives from the Alaska Movers Association to discuss the Alaska transportation network. An initial meeting was held on 18 September 98 and a second meeting is scheduled for mid-November.

Comment 7: DOD's intent to use the shortest miles may put carriers competing for Government traffic at a disadvantage because the motor carrier industry's operating systems are geared toward the use of practical miles.

Response: Household goods shipments are not normally over-dimensional shipments and are, therefore, routed via the shortest truck-navigable route. DOD has always used shortest miles for freight shipments not involving munitions or overweight/over-dimensional cargo. Hence, there will be no change in the distance standard used for household goods shipments.

Comment 8: Carrier information systems use AS400 and Unix operating systems. It is not clear whether DTOD will run on these larger systems.

Response: DOD has chosen to use a Windows NT operating system. However, carriers are free to license a PC*Miler version that will run on an operating system of their choice. ALK currently has versions of PC*Miler for AS400 and Unix operating systems.

Comment 9: System duplicity would increase the probability for error in distance 5 calculations.

Response: DOD transportation and payment activities, including DFAS, will base mileage computations on DTOD. Transportation audit by GSA will also be based on DTOD. PC*Miler, which is a DTOD-compliant commercial product, and DTOD are identical and will produce consistent, error-free mileages. The use of commercial mileage software other than PC*Miler may produce mileages different from DTOD. In such instances, DTOD will govern.

Comment 10: Many small businesses do not have updated computer capability or do not use computers.

Response: MTMC realizes that all carriers do not operate their businesses in the same way. However, current and future business practices are centered on the use of computers in one way or another. As the business process changes to embrace principles of electronic commerce (e.g., electronic data interchange and electronic funds transfer), MTMC is anxious to capitalize on the economies and efficiencies those changes represent. MTMC is confident that commercial shippers and transportation providers are moving in the same direction.

Comment 11: PC*Miler is unproven in industry and lacks version control.

Response: Currently, over 9,500 shippers and carriers in commercial transportation are using PC*Miler. The DTOD project office, in conjunction with the software vendor, will maintain precise version control of the distance software to ensure all parties (finance centers, audit agencies, shippers, and carriers) have the same version of DTOD/PC*Miler at the same time.

Comment 12: DOD's proposed implementation of DTOD in its personal property program violates the Regulatory Flexibility Act by failing to include an initial regulatory flexibility analysis.

Response: DOD's decision to adopt and implement a single, integrated mileage calculation source is a procurement policy decision that directly related to the basis DOD will use to pay for commercial transportation

services. The decision and steps taken to implement it in DOD's personal property program relate to public contracts and are exempt from the Regulatory Flexibility Act, 5 U.S.C. 601–612. This policy decision to implement a single distance calculation source for procurement purposes is not considered rule making within the meaning of the Administrative Procedure Act or the Regulatory Flexibility Act.

Mary V. Yonts,

Alternate Army Federal Register Liaison Officer.

[FR Doc. 98–31950 Filed 11–30–98; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF DEFENSE

Department of the Army

Proposed Implementation of the Defense Table of Official Distances (DTOD) for Passenger Transportation and Travel Services

AGENCY: Military Traffic Management Command, DoD.

ACTION: Final Notice (Policy Statement).

SUMMARY: The Department of Defense (DoD) has decided as a matter of procurement policy and internal agency procedure to change the distance calculation source used for payment under DoD passenger transportation and travel entitlement programs. Beginning on the effective date, the DoD will use the Department of Defense Table of Distances (DTOD) for computing highway distances traveled by the DoD personnel in connection with temporary duty (TDY) or to permanent change of station (PCS). The DTOD will also be used with the Groups Operational Passenger System (GOPAX) in situations where mileage is used as the basis for payment of commercial transportation services. Carriers and passenger service providers participating in the DoD passenger transportation and travel services programs must agree to be bound by the DTOD distance calculations for payment and audit purposes in all procurements using mileage-based rates. This policy decision is in furtherance of DoD's goal to use a single integrated, electronic distance calculation source for its passenger, freight and personal property programs.

EFFECTIVE DATE: 1 June 1999.

FOR FURTHER INFORMATION CONTACT: Ms. Beverly Cox, Headquarters, Military Traffic Management Command, ATTN: MTOP-TC, Room 621, 5611 Columbia Pike, Falls Church, VA 22041–5050; Telephone (703) 681–9444; telefax (703) 681–3265.

SUPPLEMENTARY INFORMATION:

a. Background

In furtherance of DoD's goal of making its transportation programs, including passenger transportation and travel entitlement, more economical and efficient, the DoD Comptroller tasked MTMC to find a commercially available, integrated, automated distance calculation source capable of supporting all DoD's transportation and travel related requirements. After an extensive proof of concept and market analysis phase, MTMC contracted for delivery and installation of a commercial-off-the-shelf distance calculation system adaptable to DoD's global transportation and travel environment. The DTOD, commercially known as PC*MILER by ALK Associates, Inc., will become the DoD standard, automated source for surface vehicular distance information worldwide. A notice of proposed implementation of DTOD in DoD passenger transportation and travel entitlement programs was published in the **Federal Register**, Vol. 63, No. 130, pages 36886–36887, Wednesday, July 8, 1998. In response to this notice, two comments were submitted and were carefully considered in the decision to implement this policy change. Concerns raised by the comments include:

Concern: The use of ''truck safe'' or practical mileage to determine mileage calculation for personal travel will result in systematic overpayment.

Response: ''Truck safe'' and practical mileage considers the use of the interstate highway system and other heavily traveled routes. DoD travelers generally use these routes and are entitled to reimbursement for mileage traveled.

Concern: DTOD will significantly impact passenger carriers.

Response: Nearly all DoD passenger movements using commercial transportation service providers are procured on a point-to-point or seat-mile basis. Mileage sources are not used in the payment and audit process. Commercial passenger transportation providers submitted no comments describing significant operational impact resulting from DTOD implementation.

Concern: The DTOD product lacks version control and flexible delivery systems.

Response: The DoD is confident that DTOD includes management controls and delivery systems well suited to the DoD and commercial user movement.

Concern: DTOD creates a DoD unique system and is contrary to commercial practice.

Response: DTOD is based on ALK's PC*MILER which is a well-established and widely used commercial product. DTOD will be accessible through the internet, as well as in mainframe, personal, computer network or CD-ROM stand-alone versions.

Concern: DTOD will require costly, complicated and risky program transitions.

Response: The impact of transition to DTOD will be minimal. Passenger transportation service providers who contract on a mileage-based rate basis will be able to access PC*MILER on the worldwide web for a fee of $375 for 500 look-ups. The cost to the DoD in transitioning to DTOD will be more than offset by the economies and efficiencies of using, maintaining and training on a standard, integrated distance calculation product.

Concern: MTMC did not do an initial regulatory flexibility analysis as required under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612.

Response: MTMC is a procurement activity rather than a regulatory agency. The decision to implement DTOD in DoD's passenger transportation acquisition program is a policy decision relating to public contracts and agency personnel entitlements and is not ''rulemaking'' within the meaning of the Administrative Procedures Act, 5 U.S.C. 552 et seq., and is exempt from its procedural rules. Implementation of DTOD in DoD's travel and travel entitlement programs involves matters of internal agency procedure, namely the distance basis for paying DoD personnel for travel expenses related to temporary duty (TDY) and permanent change of station (PCS), and is also not considered rulemaking.

b. Regulatory Flexibility Act

Implementation of this policy change in DoD passenger transportation and travel entitlement programs involves public contracts and DoD personnel entitlements and is designed to standardize distance calculation in the payment and audit process. This change is not considered rule making within the meaning of the Administrative Procedures Act or the Regulatory Flexibility Act, 5 U.S.C. 601–612.

c. Paperwork Reduction Act

The Paperwork Reduction Act, 44 U.S.C. 3051 *et seq.*, does not apply because no information collection, reporting or records keeping

responsibilities are imposed on offerors, contractors, or members of the public.

Gregory D. Showalter,

Army Federal Register Liaison Officer.

[FR Doc. 98–31951 Filed 11–30–98; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF DEFENSE

Defense Logistics Agency

Privacy Act of 1974; Computer Matching Program

AGENCY: Defense Manpower Data Center, Defense Logistics Agency, DoD.

ACTION: Notice of a Computer Matching Program.

SUMMARY: Subsection (e)(12) of the Privacy Act of 1974, as amended (5 U.S.C. 552a), requires agencies to publish advanced notice of any proposed or revised computer matching program by the matching agency for public comment. The DoD, as the matching agency under the Privacy Act is hereby giving notice to the record subjects of a computer matching program between VA and DoD that their records are being matched by computer. The purpose of this agreement is to obtain an accurate reconciliation between DoD/USCG and VA as to the correct pay and allowances to be paid by the military services to the individual for duty performed and the proper disability compensation or pension to be paid to, or waived by, certain veterans in the Reserve Forces.

DATES: This proposed action will become effective December 31, 1998, and matching may commence unless changes to the matching program are required due to public comments or by Congressional or by Office of Management and Budget objections. Any public comment must be received before the effective date.

ADDRESSES: Any interested party may submit written comments to the Director, Defense Privacy Office, 1941 Jefferson Davis Highway, Suite 920, Arlington, VA 22202–4502.

FOR FURTHER INFORMATION CONTACT: Mr. Vahan Moushegian, Jr. at (703) 607–2943.

SUPPLEMENTARY INFORMATION: Pursuant to subsection (o) of the Privacy Act of 1974, as amended, (5 U.S.C. 552a), the DMDC and VA have concluded an agreement to conduct a computer matching program. The purpose of this agreement is to obtain an accurate reconciliation between the DoD/USCG and VA as to the correct pay and allowances to be paid by the military services to the individual for duty performed and the proper disability compensation or pension to be paid to, or waived by, certain veterans in the Reserve Forces.

The parties to this agreement have determined that a computer matching program is the most efficient, expeditious, and effective means of obtaining and processing the information needed by the DVA to identify those individuals who are receiving both VA compensation and DoD/USCG payments for those periods when they are performing Reserve Duty. By law, the individual must waive his or her entitlement to VA disability compensation or pension if he or she desires to receive DoD/USCG pay and allowances for the period of duty performed. This matching agreement will result in an accurate reconciliation of such payments by permitting the VA to determine which individuals are being paid by DoD/USCG for duty performed and are being paid VA disability compensation or pension benefits for the same period of time without a waiver on file with the VA. If this reconciliation is not done by computer matching, but is done manually, the cost would be prohibitive and it is possible that not all such dual payments would be detected.

A copy of the computer matching agreement between VA and DoD is available upon request. Requests should be submitted to the address caption above or to the Department of Veterans Affairs, Veterans Benefit Administration, 810 Vermont Avenue, NW, Washington, DC 20420.

Set forth below is the notice of the establishment of a computer matching program required by paragraph 6.c. of the Office of Management and Budget Guidelines on computer matching published on June 19, 1989, at 54 FR 25818.

The matching agreement, as required by 5 U.S.C. 552a(r) of the Privacy Act, and an advance copy of this notice was submitted on November 4, 1998, to the House Committee on Government Reform and Oversight, the Senate Committee on Governmental Affairs, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget pursuant to paragraph 4d of Appendix I to OMB Circular No. A–130, 'Federal Agency Responsibilities for Maintaining Records about Individuals,' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: November 16, 1998.

L. M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

NOTICE OF A COMPUTER MATCHING PROGRAM BETWEEN THE DEPARTMENT OF VETERANS AFFAIRS AND THE DEPARTMENT OF DEFENSE FOR RESERVE PAY RECONCILIATION

A. *Paticipating agencies:* Participants in this computer matching program are the Department of Veterans Affairs (VA) and the Defense Manpower Data Center (DMDC) of the Department of Defense (DoD). The VA is the source agency, i.e., the activity disclosing the records for the purpose of the match. The DMDC is the specific recipient activity or matching agency, i.e., the agency that actually performs the computer matching.

B. *Purpose of the match:* The purpose of this agreement is to obtain an accurate reconciliation between DoD/USCG and VA as to the correct pay and allowances to be paid by the military services to the individual for duty performed and the proper disability compensation or pension to be paid to, or waived by, certain veterans in the Reserve Forces. The agreement will not only cover current individuals receiving dual payments but those who may have received them for Fiscal Years 1993 through 1997.

C. *Authority for conducting the match:* The legal authority for conducting the matching program is 38 U.S.C. 5304(c) which provides that VA disability compensation or pension based upon his or her previous military service shall not be paid to a person for any period for which such person receives active service pay. 10 U.S.C. 12316 further provides that a reservist who is entitled to disability payments due to his or her earlier military service and who performs duty for which he or she is entitled to DoD/USCG compensation may elect to receive for that duty either the disability payments or, if he or she waives such payments, the DoD/USCG compensation for the duty performed.

D. *Records to be matched:* The systems of records maintained by the respective agencies under the Privacy Act of 1974, as amended, 5 U.S.C. 552a, from which records will be disclosed for the purpose of this computer match are as follows:

1. The VA will use 58 VA 21/22, entitled 'Compensation, Pension, and Education and Rehabilitation Records - VA' first published on March 3, 1976, at

41 FR 924, and last amended on April 24, 1995, at 60 FR 20156, with other amendments as cited therein.

2. The DMDC will use S322.10 DMDC, entitled 'Defense Manpower Data Center Data Base', last published on July 14, 1998 at 63 FR 37860.

E. *Description of Computer Matching Program:* Annually, VA will submit to DMDC an electronic file of all VA pension and disability compensation beneficiaries as of the end of September. Upon receipt of the electronic file, DMDC will match this file by SSN with a file of days drilled as submitted to DMDC by the military services and the USCG. Upon a SSN match, or a 'hit,' of both files, DMDC will provide VA the individual's name and other identifying data, to include the number of days drilled, by Fiscal Year, for each matched record.

The hits will be furnished to VA which will be responsible for verifying and determining that the data in the DMDC electronic file is consistent with the VA files and for resolving any discrepancies or inconsistencies on an individual basis. VA will initiate actions to obtain an election by the individual of which pay he or she wishes to receive and will be responsible for making final determinations as to positive identification, eligibility for, or amounts of pension or disability compensation benefits, adjustments thereto, or any recovery of overpayments, or such other action as authorized by law.

The annual electronic file provided by the VA will contain information on approximately 2.2 million pension and disability compensation recipients.

The DMDC computer database file contains information on approximately 885,000 DoD and 7,000 USCG reservists who receive pay and allowances for performing authorized duty.

VA will furnish DMDC the name and SSN of all VA pension and disability compensation recipients and DMDC will supply VA the name, SSN, date of birth, and the number of days drilled by fiscal year of each reservist who is identified as a result of the match.

F. *Inclusive dates of the Matching Program:* This computer matching program is subject to public comment and review by Congress and the Office of Management and Budget. If the mandatory 30 day period for comment has expired and no comments are received and if no objections are raised by either Congress or the Office of Management and Budget within 40 days of being notified of the proposed match, the computer matching program becomes effective and the respective agencies may begin the exchange at a mutually agreeable time on a annual basis. By agreement between VA and DMDC, the matching program will be in effect for 18 months with an option to renew for 12 additional months unless one of the parties to the agreement advises the other by written request to terminate or modify the agreement.

G. *Address for receipt of public comments or inquiries:* Director, Defense Privacy Office, 1941 Jefferson Davis Highway, Suite 920, Arlington, VA 22202–4502. Telephone (703) 607–2943.

[FR Doc. 98–30996 Filed 11–30–98; 8:45 am]

BILLING CODE 5000–04–F

DEPARTMENT OF DEFENSE

Department of the Navy

Privacy Act of 1974; System of Records Notice.

AGENCY: Department of the Navy, DoD.

ACTION: Notice to amend a record system.

SUMMARY: The Department of the Navy proposes to amend a system of records notice in its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The amendment will be effective on December 31, 1998, unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the Department of the Navy, PA/FOIA Policy Branch, Chief of Naval Operations (N09B30), 2000 Navy Pentagon, Washington, DC 20350–2000.

FOR FURTHER INFORMATION CONTACT: Mrs. Doris Lama at (202) 685–6545 or DSN 325–6545.

SUPPLEMENTARY INFORMATION: The Department of the Navy's record system notices for records systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The Department of the Navy proposes to amend a system of records notice in its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended. The changes to the system of records are not within the purview of subsection (r) of the Privacy Act of 1974 (5 U.S.C. 552a), as amended, which requires the submission of new or altered systems report. The record system being amended is set forth below, as amended, published in its entirety.

Dated: November 23, 1998.

L. M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

N01070–2

SYSTEM NAME:

Naval Attache Files *(February 22, 1993, 58 FR 10695).*

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete entry and replace with 'Navy Files: Naval Attache Affairs Office, Office of Naval Intelligence (ONI-3), 4251 Suitland Road, Washington, DC 20395–5720.

Marine Corps Files: Commandant of the Marine Corps, Headquarters, United States Marine Corps, (ATTN: CI/CIRP), 2 Navy Annex, Washington, DC 20380–1775.'

* * * * *

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with 'File contains copies of questionnaires (i.e., Naval Attache Background Inventory, Naval Attache Opinion Inventory; Naval Attache Relationship Questionnaire; and Substance Abuse Subtle Screening Inventory (SASSI)), data collected during personal interviews; information from the individual's military personnel file; etc.'

* * * * *

PURPOSE(S):

Delete entry and replace with 'To provide data to Navy, Marine Corps and Defense Intelligence Agency officials to determine suitability of Navy and Marine Corps officer personnel for assignment to the Defense Attache System.'

* * * * *

SAFEGUARDS:

Delete entry and replace with 'Access is provided on need-to-know basis only. Manual records are stored in a controlled access area and are accessible only to a very limited number of authorized personnel with proper security clearance. Access to computerized data is controlled by password or other user code.'

RETENTION AND DISPOSAL:

Delete entry and replace with 'Records are opened on individuals when first nominated for attache duty. Records are destroyed when personnel are transferred, separated, or when files

are no longer needed, whichever is earlier.'

* * * * *

RECORD SOURCE CATEGORIES:

Delete entry and replace with 'Individual; family members; Defense Security Service; Naval Criminal Investigative Service; and personnel files.'

* * * * *

N01070–2

SYSTEM NAME:

Naval Attache Files.

SYSTEM LOCATION:

Navy Files: Naval Attache Affairs Office, Office of Naval Intelligence (ONI-3), 4251 Suitland Road, Washington, DC 20395–5720.

Marine Corps Files: Commandant of the Marine Corps, Headquarters, United States Marine Corps, (ATTN: CI/CIRP), 2 Navy Annex, Washington, DC 20380–1775.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

U.S. Navy and Marine Corps Officers nominated and/or assigned to duty in the Defense Attache System (DAS).

CATEGORIES OF RECORDS IN THE SYSTEM:

File contains copies of questionnaires (i.e., Naval Attache Background Inventory, Naval Attache Opinion Inventory; Naval Attache Relationship Questionnaire; and Substance Abuse Subtle Screening Inventory (SASSI)), data collected during personal interviews; information from the individual's military personnel file; etc.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

National Security Act of 1974, as amended: 5 U.S.C. 301, Departmental Regulations; 10 5013; 44 U.S.C. 3101; and E.O. 9397 (SSN).

PURPOSE(S):

To provide data to Navy, Marine Corps and Defense Intelligence Agency officials to determine suitability of Navy and Marine Corps officer personnel for assignment to the Defense Attache System.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To the Department of State to determine suitability of personnel for security clearances and assignment to the Defense Attache System.

The 'Blanket Routine Uses' that appear at the beginning of the Navy's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Manual and automated files.

RETRIEVABILITY:

Retrieved by name and Social Security Number.

SAFEGUARDS:

Access is provided on need-to-know basis only. Manual records are stored in a controlled access area and are accessible only to a very limited number of authorized personnel with proper security clearance. Access to computerized data is controlled by password or other user code.

RETENTION AND DISPOSAL:

Records are opened on individuals when first nominated for attache duty. Records are destroyed when personnel are transferred, separated, or when files are no longer needed, whichever is earlier.

SYSTEM MANAGER(S) AND ADDRESS:

Navy Files: Naval Attache Affairs Office, Office of Naval Intelligence (ONI-3), 4251 Suitland Road, Washington, DC 20395–5720

Marine Corps Files: Commandant of the Marine Corps, Headquarters, United States Marine Corps, (ATTN: CI/CIRP), 2 Navy Annex, Washington, DC 20380–1775.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Naval Attache Affairs Office, Office of Naval Intelligence (ONI-3), 4251 Suitland Road, Washington, DC 20395–5720 (for Navy files) or to the Commandant of the Marine Corps, Headquarters, United States Marine Corps, (ATTN: CI/CIRP), 2 Navy Annex, Washington, DC 20380–1775 (for Marine Corps files).

Request should contain name and Social Security Number of individual and be signed.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Naval Attache Affairs Office, Office of Naval Intelligence (ONI-3), 4251 Suitland Road, Washington, DC 20395–5720 (for Navy files) or to the Commandant of the Marine Corps, Headquarters, United States Marine Corps, (ATTN: CI/CIRP), 2 Navy Annex, Washington, DC 20380–1775 (for Marine Corps files).

Request should contain name and Social Security Number of individual and be signed.

CONTESTING RECORD PROCEDURES:

The Navy's rules for accessing records, and for contesting contents and appealing initial agency determinations are published in Secretary of the Navy Instruction 5211.5; 32 CFR part 701; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Individual; family members; Defense Security Service; Naval Criminal Investigative Service; and personnel files.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 98–31766 Filed 11–30–98; 8:45 am]

BILLING CODE 5000–04–F

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Leader, Information Management Group, Office of the Chief Financial and Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before February 1, 1999.

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, S.W., Room 5624, Regional Office Building 3, Washington, D.C. 20202–4651, or should be electronically mailed to the internet address *Pat Sherrill@ed.gov*, or should be faxed to 202–708–9346.

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 Leader, Information Management Group, Office of the Chief Financial and Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment 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: November 24, 1998.

Kent H. Hannaman,

Leader, Information Management Group, Office of the Chief Financial and Chief Information Officer.

Office of Educational Research and Improvement

Type of Review: Revision.

Title: Data Collection for Third International Mathematics and Science Study—Report (TIMSS-R).

Frequency: One-Time Student Assessment.

Affected Public: Individuals or households; Not-for-profit institutions.

Reporting and Recordkeeping Hour Burden:

Responses: 11,250

Burden Hours: 24,583

Abstract: In order to provide international benchmarks against which to measure the performance of American students in mathematics and science, with comparisons of data for 1995 and 1999, and to measure progress toward the U.S. national goal of being first in the world in mathematics and science in the year 2000, the National Center for Education Statistics (NCES) wishes to repeat TIMSS for the 8th grade in U.S. schools in 1999.

Office of Postsecondary Education

Type of Review: Revision.

Title: Annual Performance for the Student Support Services (SSS) Program.

Frequency: Annually.

Affected Public: Not-for-profit institutions.

Reporting and Recordkeeping Hour Burden:

Responses: 800

Burden Hours: 3,600

Abstract: SSS grantees must submit the report annually so the Department can evaluate the performance of grantees prior to awarding continuation grants and to assess a grantee's prior experience at the end of each budget period. The Department will also aggregate the data to provide descriptive information and analyze program impact.

[FR Doc. 98–31893 Filed 11–30–98; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Assessment Governing Board; Public Forum

AGENCY: National Assessment Governing Board; Education.

ACTION: Notice of information collection activity.

SUMMARY: This notice announces that the National Assessment Governing Board (NAGB) will submit an Information Collection Request (ICR) to the Office of Management and Budget for approval.

The ICR is: Similarities Classification Validation Research Study of the Achievement Levels for the Writing National Assessment of Educational Progress (NAEP) and the Civics National Assessment of Educational Progress.

DATES: Public comments must be submitted on or before February 1, 1999.

ADDRESSES: Written comments should be submitted by February 1, 1999. Mail to Patricia Hanick, NAEP ALS Project Manager, ACT, Inc., 2255 North Dubuque Road, P.O. Box 168, Iowa City, IA 52243–0168. Copies of the complete ICR and accompanying appendices may be obtained from the NAEP ALS Project Manager at the address above.

Comments may also be submitted electronically by sending electronic mail (e-mail) to *Hanick@ACT.org.* Electronic comments must be identified by the title of the ICR. No confidential business information should be submitted through e-mail.

Information submitted as a comment concerning this document may be claimed confidential by marketing any part or all of that information as confidential business information (CBI). Information so market 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 market confidential may be disclosed publicly by NAGB without prior notice.

FOR FURTHER INFORMATION CONTACT: Patricia Hanick, NAEP ALS Project Manager, ACT, Inc., 2255 North Dubuque Road, P.O. Box 168, Iowa City, IA 52243–0168, Telephone: (319) 337–1452 or (800) 525–6930, e-mail: *Hanick@ACT.org.*

SUPPLEMENTARY INFORMATION: Electronic copies of this ICR can be obtained from the contact person listed above.

I. Information Collection Request

NAGB is seeking comments on the following Information Collection Request (ICR).

Title: Similarities Classification Validation Research Study of the Achievement Levels for the Writing NAEP and the Civics NAEP.

Affected Entities: Parties affected by this information collection are civics and writing teachers who served as grade 8 achievement levels-setting (ALS) panelists for pilot studies and ALS meetings. Additional parties include the eighth grade students of these teachers as well as their school administrators.

Abstract: The purpose of this information collection activity is to gather information for NAGB relating to the issue of the validity of the achievement levels and the achievement levels-setting process for the 1998 NAEP in Writing and in Civics. In particular, Congress has denied that the achievement levels must be shown to be reasonable, valid, and informative to the public. The research design class for administration of an extended NAEP. The students to be assessed are currently enrolled in courses taught by

teachers who participate in setting the achievement levels. The focus of the study is to assess the correspondence between the teachers' estimates of the performance of their students on this assessment and the empirical performance of the student on the assessment. The teachers who will be asked to participate in this study are familiar with the content of the assessment framework and with the pool of items developed for the 1998 assessment. They also are familiar with the meaning of the achievement levels describing what students should know and be able to do and the abilities of the students who will be assessed. Teachers will not know how their individual students performed on the assessment. If the achievement levels are ''reasonable, valid, and informative,'' there should be relatively high correspondence between the teachers' estimates of performance and the actual performance of students with respect to the achievement levels.

No third party notification or public disclosure burden is associated with this collection.

Burden Statement: The estimated maximum total respondent burden is 6957 hours, and the average burden per student is 1.92 hours. This is a one-time data collection effort. Neither small businesses nor other small entities are included in the survey.

II. Request for Comments

NAGB solicits comments to:

(i) Evaluate whether the proposed data collection is an appropriate method to determine whether the achievement levels are valid.

(ii) Enhance the accuracy, quality, and utility of the information to be collected.

Records are kept of all public comments and are available for public inspection at the U.S. Department of Education, National Assessment Governing Board, Suite 825, 800 North Capitol Street, N.W., Washington, D.C. from 8:30 a.m. to 5:00 p.m.

Dated: November 25, 1998.

Roy Truby,

Executive Director, National Assessment Governing Board.

[FR Doc. 98–31913 Filed 11–30–98; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

Record of Decision on Management of Certain Plutonium Residues and Scrub Alloy Stored at the Rocky Flats Environmental Technology Site

AGENCY: Department of Energy.

ACTION: Record of Decision.

SUMMARY: The Department of Energy (DOE) has decided to prepare the categories of plutonium residues and scrub alloy listed below for disposal or other disposition as specified in the Preferred Alternative contained in the Final Environmental Impact Statement on Management of Certain Plutonium Residues and Scrub Alloy Stored at the Rocky Flats Environmental Technology Site (the Final EIS, DOE/EIS–0277F, August 1998). The material categories covered by this Record of Decision are: (1) Sand, slag and crucible residues, (2) Direct oxide reduction salt residues (low plutonium concentration), (3) Combustible residues, (4) Plutonium fluoride residues, (5) Ful Flo filter media residues, (6) Glass residues, (7) Graphite residues, (8) Inorganic (metal and other) residues, and (9) Scrub alloy.

Additional Copies: Copies of the Final EIS and this Record of Decision are available in the public reading rooms and libraries identified in the **Federal Register** Notice that announced the availability of the Final EIS (63 FR 46006, August 28, 1998), or by calling the Center for Environmental Management Information at 1–800–736–3282 (toll free) or 202–863–5084 (in Washington, DC).

FOR FURTHER INFORMATION CONTACT: For information on the management of plutonium residues and scrub alloy currently stored at the Rocky Flats Environmental Technology Site, contact: Ms. Patty Bubar, Acting Director, Rocky Flats Office (EM–64), Office of Nuclear Material and Facility Stabilization, Environmental Management, U.S. Department of Energy, 1000 Independence Avenue, S.W., Washington, DC 20585, Telephone: 301–903–7130.

For information concerning development of the Final EIS or this Record of Decision, contact: Mr. Charles R. Head, Senior Technical Advisor, Office of Nuclear Material and Facility Stabilization (EM–60), Environmental Management, U.S. Department of Energy, 1000 Independence Avenue, S.W., Washington, DC 20585, Telephone: 202–586–5151.

For information on DOE's National Environmental Policy Act (NEPA) process, contact: Ms. Carol Borgstrom, Director, Office of NEPA Policy and Assistance (EH–42), U.S. Department of Energy, 1000 Independence Avenue, S.W., Washington, DC 20585 Telephone: 202–586–4600, or leave a message at 1–800–472–2756.

SUPPLEMENTARY INFORMATION:

I. Synopsis of the Decision

The U.S. Department of Energy (DOE) announced issuance of the Final Environmental Impact Statement on Management of Certain Plutonium Residues and Scrub Alloy Stored at the Rocky Flats Environmental Technology Site (the Final EIS, DOE/EIS–0277F) on August 28, 1998 (63 FR 46006, August 28, 1998). In the Final EIS, DOE considered the potential environmental impacts of a proposed action to prepare certain plutonium residues and scrub alloy currently stored at the Rocky Flats Environmental Technology Site (Rocky Flats) near Golden, Colorado, for disposal or other disposition. After consideration of the Final EIS, including public comments submitted on the Draft EIS, and public comments submitted following issuance of the Final EIS, DOE has decided to implement the Preferred Alternative specified in the Final EIS for the following categories of material: (1) Sand, slag and crucible residues, (2) Direct oxide reduction salt residues (low plutonium concentration), (3) Combustible residues, (4) Plutonium fluoride residues, (5) Ful Flo filter media residues, (6) Glass residues, (7) Graphite residues, (8) Inorganic (metal and other) residues, and (9) Scrub alloy.

Implementation of the Preferred Alternative will involve the following:

1. Up to approximately 6,587 kg of plutonium residues (containing up to approximately 351 kg of plutonium) will be processed at Rocky Flats and packaged in preparation for disposal at the Waste Isolation Pilot Plant (WIPP) in New Mexico. These residues consist of direct oxide reduction salt residues containing low concentrations of plutonium, combustible residues, Ful Flo filter media residues, glass residues, graphite residues and inorganic (metal and other) residues. The processed residues will remain in storage at Rocky Flats until they are shipped to WIPP for disposal.

2. Approximately 3,377 kg of sand, slag and crucible residues and plutonium fluoride residues (containing approximately 271 kg of plutonium), and approximately 700 kg of scrub alloy (containing approximately 200 kg of plutonium) will be packaged and shipped to the Savannah River Site near Aiken, South Carolina, where these materials will be stabilized in the F-Canyon by chemically separating the plutonium from the remaining materials in the residues and scrub alloy. The separated plutonium will be placed in safe and secure storage, along with a larger quantity of plutonium already in storage at the Savannah River Site, until DOE has completed the Surplus

Plutonium Disposition Environmental Impact Statement (DOE/EIS–0283, under preparation, draft issued in July 1998; see Section VII. A. 2, below, for additional discussion of the plutonium disposition topic) and made final decisions on the disposition of the separated plutonium. Transuranic wastes generated during the chemical separations operations will be sent to WIPP for disposal. Other wastes generated during the chemical separations operations will be disposed of in accordance with the Savannah River Site's normal procedures for disposing of such wastes.

The actions summarized above are scheduled to take place at Rocky Flats between 1998 and 2004, and at the Savannah River Site between 1998 and 2002.

As specified in Section 1.4.2 of the Final EIS, DOE will issue a second Record of Decision in the near future regarding the remaining categories of plutonium residues within the scope of the Final EIS, after consideration of any comments submitted during an additional public comment period from August 28, 1998 through October 12, 1998. The material categories to be covered by the second Record of Decision are: (1) Incinerator ash residues, (2) Graphite fines residues, (3) Inorganic ash residues, (4) Molten salt extraction/electrorefining salt residues, (5) Direct oxide reduction salt residues (high plutonium concentration), (6) High-efficiency particulate air (HEPA) filter media residues, and (7) Sludge residues.

II. Background

During the Cold War, DOE and its predecessor agencies conducted various activities associated with the production of nuclear weapons. Several intermediate products and wastes were generated as a result of those operations, some of which are still in storage at various DOE sites, including Rocky Flats. Now that the Cold War is over and the United States has ceased production of fissile nuclear weapons materials, DOE is conducting activities to safely manage, clean up, and dispose of (where appropriate) the intermediate products and wastes from prior nuclear weapons production activities. Among the intermediate products and wastes requiring proper management and preparation for disposal or other disposition are approximately 106,600 kg of plutonium residues and 700 kg of scrub alloy currently stored at Rocky Flats.

The Defense Nuclear Facilities Safety Board (the Board) in its Recommendation 94–1, addressed health and safety concerns regarding various materials at Rocky Flats, including the plutonium residues and scrub alloy. The Board concluded that hazards could arise from continued storage of these materials in their current forms and recommended that they be stabilized as expeditiously as possible. Approximately 64,400 kg of the plutonium residues in storage at Rocky Flats contain very low concentrations of plutonium and are currently being stabilized and prepared for disposal under the Solid Residue Treatment, Repackaging, and Storage Environmental Assessment/Finding of No Significant Impact (DOE/EA–1120, April 1996). However, the remaining 42,200 kg of plutonium residues, which contain higher concentrations of plutonium, and all 700 kg of scrub alloy still require processing for stabilization and to prepare them for disposal or other disposition. These materials are addressed in the Final EIS.

The approximately 42,200 kg of plutonium residues consist of nine heterogeneous categories of materials (e.g., ashes, salts, combustible materials, sludges, pieces of glass, pieces of graphite). On average, the plutonium residues contain about 6% plutonium by weight, although a small amount of the plutonium residues contains well above the average percentage of plutonium by weight. For example, the 315 kg of plutonium fluoride residues (less than 1 percent of the material addressed in the Final EIS) contains approximately 45% plutonium by weight. The approximately 700 kg of scrub alloy (less than 2 percent of the material addressed in the Final EIS) consists primarily of a metallic alloy of magnesium, aluminum, americium, and plutonium, containing approximately 29% plutonium by weight.

Although the average concentration of plutonium in the 42,200 kg of residues is small, there is still enough plutonium present (about 2,600 kg) to subject the residues to a special set of requirements (referred to as ''safeguards and security'' requirements) to maintain control of the materials and ensure that the plutonium in them is not stolen or diverted for illicit use, perhaps in a nuclear weapon. The 700 kg of scrub alloy, with its greater plutonium concentration, is also subject to safeguards and security requirements. Prior to disposal or other disposition of the residues and scrub alloy, action must be taken to reduce the plutonium concentration in the materials, make the plutonium more difficult to remove from the materials, or otherwise implement steps to ensure that the plutonium would not be stolen or diverted for illicit purposes. This process is referred to as ''termination of safeguards'' or ''meeting safeguards termination limits.''

Accordingly, the Purpose and Need for Agency Action addressed in the Final EIS was to evaluate action alternatives for processing the approximately 42,200 kg of plutonium residues and 700 kg of scrub alloy currently in storage at Rocky Flats to address the health and safety concerns regarding storage of the materials, as raised by the Board in its Recommendation 94–1, and to prepare the materials for offsite disposal or other disposition (including termination of safeguards, when appropriate). The action alternatives evaluated would be implemented in a manner that supports closure of Rocky Flats by 2006 and limits worker exposure and waste production. Disposal or other disposition would eliminate the health and safety concerns associated with indefinite storage of these materials.

Subsequent to completion of the Final EIS, DOE has completed its compliance process under the requirements of the Endangered Species Act. Section 7 of the Endangered Species Act provides Federal agencies with the authority to determine whether a proposed Federal action may affect protected species or habitats and, if the agency determines that it will not (i.e., makes a ''no effect'' determination), then no consultation with the Fish and Wildlife Service is required. Rather than specifying a ''no effect'' determination, the Final EIS concludes that the proposed processing of plutonium residues and scrub alloy is not likely to adversely affect threatened or endangered species or critical habitats in areas involved in this proposal. Although indicating some effect on threatened or endangered species, a ''not likely to adversely affect'' determination falls short of a determination that a species or critical habitat is likely to be adversely affected overall by the proposed action.

Upon further review of the likely impacts of the proposed processing, DOE concludes that a ''no effect'' determination would have been more appropriate in this case because DOE does not believe that the proposed processing will affect protected species or critical habitats overall. Therefore, no consultation with the Fish and Wildlife Service is required.

The decision process reflected in this Record of Decision complies with the requirements of the National Environmental Policy Act (42 U.S.C., Sec. 4321 *et seq.*) and DOE's NEPA implementing regulations at 10 CFR Part 1021. Further, Section 308 of the Fiscal Year 1999 Energy and Water

Development Appropriations Act (Public Law 105–245) specifies that ''None of the funds in this Act may be used to dispose of transuranic waste in the Waste Isolation Pilot Plant which contains concentrations of plutonium in excess of 20 percent by weight for the aggregate of any material category on the date of enactment of this Act, or is generated after such date.'' The decisions specified in this Record of Decision comply with the requirements of Pub. L. 105–245.

III. Alternatives Evaluated in the Final EIS

DOE evaluated the following alternatives for management of the Rocky Flats plutonium residues and scrub alloy covered by this Record of Decision:

III.A. Alternative 1 (No Action—Stabilize and Store)

This alternative consists of stabilization or repackaging to prepare the material for interim storage as described in the Rocky Flats Solid Residue Environmental Assessment (Solid Residue Treatment, Repackaging, and Storage Environmental Assessment/Finding of No Significant Impact, DOE/EA–1120, April 1996). Under this alternative, further processing to prepare the material for disposal or other disposition would not occur. Since scrub alloy was not addressed in the Rocky Flats Solid Residue Environmental Assessment, the ''No Action'' alternative for scrub alloy has been defined as continued storage at Rocky Flats with repackaging, as necessary. Under this alternative, approximately 40 percent of the Rocky Flats plutonium residues and all of Rocky Flats scrub alloy would be left in a form that would not meet the requirements for termination of safeguards, thus making these materials ineligible for disposal. Thus, while implementation of this alternative would address the immediate health and safety concerns associated with near-term storage of the materials, the health and safety risks associated with potential long-term storage of these materials would remain.

III.B. Alternative 2 (Processing Without Plutonium Separation)

Under this alternative, the materials would be processed to convert them into forms that would meet the requirements for termination of safeguards. The materials would be ready for shipment to WIPP in New Mexico for disposal.

The technologies evaluated for use under this alternative for the material categories covered by this Record of Decision are listed in Table 1.

TABLE 1.—ALTERNATIVE 2 PROCESSING TECHNOLOGIES

Material category	Processing technology
Sand, slag and crucible residues	Calcination/vitrification, or blend down.
Direct oxide reduction salt residues (low plutonium concentration)	Blend down.
Combustible residues	Blend down, catalytic chemical oxidation, or sonic wash.
Plutonium fluoride residues	Blend down.
Ful Flo filter media residues	Blend down or sonic wash.
Glass residues	Calcination/vitrification, blend down, or sonic wash.
Graphite residues	Cementation, calcination/vitrification, or blend down.
Inorganic (metal and other) residues	Calcination/vitrification, or blend down.
Scrub alloy	Calcination/vitrification.

All of the technologies specified in Table 1 would be implemented onsite at Rocky Flats. The blend down technology referred to in Table 1 would consist of mixing the plutonium residues within the scope of the Final EIS with other, lower plutonium content residues that are also planned for disposal in WIPP, or with inert material, so that the resulting mixture would be below the safeguards termination limits.

III.C. Alternative 3 (Processing With Plutonium Separation)

Under this alternative, the plutonium residues and scrub alloy would be processed to separate plutonium from the material and concentrate it so that the secondary waste would meet the requirements for termination of safeguards and be ready for disposal, while the separated and concentrated plutonium would be placed in safe and secure storage pending disposition in accordance with decisions to be made under the Surplus Plutonium Disposition Environmental Impact Statement (DOE/EIS–0283, under preparation, draft issued in July 1998). DOE would not use this plutonium for nuclear explosive purposes.

The technologies evaluated for use under this alternative for the material categories covered by this Record of Decision are listed in Table 2. These technologies would be implemented at the sites specified in Table 2.

TABLE 2.—ALTERNATIVE 3 PROCESSING TECHNOLOGIES

Material category	Processing technology	Processing site
Sand, slag and crucible residues	Purex processing	Savannah River Site.
Direct oxide reduction salt residues (low plutonium concentration).	Acid dissolution/plutonium oxide recovery, or	Los Alamos National Lab
	Salt scrub followed by Purex processing, or	Salt scrub at Rocky Flats, Purex at the Savannah River Site.
	Water leach, or	Rocky Flats
	Water leach	Los Alamos National Lab.
Combustible residues	Mediated electrochemical oxidation	Rocky Flats.
Plutonium fluoride residues	Purex processing, or	Savannah River Site
	Acid dissolution/plutonium oxide recovery	Rocky Flats.
Ful Flo filter media residues	Mediated electrochemical oxidation	Rocky Flats.
Glass residues	Mediated electrochemical oxidation	Rocky Flats.

TABLE 2.—ALTERNATIVE 3 PROCESSING TECHNOLOGIES—Continued

Material category	Processing technology	Processing site
Graphite residues	Mediated electrochemical oxidation, or	Rocky Flats
	Mediated electrochemical oxidation	Savannah River Site.
Inorganic (metal and other) residues	Mediated electrochemical oxidation, or	Rocky Flats
	Mediated electrochemical oxidation	Savannah River Site.
Scrub alloy	Purex processing	Savannah River Site.

III. D. Alternative 4 (Combination of Processing Technologies)

Under this alternative, the residues would be stabilized and blended down, if necessary, and repackaged in preparation for shipment of the material to WIPP. Termination of safeguards would be accomplished through use of a variance to the safeguards requirements. A variance is the record of a review process whereby DOE's Office of Safeguards and Security approves a proposal by another part of DOE to terminate safeguards on specific quantities of safeguarded materials because of special circumstances that make the safeguards controls unnecessary. The variance to safeguards termination limits that is required to allow implementation of this alternative was approved by the DOE Office of Safeguards and Security after conducting a detailed review and extensive vulnerability assessment regarding the alternative mechanisms that would be used to protect and control access to the material. The Office of Safeguards and Security concluded that the nature of the residues, the relatively low concentration of plutonium in the residues after blend down (if necessary), and the waste management controls that would be in effect during the transportation to and staging at WIPP prior to disposal would be sufficient to provide a level of protection for the materials comparable to that required by safeguards.

The plutonium fluoride residues and the scrub alloy were not analyzed under this alternative because their higher plutonium content would make application of a safeguards termination limit variance impractical. In addition, the Ful Flo filter media residues were not analyzed under this alternative because they had not been identified in the Draft EIS as materials for which a variance to the safeguards termination requirements had been requested. Accordingly, application of a variance to these materials was not considered in the Final EIS.

III. E. Strategic Management Approaches

Theoretically, it would be possible to process all of the residues using only one of the alternatives listed above (e.g., all the materials would be processed under a single alternative, except for certain material categories for which there is no processing technology under that alternative). Nevertheless, in practice, DOE recognized in preparing the EIS that the most appropriate technologies were likely to be chosen separately for each material category by selecting from among the technologies in all the alternatives. However, there are too many combinations of material categories, processing technologies and processing sites to address each individual combination in the EIS in a manner that would be easily understandable. As a result, in addition to individually evaluating technologies that could be used to implement the alternatives for each material category, DOE also evaluated several ''Strategic Management Approaches''. These approaches involve compilations of sets of processing technologies which would allow a specific management criterion to be met. The management criteria addressed in the Strategic Management Approaches are as follows:

1. No Action (i.e., Alternative 1 discussed above)
2. Preferred Alternative (Discussed in more detail in Section III. F. below)
3. Minimizing Total Processing Duration at Rocky Flats
4. Minimizing Cost
5. Conducting all Processing at Rocky Flats
6. Conducting the Fewest Actions at Rocky Flats
7. Processing with the Maximum Amount of Plutonium Separation
8. Processing without Plutonium Separation

The decisions on which technology to implement have been made separately for each material category covered by this Record of Decision; the Strategic Management Alternatives were merely illustrative. Nevertheless, evaluation of the Strategic Management Approaches allowed presentation of the environmental impacts of the proposed action as one set of data, instead of separate sets of data representing the impacts from management of each of the material categories individually. Examination of the various Strategic Management Approaches also allowed DOE and the public to determine whether there are any significant differences between the impacts that would result from implementation of one Strategic Management Alternative as compared to any other.

III. F. Preferred Alternative

The preferred alternative was constructed by selecting a preferred technology for each material category from among the action alternatives (i.e., Alternatives 2, 3 and 4) described above.

The technologies that comprise the Preferred Alternative for the material categories covered by this Record of Decision are listed in Table 3 (the bases for selection of these technologies are discussed in Section 2.4 of the Final EIS, and again in Section VII. of this Record of Decision). These technologies would be implemented at the sites specified in Table 3.

TABLE 3.—PREFERRED ALTERNATIVE PROCESSING TECHNOLOGIES

Material category	Processing technology	Processing site
Sand, slag and crucible residues	Purex processing (Alternative 3)	Savannah River Site.
Direct oxide reduction salt residues (low plutonium concentration).	Repackage (Alternative 4)	Rocky Flats.
Combustible residues	Stabilize, if necessary, and repackage (Alternative 4) (see Note 1).	Rocky Flats.
Plutonium fluoride residues	Purex processing (Alternative 3)	Savannah River Site.
Ful Flo filter media residues	Blend down (Alternative 2)	Rocky Flats.

TABLE 3.—PREFERRED ALTERNATIVE PROCESSING TECHNOLOGIES—Continued

Material category	Processing technology	Processing site
Glass residues	Stabilize (i.e., neutralize and dry) and repackage (Alternative 4).	Rocky Flats.
Graphite residues	Repackage (Alternative 4)	Rocky Flats.
Inorganic (metal and other) residues	Repackage (Alternative 4)	Rocky Flats.
Scrub alloy	Purex processing (Alternative 3)	Savannah River Site.

Note 1—Aqueous contaminated residues would be stabilized by neutralizing and drying. Organic contaminated residues would be stabilized by thermal desorption/steam passivation.

IV. Other Factors

In addition to comparing the environmental impacts of implementing the various alternatives, DOE also considered other factors in reaching the decisions announced here. These other factors included issues raised by comments received during scoping, or on the Draft and Final versions of the EIS. The other factors considered are briefly summarized in the following paragraphs.

IV.A. Nonproliferation

Preventing the spread of nuclear weapons has been a fundamental national security and foreign policy goal of the United States since 1945. The current U.S. policy is summarized in the White House Fact Sheet on Nonproliferation and Export Control Policy, dated September 27, 1993. This policy makes it clear that the United States does not encourage the civil use of plutonium and, accordingly, does not itself engage in plutonium reprocessing (that is, separation of plutonium from spent nuclear fuel) for either nuclear power or nuclear explosives purposes. In addition, it is U.S. policy to seek to eliminate where possible the accumulation of stockpiles of plutonium.

The alternatives analyzed in the Final EIS, including plutonium separation alternatives, would result in varying levels of risk associated with potential use of the plutonium in nuclear weapons, either by the U.S. or an adversary. None of the alternatives would eliminate the plutonium from the current inventory. Nevertheless, as discussed in Section 4.1.9 of the Final EIS, all of the action alternatives would result in appropriate management of the plutonium residues and scrub alloy to ensure that they are not stolen or diverted for illicit purposes. Furthermore, all of the action alternatives set the stage for ending the proliferation risk posed by the plutonium in the plutonium residues and scrub alloy by preparing these materials for disposal or other disposition in a form that is proliferation resistant (i.e., a form which contains very little plutonium per unit weight, from which the plutonium would be especially difficult to extract, or for which other measures are taken to ensure sufficient security). In addition, because of the potential concern regarding any processing and consolidating of plutonium that might be accomplished by DOE, the Secretary of Energy has committed that any separated or stabilized plutonium-239 would be prohibited from use for nuclear explosive purposes (Secretarial Action Memorandum approved December 20, 1994). This prohibition would apply to plutonium-239 separated as a result of actions implemented under this Record of Decision.

IV.B. Technology Availability and Technical Feasibility

DOE considered technology availability and technical feasibility in identifying processing technologies to be evaluated in the Final EIS and in making the decisions specified in Section VI of this Record of Decision. DOE considered the extent to which technology development would be required and the likelihood of success of such endeavors. All of the technologies evaluated in the Final EIS are technically feasible. In general, however, the more that processing technologies vary from the historical processes and facilities used by DOE, the greater the technical uncertainty and extent to which new facilities or modifications to existing facilities would have to be made (as discussed in Section 4.17.7 of the Final EIS).

IV.C. Timing

DOE considered the degree to which the various technologies that could potentially be used in management of the plutonium residues and scrub alloy would support DOE's plans for cleanup of the radioactive, chemical and other hazardous wastes left after 50 years of nuclear weapons production by the United States, as outlined in the document titled Accelerating Cleanup: Paths to Closure (DOE/EM–0362, June 1998), including the goal of closing Rocky Flats by 2006.

IV.D. Cost

In reaching decisions on processing technologies, an important consideration for DOE was cost. DOE evaluated the costs of implementing the various processing technologies for each material category on both an individual basis and collectively. DOE estimates it would cost from approximately $428 Million to $814 Million to implement the Strategic Management Approaches (other than No Action) analyzed in the Final EIS. An even larger expenditure (approximately $1.1 Billion) would be required to pay for continued storage of the nuclear materials if DOE chose to implement the No Action alternative. On the other hand, DOE expects that the annual costs of operating and maintaining Rocky Flats facilities will decrease as nuclear materials are removed from the site. DOE expects further reductions in costs as the Rocky Flats facilities are deactivated.

V. Comments on the Final EIS

After issuing the Final EIS, DOE received two letters commenting on the preferred alternative, one from Alternatives in Action, and the other from the Environmental Evaluation Group. In addition, while DOE was in the process of distributing the Final EIS, DOE received a copy of a letter from the Institute for Energy and Environmental Research to the South Carolina State Department of Health and Environmental Control commenting on an issue that is relevant to this Record of Decision. Finally, during consultations conducted after completion of the Final EIS, DOE received a comment on the Final EIS from the U.S. Fish and Wildlife Service of the Department of the Interior. DOE's responses to these comments are as follows:

V.A.

The letter from Alternatives in Action (signed by Virginia Dollar and dated September 23, 1998) expressed a

preference for implementation of the No Action alternative because it would not involve separation of plutonium; would reduce the number of people who would move, handle, treat and repackage the materials; and would result in management of the materials close to their point of origin. The No Action alternative is fully evaluated in the Final EIS, along with the action alternatives. Section VII. of this Record of Decision specifies the technologies that DOE has decided to implement for each material category addressed in the Final EIS and explains why DOE chose those technologies. DOE did not choose to implement the No Action alternative for any material category because implementation of the No Action alternative would leave the plutonium residues and scrub alloy in forms that could not be disposed of or otherwise dispositioned. Such an action would only postpone eventual action necessary to terminate storage of these materials and would result in continuation of the risks and costs associated with their indefinite storage.

V.B.

The letter from the Environmental Evaluation Group [1] (signed by Robert H. Neill and dated October 6, 1998) contained several comments on two topics, (1) safeguards termination limits, and (2) treatment of ash residues and other residues containing fines or powder. DOE's responses to the Environmental Evaluation Group comments are provided below:

V.B.1. Safeguards Termination Limits

The Environmental Evaluation Group letter raised several issues that relate to ''safeguards termination limit variances''. The comments requested more details regarding the process used to review and approve applications for variances, and raised issues relating to the basis for any variances.

The Office of Safeguards and Security is the organization within DOE that is responsible for determining when special nuclear materials (such as plutonium) must be subject to physical safeguards to prevent theft or diversion. To that end, the Office of Safeguards and Security has established concentrations of plutonium that DOE organizations use to determine which materials containing plutonium must be safeguarded and which can be held or disposed of without maintaining physical safeguards. However, the Office of Safeguards and Security recognizes that there are circumstances under which the threat of theft or diversion would be very small even if these concentrations were exceeded. Accordingly, it has a procedure under which a DOE site may petition for a variance from the safeguards termination limits. To obtain a variance, the site must demonstrate that '' given the nature of the materials, their plutonium concentrations, and the other management controls that would be in effect during their transportation and storage—safeguards controls would not be needed to adequately ensure that the material would not be stolen or diverted for illicit purposes. This process was discussed in Section 1.3.1 of the Final EIS.

The Environmental Evaluation Group letter states that some of the residues are above the Economic Discard Limits for plutonium. With the termination of plutonium production in the United States, the Economic Discard Limit concept has become obsolete and has been replaced by criteria that comprise DOE's current plutonium disposition methodology. These criteria include consideration of security and nonproliferation, waste minimization and costs. All of these criteria were satisfied in the development of the safeguards termination limit variance associated with Alternative 4, the Combination Alternative analyzed in the Final EIS (see Section III. D.).

The Environmental Evaluation Group letter also refers to the Office of Safeguards and Security Version 1.2 formula supposedly used to calculate safeguards termination limits. The Version 1.2 formula was a draft proposal developed in 1995 that was not used in the development of the safeguards termination limits established in 1996. After detailed technical evaluations of the Version 1.2 formula, DOE concluded that the formula had no relationship to actual capability to recover plutonium from plutonium residues and other plutonium bearing materials. Therefore, the formula is not pertinent to making decisions regarding the plutonium contained in the Rocky Flats plutonium residue inventory.

Current DOE policies allow a variance to safeguards termination limits to be approved for materials containing plutonium above the limits when vulnerability assessments conclude that no additional significant risk would occur by approving a variance. To support a variance request for certain categories of plutonium residues, Rocky Flats conducted vulnerability (or risk) assessments. The vulnerability assessments for the residues and their disposition paths were conducted to evaluate risks and determine acceptable protection measures needed to mitigate any unacceptable risks. These vulnerability assessments were thoroughly reviewed by the DOE Office of Safeguards and Security and were a primary basis for DOE's decision to grant the safeguards termination limit variance for the Rocky Flats plutonium residues. These assessments included consideration of all design based threats and adversary capabilities for diversion, theft and sabotage, not only at Rocky Flats, but also during transportation and final staging and disposal at WIPP.

The Environmental Evaluation Group opposes granting a variance to safeguards termination limits until there is a review by affected state technical oversight agencies of the Rocky Flats application, the Office of Safeguards and Security review and decision, and the vulnerability assessments. Normally DOE does not involve outside organizations, including state government agencies, in the nuclear safeguards and security vulnerability review process. Furthermore, the governments of states potentially impacted by the issuance of safeguards termination limit variances have expressed no concerns on this matter to DOE. Moreover, the Office of Safeguards and Security received a letter from the Director of the State of Colorado Department of Public Health and Environment, dated December 30, 1997, that strongly endorsed DOE's approval of Rocky Flats request for variances to safeguards termination limits. The letter states that ''* * * approval of the proposal [a Safeguards Termination Limit (STL) variance] would result in processing which is strictly designed to stabilize residue material and meet the WIPP Waste Acceptance Criteria rather than requiring further processing only to meet STLs.'' Comments on the Draft EIS from the State of New Mexico Environment Department (see Chapter 9 of the Final EIS) include no mention of variances to safeguards termination limits.

V.B.2. Treatment of Residues Containing Fines and Powders

The Environmental Evaluation Group recommends that certain residues that contain fines and powders be ''fixed'' to minimize dispersibility in the event of accidents, reduce their attractiveness for diversion, or improve short and long term performance in WIPP. The Environmental Evaluation Group specifically identifies incinerator ash,

[1] The Environmental Evaluation Group is an independent group established in 1979 as a part of the New Mexico Institute of Mining and Technology with funds provided to the State of New Mexico by DOE. Pursuant to Pub.L. 100–456, the Environmental Evaluation Group conducts an independent technical evaluation of WIPP to assist in ensuring protection of the environment and the public health and safety.

graphite fines, inorganic ash, molten salt extraction salt/electrorefining salts, sludges and HEPA filter residues as being subject to this comment and mentions cold ceramification and vitrification as potential fixation processes.

DOE's decisions on future management of each material category covered by these comments will be included in the second Record of Decision, as discussed in Section I of this Record of Decision (above). Nevertheless, DOE is responding to these comments in this Record of Decision, thus making the responses available to the public sooner, and addressing the comments in the same document that addresses the preceding comment on safeguards termination limits.

DOE considers that the actions recommended by the Environmental Evaluation Group to control dispersibility in the event of accidents under the preferred alternative are not necessary. As stated in Section 2.6.1 of the Final EIS, the residues would be packaged in multiple layers of sealed packages specifically to preclude dispersion if an accident were to occur. The residues would first be packaged in either metal containers or plastic bags. They would then be placed in stainless-steel pipe components, as appropriate, which in turn would be placed inside 55-gallon drums. When ready for transport to WIPP, the drums would be placed into TRUPACT-II containers, which are Type B shipping packages, certified by the Nuclear Regulatory Commission and approved by the Department of Transportation. The multiple containment afforded the residues would virtually eliminate the possibility for their dispersion into the environment, even in the unlikely event of an accident.

Concerning the improvement of short and long term performance in WIPP, the specific residues identified by the Environmental Evaluation Group (and certain other residues) do not require further stabilization prior to repackaging to meet the WIPP waste acceptance criteria (WIPP WAC), except that some of the sludges would have to be filter-dried and some of the HEPA filters neutralization-dried prior to being repackaged in order to meet the WIPP WAC. This is discussed in Section 2.1 of the Final EIS. Compliance with the WIPP WAC would demonstrate that requirements for disposal at WIPP have been met. While ''fixing'' some of the residues, as evaluated in the Final EIS under several of the Alternative 2 technologies, could improve performance at WIPP, the improvement would be modest, and would be accompanied by additional costs, delays in the time when the residues would be ready to leave Rocky Flats, and additional hazards to workers who would perform the ''fixing'' process. Although the ''fixing'' would make extraction of the plutonium from these residues more difficult, DOE's analyses (see Section V. B. 1, above) demonstrate that the residues are suitable for termination of safeguards (including consideration of the potential for diversion of the material) without such additional processing. Furthermore, conducting the operations necessary to ''fix'' the residues would subject workers to unnecessary radiation exposure. Nevertheless, DOE will consider all of the alternatives evaluated for these material categories in the Final EIS in the process of preparing the second Record of Decision.

V. C.

The letter from the Institute for Energy and Environmental Research to the South Carolina Department of Health and Environmental Control (signed by Brian Costner and dated September 24, 1998) questioned whether the proposal in the Draft EIS to ship the plutonium fluoride residues from Rocky Flats to the Savannah River Site for processing through the canyons is consistent with the requirements of the Resource Conservation and Recovery Act (RCRA) and asserted that the public has been largely excluded from the decision making process in this matter.

DOE's management of the plutonium fluoride residues will comply with all applicable RCRA requirements. DOE will transport the plutonium fluoride residues to the Savannah River Site in compliance with RCRA transportation requirements, and will store them there pursuant to RCRA storage requirements prior to processing. The applicability of RCRA requirements to the processing of the plutonium fluoride residues in the canyons is the subject of ongoing discussions between DOE and the South Carolina Department of Health and Environmental Control.

DOE currently is in the process of preparing the Surplus Plutonium Disposition Environmental Impact Statement (DOE/EIS–0283), which addresses the extent to which two surplus plutonium disposition approaches (immobilization and use in mixed oxide fuel [MOX]) would be implemented. Even after completion of the Surplus Plutonium Disposition Environmental Impact Statement, currently scheduled for early 1999, DOE does not expect to make decisions about which, if any, of the plutonium to be separated in the canyons would be used in MOX fuel until shortly before the material would be transferred to a MOX fabrication facility. Those decisions are not expected to be made until the plutonium separation operations under this Record of Decision have been completed.

DOE does not believe that the public has been excluded from the decision making process regarding the management of the plutonium fluorides. The public was provided an opportunity to comment on management of the plutonium fluoride residues through this NEPA process. The Draft EIS discussed processing of the plutonium fluorides in the Savannah River Site canyons, followed by either immobilizing the separated plutonium or using it in MOX fuel.

V. D.

The comment from the Fish and Wildlife Service (from Craig Miller of the Fish and Wildlife Service office in Lakewood, Colorado on September 4, 1998) pertained to the listing of Federal threatened, endangered and candidate species that may be found on or in the vicinity of Rocky Flats, as provided in Section 3.1.6, Table 3–6 of the Final EIS. During discussions on the Final EIS between DOE and the Fish and Wildlife Service office in Lakewood, Colorado, the Fish and Wildlife Service requested that DOE update the list of Federal threatened, endangered and candidate species in Table 3–6 as follows (new entries are marked with an *, other changes are noted in italics):

Revise the list of Federal Endangered Species to read as follows:

American peregrine falcon
whooping crane*
eskimo curlew*
black-footed ferret*

Revise the list of Federal Threatened Species to read as follows:

bald eagle
pawnee mountain skipper*
Mexican spotted owl*
Preble's meadow jumping mouse
greenback cutthroat trout*
utes ladies-tress orchid*
Colorado butterfly plant (proposed)* *[moved from ''Candidate Species'' list]*
Canada lynx (proposed)*

Revise the list of Federal Candidate Species to read as follows:

mountain plover
boreal toad*
swift fox*
[the Southwest willow flycatcher has been deleted from this list]

VI. New Information

Since the Final EIS was issued, DOE has improved its estimate of the number of shipments that would be required to transport certain residues off-site for processing. While the amount of residues (and the amount of plutonium in the residues, both measured in terms of their weight) that would be shipped under the Preferred Alternative has not changed, the number of shipments that would be required to implement the Preferred Alternative is now projected to be greater than the number discussed in the Final EIS (Chapter 2, ''Alternatives'').

Specifically, routine characterization of the sand, slag and crucible residues that was conducted in parallel with preparation of the Final EIS found these residues to be less dense (i.e., they occupy more volume per unit mass) than had been assumed during preparation of the Final EIS. As a result, less sand, slag and crucible residues could be placed in any shipping container, resulting in a projected increase in the number of shipments that would be required from Rocky Flats to the Savannah River Site.

In addition, the precise radiation levels being emitted by the plutonium fluoride residues are not known at the present time. If the radiation level emitted by the plutonium fluoride residues is found to be higher than had been assumed during preparation of the Final EIS, then the amount of plutonium fluoride residues that could be included in any shipment would have to be reduced to avoid exceeding a transportation regulatory limit, thus also requiring the number of shipments to be increased. The actual radiation levels being emitted by the plutonium fluoride residues would not be known until they were repackaged for shipment. To avoid unnecessary radiation exposures to workers, DOE has deferred taking these measurements until the repackaging operation, when personnel would have to be near the material in any case.

Finally, if it becomes necessary to change from use of the 6M shipping container, the container assumed in the Final EIS, to the 9975 shipping container, the number of scrub alloy shipments could also increase. This is due to the fact that, after the 9975 container is certified, DOE will phase out use of the 6M containers as sufficient numbers of 9975 containers become available, and the 9975 container can hold less scrub alloy than the 6M container could.

Overall, the changes in the number of shipments, as discussed above, increase shipments that might be made under the Preferred Alternative from 39, as estimated in the Final EIS, to a current estimate of between 60 and 90 shipments.

DOE has considered the environmental implications of this increase in the estimated number of shipments that would be necessary to implement the Preferred Alternative and has concluded that there would be no significant change to the small impacts as estimated in the Final EIS for the following reasons:

VI. A.

First, the estimate of the incident free radiological impacts from each individual shipment would remain the same as in the Final EIS. Such impacts were calculated under a simple, but conservative, assumption that all shipments emit radiation at the regulatory limit. Accordingly, the total of the incident free radiological impacts for all shipments would increase, in proportion to the increased number of shipments. However, the incident free radiological impacts would remain low. For example, the highest incident free radiological impact (that of the transportation crew for 90 shipments) would be 0.0055 latent cancer fatalities (as opposed to 0.0024 latent cancer fatalities as estimated in the Final EIS).

VI. B.

Second, the radiological impacts associated with accidents would remain unchanged because the increased likelihood of an accident (due to the increased number of shipments) is offset by the decrease in the amount of radioactive material that would be present in an accident [2].

VI. C.

Third, although the nonradiological impacts (incident free and accident) would be increased in proportion to the increased number of shipments, the estimate remains small (approximately 0.0012 emission related latent cancer fatalities and approximately 0.010 traffic accident related fatalities for the new shipment values, as opposed to 0.00051 and 0.0039, respectively, as estimated in the Final EIS).

In summary, the transportation impacts from the current estimated number of shipments from Rocky Flats to the Savannah River Site would be small, and the current impact estimates differ insignificantly from corresponding estimates presented in the Final EIS.

VII. Decision

DOE has decided to implement the proposed action in the manner described in this section. The alternatives that DOE has decided to implement are presented separately below for each material category because the decisions on the selected technology were based on considerations that are unique to the chemical and physical characteristics of the individual material categories. Furthermore, these decisions are independent of one another and are not connected to the decisions to be made in the upcoming second Record of Decision. Although alternative technologies analyzed in the EIS might use certain common facilities or personnel, sufficient facility capacity and personnel are available to allow use of any technology without interfering with any other.

For clarity and brevity, this section also includes the discussion of the environmentally preferable alternative (as required by CEQ regulations [40 CFR 1505.2]) and the basis for selection of the alternative to be implemented.

The analysis of alternative technologies presented in the Final EIS indicates that all of the alternative technologies, including those in the Preferred Alternative and the No Action alternative, would have only small impacts on the human environment on or around the DOE management sites and on the populations along transportation routes (see Sections 4.23 and 4.24 of the Final EIS). Using conservative assumptions (i.e., assumptions that tend to overestimate risks), the potential risks from incident-free operations and postulated accidents that are of most interest would be (1) Those associated with radiation exposure to workers performing processing operations on the plutonium residues and scrub alloy or near loaded transportation containers, and (2) radiation risks to the general public in and around the DOE management sites and along the transportation routes. The Final EIS also estimates (1) the risks from incident-free operations and postulated accidents associated with chemical releases and transportation accidents; (2) the amounts of various wastes and other materials that would result from implementation of the various alternative technologies; (3) the cost of implementing the various

[2] Note that the radiological impacts of incident free transportation and transportation accidents are calculated differently. As noted above, incident free impacts are calculated under the simplifying assumption that all shipments contain enough radioactive material to cause them to emit radiation at the regulatory limit. This assumption overstates impact estimates for some shipments, but more precise calculations were not needed in this case to estimate the nature of the impacts. Accident impacts, however, are estimated based on the likely contents of the shipping containers.

alternative technologies; (4) the effect on nuclear weapons nonproliferation; and (5) air quality impacts.

Environmentally Preferable Alternative—Although there are differences among the estimated impacts for the various alternatives, the impacts would be small for any of the alternative technologies, and the magnitude of the differences in potential impacts between alternatives is small. In addition, the nature of the potential impacts is such that comparing them is a very judgmental process. For example, under the preferred alternative for scrub alloy (plutonium separation), only 61 drums of transuranic waste would be generated; whereas the other action alternative for this material (calcination and vitrification) would generate 2,809 drums of transuranic waste. However, the plutonium separation would also result in generation of 200 kg of separated plutonium; whereas calcination and vitrification would result in no separated plutonium. Comments received from members of the public on the Draft EIS demonstrate that different individuals would make different value judgments as to which of these product/waste materials is of most concern. Furthermore, in addition to having no indisputable means of identifying which waste or product stream would be most important to minimize, there is no indisputable way to trade off differences between the amounts of various types of waste and separated plutonium against differences in levels of radiological risk or chemical hazards; or between risks to workers versus risks to the public (risks to the public would be lower than those to workers for all technologies evaluated in the Final EIS).

In general, because of the small risks that would result from any of the action alternatives (as demonstrated by Tables 2–9 through 2–26, and 4–8 through 4–54 of the Final EIS) and the absence of any clear basis for discerning an environmental preference, DOE concludes that no one of the action alternatives is clearly environmentally preferable over any other action alternative.

On the other hand, under the No Action alternative, the materials would be left in storage at Rocky Flats with no defined disposal path. There would be additional risk associated with both the indefinite storage and whatever processing may ultimately be determined to be necessary to prepare the material for ultimate disposition. There would also be risks from potential degradation of storage facilities and containers. Accordingly, in consideration of the long term risks that would be associated with implementation of the No Action alternative, DOE considers that all of the action alternatives are environmentally preferable over the No Action alternative.

The processing technologies that DOE has decided to implement are as follows for each material category addressed in this Record of Decision:

VII.A. Sand, Slag and Crucible Residues

VII.A.1. Selected Alternative

DOE has decided to preprocess the sand, slag and crucible residues at the Rocky Flats site and then transport them to the Savannah River Site for stabilization in the F-Canyon. The Purex process will be used to chemically separate the plutonium from the other residue constituents (i.e., Alternative 3). The separated plutonium will then be placed in storage at the Savannah River Site until it is dispositioned as determined by DOE after completion of the Surplus Plutonium Disposition Environmental Impact Statement (DOE/EIS–0283, under preparation, draft issued in July 1998).

VII.A.2. Basis for the Decision

Transporting the residues and processing them at the Savannah River Site was chosen as the technology to be implemented for this material category because it provides the most expeditious approach for stabilization of these residues. The Savannah River Site is now processing in the canyons sand, slag, and crucible residues that were produced at the Savannah River Site. Consideration of alternative processing technologies that would result in sending the Rocky Flats sand, slag and crucible residues directly to WIPP for disposal as transuranic waste revealed that significant further characterization of the material would be required to verify its suitability for disposal in WIPP, due to the presence of reactive calcium in the residues. Resolution of the issues raised by the reactive calcium would require (1) Further testing to demonstrate that no more than 5 percent of the residues contain enough reactive calcium to be pyrophoric, (2) approval by the Nuclear Regulatory Commission of a change to the WIPP TRUCON Shipping Code to change the allowable passivated calcium metal content from a trace (i.e., less than 1 percent) to a minor (i.e., 1 to 10 percent) constituent, and (3) obtaining WIPP certification of the material. This strategy, if successful, would take about one year longer to implement than processing at the Savannah River Site. Therefore, in conformance with Defense Nuclear Facilities Safety Board Recommendation 94–1 concerning expeditious stabilization of plutonium bearing materials to resolve health and safety concerns, DOE has decided to stabilize the sand, slag and crucible residues as quickly as possible by transporting them to the Savannah River Site for processing, even though this technology would cost $25 Million more than the more technically uncertain calcination/vitrification technology (see Section 4.17.7 of the Final EIS).

The Final EIS specified that any plutonium separated under any alternative analyzed in this EIS would be disposed of using the immobilization process. (Final EIS, page 2–2.) Upon further review, DOE has decided for the following reasons not to make a determination at this time on the disposition of any plutonium separated under the decisions announced in this ROD. In December 1996, DOE published the Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic Environmental Impact Statement (DOE/EIS–0229, the PEIS). That PEIS analyzed, among other things, the potential environmental consequences of alternative strategies for the long term storage and disposition of weapons-usable plutonium that has been or may be declared surplus to national security needs. DOE announced the Record of Decision for that PEIS in January 1997, which outlines an approach to plutonium disposition that would allow for both the immobilization of some of the surplus plutonium, and the use of some of the surplus plutonium as MOX fuel in existing domestic, commercial reactors (62 FR 3014).

As a follow-on analysis to that PEIS, DOE is in the process of preparing the Surplus Plutonium Disposition Environmental Impact Statement (DOE/EIS–0283, draft issued July 1998), which addresses the extent to which each of the two surplus plutonium disposition approaches (immobilization and MOX) would be implemented. Thus, at the present time, DOE has not decided the extent to which either the immobilization or the MOX approach to surplus plutonium disposition would be implemented. Moreover, as noted above, even after completion of the Surplus Plutonium Disposition Environmental Impact Statement, DOE does not expect to make decisions about which, if any, of the surplus plutonium would be used in MOX fuel until shortly before any such material would be transferred to a MOX fabrication facility. Thus, DOE believes at this time it is appropriate not to make any commitment as to which

approach would be implemented for the disposition of any plutonium to be separated under the decisions announced in this Record of Decision.

The plutonium declared to be surplus includes any weapons-useable plutonium resulting from the stabilization (for health and safety reasons) of the Rocky Flats plutonium residues and scrub alloy discussed under this Record of Decision. As a result, weapons-useable plutonium that is separated under actions from this Record of Decision is a candidate for both of the surplus weapons-useable plutonium disposition alternatives that have been identified by DOE (i.e., MOX and immobilization).

VII. B. Direct Oxide Reduction Salt Residues (low plutonium concentration)

VII. B. 1. Selected Alternative

DOE has decided to repackage the low plutonium concentration direct oxide reduction salt residues to prepare them for disposal in WIPP (Alternative 4). A portion of these residues may be pyro-oxidized, if this additional processing is found to be necessary during examination of the residues prior to repackaging. During the repackaging operation, the residues may be mixed with other, lower plutonium concentration residues from the same material category, or with an inert material.

VII. B. 2. Basis for the Decision

Repackaging at Rocky Flats was chosen as the technology to be implemented for this material category because it is the simplest and least costly of all processing technologies considered, and the one that will allow DOE to complete processing and ready the material for disposal most expeditiously. This approach will also allow use of resources that would otherwise be required to manage these residues to speed up other activities required to close the site.

VII. C. Combustible Residues

VII. C. 1. Selected Alternative

DOE has decided to stabilize, if necessary, and repackage the combustible residues to prepare them for disposal in WIPP (Alternative 4). Aqueous-contaminated combustible residues will be neutralized and dried, with any fines stabilized by cementation or repackaging. Organic contaminated combustible residues will be stabilized with a combination of washing, low-temperature thermal desorption, stabilization of plutonium fines, mixing with an absorbent material, and cementation. Dry combustible residues will just be repackaged because they are in a form that does not require stabilization. During the repackaging operation, the residues may be mixed with other, lower plutonium concentration residues from the same material category, or with an inert material.

VII. C. 2. Basis for the Decision

Stabilizing and repackaging at Rocky Flats was chosen as the technology to be implemented for this material category because it is the simplest of all processing technologies considered and the one that will allow the site to complete processing and ready the material for disposal most expeditiously. This approach will also allow use of the resources that would otherwise be required to manage these residues to speed up completion of other activities required to close the site. Finally, selection of stabilization and repackaging avoids the technical uncertainty (discussed in Section 4.17.7 of the Final EIS) that would be associated with implementation of the $10 Million less expensive blend down alternative.

VII. D. Plutonium Fluoride Residues

VII. D. 1. Selected Alternative

DOE has decided to transport the plutonium fluoride residues to the Savannah River Site and use the F-Canyon to stabilize the material (i.e., Alternative 3). The separated plutonium will then be placed in storage at the Savannah River Site until it is dispositioned as determined by DOE after completion of the Surplus Plutonium Disposition Environmental Impact Statement (under preparation—see Section VII. A. 2. above). No decision concerning the final disposition of any plutonium separated from the plutonium fluoride residues, however, is expected in the near future, and not until after completion of the plutonium separation operations at the Savannah River Site. Even after completion of the Surplus Plutonium Deposition Environmental Impact Statement, currently scheduled for early 1999, DOE expects to make decisions about which, if any, of the plutonium would be used in MOX fuel shortly before the material would be transferred to a MOX fabrication facility. As a result, DOE does not expect to know soon whether the separated plutonium will be used in MOX fuel and will keep it in storage pending such a decision.

VII. D. 2. Basis for the Decision

Purex plutonium separation at the Savannah River Site was chosen as the technology to be implemented for this material category because it poses less technical risk and will cost less than would establishment of a new acid dissolution/plutonium oxide recovery capability at Rocky Flats. Blend down, while technically feasible, would result in a very large increase in the amount of transuranic waste requiring disposal, and would result in higher costs.

VII. E. Ful Flo Filter Media Residues

VII. E. 1. Selected Alternative

DOE has decided to shred and blend down the Ful Flo filter media residues with an inert material to below the safeguards termination limits, and to repackage the product for disposal in WIPP (Alternative 2).

VII. E. 2. Basis for the Decision

Shred and blend down at Rocky Flats was chosen as the technology to be implemented for this material category because the other alternatives are aqueous processes that would be more difficult and more costly to implement. The increase in the amount of material to be disposed of after blend down is much less of a concern because of the relatively small amount of material in this category and the small amount of plutonium it contains (about 800 kg of residues containing about 20 kg of plutonium).

VII. F. Glass Residues

VII. F. 1. Selected Alternative

DOE has decided to stabilize (i.e., neutralize and dry) and repackage the glass residues to prepare them for disposal in WIPP (Alternative 4). During the repackaging operation, the glass residues may be mixed with other, lower plutonium concentration residues from the same material category, or with an inert material.

VII. F. 2. Basis for the Decision

Stabilizing and repackaging at Rocky Flats was chosen as the technology to be implemented for this material category because it is the simplest and least costly of all processing technologies considered, and the one that will allow the site to complete processing and ready the material for disposal most expeditiously. This approach will also allow use of the resources that would otherwise be required to manage these residues to speed up other activities required to close the site.

VII. G. Graphite Residues

VII. G. 1. Selected Alternative

DOE has decided to repackage the graphite residues to prepare them for disposal in WIPP (Alternative 4). During

the repackaging operation, these residues may be mixed with other, lower plutonium concentration residues from the same material category, or with an inert material.

VII. G. 2. Basis for the Decision

Repackaging at Rocky Flats was chosen as the preferred processing technology for this material category because it is the simplest and least costly of all processing technologies considered, and the one that will allow the site to complete processing and ready the material for disposal most expeditiously and at least cost. This approach will also allow use of the resources that would otherwise be required to manage these residues to speed up other activities required to close the site.

VII. H. Inorganic (Metal and Other) Residues

VII. H. 1. Selected Alternative

DOE has decided to repackage the inorganic (metal and other) residues to prepare them for disposal in WIPP (Alternative 4). During the repackaging operation, these residues may be mixed with other, lower plutonium concentration residues from the same material category, or with an inert material.

VII. H. 2. Basis for the Decision

Repackaging at Rocky Flats was chosen as the preferred processing technology for this material category because it is the simplest and least costly of all processing technologies considered, and the one that will allow the site to complete processing and ready the material for disposal most expeditiously, and at the least cost. This approach will also allow use of the resources that would otherwise be required to manage these residues to speed up other activities required to close the site.

VII. I. Scrub Alloy

VII. I. 1. Selected Alternative

DOE has decided to package the scrub alloy, transport it to the Savannah River Site and use the F-Canyon to stabilize the material (i.e., Alternative 3). The separated plutonium will then be placed in storage at the Savannah River Site until it is dispositioned as determined by DOE after completion of the Surplus Plutonium Disposition Environmental Impact Statement (under preparation—see Section VII. A. 3. above).

VII. I. 2. Basis for the Decision

Purex plutonium separation at the Savannah River Site was chosen as the preferred processing technology for this material category because this alternative will allow the most expeditious and least expensive removal of the scrub alloy from Rocky Flats. Furthermore, scrub alloy has traditionally been processed at the Savannah River Site using the Purex technology, and it is a well understood operation that has been demonstrated to work. By comparison, the calcine and vitrify technology (Alternative 2) would involve more technical risk because vitrification operations have never been conducted at Rocky Flats on a production basis.

VIII. Use of All Practical Means to Avoid or Minimize Harm

Implementation of this decision will result in low environmental and health impacts. However, DOE will take the following steps to avoid or minimize harm wherever possible:

VIII. A.

DOE will use current safety and health programs and practices to reduce impacts by maintaining worker radiation exposure as low as reasonably achievable and by meeting appropriate waste minimization and pollution prevention objectives.

VIII. B.

DOE will provide a level of health and safety for DOE transportation operations that is equivalent to or greater than that provided by compliance with all applicable Federal, State, Tribal, and local regulations. In addition to meeting applicable shipping containment and confinement requirements of the Nuclear Regulatory Commission regulations on Packaging and Transportation of Radioactive Material (10 CFR Part 71) and Department of Transportation regulations at 49 CFR, all packaging for transportation of the material covered by this Record of Decision will also be certified by DOE. DOE also provides Federal, State, Tribal and local authorities with access to training and technical assistance necessary to allow them to safely, efficiently, and effectively respond to any incident involving transportation of the materials covered by this Record of Decision.

Items A and B above will be accomplished under existing business practices in the normal course of implementing this Record of Decision.

VIX. Conclusion

DOE has decided to implement the Preferred Alternative specified in the Final EIS to prepare the plutonium residue categories and scrub alloy specified in Sections I and VII. of this Record of Decision for disposal or other disposition. This decision is effective upon being made public, in accordance with DOE's NEPA implementation regulations (10 CFR 1021.315). The goals of this decision are to prepare the plutonium residues and scrub alloy for disposal or other disposition in a manner that addresses immediate health and safety concerns associated with storage of the materials and to support Rocky Flats' closure. Disposal or other disposition of these materials will also eliminate health and safety concerns and costs that would be associated with indefinite storage of these materials.

Issued in Washington, D.C. this 25th day of November, 1998.

James M. Owendoff,

Acting Assistant Secretary for Environmental Management.

[FR Doc. 98–32011 Filed 11–30–98; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

Energy Conservation Program for Consumer Products: Petition for Waiver of Sanyo Electric Co., Ltd., From the Department of Energy Central Air Conditioner and Central Air Conditioning Heat Pump Test Procedure. (Case No. CAC–009)

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice.

SUMMARY: Today's notice publishes a ''Petition for Waiver'' from Sanyo. Sanyo's Petition for Waiver requests the Department of Energy (Department or DOE) to grant relief from the DOE heat pump test procedure for the Sanyo lines of gas source heat pumps, which operate in both the cooling and heating modes. Sanyo requests that the heating mode tests be waived for its gas burner-assisted heat pumps because the DOE procedure has no provision for testing gas burner-assisted heat pumps. The Department is soliciting comments, data, and information respecting the Petition for Waiver.

DATES: DOE will accept comments, data, and information not later than December 31, 1998.

ADDRESSES: Written comments and statements shall be sent to: U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Case No. CAC–009, Mail Stop EE–43, Room

1J–018, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585-0121, (202) 586–9145.

FOR FURTHER INFORMATION CONTACT: Michael G. Raymond, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Mail Station EE–43, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585–0121, Telephone: (202) 586-9611, E-mail: michael.raymond@ee.doe.gov or Eugene Margolis, Esq., U.S. Department of Energy, Office of General Counsel, Mail Station GC–72, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585–0121, Telephone: (202) 586–9507.

SUPPLEMENTARY INFORMATION: The Energy Conservation Program for Consumer Products (other than automobiles) was established pursuant to the Energy Policy and Conservation Act, as amended, which requires DOE to prescribe standardized test procedures to measure the energy consumption of certain consumer products, including heat pumps. The intent of the test procedures is to provide a comparable measure of energy consumption that will assist consumers in making purchasing decisions, and will determine whether a product complies with the applicable energy conservation standard. The test procedures appear at 10 CFR Part 430, Subpart B, Appendix M.

The Department amended the prescribed test procedures by adding 10 CFR 430.27 on September 26, 1980, creating the waiver process. 45 FR 64108. Subsequently, DOE further amended the waiver process to allow the Assistant Secretary for Energy Efficiency and Renewable Energy (Assistant Secretary) to grant an Interim Waiver from test procedure requirements to manufacturers that have petitioned DOE for a waiver of such prescribed test procedures. 10 CFR Part 430, § 430.27(a)(2).

The waiver process allows the Assistant Secretary to waive temporarily test procedures for a particular basic model when a petitioner shows that the basic model contains one or more design characteristics which prevent testing according to the prescribed test procedures, or when the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption as to provide materially inaccurate comparative data. Waivers generally remain in effect until final test procedure amendments become effective, resolving the problem that is the subject of the waiver.

On March 3, 1998, Sanyo filed a Petition for Waiver and an Application for Interim Waiver regarding the heat pump tests. On July 21, 1998, Sanyo withdrew its request for an interim waiver. Sanyo's application seeks a Waiver from the DOE test of heating mode operation for its burner-assisted heat pumps because the current DOE test procedure does not address burner-assisted heat pumps.

The Department has granted a waiver to Kool-Fire (Division of Friedrich Corporation) for a burner assisted heat pump product similar to Sanyo's. Pursuant to paragraph (b) of 10 CFR Part 430.27, DOE is hereby publishing the ''Petition for Waiver'' in its entirety. The Petition contains no confidential information. The Department solicits comments, data, and information respecting the Petition.

Issued in Washington, DC, on November 23, 1998.

Dan W. Reicher,

Assistant Secretary, Energy Efficiency and Renewable Energy.

Sanyo Electric Co., Ltd.

March 3, 1998

ATTN: Ms. Christine Ervin, Assistant Secretary for Energy Efficiency and Renewable Energy, U.S. Department of Energy, Mail Station EE–1, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585

CC: Mr. T. Hada (Gas Appliances), Mr. W. C. Ryan (Ryan Co., Inc.)

RE: Petition for Waiver and Application for Interim Waiver for Sanyo Gas Source Heat Pump

Dear Ms. Ervin: Sanyo described a gas source heat pump product to your Mr. Mike Raymond and Mr. Ed. Pollock during a meeting on June 24, 1997. The recommendation from this meeting was for Sanyo to submit an application for Interim Waiver and Petition for Waiver from the Department of Energy central air conditioning heat pump test procedure for Sanyo's gas source heat pump. Sanyo's business plan is to provide our unique cooling and heating design for the United States domestic market. Our business will suffer economic hardship without a waiver from Department of Energy heating operation test procedures and efficiency standard for this product line.

Sanyo's ductless split type air conditioner-gas source heat pump product operates as a conventional air conditioner for cooling. Cooling efficiency is to be evaluated under DOE test procedures for the seasonal energy efficiency ratio (SEER) product rating. The cooling mode test procedure is specified in 10 CFR Part 430, Subpart B, Appendix M, Section 2.1.

For heating operation this product employs a fuel gas burner to apply heat to the interior wall of a second heat exchanger located in the outdoor section. The exterior wall of this heat exchanger is in close contact with tubing containing a refrigerant. Refrigerant is heated through intimate contact with the exterior wall of this heat exchanger and circulated by the refrigerant compressor from the outdoor tubing to the indoor tubing of the evaporator coil. The indoor fan motor and blower system extracts heat from the circulated refrigerant into the conditioned space. During heating operation the outdoor fan motor and air conditioning heat transfer tubing are isolated from the active circuit by valves and electrical controls.

Accordingly, a DOE test procedure for heating mode of such a gas source heat pump is not developed. Sanyo has no knowledge of an industry standard or test method for evaluating heating efficiency of this type of product. Requirements in 10 CFR Part 430, Subpart B, Appendix M, Section 2.3 do not apply for gas source heat pump units.

In order for this product to comply with the requirements of the Energy Policy and Conservation Act (Pub. L. 94–163) and amendments, Sanyo's business needs require that DOE favorably consider our application for an interim waiver and petition for waiver from the heating efficiency requirements for our combination ductless split air conditioner and gas-source heat pump product line.

Your review and consideration is appreciated. If more information is needed, we will be pleased to provide what you need.

Truly yours,

S. Ukai,

Engineer.

K. Mori,

Manager, International Operation, Air Conditioning Division, Environmental Systems, Business Head Quarter, Sanyo Electric Co., Ltd.

Mike Raymond, U.S. Department of Energy

Sanyo's letter dated March 3, 1998 was a request for a waiver and interim waiver of DOE heating test procedures for their gas source heat pump products.

Sanyo requests you disregard their request for an interim waiver and proceed to extend the final waiver in response to their letter request.

This modification is due to Sanyo's product introduction schedule having sufficient time to allow for completion of the final ruling.

If you have questions or need more information please contact me.

Sincerely,

W. C. Ryan,

Ryan Company, Inc.

[FR Doc. 98–32008 Filed 11–30–98; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Energy Information Administration

Agency Information Collection Under Review by the Office of Management and Budget

AGENCY: Energy Information Administration, Department of Energy.

ACTION: Submission for OMB review; comment request.

SUMMARY: The Energy Information Administration (EIA) has submitted the energy information collection(s) listed at the end of this notice to the Office of Management and Budget (OMB) for review under provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13). The listing does not include collections of information contained in new or revised regulations which are to be submitted under section 3507(d)(1)(A) of the Paperwork Reduction Act, nor management and procurement assistance requirements collected by the Department of Energy (DOE).

Each entry contains the following information: (1) Collection number and title; (2) summary of the collection of information (includes sponsor (the DOE component)), current OMB document number (if applicable), type of request (new, revision, extension, or reinstatement); response obligation (mandatory, voluntary, or required to obtain or retain benefits); (3) a description of the need and proposed use of the information; (4) description of the likely respondents; and (5) estimate of total annual reporting burden (average hours per response × proposed frequency of response per year × estimated number of likely respondents.)

DATES: Comments must be filed on or before December 31, 1998. If you anticipate that you will be submitting comments but find it difficult to do so within the time allowed by this notice, you should advise the OMB DOE Desk Officer listed below of your intention to do so as soon as possible. The Desk Officer may be telephoned at (202) 395–3084. (Also, please notify the EIA contact listed below.)

ADDRESSES: Address comments to the Department of Energy Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, 726 Jackson Place NW, Washington, DC 20503. (Comments should also be addressed to the Statistics and Methods Group at the address below.)

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Herbert Miller, Statistics and Methods Group, (EI–70), Forrestal Building, U.S. Department of Energy, Washington, DC 20585. Mr. Miller may be telephoned at (202) 426–1103, FAX (202) 426–1081, or e-mail at hmiller@eia.doe.gov.

SUPPLEMENTARY INFORMATION: The energy information collection submitted to OMB for review was:

1. EIA–1, 3, 3A, 4, 5, 5A, 6A, 6Q, 7A, and 20, ''Coal Program Package.''
2. Energy Information Administration; OMB No. 1905–0167; Revision of a Currently Approved Collection; Mandatory.
3. The coal surveys collect data on coal production, consumption, stocks, prices, imports and exports. Data are published in various EIA publications. Respondents are manufacturing plants, producers of coke, purchasers and distributors of coal, coal mining operators, and coal-consuming electric utilities.
4. Business or other for-profit; Federal Government; State, Local or Tribal Government.
5. 10,137 hours (6,733 respondents × 1.7 responses per year × .9 hours per response).

Statutory Authority: Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (Pub. L. No. 104–13).

Issued in Washington, DC, November 23, 1998.

Jay H. Casselberry,

Agency Clearance Officer, Statistics and Methods Group, Energy Information Administration.

[FR Doc. 98–32010 Filed 11–30–98; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–156–000]

CNG Transmission Corporation; Notice of Proposed Changes in FERC Gas Tariff

November 25, 1998.

Take notice that on November 20, 1998, CNG Transmission Corporation (CNG), tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following revised tariff sheets, with an effective date of January 1, 1999:

Fourth Revised Sheet No. 344
Fifth Revised Sheet No. 345

CNG states that the purpose of its filing is to implement Article II, Section 1.7 of the January 21, 1998, ''Stipulation and Agreement Concerning GRI Funding'' as approved by the Commission in Docket Nos. RP97–149–003, et al. (the GRI Settlement). CNG has incorporated a mechanism to permit shippers to make voluntary contributions to the GRI, at Section 13.4 of the General Terms and Conditions of its tariff. The inserted provision allows CNG's Customers to make voluntary contributions to GRI, in addition to the existing GRI Adjustment Charge. Through this mechanism, CNG will continue to serve as a GRI collection agent consistent with Article II of the GRI Settlement.

CNG states that copies of its letter of transmittal and enclosures are being mailed to CNG's customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

David P. Boegers,

Secretary.

[FR Doc. 98–31990 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. TM99–2–22–000]

CNG Transmission Corporation; Notice of Proposed Changes in FERC Gas Tariff

November 25, 1998.

Take notice that on November 20, 1998, CNG Transmission Corporation (CNG), tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following revised tariff sheets, with an effective date of January 1, 1999:

Eighteenth Revised Sheet No. 31
Forty Second Revised Sheet No. 32
Forty Second Revised Sheet No. 33

CNG states that the purpose of this filing is to adopt the GRI surcharges established by Article II, Sections 1.2 through 1.5 of the January 21, 1998, ''Stipulation and Agreement Concerning GRI Funding'' as approved by the Commissin in Docket Nos. RP97–149–003, et al. (the GRI Settlement). CNG

further states that the rates established by its filing correspond to those set forth in Appendix A to the GRI Settlement; the unit rate impact on CNG's GRI Adjustment Charge for each affected rate schedule is summarized in CNG's transmittal letter.

CNG states that copies of its letter of transmittal and enclosures are being mailed to CNG's customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

David P. Boergers,

Secretary.

[FR Doc. 98–31991 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. TM99–1–21–000]

Columbia Gas Transmission Corporation; Notice of Proposed Changes in FERC Gas Tariff

November 24 , 1998.

Take notice that on November 19, 1998, Columbia Gas Transmission Corporation (Columbia) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following revised tariff sheets to become effective January 1, 1999:

Thirty-first Revised Sheet No. 25
Thirty-first Revised Sheet No. 26
Thirty-first Revised Sheet No. 27
Thirtieth Revised Sheet No. 28

Columbia states that this filing is being submitted in accordance with the Commission's order issued on April 29, 1998 in Gas Research Institute's (GRI) Docket Nos. RP97–149–003, RP97–149–004, RP97–391–001, RP97–391–002, and RM97–3–001 (Order Approving Settlement) (83 FERC ¶ 61,093), and in accordance with Section 33 of the General Terms and Conditions of its FERC Gas Tariff, Columbia is submitting revised tariff sheets to reflect the 1999 GRI funding mechanism.

Columbia states further that copies of this filing have been mailed to all of its customers and affected state regulatory commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31886 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. TM99–1–70–000]

Columbia Gulf Transmission Company; Notice of Proposed Changes in FERC Gas Tariff

November 24, 1998.

Take notice that on November 19, 1998, Columbia Gulf Transmission Company (Columbia Gulf) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following revised tariff sheets to become effective January 1, 1999:

Twentieth Revised Sheet No. 18
Tenth Revised Sheet No. 18A
Twenty-first Revised Sheet No. 19

Columbia Gulf states that this filing is being submitted in accordance with the Commission's order issued on April 29, 1998 in Gas Research Institute's (GRI) Docket Nos. RP97–149–003, RP–149–004, RP97–391–001, RP97–391–002, and RM97–3–001 (Order Approving Settlement) (83 FERC ¶ 61,093), and in accordance with Section 33 of the General Terms and Conditions of its FERC Gas Tariff, Columbia Gulf is submitting revised tariff sheets to reflect the 1999 GRI funding mechanism.

Columbia Gulf states further that copies of this filing have been mailed to all of its customers and affected state regulatory commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31888 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. GT99–6–000]

El Paso Natural Gas Company; Notice of Proposed Changes in FERC Gas Tariff

November 24, 1998.

Take notice that on November 19, 1998, El Paso Natural Gas Company (El Paso) tendered for filing and acceptance by the Commission two firm Transportation Service Agreements (TSAs) between El Paso and Pemex Gas y Petroquimica Basica (Pemex) and Eleventh Revised Sheet No. 1 to its FERC Gas Tariff, Second Revised Volume No. 1–A.

El Paso states that it is submitting the TSAs for Commission approval since the TSAs contain provisions which differ from El Paso's Volume No. 1–A Tariff. The tariff sheet, which references the TSAs, is proposed to become effective on December 20, 1998.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with the Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions

or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commissions in determining 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 in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31878 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–07–M

FEDERAL ENERGY REGULATORY COMMISSION

[Docket No. CP99–92–000]

Equitrans, L.P.; Notice of Application

November 25, 1998.

Take notice that on November 18, 1998, Equitrans, L.P. (Equitrans), 3500 Park Lane, Pittsburgh, PA 15275, filed an application pursuant to Section 7(b) of the Natural Gas Act (NGA) and the Commission's Regulations thereunder, for an order approving pre-granted blanket abandonment of Equitable Gas Company's (Equitable) FERC Rate Schedule SS–3 storage as requested by Equitable in the future. Equitrans states that upon approval of this application, Equitrans will convert on an as-necessary basis in the future Equitable's Rate Schedule SS–3 storage entitlements to equivalent firm storage entitlements under Equitrans' open-access Rate Schedule 115SS. Equitrans application is on file with the Commission and open to public inspection.

Equitrans states that future storage conversions will permit Equitable to release its storage entitlements to its own customers as part of its retail customer choice program in the State of Pennsylvania. Equitrans states the pre-granted abandonment will allow Equitable to comply with the short notification requirements for customer choice. Equitrans states that the certificate level of service entitlements to all other customers will remain unchanged, and that no modification of Equitrans' rates is required by this application. Equitrans states that blanket pre-granted abandonment authorization will facilitate the elimination of anticipated Section 7(c) services on the Equitrans system and a fuller conversion to uniform open-access services.

Any person desiring to be heard or to make any protest with reference to said applicated should on or before December 16, 1998, file with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a petition to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in an subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no petition to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a petition for leave is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure provided for, unless otherwise advised, it will be unnecessary for Equitrans to appear or be represented at the hearing.

David P. Boergers,

Secretary.

[FR Doc. 98–31986 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–84–001]

Gas Transport, Inc.; Notice of Proposed Changes in FERC Gas Tariff

November 24, 1998.

Take notice that on November 19, 1998, Gas Transport, Inc. (GTI) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, certain revised tariff sheets, with a proposed effective date of November 2, 1998.

GTI states that the purpose of this filing is to comply with the Commission's letter order issued on November 4, 1998 in the above-referenced proceeding. The November 4 order directed GTI to file revised tariff sheets to rectify certain matters with respect to GTI's October 9, 1998 filing made to comply with the Commission's Order No. 587–H, issued July 15, 1998. Specifically, the revised tariff sheets address bumping notice procedures, the incorporation of GISB Standards 1.3.2(I) through 1.3.2(iv), version 1.3 verbatim, and the incorporation of GISB Standard 1.3.2(v) by reference in GTI's General Terms and Conditions, Section 22.

GTI states that copies of this filing were served upon its firm customers, interested state commissions, and on all interruptible customers.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31882 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–66–002]

High Island Offshore System; Notice of Proposed Change in FERC Gas Tariff

November 24, 1998.

Take notice that on November 19, 1998, High Island Offshore System, (HIOS) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheets, with an effective date of November 2, 1998:

Third Revised Sheet No. 57A
First Revised Sheet No. 57B
First Revised Sheet No. 57C
Fifth Revised Sheet No. 58
Eighth Revised Sheet No. 110
Sub Fourth Revised Sheet No. 110A

HIOS states that the filing is being made in compliance with the

Commission's letter dated November 18, 1998 in the above referenced proceeding.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31880 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–82–001]

KO Transmission Company; Notice of Tariff Filing

November 24, 1998.

Take notice that on November 20, 1998, KO Transmission Company (KO Transmission) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, the following tariff sheets:

Second Revised Sheet No. 92
Second Revised Sheet No. 93
Second Revised Sheet No. 94
Original Sheet No. 94A
Second Revised Sheet No. 96
Second Revised Sheet No. 106
Third Revised Sheet No. 147

KO Transmission tendered this tariff filing in compliance with the Commission's November 5, 1998 Letter Order in the above-captioned proceeding. Therein the Commission required KO Transmission to further modify its Tariff in compliance to Order Nos. 587–G and 587–H, wherein the Commission amended Section 284.10 of its regulations governing standards for conducting business practices.

KO Transmission states that copies of this filing were served to all of its customers.

Any person desiring the protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31881 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP99–81–000]

Natural Gas Pipeline Company of America; Notice of Application

November 24, 1998.

Take notice that on November 17, 1998, Natural Gas Pipeline Company of America (Natural), 747 East 22nd Street, Lombard, Illinois, 60148, filed in Docket No. CP99–81–000 an application pursuant to Section 7(b) of the Natural Gas Act for permission and approval to abandon, by sale to Stingray Pipeline Company (Stingray) a dual 4-inch platform measuring facility located in East Cameron Block 286, offshore Louisiana (EC 286), all as more fully set forth in the application on file with the Commission and open to public inspection.

Natural states that the facilities were originally constructed to allow Natural to measure system supply gas that it had purchased in EC 286, which gas Stingray had received for Natural's account and transported and redelivered to Natural onshore at Holly Beach in Cameron Parish, Louisiana. Natural states that its gas purchase and transportation agreements related to these facilities have been terminated and that currently the facilities are used to measure gas that stingray receives and transports onshore for the accounts of Stingray's shippers. Moreover, Natural states that said facilities no longer hold sufficient value to Natural to warrant the expenditures required to maintain them as a result, Natural intends to sell said facilities to Stingray.

Any person desiring to be heard or to make any protest with reference to said application should on or before December 15, 1998, file with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211 and the regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to the proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission on this application if no motion to intervene is filed within the time required herein, and if the Commission on its own review of the matter finds that the abandonment is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provide for, unless otherwise advised, it will be unnecessary for Natural to appear or be represented at the hearing.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31877 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP99–60–000]

NorAm Gas Transmission Company; Notice of Request Under Blanket Authorization

November 24, 1998.

Take notice that on November 6, 1998, NorAm Gas Transmission Company (NGT), 1111 Louisiana, Houston, Texas 77002–5231, filed in Docket No. CP99–60–000 a request pursuant to Sections 157.205 and 157.211 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 157.211) for authorization to operate certain facilities in Arkansas under NGT's blanket certificate issued in Docket No. CP82–384–000 and CP82–384–001 pursuant to

Section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

NGT specifically requests authority to continue operating three delivery taps installed and one that is in the process of being constructed solely to provide service authorized under Section 311 of the Natural Gas Policy Act and Subpart B, of the Commission's Regulations under Subpart G of Part 284 of the Commission's Regulations to ARKLA, a distribution division of NorAm Energy Corp. (ARKLA). The estimated volumes to be delivered through these facilities are approximately 10,200 MMBtu annually and 91 MMBtu on a peak day. The facility upgrades have an estimated cost of $6,975, and $5,985 will be reimbursed by ARKLA.

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 Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefore, 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. 98–31873 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP96–200–034]

NorAm Gas Transmission Company; Notice of Proposed Changes in FERC Gas Tariff

November 25, 1998.

Take notice that on November 20, 1998, NorAm Gas Transmission Company (NGT) tendered for filing as part of its FERC Gas Tariff, Fourth Revised Volume No. 1, the following revised tariff sheet to be effective November 1, 1998:

Substitute Seventh Revised Sheet No. 7E

NGT states that the purpose of this filing is to reflect a corrected publication for determination of an index price and replaces Seventh Revised Sheet No. 7E filed on October 30, 1998 (RP96–200–034).

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

David P. Boergers,

Secretary.

[FR Doc. 98–31987 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP99–77–000]

Northern Natural Gas Company; Notice of Application

November 24 , 1998.

Take notice that on November 16, 1998, Northern Natural Gas Company (Northern), 1111 South 103rd Street, Omaha, Nebraska 68124, filed in Docket No. CP99–77–000, an application pursuant to Section 7(b) of the Natural Gas Act (NGA) for an order permitting and approving the abandonment of certain individually certificated agreements, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Specifically, Northern proposes to abandon service under Rate Schedules T–27 with Texas Eastern Transmission Corporation, Transcontinental Gas Pipe Line Corporation and Columbia Gas Transmission Company (Columbia); X–59 and X–60 with Trunkline Gas Company (Trunkline) and Panhandle Eastern Pipe Line Company (Panhandle); X–77 with Tennessee Gas Pipeline Company (Tennessee) and Columbia; X–92 with ANR Pipeline Company; X–102 with Tennessee; and X–104 with Trunkline and Panhandle, all of which are contained in Northern's FERC Gas Tariff, Original Volume No. 2.

Northern states that no facilities will be abandoned as a result of this proposed abandonment of service. Northern states the contracts underlying these arrangements have been terminated pursuant to the terms of the underlying contracts and that Northern does not currently provide service under any of these agreements. Northern asserts that abandonment of the services under the referenced rate schedules will not impair any of Northern's remaining service obligations. Northern relates that these agreements are a carry-over from years past and need to be abandoned solely as a housekeeping event. Northern says that because its merchant obligation has terminated, it no longer purchases natural gas volumes which were the supply source for most of these agreements.

Any person desiring to be heard or to make any protest with reference to said application should on or before December 15, 1998, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 and 385.211) and the regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party in any proceeding herein must file a motion to intervene in accordance with the Commission's rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and procedure, a hearing will be held without further notice before the Commission or its designee on this application if no protest or motion to intervene is filed within the time required herein. At that time, the Commission on its own review of the matter will determine whether granting permission and approval for the proposed abandonment is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be

unnecessary for Northern to appear or to be represented at the hearing.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31876 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–155–000]

Panhandle Eastern Pipe Line Company; Notice of Reconciliation Report

November 24, 1998.

Take notice that on November 20, 1998, Panhandle Eastern Pipe Line Company (Panhandle) tendered for filing its reconciliation report in accordance with the Commission's order issued October 30, 1992 in Docket No. RP91–229–000, *et al.*, 60 FERC 61,160 (1992) and letter order issued August 28, 1998 in Docket No. RP98–360–000. The Canadian Reservation and Volumetric Surcharges were established in an October 2, 1992 Stipulation and Agreement (October 2, 1992 Settlement) in Docket No. RP91–229–000, et al. The Commission's orders required the filing of a reconciliation report as soon as practicable following the termination of the Canadian Resolution Surcharges.

Panhandle states that its filing on July 31, 1998, in Docket No. RP98–360–000 removed the Canadian Resolution Reservation Surcharge applicable to firm transportation services provided under Rate Schedules FT, EFT and LFT, the Canadian Resolution Volumetric Surcharge applicable to service provided under Rate Schedule SCT and the Canadian Resolution Volumetric Surcharge applicable to service provided under Rate Schedules IT and EIT effective September 1, 1998. Panhandle's July 31, 1998 filing was approved by Commission letter order issued August 28, 1998.

Panhandle states that copies of this filing are being served on all affected customers and applicable state regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed on or before December 3, 1998. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31885 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP98–425–003]

Texas Gas Transmission Corporation; Notice of Filing of Tariff Sheets

November 25, 1998.

Take notice that on November 20, 1998, Texas Gas Transmission Corporation (Texas Gas) tendered for filing, as part of its FERC Gas Tariff, First Revised Volume No. 1, November 1, 1998:

Third Substitute Second Revised Sheet No. 206C
Substitute Second Revised Sheet No. 206D
Third Substitute Ninth Revised Sheet No. 207

Texas Gas states that the instant filing revises specific tariff sheets filed on November 10, 1998 in the same docket listed above and replaces those sheets filed on November 18, 1998 in their entirety which Texas Gas has sought to withdraw due to various errors. The revised tariff sheets simply correct mistakes of an omission of previously approved timelines and the deletion of GISB Standards 1.3.2(v) and (vi). The instant tariff sheets continue to reflect those revisions filed in the November 10, 1998 filing in order to comply with the Commission's directives in the October 29, 1998 Order which conditionally accepted Texas Gas's September 30, 1998 filing to comply with the Commission's Order No. 587–H.

Texas Gas states that copies of the tariff sheets are being served upon Texas Gas's jurisdictional customers and interested state commissions, and all parties on the official service list in Docket No. RP98–425.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

David P. Boergers,

Secretary.

[FR Doc. 98–31988 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–85–001]

Texas-Ohio Pipeline, Inc.; Notice of Compliance Filing

November 25, 1998.

Take notice that on November 23, 1998, Texas-Ohio Pipeline, Inc. (Texas-Ohio), tendered for filing to become part of its FERC Gas Tariff, Original Volume No. 1, the following tariff sheets, to be effective November 2, 1998:

Original Sheet No. 53B
Original Sheet No. 53C
Substitute Second Revised Sheet No. 54
Substitute Second Revised Sheet No. 54A
Substitute Second Revised Sheet No. 78

Texas-Ohio states that the purpose of this filing is to comply with the Commission's Letter Order issued November 5, 1998 in this proceeding.

Texas-Ohio further states that copies of this filing have been served on Texas-Ohio's jurisdictional customers and interested state commissions.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

David P. Boergers,

Secretary.

[FR Doc. 98–31989 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP99–76–000]

Transcontinental Gas Pipe Line Corporation; Notice of Application

November 24, 1998.

Take notice that on April 20, 1998, Transcontinental Gas Pipe Line Corporation (Transco), Post Office Box 1396, Houston, Texas 77251, filed in Docket No. CP99–76–000, an application pursuant to Section 7(c) of the Natural Gas Act (NGA) and Part 157 of the Commission's Regulations, for a certificate of public convenience and necessity authorizing Transco to construct and operate the proposed Southeast Louisiana Crossover Project (SELA Crossover), all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Transco states that the SELA Crossover is designed to provide incremental capacity for new firm and interruptible transportation service in the supply area by interconnecting Transco's Southeast Louisiana Gathering System with its Central Louisiana Gathering System. Transco states that the SELA Crossover will be able to provide 256,762 Mcf per day of incremental firm transportation service from an interconnection with Garden Banks Gas Pipeline, L.L.C. (Garden Banks), at South Marsh Island, Block 76 (SMI 76) to Transco's Compressor Station 50 onshore at Eunice, Louisiana. Transco states that the SELA Crossover also will create 141,970 Mcf per day of firm transportation capacity from SMI 76 to Vermillion Block 67 offshore.

Specifically, Transco seeks authority to construct, own, and operate approximately 53.23 miles of 24-inch diameter pipeline extending from an existing Transco-owned platform at South Marsh Island Block 66 (SMI 66) on the Southeast Louisiana Gathering System to an existing Transco-owned platform at Vermillion Block 678 on the Central Louisiana Gathering System, 7,400 horsepower of compression at SMI 66, 1,200 horsepower of compression at South Marsh Island Block 106 (SMI 106), and separation and measurement facilities and other appurtenant facilities. Transco estimates that the proposed facilities will cost $80,060,542.

Transco states that it is also seeking approval of initial rates for firm and interruptible transportation service over the SELA Crossover based upon the incremental cost of service of the project's facilities. Transco states that it has submitted for approval Rate Schedules FTP–1, FTP–2, and FTP–3 for incremental firm projects in the supply area. Transco further states that it seeks Commission approval of a negotiated fixed rate with an anchor tenant, which has executed a precedent agreement for firm transportation service from SMI 76 to Station 50.

Any person desiring to be heard or making any protest with reference to said application should on or before December 15, 1998, file with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. The Commission's rules require that protestors provide copies of their protests to the party or person to whom the protests are directed. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

A person obtaining intervenor status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents issued by the Commission, filed by the applicant, or filed by all other intervenors. An intervenor can file for rehearing of any Commission order and can petition for court review of any such order. However, an intervenor must serve copies of comments of any other filing it makes with the Commission to every other intervenor in the proceeding, as well as filing an original and 14 copies with the Commission.

A person does not have the intervene, however, in order to have comments considered. A person, instead, may submit two copies of such comments to the Secretary of the Commission. Commenters will be placed on the Commission's environmental mailing list, will receive copies of environmental documents, and will be able to participate in meetings associated with the Commission's environmental review process. Commenters will not be required to serve copies of filed documents on all other parties. However, commenters will not receive copies of all documents filed by other parties or issued by the Commission, and will not have the right to seek rehearing or appeal the Commission's final order to a Federal court.

The Commission will consider all comments and concerns equally, whether filed by commenters or those requesting intervenor status.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by Sections 7 and 15 of the NGA and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Transco to appear or be represented at the hearing.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31875 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–153–000]

Transcontinental Gas Pipe Line Corporation; Notice of Proposed Changes in FERC Gas Tariff

November 24, 1998.

Take notice that on November 19, 1998 Transcontinental Gas Pipe Line Corporation (Transco) tendered for filing to become part of its FERC Gas Tariff, Third Revised Volume No. 1, certain revised tariff sheets which tariff sheets are enumerated in Appendix A to the filing. The tariff sheets are proposed to be effective November 1, 1998.

Transco states that the purpose of the instant filing is to track rate changes attributable to storage service purchased from CNG Transmission Corporation (CNG) under its Rate Schedule GSS the costs of which are included in the rates and charges payable under Transco's Rate Schedules GSS and LSS. The filing is being made pursuant to tracking provisions under Section 3 of Transco's Rate Schedule GSS and Section 4 of Transco's Rate Schedule LSS.

Transco states that included in Appendix B attached to the filing are the explanations of the rate changes and details regarding the computation of the revised Rate Schedule GSS and LSS rates.

Transco states that copies of the filing are being mailed to each of its GSS and LSS customers and interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Sections 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings.

Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31883 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–154–000]

Transwestern Pipeline Company; Notice of Proposed Change in FERC Gas Tariff

November 24, 1998.

Take notice that on November 19, 1998, Transwestern Pipeline Company (Transwestern), tendered for filing to become part of Transwestern's FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheets, with an effective date of December 18, 1998:

First Revised Sheet No. 37A
First Revised Sheet No. 37B
First Revised Sheet No. 37C
First Revised Sheet No. 37E
First Revised Sheet No. 37F
First Revised Sheet No. 156

Transwestern proposes to amend its Rates Schedule PNR to include a Valet Hub Service in addition to Parking Service and Riding Service, Valet Hub Service shall be an interruptible service in which a Shipper (via a transportation agreement) or a Buyer (via a PNR Agreement) may nominate gas quantities to be delivered to a Valet Point for subsequent delivery to another Buyer at the Valet Point or for subsequent delivery from such Valet Point to an associated point(s) as designated by such Buyer.

Transwestern states that copies of the filing were served upon Transwestern's customers and interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings.

Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31884 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP99–61–000, CP99–62–000, CP99–63–000, and CP99–64–000]

TriState Pipeline, L.L.C.; Notice of Applications for Certificates and for a Presidential Permit and Section 3 Authorization

November 24, 1998.

Take notice that on November 9, 1998, TriState Pipeline, L.L.C. (TriState), Fairlane Plaza South, 330 Town Center Drive, Suite 900, Dearborn, Michigan 48126–2712, filed applications pursuant to Sections 7(c) and 3 of the Natural Gas Act. In Docket No. CP99–61–000, TriState seeks a certificate of public convenience and necessity to construct, install, own, lease, operate and maintain a new interstate natural gas pipeline and ancillary facilities. Further, in Docket No. CP99–62–000, TriState requests a blanket certificate pursuant to Subpart F of Part 157 of the Commission's Regulations to perform certain routine activities and operations. In addition, in Docket No. CP99–63–000, TriState seeks a blanket certificate pursuant to Subpart G of Part 284 of the Commission's Regulations to provide open-access transportation of natural gas for others. TriState also seeks approval of its initial rates and pro forma tariff provisions included in its certificate application. Finally, in Docket No. CP99–64–000, TriState requests a Presidential Permit and Section 3 authorization under Section 153 of the Commission's Regulations, all as more fully set forth in the applications which are on file with the Commission and open to public inspection.

TriState reports it is a limited liability company formed under the laws of the State of Michigan, with its principal place of business in Dearborn, Michigan. TriState further states that it is jointly owned by CMS Gas Transmission and Storage Company and Westcoast Energy (U.S.) Inc.

In Docket No. CP99–61–000, TriState proposes to construct and operate the United States segment of the TriState Pipeline System which will be comprised of approximately 148 miles of new 30-inch diameter natural gas transmission pipeline running from near Joliet, Illinois to White Pigeon, Michigan; approximately 66 miles of new 36-inch diameter natural gas transmission pipeline looping the existing Consumers Energy Company (Consumers) and Michigan Gas Storage (MGS) systems in three segments between White Pigeon and St. Clair; approximately 12 miles of new 24-inch diameter natural gas transmission pipeline running from the St. Clair compressor station to the United States-Canadian International Boundary in the St. Clair River; a new approximately 30,000 hp compressor station at Joliet, and approximately 18,570 hp of additional compression at Consumers' existing St. Clair compressor station; and 450 MDth per day of leased pipeline capacity between White Pigeon, Michigan and the St. Clair compressor station located in St. Clair County, Michigan, which leased capacity is available from Consumers and MGS as a result of the looping and added compression that TriState will undertake.

TriState asserts that its approach of combining new pipeline construction with the expansion of existing pipeline facilities and the lease of the expanded capacity created on those existing facilities will make a pipeline sized to meet market demand efficiently and cost-effectively. TriState believes its lease satisfies the *Texas Eastern* standards as reiterated by the

Commission in *Wyoming Interstate Company, Ltd.*, 84 FERC ¶ 61,007 (1998), because its lease (1) avoids the construction of duplicative facilities and has the least environmental impact; (2) provides shippers with access to new supply and market areas and/or allows shippers to avoid administrative burdens from dealing with multiple pipelines; (3) is actively supported by shippers using the capacity; and (4) can be managed or integrated into the acquiring pipeline's open-access operations.

TriState states that it held an open season in which it made capacity on its system available to interested shippers on a nondiscriminatory basis. As a result, TriState says it executed binding precedent agreements with six shippers for 435 MDth of firm transportation service. TriState asserts that the results of its open season demonstrates that there is market demand for natural gas transportation service on TriState from the Chicago Hub to the Dawn Hub and to points in between in Michigan. TriState indicates it is negotiating with other potential shippers and will file additional precedent agreements after they are executed.

TriState proposes to provide firm transportation service for the following shippers:

Shipper	Maximum daily quantity (MDth/day)	Term (years)
Consumers Energy Co. (affiliate)	100	Ten.
CMS Marketing Services and Trading (affiliate)	100	Ten.
Union Gas Ltd. (affiliate)	80	Fifteen.
Shipper A (confidential)	100	Ten.
Shipper B (confidential)	25	Ten.
Shipper C (confidential)	30	Ten.

TriState proposes to provide firm transportation service under Rate Schedule FT–1 and interruptible transportation service under Rate Schedule IT, under rates, terms and conditions provided in its pro forma tariff submitted with the application. TriState proposes to offer both negotiated and recourse rates. TriState explains its recourse rates are traditional cost-of-service based rates, designed under the straight-fixed variable method. TriState explains its negotiated rates are different from the recourse rates in that they are fixed rates plus an agreed upon escalator for either a 10-year or 15-year term. TriState says that during its open season process it offered firm shippers the choice of negotiated or recourse rates and each one who executed a precedent agreement elected negotiated rates.

TriState estimates the total capital cost of constructing the U.S. segment of the pipeline and appurtenant facilities will be approximately $361 million, excluding AFUDC. TriState relates that $305 million would be the cost of pipeline and ancillary facilities and $56 million would be the cost of the compressor stations. TriState says to date this project has been financed by equity furnished by the project sponsors. TriState states following issuance of the Commission's Preliminary Determination, the project will be financed during the remainder of the construction phase through a combination of debt and equity capital. After the project is in-service, Tristate relates that the construction financing will be replaced by permanent capital to consist of 60% debt and 40% equity. TriState states the project sponsors will furnish the equity capital. TriState says that it is anticipated that the construction of the pipeline project will be funded primarily through debt raised in the commercial bank market and equity provided by the project sponsors. Further, TriState says the credit support for the debt will be the shipper contracts and the debt will be non-recourse to project sponsors during the initial term of the shipper contracts. TriState states it has not yet finalized precise financing plans.

In Docket No. CP99–64–000, TriState has filed a companion application for a Presidential Permit and Authority, pursuant to Section 3 of the NGA, 15 U.S.C. § 717b and 18 CFR Part 153, to site, construct, install, own, operate, and maintain facilities at the United States-Canadian International Boundary in the St. Clair River near Marine City, Michigan. TriState relates that the border facilities will connect TriState's proposed United States facilities with Canadian facilities owned by TriState's Canadian affiliate, TriState-Canada.

TriState has requested a waiver of Section 154.109(c) of the Commission's regulations which requires that the General Terms and Conditions of a tariff contain a statement regarding discounts that specifies the order in which various rate components will be discounted in accordance with Commission policy. As a new pipeline, TriState does not have separate rate components, and therefore, it believes that the order of discounting requirement is not applicable to its operations.

TriState has stated that it will lease capacity from Consumers and MGS. Consumers is a Hinshaw pipeline subject to the jurisdiction of the Michigan Public Service Commission and is currently authorized to perform service on behalf of others under Section 311 of the NGPA. MGS is an interstate pipeline regulated by the Commission. Consumers has authorized TriState to state that it is willing to accept a limited jurisdiction certificate authorizing Consumers to act as operator of the capacity leased to TriState, provided Consumers' status as a Hinshaw Pipeline is not affected and that Consumers is not otherwise subject to Commission jurisdiction as a result of its lease of capacity to TriState. TriState requests that the Commission's Preliminary Determination of this project confirm that Consumer's Hinshaw status is unaffected.

TriState's proposed in-service date is November 1, 2000. TriState requests that the Commission issue a Preliminary Determination with respect to non-environmental issues by May 1, 1999, and a final certificate by January 15, 2000, so that TriState can meet its proposed in-service date.

Any person desiring to participate in the hearing process or to make any protest with reference to said applications should on or before December 15, 1998, file with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 and 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will

not serve to make the protestants parties to the proceeding. The Commission's rules require that protestors provide copies of their protests to the party or parties directly involved. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's rules.

A person obtaining intervenor status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by every one of the intervenors. An intervenors can file for rehearing of any Commission order and can petition for court review of any such order. However, an intervenor must submit copies of comments or any other filing it makes with the Commission to every other intervenor in the proceeding, as well as 14 copies with the Commission.

A person does not have to intervene, however, in order to have comments considered. A person, instead, may submit two copies of comments to the Secretary of the Commission. Commenters will be placed on the Commission's environmental mailing list, will receive copies of environmental documents and will be able to participate in meetings associated with the Commission's environmental review process. Commenters will not be required to serve copies of filed documents on all other parties. However, commenters will not receive copies of all documents filed by other parties or issued by the Commission and will not have the right to seek rehearing or appeal the Commission's final order to a federal court.

The Commission will consider all comments and concerns equally, whether filed by commenters or those requesting intervenor status.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on these applications if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificates is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for TriState to appear or to be represented at the hearing.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31874 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP98–371–004]

Williams Gas Pipelines Central, Inc.; Notice of Proposed Changes in FERC Gas Tariff

November 24, 1998.

Take notice that on November 19, 1998, Williams Gas Pipelines Central, Inc. (Williams), tendered for filing to become part of its FERC Gas Tariff, Original Volume No. 1, the following tariff sheets:

Effective September 3, 1998
Second Substitute Fourth Revised Sheet No. 6A
Effective November 1, 1998
Substitute Fifth Revised Sheet No. 6A

Williams states that this filing is being made in compliance with Commission order issued November 4, 1998, in Docket No. RP98–371–002. The Commission directed Williams to file tariff sheets providing for two PLS rates, one for the Production Area and one for the Market Area.

Williams states that a copy of its filing was served on all participants listed on the service list maintained by the Commission in the docket referenced above and on all of Williams' jurisdictional customers and interested state commissions.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31879 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. TM99–1–43–000]

Williams Gas Pipelines Central, Inc.; Notice of Proposed Changes in FERC Gas Tariff

November 24, 1998.

Take notice that on November 19, 1998, Williams Gas Pipelines Central, Inc. (Williams), tendered for filing to become part of its FERC Gas Tariff, Original Volume No. 1, the following tariff sheet, with the proposed effective date of January 1, 1999:

Sixth Revised Sheet No. 6A

Williams states that pursuant to Order Approving Settlement, issued April 29, 1998, in Docket No. RP97–391–002, *et al.* and Williams FERC Gas Tariff, Original Volume No. 1, Article 25, Williams is filing to reflect the new GRI surcharges to be collected on nondiscounted transportation services.

Williams states that a copy of its filing was served on all of Williams' jurisdictional customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98–31887 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. TM99–2–119–000]

Young Gas Storage Company, Ltd.; Notice of Tariff Filing

November 25, 1998.

Take notice that on November 20, 1998, Young Gas Storage Company, Ltd. (Young) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, the following tariff sheet, with an effective date of December 1, 1998:

Seventh Revised Sheet No. 4

Young states it is adjusting the rates for Rate Schedules FS–1 and IS–1 resulting from the currently effective Average Thermal Content of Gas in Storage (ATC) posted on Young's electronic bulletin board on November 11, 1998, pursuant to Section 1.2 of the General Terms and Conditions of this tariff. Further, Young states the combination of the revised ATC, the revised contractual entitlements and the revised storage rates will not change the current customer storage reservation payments under the instant proposal.

Young states that copies of this filing have been served on Young's affected jurisdictional customers and public bodies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

David P. Boergers,

Secretary.

[FR Doc. 98–31992 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM99–2–000]

Regional Transmission Organizations, Notice of Intent To Consult Under Section 202(a)

November 24, 1998.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of Intent to Consult with State Commissions.

SUMMARY: The Federal Energy Regulatory Commission (Commission) intends to consult with State commissions for the purpose of affording them a reasonable opportunity to present their views with respect to the Commission's use of authority under section 202(a) of the Federal Power Act.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in the Public Reference Room at 888 First Street, N.E., Room 2A, Washington, D.C. 20426.

The Commission Issuance Posting System (CIPS) provides access to the texts of formal documents issued by the Commission. CIPS can be accessed via Internet through FERC's Homepage (http://www.ferc.fed.us) using the CIPS Link or the Energy Information Online icon. The full text of this document will be available on CIPS in ASCII and WordPerfect 6.1 format. CIPS is also available through the Commission's electronic bulletin board service at no charge to the user and may be accessed using a personal computer with a modem by dialing 202–208–1397, if dialing locally, or 1–800–856–3920, if dialing long distance. To access CIPS, set your communications software to 19200, 14400, 12000, 9600, 7200, 4800, 2400, or 1200 bps, full duplex, no parity, 8 data bits and 1 stop bit. User assistance is available at 202–208–2474 or by E-mail to cipsmaster@ferc.fed.us.

This document is also available through the Commission's Records and Information Management System (RIMS), an electronic storage and retrieval system of documents submitted to and issued by the Commission after November 16, 1981. Documents from November 1995 to the present can be viewed and printed. RIMS is available in the Public Reference Room or remotely via Internet through FERC's Homepage using the RIMS link or the Energy Information Online icon. User assistance is available at 202–208–2222, or by E-mail to rimsmaster@ferc.fed.us.

Finally, the complete text on diskette in WordPerfect format may be purchased from the Commission's copy contractor, RVJ International, Inc. RVJ International, Inc. is located in the Public Reference Room at 888 First Street, N.E., Washington, D.C. 20426.

As part of a broader inquiry concerning the Commission's policies on independent system operators (ISOs) and other regional transmission organizations (RTOs) in the electric utility industry,[1] the Commission is considering whether and how to use its authority under section 202(a) of the Federal Power Act (FPA), 16 U.S.C. § 824a(a) (1994), which was recently delegated to the Commission by the Secretary of Energy.[2] As a first step in that process, the Commission gives notice of its intent to initiate a consultation process with State commissions pursuant to section 202(a). The purpose of this initial consultation is to afford State commissions a reasonable opportunity to present their views and recommendations with respect to dividing the country into regional districts for development of independent regional transmission organizations.

The Commission intends initially to seek the views and recommendations of State commissions on the issues of what criteria should be used to establish regional boundaries for RTOs, and what should be the appropriate role of States in the formation and governance of RTOs, in the event that the Commission decides to exercise its authority. We will do so through one or more conferences to be held in January or early February 1999. After these conferences, there will be additional consultation, during which the Commission will solicit and consider the views of the States, and others, in a rulemaking or other generic proceeding on RTOs. Among the issues to be examined then will be whether to exercise section 202(a) authority to establish regional boundaries for RTOs.

[1] *See* Midwest Independent Transmission System Operator, Inc., 84 FERC ¶ 61,231 at 62,142 (1998), *reh'g pending (Midwest ISO).*

[2] A copy of section 202(a) is attached to this notice and will also be published in the **Federal Register**.

Background

In Order Nos. 888[3] and 889,[4] the Commission required all public utilities that own, operate or control interstate transmission facilities to provide open access transmission services and to separate their transmission operations functions from their wholesale power marketing functions. The Commission took this step to ''remedy undue discrimination in access to monopoly owned transmission lines'' in order to ''remove impediments to competition in the wholesale bulk power marketplace and to bring more efficient, lower cost power to the Nation's electricity consumers.''[5] During the course of that proceeding, the Commission received comments urging it to require generation divestiture or structural institutional arrangements such as regional ISOs to better assure non-discrimination. The Commission responded at that time that, while it believed that ISOs had the potential to provide significant benefits, efforts to remedy undue discrimination should begin by requiring the less intrusive functional unbundling approach.[6] Order No. 888 stated:

[W]e see many benefits in ISOs, and encourage utilities to consider ISOs as a tool to meet the demands of the competitive marketplace.

As a further precaution against discriminatory behavior, we will continue to monitor electricity markets to ensure that functional unbundling adequately protects transmission customers. At the same time, we will analyze all alternative proposals, including formation of ISOs, and, if it becomes apparent that functional unbundling is inadequate or unworkable in assuring non-discriminatory open access transmission, we will reevaluate our position and decide whether other mechanisms, such as ISOs, should be required.[7]

Order No. 888 also set forth eleven principles that would be used to assess ISO proposals that may be submitted to the Commission.[8] Since Order No. 888 was issued, the Commission conditionally approved proposals for the establishment of five ISOs. These are the California ISO,[9] the PJM ISO,[10] ISO New England,[11] the New York ISO,[12] and the Midwest ISO.[13] In addition, the Texas Commission has ordered an ISO for the Electric Reliability Council of Texas (ERCOT).[14] These organizations, and others rumored to be in development, vary widely with respect to their operational responsibilities, geographic scope, governance, and structure.

On April 15–16, 1998, the Commission held a public conference in Washington, D.C., in Docket No. PL98–5–000, to examine the future of ISOs in administering the electric transmission grid on a regional basis. The Washington conference highlighted the industry's change in thinking about types of regional transmission organizations other than ISOs that the Commission should consider. As a follow-up to the Washington conference, the Commission held seven regional conferences at locations around the country between May 28 and June 8, 1998. These regional conferences focused on specific regional characteristics and institutional factors that bear on the formation of regional transmission organizations. As a result of these conferences, the Commission received numerous oral and written comments on the appropriate size, scope, organization and functions of regional transmission organizations.

In our recent order conditionally approving the Midwest ISO, the Commission noted that many issues had been raised in that proceeding about the proper size and configuration of the ISO; the relative merits of ISOs, transcos, and other possible forms of regional organization; how much control the regional entity should have over various facilities, and other issues. The Commission stated that it would not attempt to resolve industry-wide issues in that proceeding, but that it would address such issues in a rulemaking or other generic proceeding in the future.[15]

On October 1, 1998, the Secretary of Energy delegated his authority under section 202(a) of the FPA to the Commission. The Secretary stated that section 202(a) ''provides DOE with sufficient authority to establish boundaries for Independent System Operators (ISOs) or other appropriate transmission entities.''[16]

Discussion

Under section 202(a) of the FPA, ''the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy.'' The purpose of this division into regional districts is for ''assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources.'' Section 202(a) states that it is ''the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts.''

The Commission believes that an abundant supply of electric energy throughout the United States with the greatest possible economy can be best achieved with fully competitive wholesale power markets and open and non-discriminatory access to interstate transmission facilities. Order No. 888 has laid the necessary predicate for competition but, after more than two years of experience, the requirements of Order Nos. 888 and 889 may not alone

[3] Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 FR 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g,* Order No. 888–A, 62 FR 12,274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 at 30,278–79 (1997), *order on reh'g,* Order No. 888–B, 62 FR 64688 (Dec. 9, 1997) 81 FERC ¶ 61,248 (1997), *order on reh'g,* Order No. 888–C, 82 FERC ¶ 61,046 (1998).

[4] Open Access Same-Time Information System and Standards of Conduct, Order No. 889, 61 FR 21737 (May 10, 1996), FERC Stats. & Regs. ¶ 31,035 (1996); *order granting request for clarification,* 62 FR 610 (Jan. 1, 1997), 77 FERC ¶ 61,335 (1996); *order on reh'g,* Order No. 889–A, 62 FR 12484 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,049 (1997); and *order denying reh'g,* Order No. 889–B, 62 FR 64715 (Dec. 9, 1997), 81 FERC ¶ 61,253 (1997).

[5] Order No. 888, FERC Stats. & Regs. at 31,634.

[6] Functional unbundling requires the separation of transmission system functions and wholesale generation marketing functions, and a code of conduct to define impermissible contact between generation and transmission personnel. Under functional unbundling, a public utility must: (1) take transmission services under the same tariff of general applicability as do others; (2) state separate rates for wholesale generation, transmission, and ancillary services; and (3) rely on the same electronic information network that its transmission customers rely on to obtain information about its transmission system when buying or selling power. *See* Order No. 888, FERC Stats. & Regs. at 31,654–55.

[7] Order No. 888, FERC Stats. & Regs. at 31,655.

[8] *Id.* at 31,730.

[9] Pacific Gas & Electric Company, *et al.,* 77 FERC ¶ 61,204 (1996), *order on reh'g,* 81 FERC ¶ 61,122 (1997).

[10] Pennsylvania-New Jersey-Maryland Interconnection, *et al.,* 81 FERC ¶ 61,257 (1997), *reh'g pending.*

[11] New England Power Pool, 79 FERC ¶ 61,374 (1997), *order on reh'g,* 85 FERC ¶ 61,242 (1998) (order conditionally authorizing ISO New England); New England Power Pool, 83 FERC ¶ 61,045 (1998), *reh'g pending* (order on NEPOOL tariff and restructuring).

[12] Central Hudson Gas & Electric Corporation, *et al.,* 83 FERC ¶ 61,352 (1998), *reh'g pending.*

[13] *Midwest ISO,* 84 FERC ¶ 61,231 (1998).

[14] *See* 16 Texas Administrative Code § 23.67(p).

[15] *Midwest ISO,* 84 FERC at 62,142. The Commission also stated therein, among other things, that ''at this early stage in the restructuring of the U.S. electric power industry'' it believes that there is no ''single structural or operational arrangement that must apply universally to all utilities seeking to form regional transmission entities'' and that the better approach ''at this time'' is ''to encourage and accommodate regional experimentation.'' *Id.* The Commission further stated that coordination in the public interest is best served if a proposed transmission entity is as large as possible. *Id.* at 62,145.

[16] 63 FR 53889 (Oct. 7, 1998).

be sufficient to accomplish a completely competitive market. The Commission therefore is considering whether the goals of full competition and non-discriminatory access can be achieved in the absence of broad participation by transmission-owning electric utilities in regional transmission organizations.

The Commission has identified in earlier orders several issues inherent in the present system that may interfere with the development of fully competitive markets. These include lack of sufficient separation between transmission and merchant functions, multiple pancaked transmission rates within a region, congestion management issues, loop flow issues, the complexities of current transmission planning, and generation market power that results when market size is constricted by transmission constraints.[17] As the Commission has previously explained, the establishment of and participation in properly structured regional transmission organizations can foster fully competitive markets. To be effective, the Commission believes that these regional transmission organizations must, at a minimum, have adequate operational authority, ensure comparable treatment for all transmission users, address loop flow issues, eliminate pancaked transmission rates, manage short-term transmission reliability, manage congestion, and plan transmission expansion.[18]

The Commission does not have preconceived notions as to what types of structures would be optimal for such regional transmission organizations, and they may in fact vary from region to region. ISOs are one type of regional institution, but there are other ways that interests in generation and transmission can be separated. These may include the creation of separate transmission companies.

Section 202(a) requires that before the Commission exercises its authority to establish regional districts and to fix or modify their boundaries:

The Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

Accordingly, the Commission intends to hold one or more conferences during January or early February 1999 for the purpose of beginning the consultative process with the State commissions. The Commission currently envisions that one representative from each State commission would attend and discuss questions that would include, but not necessarily be limited to, the following:

(1) What criteria and policy considerations should be used to establish the boundaries for effective RTOs if the Commission later decides to do so?

(2) Are there factors that make it appropriate for the utilities in your state to belong in a specific region?

(3) What is the appropriate role of the States in the formation of RTOs?

(4) What is the appropriate role of the States in the governance of RTOs?

This notice is being given at this early time to permit interested State commissions sufficient time to consult with each other or with the industry on these technical matters. Details about the specific time, place, and format of this conference (or conferences) will be announced in the future.

Finally, as noted above, the Commission views the consultation with State commissions as an initial step in a broader inquiry on RTOs. If the Commission determines there is a need to establish regional boundaries for RTOs to further the goals of full competition and non-discriminatory access, it will do so as part of a rulemaking or other generic proceeding on RTOs. That proceeding will afford State commissions and others an opportunity to comment on the broader policy issues involved in creating RTOs, as well as specific regional boundaries.

By direction of the Commission. Commissioner Bailey concurred in part and dissented in part with a separate statement attached. Commissioner Breathitt concurred with a separate statement attached.

David P. Boergers,

Secretary.

Section 202(a) of the Federal Power Act, 16 U.S.C. § 824a(a) (1994).

Interconnection and Coordination of Facilities; Emergencies; Transmission to Foreign Countries

Sec. 202. (a) For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

Regional Transmission Organizations

[Docket No. RM99–2–000]

Issued: November 24, 1998.

BAILEY, Commissioner, concurring in part and dissenting in part

I support the initiation of a consultation process with State commissions. I do not support, however, at this time the exercise of whatever authority we possess under section 202(a) of the Federal Power Act, 16 U.S.C. § 824a(a) (1998), to divide up the country and to establish regional boundaries for the development of regional transmission organizations (RTOs). For these reasons, I respectfully concur in part and dissent in part with today's notice.

Today's notice does not decide the threshold question of whether the Commission should do anything more at this time other than to consult with State commissions. The notice is clear in its very first sentence that the Commission has not decided whether and how to use its authority under newly-delegated section 202(a) to establish regional boundaries for RTOs. In addition, the notice does not limit the scope of State consultation. While the notice articulates a number of questions for State consideration, focusing on the criteria that the Commission should employ in establishing regional boundaries for RTOS, those questions are decidedly inclusive rather than exclusive.

I have not reached any conclusions as to the issue of whether the Commission, acting pursuant to section 202(a), needs to establish regional districts to further the goals of full competition and non-discriminatory access. I am interested in hearing from the States as to whether it is imperative for the Commission to take this aggressive and immediate step. My own view is that after two years of operational experience under the procedures of Order Nos. 888 and 889, less aggressive steps could be pursued.

[17] *See, e.g.,* Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,730–32; Order No. 888–A, FERC Stats. & Regs. ¶ 31,048 at 30,247–51; Notice of Conference, Inquiry Concerning the Commission's Policy on Independent System Operators, Docket No. PL98–5–000; Louisville Gas and Electric Company, *et al.,* 82 FERC ¶ 61,308 at 62,222 (1998); *Midwest ISO* at 62,142, 62,145, 62,153–165.

[18] *Id.*

As the notice indicates, in Order Nos. 888 and 889, the Commission purposefully favored functional unbundling of utility operations over more dramatic structural separation. I understand that transmission customers have challenged whether transmission providers are continuing to offer their wholesale merchant function or affiliates with preferential access to transmission and transmission information. But I am not convinced that functional unbundling, backed by the Commission's vigilance and commitment in responding to customer complaints, is ineffectual in deterring and detecting preferential access and undue discrimination.

However, as events in the last year have demonstrated, transmission providers are increasingly reaching the conclusion that competitive market forces—as opposed to Commission directive—favor some type of structural disaggregation. The Commission has acted on a number of recent filings that seek Commission authorization for the divestiture of generation assets. The Commission also is aware of a number of recent proposals to place transmission assets in the control and operation of a separate regional transmission entity (going under various names and forms).

I continue to encourage all of these undertakings, and I do not want to see these efforts stymied awaiting the outcome of our process. I am pleased to see that utilities are voluntarily agreeing to go beyond the directions of Order Nos. 888 and 889. I expect these types of voluntary undertakings to increase in the future, as utilities increasingly come to the conclusion that they can best respond to competitive market pressures by transforming themselves into generation- or transmission-only entities, thus providing the type of structural separation that better protects against undue discrimination or preference in the provision of transmission services. I am wary of Commission action that might act to undermine the initiative of utilities to come forward with their own voluntary proposals.

Moreover, I am not convinced that the Commission, should it decide to provide greater guidance and prescription as to regional or unbundling filings, necessarily must proceed to an action pursuant to this newly-delegated section 202(a) authority. I am willing to commit to some type of generic proceeding, as I believe that it is in the public interest to do more to encourage the filing of regional transmission entities that enhance competition and offer improvements with respect to pricing, reliability, and market monitoring. I understand that voluntary efforts to promote and develop these type of regional entities have stalled, or have failed to commence, in many parts of the country. I am willing to provide Commission instruction on the subject, beyond that already found in Order No. 888 and our ISO orders, to jump start dormant or otherwise lagging discussions on the subject.

But why must that instruction necessarily come in the form of a generic initiative intended to result in the formation of regional districts, encompassing all regions of the country? While today's notice is drafted very carefully, I feel there is a strong bias in favor of the Commission's exercising its section 202(a) authority—whatever that entails—and establishing regional boundaries and districts in which all public utilities will be urged, subtlely or more overtly, to join. I am not endorsing such a process, especially when I do not know where that process is heading. I want the States to answer that threshold question for me.

At this juncture, I believe that the Commission is endorsing a process that is among the most aggressive it could have chosen to encourage the formation of RTOs. There are a number of alternatives to consider, and I urge the States to consider and consult with us as to whether less aggressive steps can be taken by the Commission to encourage the formation of ISOs.

There are other options the Commission could consider in encouraging the formation of RTOs. I enumerate them below, proceeding from the most mild and passive to the most aggressive option. Of course, there are numerous variations on these options for us all to consider.

First, the Commission could issue nothing in this docket. It could simply provide generic instruction in the context of its review of the filings it receives proposing ISOs, transcos, and related structures. In the Midwest ISO proceeding, for example, in an order issued only two months ago, the Commission, noting the early stage of restructuring of the U.S. electric power industry, proceeded very cautiously and refrained from endorsing any particular ISO model or ideal.[1]

Second, the Commission could issue a non-binding statement of Commission policy indicating more proactively what it is seeking when it receives and reviews a voluntary utility-specific or region-specific filing. This would provide badly-needed guidance to utilities which are now uncertain as to the size and configuration, for example, of any regional entity they propose.

Third, the Commission could do more to encourage the voluntary filing of RTO initiatives. Specifically, it could issue a policy statement or rulemaking that encourages voluntary regional filings that satisfy certain minimum criteria. Or, in addition to such minimum criteria (or ''lowest common denominators''), the Commission could articulate various incentives encouraging utilities to participate actively in RTOs—such as transmission pricing or rate of return incentives.

Fourth, moving to the more aggressive of options, the Commission could require utility participation in RTOs, establishing basic criteria but leaving many or most of the details for the utility participants themselves. In other words, the Commission could let the participants decide for themselves, in consultation with appropriate state officials, how best to comply with Commission criteria and mandates.

Fifth, the Commission could issue a rulemaking that not only requires participation in RTOs, but also involves the Commission in the setting and review of regional boundaries. Such a process could involve the invocation of section 202(a) authority in combination with the Commission's obligation under sections 205 and 206 of the Federal Power Act to act to ensure against undue discrimination and preference in the provision of jurisdictional services.

Today's notice, according to my reading, places the Commission solidly on steps 4 and 5. Since the Commission is initiating a consultative process, I ask the States to offer their advice as to how aggressive a posture the Commission should assume.

From a policy perspective, I personally much prefer providing incentives to encourage utilities to voluntarily step forward in promoting the development of regional entities. I am very wary of sitting here in Washington, D.C., and acting as a central planner with a large map of the utility grid on my wall, with a magic marker at my disposal. The competitive evolution of the industry has been very dramatic and is ongoing and quite fluid. I am exceedingly uncomfortable dictating to utilities how best to configure the industry in order to best take advantage of competitive opportunities, or how best to alleviate concern for unfair competitive advantages. Despite the expert advice of this Commission's staff, I believe that I am not situated in as good a position as

[1] *See* Midwest Independent Transmission System Operator, 84 FERC ¶ 61,231 at 62,142 (1998), *reh'g pending.*

the utilities we regulate in determining the map and boundaries of utility companies, acting alone or in concert with other utilities, operating in the future.

From a legal perspective, I have many questions as to the legitimacy of any generic Commission action that forces utilities, overtly or subtlely, into regional districts of our choosing. This is a difficult matter. Neither the Department of Energy nor the Commission has exercised section 202(a) authority to divide the country into regional districts. Moreover, the case law and legislative history on this point are obscure, and provide no definitive judgment as to the extent of the Commission's authority to encourage or compel utility participation in regional districts.

In a separate attachment, I lay out for the interested reader my understanding of relevant legislative history and precedent. It is my opinion that while the Commission can act affirmatively to encourage, promote and supervise utility participation in regional districts, it lacks the power to compel participation. Rather, Congress left it, in the language of the legislative history of section 202(a), to the ''enlightened self-interest'' of utilities to work cooperatively in the advancement of the cause of utility interconnection and coordination. I think the Commission should work to better ''enlighten'' utilities why it may be in their best economic self-interest to cooperate with their neighbors in advancing regional solutions to lingering competitive problems, rather than adopt a more heavy-handed approach.

While today's notice has compelled me to lay out my views in as comprehensive a manner as possible, I do appreciate its provisions to the extent the notice stops short of endorsing any one model of regional cooperation. I certainly agree that there are a number of types of structures that, depending on circumstances, might be optimal for a particular RTO. I leave it to individual utilities to decide for themselves whether, if they decide to proceed, a classic ISO structure best suits their needs, or whether a separate transmission company or other structure may be most appropriate.

For all of these reasons, I concur with today's notice to the extent it initiates a process allowing for consultation with the States as to how best to proceed to encourage utility participation in regional groupings. I dissent with today's notice to the extent it can be perceived as formally initiating a process intended to lead to the creation of regional districts, and to the extent this process might undermine the ability of utilities to determine for themselves how best to respond to emerging competitive opportunities and challenges.

Vicky A. Bailey,

Commissioner.

Attachment to Commissioner Bailey's Concurrence in Part/Dissent in Part

Presented below is the text and legislative history of section 202(a) of the Federal Power Act (FPA), 16 U.S.C. § 824a(a) (1994), as well as a brief discussion as to how it has been administered by the Department of Energy (DOE) and the Federal Energy Regulatory Commission. Relevant case law and Commission precedent, adding context to section 202(a), follows.

This analysis has been prepared entirely by the Office of Commissioner Bailey. It is intended to further explain her interpretation of the scope of section 202(a).

The Statute

Section 202(a) reads in its entirety as follows:

(a) Regional districts; establishment; notice to State commissions

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

Broken down into its most important constituent parts, section 202(a):

(1) ''empowers'' and ''directs'' the Commission ''to divide the country into regional districts for the voluntary interconnection and coordination of facilities;''

(2) obligates the Commission ''to promote and encourage such interconnection and coordination within each such district and between such districts;'' and

(3) obligates the Commission to work in concert with affected states prior to ''establishing any such district and fixing or modifying the boundaries thereof.''

Section 202(a) is part of a more comprehensive section of the Federal Power Act—section 202, 16 U.S.C. § 824a (1994)—entitled ''Interconnection and coordination of facilities; emergencies; transmission to foreign countries.'' Other subsections of section 202 deal with: (1) Commission-directed interconnections in certain limited circumstances (section 202(b)); (2) Commission-directed temporary interconnections in emergency circumstances (sections 202 (c)–(d)); (3) limitations on the transmission or sale of electricity to or from foreign countries (Canada and Mexico) (sections 202 (e)–(f)); and (4) utility reports to the Commission and contingency plans in times of electricity shortages.

Legislative History

There is little legislative history that illuminates the precise meaning of section 202(a). The single best piece of legislative history that is particular to section 202(a) focuses on the ''enlightened self-interest'' of utilities and Congress' preference for voluntary coordination and interconnection:

Under this subsection the Commission would have authority to work out the ideal utility map of the country and supervise the development of the industry toward that ideal. The committee is confident that enlightened self-interest will lead the utilities to cooperate with the commission and with each other in bringing about the economies which can alone be secured through the planned coordination which has long been advocated by the most able and progressive thinkers on the subject.

Senate Report No. 621 (Senate Committee on Interstate Commerce), 74th Cong., 1st Sess. (1935) at p. 49.

Courts reviewing this piece of legislative history appear to have reached the conclusion that Congress, in enacting section 202(a) (and related subsections) in 1935, was motivated by a desire to leave the coordination and joint planning of utility systems to the voluntary judgment of individual utilities, ''and it was not willing to mandate that they do so.'' *Central Iowa Power Cooperative* v. *FERC,* 606 F.2d 1156, 1167–68 (D.C. Cir. 1979); *see also Municipalities of Groton* v. *FERC,* 587 F.2d 1296, 1298 (D.C. Cir. 1978).

Other passages from the legislative history amplify the ''voluntary'' nature of utility conduct under section 202(a) and the absence of Commission

mandates. Another section of the Senate Report provided as follows:

> Section 202(a) of [the original Senate bill] imposed upon each public utility the duty to furnish energy to, exchange energy with and transmit energy for any person upon reasonable request. This provision has been eliminated, and the other subsections of the old section 202 which relate to rates have been removed to the general rate sections (sec. 205). While imposition of these duties may ultimately be found to be desirable, the committee does not think that they should be included in this first exercise of Federal power over electric companies. It relies upon the provision for the voluntary coordination of electric facilities in regional districts contained in the new section 202(a) * * * for the first Federal effort in this direction * * * Furthermore, the provisions of the old section 203(b) empowering the Federal Power Commission to require one utility to permit the use of its facilities by another * * * have been eliminated; these matters are left to the voluntary action of the utilities.

Senate Report No. 621, 74th Cong., 1st Sess. (1935) at p.19. In addition, the report of the House Committee on Interstate and Foreign Commerce similarly emphasized the voluntary character of the coordination of utility facilities:

> This section authorizes the Commission to establish regional districts and to encourage the voluntary interconnection and coordination of facilities within and between such districts, but the coordination of facilities is left to the voluntary action of the utilities.

H.R. Report No. 1318, 74th Cong., 1st Sess. (1935) at p.27.

Taken together, the pieces of legislative history quoted above focus on the voluntary conduct of utilities and the cautious, limited exercise of federal authority in this area. There is no apparent discussion of the extent of the Commission's authority to divide the country up into regional districts—or what the Commission affirmatively can do under section 202(a) if utilities are not ''voluntarily'' moving in the manner (or as quickly as that) favored by the Commission.

Exercise of Section 202(a) Authority

Section 202(a) authority to ''divide the country into regional districts for the voluntary interconnection and coordination of facilities'' originally was vested in the Federal Power Commission (FPC). This authority was transferred to DOE in 1977 when Congress enacted the Department of Energy Organization Act. The DOE Act vested in the newly-created FERC only specifically-enumerated statutory authority. Because the DOE Act did not specifically vest in the FERC the FPC's existing section 202(a) authority with respect to dividing the country into regional districts, that authority remained with DOE.

The DOE did not exercise its section 202(a) authority during the 21 years in which it controlled that authority. On October 1, 1998, DOE Secretary Richardson, in DOE Delegation Order No. 0204–166, ''delegated and assigned to the [Commission] the authority to carry out such functions as are vested in the Secretary under section 202(a) of the Federal Power Act.''

In delegating section 202(a) authority, Secretary Richardson concluded that the Commission is the ''most appropriate agency'' to exercise this authority. In support, Secretary Richardson explained, without citation to any legal authority, that section 202(a) affords the Commission ''sufficient authority to establish boundaries for Independent System Operators (ISOs) or other appropriate transmission entities.'' He added that ''[p]roviding FERC with the authority to establish boundaries for ISOs or other appropriate transmission entities could aid in the orderly formation of properly-sized transmission institutions and in addressing reliability-related issues, thereby increasing the reliability of the transmission system.'' The press release accompanying the delegation order added that the DOE delegation of section 202(a) authority ''gives FERC much-needed authority it now lacks.''

Judicial Precedent

Not surprisingly, given the dormant nature of this section for its 63-year history, the United States Supreme Court has never ruled directly on the precise meaning of section 202(a). It has, however, addressed more generally the ''voluntary'' scheme of utility action running throughout the Federal Power Act.

In the landmark case of *Otter Tail Power Company* v. *United States,* 410 U.S. 366 (1973), the Supreme Court ruled that Commission regulation of electric utility rates and practices under the FPA does not immunize electric utilities from antitrust scrutiny and liability. In so ruling, the Supreme Court rejected the utility argument that its refusal to deal with certain municipal customers was immune from antitrust prosecution because the Commission has the authority to compel involuntary electrical interconnections pursuant to section 202(b) of the FPA. The Court responded that ''[t]he essential thrust of § 202, however, is to encourage voluntary interconnections of power.'' *Id.* at 373 (citing legislative history).

The Court continued with an analysis of the overall scheme of Part II the FPA (which includes section 202) and its legislative history:

> As originally conceived, Part II would have included a ''common carrier'' provision making it ''the duty of every public utility to * * * transmit energy for any person upon reasonable request. * * *'' In addition, it would have empowered the Federal Power Commission to order wheeling if it found such action to be ''necessary or desirable in the public interest.'' These provisions were eliminated to preserve ''the voluntary action of the utilities.''
>
> It is clear, then, that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships.

Id. at 374 (citations to legislative history omitted).

In an earlier Supreme Court citing section 202, the Court ruled in *Penn Water & Power Company* v. *FPC,* 343 U.S. 414 (1952), that the statutory language of sections 202(a), 202(b), and 206(b) of the FPA justified a bilateral, existing contractual ''practice'' of two utilities integrating their power output. In relevant part, the Court found that the regional coordination of power facilities ''ready made by prior contractual arrangements'' was precisely the type of coordinated action authorized under section 202(a) of the FPA. *Id.* at 423.

The few lower court decisions to address section 202(a), like the *Penn Water* case, address situations in which utilities voluntarily banded together to coordinate their activities in such a manner as to achieve efficiencies and economies unachievable by unilateral, utility-specific conduct. Two cases in particular—involving voluntary pooling arrangements by utilities—are instructive as to the reach of section 202(a) and the Commission's historical hesitation to invoke that statutory authority to compel utilities to do more than what they voluntarily had committed to do.

In *Central Iowa Power Cooperative* v. *FERC,* 606 F.2d 1156 (D.C. Cir. 1979), the D.C. Circuit affirmed the Commission's approval of the Mid-Continent Area Power Pool (MAPP), a tight power pool among Midwestern utilities, as modified in only one respect (membership). In so doing, the court affirmed the Commission's judgment not to accede to the request of intervenors to try to turn the power pool—which provided for the coordinated operation of generating facilities and short-term exchanges of power (reserve sharing)—into a better power pool.

Specifically, the court upheld the Commission's judgment to decline to expand the scope of pool services, as requested by intervenors, to require

MAPP utilities to construct larger generating units and to engage in single-system planning with central dispatch. The Commission had reasoned that section 202(a) of the FPA does not compel the Commission, against the wishes of the pool utilities, to transform MAPP from its limited scope to one offering a wider array of pool services:

> While Section 202(a) of the Federal Power Act speaks in terms of ''voluntary interconnection and coordination'' and to ''promote and encourage'' the same, the pooling agreement is an FPC tariff which must pass muster under Sections 205 and 206 of the Federal Power Act. For example, we have already found the membership provisions unacceptable. Nevertheless, the scope of a power pool is in the first instance a matter for the utilities involved. The mere fact that a particular pool does not offer the same range of services as another pool does not permit the Commission to direct expansion of the narrower pools' scope. Unless the limited scope of the MAPP Agreement is for some other reason unjust, unreasonable or unduly discriminatory, we are not authorized under Part II of the Federal Power Act to direct the pool to offer more services. While we can and do ''encourage and promote'' greater use of pooling, the peculiarities of each region necessitate that the member utilities determine the services to be offered. One cannot automatically apply the broader scope of NEPOOL, based upon very different geography, industry history and make-up in New England, to the mid-continent region with its tremendous area, sparse load and different industry make-up.

Id. at 1167 (quoting underlying Commission order).

The reviewing court found the Commission's reluctance to direct the pooling utilities to do more than what they had voluntarily committed to do to represent an ''informed and reasoned decision consistent with congressional purposes.'' *Id*. In support, the court reviewed the language and legislative history of section 202(a) and concluded that Congress intended to leave the coordination of electric systems to the *voluntary* decisions of utilities acting in their ''enlightened self-interest.'' For this reason,

> Given the expressly voluntary nature of coordination under section 202(a), the Commission could not have mandated adoption of the Agreement, and failure of the MAPP participants to establish a fully-integrated electric system could not justify rejection of the [MAPP] Agreement filed.

Id. at 1168. The court recognized that, pursuant to section 202(a), regional coordination of electric power systems is in the public interest. Nevertheless,

> This does not mean, however, that a pooling plan is unlawful * * * merely because a more comprehensive arrangement might better achieve the purposes of section 202(a). To so conclude would undermine Congress' determination that coordination under section 202(a) be voluntary. Moreover, we cannot agree with South Dakota that in approving the [MAPP] Agreement the Commission abdicated its duty under section 202(a) to promote and encourage regional interconnection and coordination of electric facilities.

Id.

The findings and rationale of the D.C. Circuit, in upholding the Commission's limited exercise of its section 202(a) authority, mimic its conclusions in an earlier case, also involving the voluntary actions of utilities to create a coordinated power pool in another region of the country. In *Municipalities of Groton* v. *FERC*, 587 F.2d 1296 (D.C. Cir. 1978), the court affirmed the Commission's approval, with one modification (as to a deficiency charge), of the New England Power Pool (NEPOOL), a tight power pool among New England utilities.

In so doing, the court affirmed the Commission's judgment to reject the argument of certain municipal electric systems that the NEPOOL Agreement was necessarily discriminatory and anticompetitive because it omits certain services (including firm power sales). The court explained that section 202(a) of the FPA ''sanctions and encourages these voluntary pooling agreements,'' and that the Commission's conclusions that the NEPOOL Agreement is not unduly discriminatory or anticompetitive, despite its limited size and scope, ''is reasonable in light of the voluntary nature of this agreement.'' *Id*. at 1298–99. *See also Duke Power Company* v. *FPC*, 401 F.2d 930, 943–44 (D.C. Cir. 1968) (emphasizing that section 202(a) encourages *voluntary* interconnection and coordination of facilities, that the Commission's responsibility under that section is only to *promote* and *encourage* such interconnection and coordination, and that the Commission is not authorized to ''*compel* any particular interconnection or technique of coordination.'').[2]

BREATHITT, Commissioner, concurring

I view today's Notice of Intent to Consult Under Section 202(a) as the initiation of important discussions between the FERC and state commissions and others on whether and how the Commission will use its authority under Section 202(a) of the Federal Power Act. These initial discussions will begin to shape the debate of how and under what time frame the Commission intends to proceed with a broader inquiry into the formation of regional transmission organizations. The direction we take in this endeavor is of utmost importance to me. It is for this reason that I respectfully concur with today's Notice of Intent to Consult. As I will explain, the Notice does not adequately frame our initial discussion with state commissioners.

I believe it is crucial that we conduct thorough and meaningful discussions with our state colleagues. Efforts by this Commission to draw regional boundaries for transmission organizations will have a tremendous impact on state commissions and on the utilities and their customers that conduct business and reside in those states. We must acknowledge that states are at varying points in the development of retail open access plans and that actions by this Commission will have different impacts on states depending on the level of functional unbundling and retail competition that has occurred in those states. Furthermore, we must consider the significant regional differences that exist in this country and the degree to which transmission planning and pricing issues will affect a state's analysis and consideration of RTOs. Obviously, this consultation process is not a simple exercise. Indeed it is one that requires a great deal of consideration. That is why the Commission must ensure that every pertinent question, even the most fundamental ones, are asked and answered.

The Notice we are voting on today asks important and relevant questions and invites comments from state commissioners on issues pertaining to the formation of regional transmission organizations and the establishment of boundaries for these RTOs. However, the Notice does not invite state commissioners, in this initial discussion, to comment on, what I believe to be, the fundamental, threshold question. That is, whether there is a need to establish regional boundaries in order to further the goals of full competition and non-discriminatory access or whether there are other means that can be equally as effective. This should be the first question we ask ourselves and state commissioners. Furthermore, I believe it

[2] In *Duke Power Company*, the court reviewed the language and legislative history of section 202(a), and other subsections of section 202 ((b)–(d)) dealing with interconnections and emergency authorizations, as part of its interpretation of the statutory reach of section 203 of the FPA, dealing with the sale, lease, disposition, merger or consolidation of jurisdictional facilities. The court found that the Commission does not have jurisdiction under section 203 to review the utility acquisition of limited local distribution facilities.

is crucial that we define the scope of our authority under Section 202(a).

I fully support the Notice of Intent to Consult and look forward to our discussions with state commissioners and, later on, with other parties. This dialogue is important and necessary. However, I do not want the Commission to lose sight of fundamental, threshold issues pertaining to the establishment of regional boundaries and the formation of RTOs. I therefore respectfully concur with this decision.

Linda K. Breathitt,

Commissioner.

[FR Doc. 98–31959 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Privacy Act of 1974; New System of Records

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of existence and character of new system of records.

SUMMARY: The Federal Energy Regulatory Commission (''Commission'' or ''FERC''), under the requirements of the Privacy Act of 1974, 5 U.S.C. 552a, is publishing a description of a new system of records.

DATES: Comments may be filed on or before February 1, 1999.

ADDRESSES: Comments should be directed to the following address: Julia A. Lake, Privacy Act Officer, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Room 91–21, Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT: Julia A. Lake, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Room 91–21, Washington, DC 20426; 202–208–0457.

SUPPLEMENTARY INFORMATION: The Privacy Act of 1974, 5 U.S.C. 552a, requires that each agency publish a notice of the existence and character of each new or altered ''system of records.'' 5 U.S.C. 552a(a)(5). This Notice identifies and describes the Commission's new system of records. There are no altered systems to report. A copy of this Notice identifies and describes the Commission's new system of records. There are no altered systems to report. A copy of this report has been distributed to the Speaker of the House of Representatives and the President of the Senate, as the Act requires.

The new system of records does not duplicate any existing agency systems. In accordance with 5 U.S.C. 552a(e)(4), the Commission lists below the following information about this system: name; location; categories of individuals on whom the records are maintained; categories of records in the system; authority for maintenance of the system; each routine use; the policies and practices governing storage, retrievability, access controls, retention, and disposal; the title and business address of the agency official responsible for the system of records; procedures for notification, access and contesting the records of each system; and the sources of the records in the system.

Linwood A. Watson, Jr.,

Acting Secretary.

FERC/36

SYSTEM NAME:

Management, Administrative, and Payroll System ''MAPS'' FERC/36.

SYSTEM LOCATION:

Hard copy of personnel and timekeeping data is located at the Federal Energy Regulatory Commission (FERC), Washington, D.C. 20426. Hard copy of payroll transactions and reports are located at the Department of Veterans Affairs, Shared Services Center (SSC), Topeka, Kansas 66604 and the Department of Veterans Affairs, Financial Services Center (FSC), Austin, Texas 78772, respectively. Computerized data is located at the Department of Veterans Affairs, Austin Automation Center (AAC), Austin, Texas 78772.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All employees (Senior Executive Service and non-Senior Executive Service, bargaining unit and non-bargaining unit) employed by the Federal Energy Regulatory Commission.

CATEGORIES OF RECORDS IN THE SYSTEM:

All official personnel action and/or payroll transaction information on Commission employees.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, 2302(b)(20)(B), 2302(b)(10), 7311, 7313; Executive Order 10450; 5 CFR 731.103.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:

- To the Merit Systems Protection Board, the Office of Special Counsel, the Equal Employment Opportunity Commission, or the Federal Labor Relations Authority, in connection with functions vested in those agencies.
- To a Congressional office in response to an inquiry made at the request of that individual.
- To the Office of Management and Budget in connection with private relief legislation.
- In litigation before a court or in an administrative proceeding being conducted by a Federal agency.
- To the National Archives and Records Administration for records management inspections.
- To Federal agencies as a data source for management information through the production of summary descriptive statistics and analytical studies in support of the functions for which the records are maintained for related studies.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

On paper in Official Folders located at the FERC, SSC, and FSC. Computerized on a DEC Alpha Server which resides at the AAC.

RETRIEVABILITY:

Data can be retrieved by employee's name, employee identification number, or social security number.

SAFEGUARDS:

The Austin Automation Center is located in a secured Federal complex. Within this secured building, the Computer Operations Center is located in a controlled access room. Specific employees have been identified as system and database administrators having specific responsibilities allowing access to FERC personnel and payroll data. Security is embedded within the software, in both the operating system and at the application level. Individuals not granted access rights cannot view or change data. The database is monitored by software applications that provide audits of log-ins, both successful and failed.

Output documents from the system are maintained as hard copy documents by FERC's Human Resources Division and the VA's Payroll Operations and Finance Offices and are safeguarded in secured cabinets located within secured rooms.

SYSTEM MANAGERS(S) AND ADDRESS:

The Federal Energy Regulatory Commission and the Department of Veterans Affairs share responsibility for system management. The first point of contact is the Director, Division of Management, Administrative and

Payroll Support, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

NOTIFICATION PROCEDURES:

Director, Division of Management, Administrative, and Payroll Support.

RECORDS ACCESS PROCEDURES:

Same as notification procedures.

CONTESTING RECORD PROCEDURES:

Same as notification procedures. Involvement by the Office of Personnel Management may be necessary, as provided in the Federal Personnel Manual, Chapter 731.

RECORD SOURCE CATEGORIES:

Department of Energy's Corporate Human Resource Information System (CHRIS); FERC's Payroll Utilization Reporting System (PURS); the employee's supervisors; and the employee.

[FR Doc. 98–31889 Filed 11–30–98; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Western Area Power Administration

Power Allocation Issues

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of Inquiry on the Impact of Electric Utility Industry Restructuring.

SUMMARY: The Western Area Power Administration (Western) is initiating an inquiry to explore the impact of electric utility industry restructuring on Western's power allocation policies.

DATES: The consultation and comment period will begin on the date of publication of this **Federal Register** notice and will end January 15, 1999. A public comment forum at which Western will receive oral and written comments will be held on Wednesday, January 6, 1999, beginning at 1 p.m., Mountain Standard Time, at the Four Points Denver Central Hotel, 3535 Quebec Street, Denver, Colorado. To be assured of consideration, written comments must be received by the end of the consultation and comment period.

ADDRESSES: Written comments may be hand-delivered, mailed, emailed, or faxed to Robert C. Fullerton, Project Manager, Corporate Services Office, Western Area Power Administration, 1627 Cole Boulevard, P.O. Box 3402, Golden, CO 80401–0098, telephone (303) 275–2700, fax (303) 275–1290, email: fullerto@wapa.gov. All documentation developed or retained by Western during the course of this public process will be available for inspection and copying at this address.

FOR FURTHER INFORMATION CONTACT:

Robert C. Fullerton, Project Manager, Corporate Services Office, Western Area Power Administration, 1627 Cole Boulevard, P. O. Box 3402, Golden, CO 80401–0098, telephone (303) 275–2700, email: fullerto@wapa.gov.

Joel K. Bladow, Regional Manager, Rocky Mountain Region, Western Area Power Administration, P.O. Box 3700, Loveland, CO 80539–3003, telephone (970) 490–7201, email: bladow@wapa.gov.

J. Tyler Carlson, Regional Manager, Desert Southwest Region, Western Area Power Administration, P.O. Box 6457, Phoenix, AZ 85005–6457, telephone (602) 352–2453, email: carlson@wapa.gov.

David Sabo, Customer Service Center Manager, Colorado River Storage Project, Western Area Power Administration, P.O. Box 11606, Salt Lake City, UT 84147–0606, telephone (801) 524–6372, email: sabo@wapa.gov.

Jerry W. Toenyes, Regional Manager, Sierra Nevada Region, Western Area Power Administration, 114 Parkshore Drive, Folsom, CA 95630–4710, telephone (916) 353–4418, email: toenyes@wapa.gov.

Gerald C. Wegner, Regional Manager, Upper Great Plains Region, Western Area Power Administration, P.O. Box 35800, Billings, MT 59107–5800, telephone (406) 247–7405, email: wegner@wapa.gov.

SUPPLEMENTARY INFORMATION:

Authorities

This public process is being conducted pursuant to the Department of Energy Organization Act (42 U.S.C. 7101, *et seq.*); the Reclamation Act of 1902 (43 U.S.C. 371, *et seq.*), as amended and supplemented by subsequent enactments, particularly section 9(c) of the Reclamation Project Act of 1939 (43 U.S.C. 485h(c)); and other acts specifically applicable to the projects involved.

Background

Western is a Federal power marketing administration, charged with the responsibility of marketing electricity generated by power plants operated by the Bureau of Reclamation, the Corps of Engineers, and the International Boundary and Water Commission. Created in 1977, Western markets on a wholesale basis and transmits Federal hydroelectric power throughout 1.3 million square miles to more than 600 customers, including rural electric cooperatives, municipal utilities, public utility districts, Federal and State agencies, and irrigation districts. Western's power customers, in turn, provide service to millions of consumers in 15 western States.

Western markets power on a project-specific basis. A marketing plan for each project is developed through a public process, with opportunity for comment on a marketing proposal before publication of the final marketing plan in the **Federal Register**. Reclamation law governs how Western markets electricity, including the requirement that Western offer power first to non-profit entities such as rural electric cooperatives and municipalities.

In the first decade of Western's existence, marketing plans were relatively inflexible. Unless new generation was available, the amount of power made available for potential new customers was relatively small. Contracts with terms up to 30 years were negotiated and signed. No capability existed under contracts to adjust Western's marketable resources in the event that power plant operational changes were necessary due to environmental considerations.

In recent years, Western added more flexibility to its marketing policies and power sales contracts. On October 20, 1995, Western adopted a final rule for the Energy Planning and Management Program (Program) (60 FR 54151), which established a framework for the project-specific allocation of hydropower. Pursuant to the Program, Western signed resource extension contracts with existing customers for the sale of power from the Pick-Sloan Missouri Basin Program-Eastern Division and the Loveland Area Projects. These 20-year contracts contain withdrawal opportunities at 5 and 10 years to meet the needs of potential new customers and other purposes as determined by Western. Western also reserved the contractual ability to adjust power commitments in response to changes in operations and hydrology. In addition, Western has full flexibility to adjust its power rates under the terms of the contracts. Resource pools of up to 6 percent of the marketable resource were set aside to meet the needs of new customers, including Indian tribes.

While the Program did not immediately impact the marketing of power from the Central Valley Project (CVP), Washoe Project, and Salt Lake City Area Integrated Projects (SLCA/IP), Western anticipated that Program

application would be evaluated for these projects in the future. Much work has already been done to advance the completion of the marketing plans for the CVP, Washoe Project, and SLCA/IP, pursuant to the Program's framework.

There is now a further need to consider the impact of electric utility industry restructuring on the way that we allocate power. Western seeks public input on six questions to help in this consideration.

Upon completion of this public process, Western will consult with the Department of Energy (DOE) prior to taking further action to complete pending power marketing plans.

While this public process was triggered by marketing proposals for CVP, Washoe Project, and SLCA/IP firm power, Western regards the issues addressed in this public process as relevant to all of our power allocation efforts. However, the conclusions we reach will be applied prospectively, and will not impact existing marketing plans and contracts.

As electric utility industry restructuring progresses over time, Western likely will evaluate the impact of industry change on a periodic basis to assure that our power marketing policy continues to be responsive to public needs.

Regulatory Procedure Requirements

Review Under Executive Order 12866

Western has an exemption from centralized regulatory review under Executive Order 12866; accordingly, no clearance of this notice by the Office of Management and Budget is required.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601, *et seq.*) requires Federal agencies to perform a regulatory flexibility analysis if a final rule is likely to have a significant economic impact on a substantial number of small entities and there is a legal requirement to issue a general notice of proposed rulemaking. Western has determined that this action does not require a regulatory flexibility analysis since it is a rulemaking of particular applicability involving rates or services applicable to public property.

Environmental Compliance

DOE National Environmental Policy Act (NEPA) regulations categorically exclude marketing plans from NEPA documentation unless they involve new generation, new transmission, or a change in operations. Therefore, Western will not conduct further evaluation under NEPA. Considerable environmental evaluation has already occurred under the Energy Planning and Management Program and during project-specific marketing plan development.

Scope of Issues

Public comment is requested on the following questions:

1. Should Western's power allocations system, including the term of firm power contract renewals, be modified to take into account changes in electricity markets that have occurred, and are expected to occur in the future, due to the enactment of California Assembly Bill 1890 and other State retail competition statutes? If so, please explain what modifications would be desirable. If not, please explain why the present system should be preserved.

2. To the extent a utility with an allocation of preference power loses load due to retail competition, should it receive the same allocation as it received previously or should its allocation be reduced proportionately?

3. Should Western allocate power directly to electricity end-users that are preference entities such as publicly-owned schools in States or localities that permit retail access? If so, how much power should be allocated for this purpose? Alternatively, should Western continue to allocate power primarily to its traditional customers such as municipal and cooperative utilities and Federal and State agencies?

4. In a retail choice environment, what additional steps, if any, should Western take to ensure that the full economic benefits of preference power are passed through to end-users served by the distribution utility that receives a power allocation from Western?

5. Should a distribution utility be permitted to transmit the economic benefits of preference power exclusively to industrial and/or commercial end users? Conversely, should a distribution utility be required to pass on the benefits of preference power exclusively to a certain class of customers such as residential or small business?

6. Should a distribution utility be required to offer retail access to its distribution customers as a condition of receiving a preference power allocation in the future?

Dated: November 20, 1998.

Michael S. Hacskaylo,

Administrator.

[FR Doc. 98–32009 Filed 11–30–98; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6195–3]

Stakeholder Meeting on the Draft Consumer Confidence Report (CCR) Implementation Guidance

AGENCY: Environmental Protection Agency.

ACTION: Announcement of Stakeholder Meeting.

SUMMARY: The Consumer Confidence Report (CCR) rule published on August 19, 1998 in the **Federal Register** requires community water systems to provide to customers annual consumer confidence reports on the quality of the water delivered by the systems. Draft CCR implementation guidance has been developed based on input from an Environmental Protection Agency (EPA) Headquarters and Regional staff workgroup. On November 19 and 20, 1998, a CCR State-EPA workgroup meeting was held to obtain State comments on the draft implementation guidance. At this time, the EPA would like to obtain stakeholder comments on the draft guidance and will hold a public meeting to solicit comments and suggestions from parties who will be affected by or are otherwise interested in the Draft CCR Implementation Guidance. EPA will consider the comments and views expressed at the meeting in developing the final version of the implementation guidance. EPA encourages the full participation of all stakeholders throughout this process.

DATES: The stakeholder meeting regarding the Draft CCR Implementation Guidance will be held on December 18, 1998, 9 a.m. to 5 p.m. ET., in Washington, DC.

ADDRESSES: The December 18, 1998 stakeholder meeting will be held in the Washington Information Center (WIC) Conference Room 3 North, U.S. EPA Headquarters, 401 M Street SW, Washington, DC.

To register for the meeting, please contact the EPA Safe Drinking Water Hotline at 1–800–426–4791, or Kathleen Williams of EPA's Office of Ground Water and Drinking Water at (202) 260–2589. Participants registering in advance will be mailed a packet of materials before the meeting. Interested parties who cannot attend the meeting in person may participate via conference call and should register with the Safe Drinking Water Hotline. Conference lines are limited and will be allocated on the basis of first-reserved, first served.

FOR FURTHER INFORMATION CONTACT: For general information on meeting logistics, please contact the Safe Drinking Water Hotline at 1–800–426–4791. For information on activities related to CCR implementation, contact: Kathleen Williams, U.S. EPA at (202) 260–2589 or e-mail at williams.kathleena@epamail.epa.gov.

Elizabeth R. Fellows,

Acting Director, Office of Ground Water and Drinking Water.

[FR Doc. 98–31806 Filed 11–30–98; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6195–6]

National Drinking Water Advisory Council; Shallow Injection Wells (Class V)/Drinking Water Source Protection Program Integration Working Group; Notice of Open Meeting

Under Section 10(a)(2) of Public Law 92–423, ''The Federal Advisory Committee Act,'' notice is hereby given that a meeting of the Shallow Injection Wells (Class V)/Drinking Water Source Protection Program Integration Working Group of the National Drinking Water Advisory Council, established under the Safe Drinking Water Act, as amended (42 U.S.C. S300f *et seq.*), will be held on January 7, 1999 from 9:00 am to 5:00 pm and January 8, 1999 from 9:00 a.m. to 5:00 p.m. in Denver, Colorado. The meeting is open to the public, but due to past experience, seating will be limited.

The purpose of this meeting is to discuss the proposed Class V well regulation (63 FR 40586); the Class V Study methodology and regulatory decision rationale for the remaining Class V well types; and source water assessment and protection as it relates to the Class V proposal. The meeting is open to the public to observe. Statements from the public will be taken at the end of the meeting if time allows.

The Designated Federal Officer for this meeting will be Connie Bosma, Chief of the Regulatory Implementation Branch. For more information, please contact Amber Moreen, U.S. EPA, Office of Ground Water and Drinking Water (4606), 401 M Street, SW, Washington, D.C. 20460. The telephone number is (202) 260–4891 and e-mail address is moreen.amber@epamail.epa.gov.

Dated: November 24, 1998.

Charlene Shaw,

Designated Federal Officer, National Drinking Water Advisory Council.

[FR Doc. 98–32007 Filed 11–30–98; 8:45 am]

BILLING CODE 6560–50–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6196–2]

Science Advisory Board; Emergency Notification of Public Advisory Committee Meetings

Pursuant to the Federal Advisory Committee Act, Pub. L. 92–463, notice is hereby given that several Committees of the Science Advisory Board (SAB) will meet on the dates and times described below. All times noted are Eastern Time. All meetings are open to the public, however, seating is limited and available on a first come basis. Documents that are the subject of SAB reviews are normally available from the originating U.S. Environmental Protection Agency (EPA) office and are *not* available from the SAB Office. Public drafts of SAB reports are available to the Agency and the public from the SAB office. Details on availability are noted below.

1. Drinking Water Committee (DWC)

The Drinking Water Committee (DWC) of the Science Advisory Board (SAB) will hold a public meeting beginning at 8:00 am Thursday, December 10, 1998 and ending not later than 5:30 pm Friday, December 11, 1998. The meeting will be held at the Hyatt Regency Crystal City Hotel, 2799 Jefferson Davis Highway, Arlington, VA 22202; telephone (703) 418–1234. At this meeting, the Committee will receive briefings on the status of various research efforts being conducted in support of the Safe Drinking Water Act Amendments (SDWA) of 1996 and conduct a review of the US EPA ORD comparative risk approach for balancing the chemical and microbial risks from drinking water.

Background

In accordance with the Safe Drinking Water Act (SDWA), regulations have been promulgated or proposed by U.S. EPA to provide maximum control of exposures to pathogenic organisms in water while minimizing concomitant exposures to the disinfection byproducts (DBPs). The SDWA Amendments of 1996 additionally require the Agency to conduct cost-benefit analyses of the regulatory impacts in order to identify cost-effective drinking water treatment options.

The National Center for Environmental Assessment-Cincinnati Office (NCEA-Cin) has developed a methodology for risk analysis and comparison that might assist the Agency in supporting its SDWA regulatory activities. The Agency's document Comparative Risk Framework Methodology and Case Study (Framework Document) presents a methodology for such comparisons that applies the prevention-effectiveness approach developed by the Centers for Disease Control for structuring and analyzing this complex risk trade-off problem. Prevention-effectiveness research combines tools of decision and economic analysis to look at the cost-effectiveness of different public health interventions and employs decision trees to explicitly and graphically structure the problem. The document consists of a Comparative Risk Framework Methodology (CRFM) and a Case Study. The application of this approach explicitly recognizes disinfection and treatment of drinking water to be a primary public health intervention and prevention measure designed to minimize the transmission of microbial pathogens in drinking water.

Charge

The Drinking Water Committee is requested to review the strategy proposed for structuring and analyzing this comparative risk/risk tradeoff problem, including the overall concept, the use of population-based probabilities for expressing both cancer and noncancer health risks and mechanisms for arriving at these numbers, and the pros and cons of the different common metrics/weights proposed for comparing qualitatively and quantitatively different health risks. Specific charge questions are available by contacting the Office of the Science Advisory Board at the address noted below. Charge questions are included for the following areas: overall approach; the comparative risk framework methodology; the case study; engineering and water treatment issues; risk characterization; microbial risks; chemical dose-response assessment; exposure; health conditions; the common health metric; the results of the methods application; and research needs.

FOR FURTHER INFORMATION CONTACT: Single copies of the background information for the review of the risk comparison framework can be obtained by contacting Dr. Glenn Rice, US EPA

National Center for Environmental Assessment, 26 Martin Luther King Drive, Cincinnati, Ohio 45268; or by telephone at (513) 569–7813. Additional information for this meeting, or the meeting agenda, can be obtained by contacting Mr. Thomas O. Miller, Designated Federal Officer (DFO) for the Drinking Water Committee, Science Advisory Board (1400), U.S. EPA, 401 M Street, SW, Washington, DC 20460; by telephone at (202) 260–5886; by fax at (202) 260–7118 or via the E-Mail at: miller.tom@epa.gov, or by contacting Ms. Dorothy Clark at (202) 260–6555, by fax at (202) 260–7118, and by E-Mail at: clark.dorothy@epa.gov. Anyone wishing to make an oral presentation to the Committee must contact Mr. Miller, in writing (by letter, fax, or E-mail) no later than 12 noon, Thursday, December 3, 1998, in order to be included on the Agenda. The request should identify the name of the individual who will make the presentation and an outline of the issues to be addressed. At least 35 copies of any written comments to the Committee are to be given to Mr. Miller no later than the time of the presentation for distribution to the Committee and the interested public.

2. Secondary Data Use Subcommittee of the Executive Committee

The Secondary Data Use Subcommittee of the Science Advisory Board's (SAB) Executive Committee, will meet Tuesday and Wednesday, December 15 and 16, 1998 in the SAB Conference Room, Room 3709, U.S. Environmental Protection Agency Headquarters Building, 401 M Street SW, Washington, DC 20460. The meeting will begin at 9:00 am on December 15th and adjourn no later than 5:00 pm on December 16th.

Purpose

The purpose of this meeting is to begin the SAB's project to provide advice to the Agency on the appropriate secondary use of EPA regulatory data bases. This review was requested by the Center for Environmental Information and Statistics (CEIS) in EPA's Office of Policy. The CEIS is in the process of reviewing 30 major EPA regulatory databases for their potential use in secondary data analyses (i.e., for uses other than that for which they were originally collected). The Agency's regulatory data bases were designed to be used in making enforcement, compliance, and standard setting decisions. The CEIS reviews will try to determine the extent to which these observational data bases can be used for other purposes such as assessment of environmental conditions and trends, scientifically based studies of cross-media relationships, and human health or environmental risk assessment.

The tentative overall charge to the Secondary Data Use Subcommittee is to: (a) provide consultations on the overall process of suitability review; (b) review CEIS's reviews for technical quality, comprehensiveness and clarity; (c) provide consultation on developing minimum criteria or characteristics that a database should possess if it is to be used for scientific purposes such as exposure assessment; (d) make recommendations for areas where the CEIS should develop new quantitative methods for the use of secondary EPA databases; and (e) set up a workshop which brings together Agency and external experts to discuss the various issues and concerns regarding the secondary use of administrative and observational EPA databases.

On July 30, 1998, the Subcommittee held its first meeting which was a consultation on the overall process of suitability review. At the December 15–16, 1998 meeting, the Subcommittee plans to review CEIS's initial descriptive reviews for technical quality, comprehensiveness and clarity; provide consultation on the next round of case studies, and receive a briefing on CEIS's approach to reviewing geographically based environmental indices.

For Further Information

Copies of the review documents and background materials are available from Dr. N. Phillip Ross, Chief Statistician, Center for Environmental Information and Statistics (2163), U.S. EPA, 401 M Street SW, Washington, DC 20460, telephone (202) 260–5244, fax (202) 260–5880, or via E-mail at ross.np@epa.gov. The review documents are also available on the Internet at: *http://www.epa.gov/ceisweb1/ceishome/quality.html.* Copies of the agenda are available from Ms. Betty Fortune, Science Advisory Board (1400), U.S. EPA, 401 M Street SW, Washington DC 20460, telephone (202) 260–4126, fax (202) 260–9232, or via E-mail at fortune.betty@epa.gov.

Any member of the public wishing to present brief oral comments to the Subcommittee must contact Mrs. Anne Barton, Designated Federal Officer (DFO) for the Secondary Data Use Subcommittee, in writing, no later than noon Tuesday, December 8 at Science Advisory Board (1400), U.S. Environmental Protection Agency, Washington DC 20460; FAX (202) 260–9232; or via E-Mail at barton.anne@epa.gov. The request should identify the name of the individual who will make the presentation and an outline of the issues to be addressed. At least 35 copies of any written comments to the Committee are to be given to the DFO no later than the time of the presentation; these will be distributed to the Subcommittee and the interested public. To discuss technical aspects of the meeting, please contact Mrs. Barton by telephone at (202) 260–9280.

3. Radiation Advisory Committee (RAC)

The Science Advisory Board's (SAB's) Radiation Advisory Committee (RAC) will conduct a public teleconference meeting on Tuesday, December 15, 1998. The teleconference meeting will convene at 11:00 a.m. and adjourn at approximately 1:00 p.m. that day. At this meeting, the RAC will review and discuss edits to their draft advisory concerning of low-activity mixed radioactive waste. The RAC began this advisory at their November 17–19, 1998 public meeting (See 63 **Federal Register** 207, Tuesday, Oct. 27, 1998, pp. 57295–57298). The charge focused on technical aspects of the Office of Radiation and Indoor Air (ORIA) performance assessment analyses. The charge questions to be answered include, but are not limited to the following: (a) Does the EPA dose assessment reasonably cover the hydrogeologic and climatic settings that might be used for the disposal of low-activity mixed waste? (b) What modeling time frame does the Committee recommend be used to project potential doses from disposal of low-activity mixed waste?, and (c) Is it reasonable to assign a constant ''high'' release rate for the duration of the simulation, or does the SAB advise an alternative approach such as assuming a lower release rate at the start and increasing it incrementally over the modeling period, thereby mimicking the gradual deterioration of the concrete?

For Further Information

Any member of the public wishing further information concerning the teleconference meeting, such as copies of the proposed meeting agenda, information to connect to the teleconference, the current public draft of the advisory, or who wish to submit written comments should contact Mrs. Diana L. Pozun at Tel. (202) 260–8432; FAX (202) 260–7118, or via E-mail at: pozun.diana@epa.gov. Members of the public who wish to make a brief oral presentation to the Committee must contact Dr. K. Jack Kooyoomjian, Designated Federal Officer (DFO) for the Radiation Advisory Committee, in writing no later than 12 noon Eastern Time, Thursday, December 10, 1998 in

order to be included on the Agenda. Dr. Kooyoomjian can be reached at: Science Advisory Board (1400), U.S. EPA, Washington, DC 20460, fax (202) 260–7118; or via E-Mail at: kooyoomjian.jack@epa.gov. Public comments at teleconferences will be normally limited to three minutes per speaker or organization. The request should identify the name of the individual who will make the presentation, the organization (if any) they will represent, and at least 35 copies of an outline of the issues to be addressed or the presentation itself. For technical information pertaining to the teleconference meeting please contact Dr. Kooyoomjian at (202) 260–2560.

For questions pertaining to the advisory, as well as background documents provided to the SAB's RAC, or to discuss any other aspects of this review or any supporting or background information please contact Dr. Mary E. Clark, ORIA, U.S. Environmental Protection Agency (6601J), 401 M Street, SW, Washington, DC 20460, tel. (202) 564–9348; fax (202) 565–2043; or E-mail: clark.marye@epa.gov.

Providing Oral or Written Comments at SAB Meetings

The Science Advisory Board expects that public statements presented at its meetings will not be repetitive of previously submitted oral or written statements. In general, each individual or group making an oral presentation will be limited to a total time of ten minutes. For teleconference meetings, opportunities for oral comment will usually be limited to no more than three minutes per speaker and no more than fifteen minutes total. Written comments (at least 35 copies) received in the SAB Staff Office sufficiently prior to a meeting date (usually one week before the meeting), may be mailed to the relevant SAB committee or subcommittee; comments received too close to the meeting date will normally be provided to the committee at its meeting, or mailed soon after receipt by the Agency. Written comments may be provided to the relevant committee or subcommittee up until the time of the meeting.

Additional information concerning the Science Advisory Board, its structure, function, and composition, may be found on the SAB Website (http://www.epa.gov/sab) and in The Annual Report of the Staff Director which is available from the SAB Publications Staff at (202) 260–4126 or via fax at (202) 260–1889. Individuals requiring special accommodation at SAB meetings, including wheelchair access, should contact the appropriate DFO at least five business days prior to the meeting so that appropriate arrangements can be made.

Dated: November 25, 1998.

John R. Fowle, III,

Acting Staff Director, Science Advisory Board.

[FR Doc. 98–31963 Filed 11–30–98; 8:45 am]

BILLING CODE 6560–50–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Equal Employment Opportunity Commission.

DATE AND TIME: Wednesday, December 9, 1998, at 2:00 P.M. (Eastern Time).

PLACE: Conference Room on the Ninth Floor of the EEOC Office Building, 1801 L Street, N.W., Washington, D.C. 20507.

STATUS: The meeting will be open to the public.

MATTERS TO BE CONSIDERED:

1. Announcement of Notation Votes, and
2. Panel on Small Business and the EEOC.

Note: Any matters not discussed or concluded may be carried over to a later meeting. (In addition to published notices on EEOC Commission meetings in the **Federal Register**, the Commission also provides a recorded announcement a full week in advance on future Commission meetings). Please telephone (202) 663–7100 (voice) and (202) 663–4074 (TDD) at any time for information on these meetings.

CONTACT PERSON FOR MORE INFORMATION: Frances M. Hart, Executive Officer on (202) 663–4070.

Date: November 25, 1998.

Frances M. Hart,

Executive Officer, Executive Secretariat.

[FR Doc. 98–32050 Filed 11–27–98; 11:22 am]

BILLING CODE 6750–06–M

EXPORT-IMPORT BANK OF THE UNITED STATES

Notice of Open Special Meeting of the Advisory Committee of the Export-Import Bank of the United States (Export-Import Bank)

SUMMARY: The Advisory Committee was established by Pub. L. 98–181, November 30, 1983, to advise the Export-Import Bank on its programs and to provide comments for inclusion in the reports of the Export-Import Bank of the United States to Congress.

TIME AND PLACE: Tuesday, December 15, 1998, at 9:30 a.m. The meeting will be held at the Export-Import Bank in room 1143, 811 Vermont Avenue, NW, Washington, DC 20571.

AGENDA: This meeting (the last meeting of the year) will include a discussion summarizing the year at Ex-Im Bank and will additionally focus on next year's agenda, Small Business outreach.

PUBLIC PARTICIPATION: The meeting will be open to public participation, and the last 10 minutes will be set aside for oral questions or comments. Members of the public may also file written statement(s) before or after the meeting. If any person wishes auxiliary aids (such as a sign language interpreter) or other special accommodations, please contact, prior to December 8, 1998, Megan Becher, room 1215, Vermont Avenue, NW, Washington, DC 20571, voice: (202) 565–3507 or TDD (202) 565–3377.

FOR FURTHER INFORMATION CONTACT: For further information, contact Megan Becher, room 1215, 811 Vermont Ave., NW, Washington, DC 20571, (202) 565–3507.

Kenneth Hansen,

General Counsel.

[FR Doc. 98–31937 Filed 11–30–98; 8:45 am]

BILLING CODE 6690–01–M

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority 5 CFR 1320 Authority, Comments Requested

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents,

including the use of automated information techniques or other forms of information technology.

DATES: Written comments should be submitted on or before February 1, 1999. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all comments to Les Smith, Federal Communications Commission, Room 234, 1919 M St., N.W., Washington, DC 20554 or via the Internet to lesmith@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collections contact Les Smith at 202–418–0127 or via the Internet at lesmith@fcc.gov.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0567.

Title: Section 76.962, Implementation and Certification of Compliance.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Businesses or other for-profit entities.

Number of Respondents: 500.

Estimated Time per Response: .5 hours (30 minutes).

Frequency of Response: Once.

Total Annual Burden: 250 hours.

Total Annual Costs: $1,000 (photocopying and stationary).

Needs and Uses: Section 76.962 requires any cable operator that has been deemed subject to remedial requirements to certify to the Commission its compliance with the Commission order requiring prospective rate reductions, refunds, or other remedial relief to subscribers. The certification must be filed with the Commission within 90 days from the date the Commission released the order mandating a remedy. These certifications are used by the Commission to monitor a cable operator's compliance with Commission rate orders.

OMB Control Number: 3060–0638.

Title: Section 76.934(g), Alternative Rate Regulation Agreements.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 100.

Estimated Time Per Response: 0.5 hours (30 minutes).

Frequency of Response: Once.

Total Annual Burden: 50 hours.

Total Annual Costs: $300 (postage and photocopying).

Needs and Uses: Section 76.934(g) states that certified local franchising authorities and small systems owned by small cable companies may enter into alternative rate regulation agreements affecting the basic service tier and the cable programming service tier. Small systems must file with the Commission a copy of the operative alternative rate agreement within 30 days after its effective date. Alternative rate regulation agreements are filed with the Commission so that verification can be made such that agreements have been entered into and executed pursuant to Commission rules.

OMB Control Number: 3060–0644.

Title: Establishing Maximum Permitted Rates for Regulated Cable Services on Small Cable Systems.

Form Number: FCC 1230.

Type of Review: Extension of a currently approved collection.

Respondents: Business and other for-profit entities; State, local and tribal governments.

Number of Respondents: 350 (250 cable systems and 100 local franchise authorities).

Estimated Time Per Response: 2.0 to 2.25 hours.

Frequency of Response: On occasion reporting requirements.

Total Annual Burden: 763 hours.

Total Annual Costs: $500.

Needs and Uses: On May 5, 1995, the Commission adopted rules that allow a small cable system owned by a small cable company to use a simplified cost-of-service procedure to set its maximum permitted rate. Pursuant to these rules, a cable system is eligible to set its maximum permitted rate with FCC form 1230 if it is a system with 15,000 or fewer subscribers, and it is not owned by a cable company with more than 400,000 subscribers. The data collected are used by the Commission and local franchise authorities to determine whether cable rates for basic service, cable programming service, and associated equipment are reasonable under Commission regulations.

OMB Control Number: 3060–0673.

Title: Section 76.956, Cable Operator Response.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 50.

Estimated Time Per Response: 4 hours.

Frequency of Response: On occasion reporting requirements.

Total Annual Burden: 200 hours.

Total Annual Costs: $250.

Needs and Uses: Section 76.956 states that unless the Commission notifies a cable operator to the contrary, the cable operator must file with the Commission a response to a rate complaint, filed on the applicable form, within 30 days of the date of service of the complaint. In addition to responding to the merits of a complaint, the cable operator may also move for dismissal of the complaint for failure to meet the minimum showing requirement. Any such motion for dismissal must state with particularity the reasons the cable operator believes the complaint is defective and shall not relieve the cable operator of its obligation to respond to the merits of the complaint. The Commission has clearance for use of its cable rate regulation forms under each form's respective OMB control number. This collection, OMB 3060–0673, is designed to account for the burden to respondents when filing motions for dismissal of rate complaints. The Commission sponsors this information collection requirement in order to ensure a process for cable operators to file a motion to dismiss a rate complaint filed against them if they feel that the complaint fails to meet the minimum showing.

OMB Control Number: 3060–0668.

Title: 76.936, Written Decisions.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: State, local or tribal governments.

Number of Respondents: 1,200.

Estimated Time Per Response: 1 hour.

Frequency of Response: On occasion reporting requirements.

Total Annual Burden: 1,200 hours

Total Annual Costs: $12,000.

Needs and Uses: Section 76.936 states a franchising authority must issue a written decision in a rate-making proceeding whenever it disapproves an initial rate for the basic service tier or associated equipment in whole or in part, disapproves a request for a rate increase in whole or in part, or approves a request for an increase in whole or in part over the objections of interested parties. Public notice must be given of any written decision required in this section, including releasing the text of any written decision to the public. Franchising authorities are required to issue a written decision in rate-making proceedings pursuant to Section 76.936 so that cable operators and the public are made aware of the results of the proceeding.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 98–31849 Filed 11–30–98; 8:45 am]

BILLING CODE 6712–10–M

FEDERAL COMMUNICATIONS COMMISSION

[CC Docket No. 92–237; DA 98–2395]

North American Numbering Council; Meeting

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: On November 24, 1998, the Commission released a public notice announcing the December 16 and December 17, 1998, meeting and agenda of the North American Numbering Council (NANC). The intended effect of this action is to make the public aware of the NANC's next meeting and its agenda.

FOR FURTHER INFORMATION CONTACT: Linda Simms, Administrative Assistant of the NANC, at (202) 418–2330 or via the Internet at lsimms@fcc.gov or Jeannie Grimes at (202) 418–2313 or jgrimes@fcc.gov. The address is: Network Services Division, Common Carrier Bureau, Federal Communications Commission, 2000 M Street, NW, Suite 235, Washington, DC 20554. The fax number is: (202) 418–7314. The TTY number is: (202) 418–0484.

SUPPLEMENTARY INFORMATION:

The next meeting of the North American Numbering Council (NANC) will be held on Wednesday, December 16, from 8:30 a.m., until 5:00 p.m., and on Thursday, December 17, from 8:30 a.m., until 12 noon. The meeting will be held at the Federal Communications Commission, 1919 M Street, N.W., Room 856, Washington, D.C., on December 16th. The December 17th meeting will be held at the Sheraton City Centre Hotel, 1143 New Hampshire Avenue, N.W., Washington, DC.

This meeting will be open to members of the general public. The FCC will attempt to accommodate as many people as possible. Admittance, however will be limited to the seating available. The public may submit written statements to the NANC, which must be received two business days before the meeting. In addition, oral statements at the meeting by parties or entities not represented on the NANC will be permitted to the extent time permits. Such statements will be limited to five minutes in length by any one party or entity, and requests to make an oral statement must be received two business days before each meeting. Requests to make an oral statement or provide written comments to the NANC should be sent to Jeannie Grimes at the address under **FOR FURTHER INFORMATION CONTACT,** stated above.

Proposed Agenda—Wednesday, December 16, 1998

1. Approval of meeting minutes.
2. Local Number Portability Administration (LNPA) Working Group Report. Update on Wireline Wireless Integration Subcommittee report regarding its further report on integration issues due to NANC by December 31, 1998.
3. Industry Numbering Committee (INC) Report. Presentation of INC work plan regarding issues relating to number portability for 500 and 900 numbers, pursuant to paragraph 41 of CC Docket 95–116, In the Matter of Telephone Number Portability, *Second Memorandum Opinion and Order on Reconsideration* (rel. Oct. 20, 1998).
4. Numbering Resource Optimization (NRO) Working Group Report. Presentation of NRO work plan for development of a recommendation regarding a successor model to the current Central Office Code Utilization Survey (COCUS).
5. Definition of Reserved Telephone Numbers. Discussion of new contributions regarding characterization of a ''legally enforceable written agreement.'' NANC decision on a single definition of reserved telephone numbers.
6. North American Numbering Plan Billing and Collection Agent (NBANC) Report. Discussion of carrier-specific interest credits.

Thursday, December 17, 1998

7. North American Numbering Plan Administration (NANPA) Oversight Working Group Report. Discussion of Chairman Hasselwander's proposal on how to proceed regarding NANPA responsibilities and the assumption of duties of the incumbent code administrators under the FCC order; the Requirements Document and industry guidelines. Discussion of Lockheed Martin anticipated FCC filing regarding divesture of its CIS unit to a neutral third party. Review and discussion regarding 11/30/98 draft number pooling administrator (PA) Requirements Document. NANC will provide guidance pertaining to the appropriate bid pricing to be inserted in the PA Requirements Document.
8. Steering Group (SG) Report. Discussion of proposed SG revisions to the July 23, 1998, version of the NANC Working Group Operating Principles. Discussion of other matters discussed at the SG meetings of November 18 and December 16, including efficient utilization of meeting time, working group mentors and audits of code holders.
9. Discussion of potential further action regarding System Beta.
10. Other Business.

Federal Communications Commission.

Blaise A. Scinto,

Deputy Chief, Network Services Division, Common Carrier Bureau.

[FR Doc. 98–32014 Filed 11–30–98; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[DA 98–2318; Report No. AUC–98–23–A (Auction No. 22)]

C Block PCS Spectrum Auction Scheduled for March 23, 1999 Comment Sought on Auction Procedural Issues

AGENCY: Federal Communications Commission.

ACTION: Notice; seeking comment.

SUMMARY: This Public Notice announces the auction of C block broadband personal communications services (''PCS'') licenses set to begin on March 23, 1999, and seeks comment on procedural issues relating to the C block broadband PCS auction.

DATES: Comments are due on or before November 30, 1998. Reply comments are due on or before December 7, 1998.

ADDRESSES: To file formally, parties must submit an original and four copies to the Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W., TW–A325, Washington, D.C. 20554. In addition, parties must submit one copy to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, Room 5202, 2025 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Wireless Telecommunications Bureau Reference Center, Room 5608, 2025 M Street, N.W., Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Audrey Bashkin, Bob Reagle, or Jeff Garretson, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, at (202) 418–0660.

SUPPLEMENTARY INFORMATION: This Public Notice was released on November 12, 1998, and is available in its entirety, including the Attachment, for inspection and copying during normal business hours in the Wireless Telecommunications Bureau Reference Center, Room 5608, 2025 M Street N.W., Washington, D.C., and also may be purchased from the Commission's copy contractor, International Transcription Services, (202) 857–3800, fax (202) 857–3805, 1231 20th Street, N.W., Washington, D.C. 20036. It is also available on the Commission's website at http://www.fcc.gov.

Synopsis of the Public Notice

1. By this Public Notice, the Wireless Telecommunications Bureau (''Bureau'') announces an auction of C block broadband personal communications services (''PCS'') licenses set to begin on March 23, 1999 (Auction No. 22). Auction No. 22 will cover licenses for operation on frequencies that were previously licensed under now-cancelled licenses, licenses for operation on 30 MHz and 15 MHz spectrum blocks that were returned to the Commission pursuant to elections, and licenses for operation on frequencies that had not been previously licensed. A list of licenses is included at Appendix A. In addition, future public notices could include information about other Commission licenses in conjunction with Auction No. 22. Future public notices will include further details regarding application filing and payment deadlines, a seminar for potential bidders, and other pertinent information. In this Public Notice, the Bureau seeks comment on procedural issues relating to Auction No. 22.

I. Reserve Price or Minimum Opening Bid

2. The Balanced Budget Act of 1997 (''Budget Act'') calls upon the Commission to prescribe methods by which a reasonable reserve price will be required or a minimum opening bid established when FCC licenses are subject to auction (i.e., because the Commission has accepted mutually exclusive applications for those licenses), unless the Commission determines that a reserve price or minimum bid is not in the public interest.

3. Normally, a reserve price is an absolute minimum price below which an item will not be sold in a given auction. Reserve prices can be either published or unpublished. A minimum opening bid, on the other hand, is the minimum bid price set at the beginning of the auction below which *no bids* are accepted. It is generally used to accelerate the competitive bidding process. Also, in a minimum opening bid scenario, the auctioneer generally has the discretion to lower the amount later in the auction.

4. The Commission in the *Second Report and Order and Further Notice of Proposed Rule Making (''C Block Further Notice'')*, 62 FR 55375 (October 24, 1997), sought comment on the use of a minimum opening bid and/or reserve price for the upcoming C block PCS auction. The Commission stated that, for the upcoming C block auction, employing a minimum opening bid, more than a reserve price, would help make certain that the public is fairly compensated, the auction is expedited, and the Commission is able to make adjustments based on the competitiveness of the auction. Accordingly, the Commission proposed to use a minimum opening bid, rather than a reserve price, for the upcoming C block auction and requested comment on this proposal, as well as on which methodology to employ and factors to consider in establishing minimum opening bids. The Commission proposed minimum opening bids for each market equal to ten percent of the corresponding net high bid for the market in the original C block auction. The Commission asked commenters to explain whether this proposal would be reasonable or would result in a substantial number of unsold licenses. The Commission asked further whether the amount of the minimum opening bid should be capped and whether the Commission should establish a different amount.

5. In the *Fourth Report and Order (''C Block Fourth Report and Order'')*, 63 FR 50791 (September 23, 1998), which resolved issues raised in the *C Block Further Notice*, the Commission decided that it would be appropriate to establish minimum opening bids for each market in the upcoming C block auction equal to ten percent of the corresponding net high bid for the market in the original C block auction. The Commission stated, however, that the Bureau may exercise its discretion to set forth minimum opening bids smaller than ten percent if, based upon further evaluation, the Bureau believes that a smaller amount is warranted. In considering a reduction of the minimum opening bid, the Bureau would consider such factors as the amount of spectrum being auctioned, levels of incumbency, the availability of technology to provide service, the size of the geographic service areas, issues of interference with other spectrum bands, and any other relevant factors that could reasonably affect valuation of the spectrum being auctioned.

6. The Commission made no adjustment to the minimum opening bid for those licenses which, in Auction No. 22, will be 15 MHz rather than 30 MHz. The Bureau, however, believes that such an adjustment is appropriate and, accordingly, proposes to establish as the minimum opening bid for each 15 MHz license available in Auction No. 22 an amount equal to five percent of the most recent net high bid for the corresponding 30 MHz license, but in no event lower than the upfront payment amount for that license in Auction No. 22 (see discussion of upfront payments immediately below). For 15 MHz licenses with minimum opening bids that would otherwise be lower than upfront payment amounts, the Bureau proposes to establish minimum opening bids that equal the upfront payment amounts. For each 30 MHz license available in Auction No. 22, the Bureau plans to establish a minimum opening bid equal to ten percent of the most recent corresponding net high bid for the license, but in no event lower than the upfront payment amount for that license in Auction No. 22. For 30 MHz licenses with minimum opening bids that would otherwise be lower than upfront payment amounts, the Bureau plans to establish minimum opening bids that equal the upfront payment amounts. Minimum opening bid amounts are provided in Attachment A.

II. Upfront Payments and Initial Maximum Eligibility for Each Bidder

7. In the *C Block Further Notice*, the Commission explained that, in the *Second Report and Order*, 59 FR 22980 (May 4, 1994), (''*Competitive Bidding Second Report and Order*''), it had indicated that the upfront payment should be set using a formula based upon the amount of spectrum and population (''pops'') covered by the license(s) for which the parties intend to bid and that the amount of the upfront payment should be determined on an auction-by-auction basis. The Commission proposed in the *C Block Further Notice* to set an upfront payment for the upcoming C block auction at $0.06 per MHz per pop. The Commission determined that this amount was appropriate to further its goal of allowing only serious, qualified applicants to participate in the auction. The Commission noted that it had adopted the same upfront payment for its most recent broadband PCS auction, the D, E, and F block auction.

8. In the *C Block Fourth Report and Order,* the Commission noted that there was support among commenters for setting the upfront payment amount at the proposed $0.06 per MHz per pop and expressed its belief that in the upcoming C block auction the upfront payment should be no higher than this amount. Accordingly, the Bureau plans to set the upfront payment amount for each license in Auction No. 22 at $0.06 * MHz * Pops (rounded up to the next dollar). The Bureau notes, however, that in the *C Block Fourth Report and Order* the Commission stated that the Bureau may establish a lower upfront payment if it deems a lower amount to be reasonable.

9. As required by the *C Block Fourth Report and Order,* the upfront payment amount for ''former defaulters,'' i.e., applicants that have ever been in default on any Commission licenses or have ever been delinquent on any non-tax debt owed to any Federal agency, will be fifty percent more than the normal amount required to be paid.

10. For Auction No. 22, the Commission proposes that the amount of the upfront payment submitted by a bidder will determine the initial maximum eligibility (as measured in bidding units) for each bidder. Upfront payments will not be attributed to specific licenses, but instead will be translated into bidding units to define a bidder's initial maximum eligibility, which cannot be increased during the auction. Thus, in calculating the upfront payment amount, an applicant must determine the *maximum* number of bidding units it may wish to bid on (or hold high bids on) in any single round, and submit an upfront payment covering that number of bidding units. The Commission seeks comment on this proposal.

III. Attribution Rules

11. The attribution rules set forth in Section 24.709 of the Commission's rules will apply to Auction No. 22.

IV. Other Auction Procedural Issues

12. The Budget Act requires the Commission to ''ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed * * * before issuance of bidding rules, to permit notice and comment on proposed auction procedures * * *'' Consistent with the provisions of the Budget Act and to ensure that potential bidders have adequate time to familiarize themselves with the specific provisions that will govern the day-to-day conduct of an auction, the Commission directed the Bureau, under its existing delegated authority, to seek comment on a variety of auction-specific issues prior to the start of each auction. The Bureau therefore seeks comment on the following issues.

a. Auction Sequence and License Groupings

13. In the *C Block Further Notice,* the Commission proposed a simultaneous multiple-round design for the upcoming C block auction, and it received no comments opposing this proposal. Accordingly, in the *C Block Fourth Report and Order,* the Commission stated that the simultaneous multiple-round design would be appropriate for the upcoming C block auction. The Commission noted, however, that it remains within the Bureau's authority to seek comment on, and to modify, the competitive bidding design of the upcoming C block auction, if the Bureau determines that another design might be warranted. In light of this history, and because a simultaneous multiple-round design allows bidders to take advantage of any synergies that exist among licenses, the Bureau proposes to award all C block PCS licenses currently available for auction in a single, simultaneous multiple-round auction. The Bureau seeks comment on this proposal.

b. Structure of Bidding Rounds, Activity Requirements, and Criteria for Determining Reductions in Eligibility

14. In the *C Block Further Notice,* the Commission tentatively concluded that a C block auction should be conducted in three stages. The Commission proposed to use high activity requirements, with bidders required to be more active in each subsequent stage than they had been in the last. The Commission also proposed requiring the Bureau to use its delegated authority to schedule bidding rounds aggressively, to move quickly into the next stage of the auction when bidding activity falls, and to use higher minimum bid increments for very active licenses. In the *Third Report and Order and Second Further Notice of Proposed Rule Making,* 63 FR 2315 (January 15, 1998), (''*Part 1 Third Report and Order*''), the Commission directed the Bureau to seek comment prior to the start of each auction on activity requirements for each stage of the auction and activity rule waivers.

15. No party opposed the Commission's tentative conclusion to conduct a C block auction in three stages. Accordingly, in the *C Block Fourth Report and Order,* the Commission expressed its continued belief that this structure would be reasonable for the upcoming C block auction. The Commission noted, however, that the Bureau normally determines the structure of the auction and stated that it remains within the Bureau's discretion to deviate from the proposed three-stage structure if, after appropriate notice and comment, the Bureau determines that a different structure would better serve the public interest.

16. Accordingly, the Bureau proposes to divide the auction into three stages: Stage One, Stage Two and Stage Three. The auction will start in Stage One. The Bureau proposes that the auction will generally advance to the next stage (*i.e.,* from Stage One to Stage Two, and from Stage Two to Stage Three) when the auction activity level, as measured by the percentage of bidding units receiving new high bids, is below ten percent for three consecutive rounds of bidding in each Stage. However, the Bureau further proposes that the Bureau retain the discretion to change stages unilaterally by announcement during the auction. In exercising this discretion, the Bureau will consider a variety of measures of bidder activity including, but not limited to, the auction activity level, the percentages of licenses (as measured in bidding units) on which there are new bids, the number of new bids, and the percentage increase in revenue. The Bureau seeks comment on these proposals.

17. In order to ensure that auctions close within a reasonable period of time, the Commission imposes an activity rule that requires bidders to bid actively on a percentage of their maximum bidding eligibility during each round of an auction rather than waiting until the end to participate. A bidder that does not satisfy the activity rule will either lose bidding eligibility in the next round or use an activity rule waiver.

18. For Auction No. 22, the Bureau proposes that, in each round of Stage One of the auction, a bidder desiring to maintain its current eligibility must remain active on licenses encompassing at least 80 percent of its current bidding eligibility. Failure to maintain the requisite activity level will result in a reduction in the bidder's bidding eligibility in the next round of bidding (unless an activity rule waiver is used). During Stage One, reduced eligibility for the next round will be calculated by multiplying the current round activity by five-fourths (5/4). In each round of the second stage of the auction, a bidder desiring to maintain its current eligibility is required to be active on at least 90 percent of its current bidding eligibility. During Stage Two, reduced eligibility for the next round will be

calculated by multiplying the current round activity by ten-ninths (10/9). In each round of Stage Three, a bidder desiring to maintain its current eligibility is required to be active on 98 percent of its current bidding eligibility. In this final stage, reduced eligibility for the next round will be calculated by multiplying the current round activity by fifty forty-ninths (50/49). The Bureau seeks comment on these proposals.

c. Minimum Accepted Bids

19. Once there is a standing high bid on a license, a bid increment will be applied to that license to establish a minimum acceptable bid for the following round. For Auction No. 22, the Bureau proposes to use a smoothing methodology to calculate bid increments. This methodology will be designed to vary the increment for a given license between a maximum and minimum value based on the bidding activity on that license. A similar methodology was used in previous auctions, including the original LMDS auction and the 220 MHz auction. The Bureau proposes initial values for the maximum of 0.2 or 20% of the license value, and a minimum of 0.1 or 10% of the license value. The Bureau seeks comment on this proposal.

20. The Bureau retains the discretion to change these values if circumstances so dictate, such as raising the minimum increment toward the end of the auction to enable bids to reach their final values more quickly. The Bureau will do so by announcement in the Automated Auction System. Under its discretion, the Bureau may also implement an absolute dollar floor for the bid increment to further facilitate a timely close of the auction. The Bureau further seeks comment on the advantages and disadvantages of using the discretion to adjust the minimum bid increment without prior notice. The Bureau additionally seeks comment on the advantages and disadvantages of, as an alternative approach, adjusting the minimum bid increment gradually over a number of rounds as opposed to single large changes in the minimum bid increment. The Bureau also retains the discretion to use alternate methodologies for Auction No. 22 if circumstances warrant. The Bureau seeks comment on these proposals.

d. Activity Rule Waivers and Reducing Eligibility

21. Use of an activity rule waiver preserves the bidder's current bidding eligibility despite the bidder's activity in the current round being below the required minimum level. An activity rule waiver applies to an entire round of bidding and not to a particular license. Activity waivers are principally a mechanism for auction participants to avoid the loss of auction eligibility in the event that exigent circumstances prevent them from placing a bid in a particular round.

22. The FCC auction system assumes that bidders with insufficient activity would prefer to use an activity rule waiver (if available) rather than lose bidding eligibility. Therefore, the system will automatically apply a waiver (known as an ''automatic waiver'') at the end of any bidding period where a bidder's activity level is below the minimum required unless: (1) There are no activity rule waivers available; or (2) the bidder overrides the automatic application of a waiver by reducing eligibility thereby meeting the minimum requirements.

23. A bidder with insufficient activity that wants to reduce its bidding eligibility rather than use an activity rule waiver must affirmatively override the automatic waiver mechanism during the bidding period by using the reduce eligibility function in the software. In this case, the bidder's eligibility is permanently reduced to bring the bidder into compliance with the activity rules as described above. Once eligibility has been reduced, a bidder will not be permitted to regain its lost bidding eligibility.

24. A bidder may proactively use an activity rule waiver as a means to keep the auction open without placing a bid. If a bidder submits a proactive waiver (using the proactive waiver function in the bidding software) during a bidding period in which no bids are submitted, the auction will remain open and the bidder's eligibility will be preserved. An automatic waiver invoked in a round in which there are no new valid bids will not keep the auction open.

25. The Bureau proposes that each bidder in Auction No. 22 be provided with five activity rule waivers that may be used in any round during the course of the auction as set forth above. The Bureau seeks comment on this proposal.

e. Information Regarding Bid Withdrawal and Bid Removal

26. In the *C Block Fourth Report and Order,* the Commission directed the Bureau, in conducting the upcoming C block auction, to follow the Part 1 rule on bid withdrawal, Section 1.2104(g), to the extent applicable. Accordingly, for Auction No. 22, the Bureau proposes the following bid removal and bid withdrawal procedures. Before the close of a bidding period, a bidder has the option of removing any bids placed in that round. By using the remove bid function in the software, a bidder may effectively ''unsubmit'' any bid placed within that round. A bidder removing a bid placed in the same round is not subject to withdrawal payments.

27. Once a round closes, a bidder may no longer remove a bid. However, in the next round, a bidder may withdraw standing high bids from previous rounds using the withdraw bid function. A high bidder that withdraws its standing high bid from a previous round is subject to the bid withdrawal payment provisions. The Bureau seeks comment on these bid removal and bid withdrawal procedures.

28. In the *Part 1 Third Report and Order,* the Commission recently explained that allowing bid withdrawals facilitates efficient aggregation of licenses and the pursuit of efficient backup strategies as information becomes available during the course of an auction. The Commission noted, however, that in some instances bidders may seek to withdraw bids for improper reasons, including to delay the close of the auction for strategic purposes. The Bureau, therefore, has discretion, in managing the auction, to limit the number of withdrawals to prevent strategic delay of the close of the auction or other abuses. The Commission stated that the Bureau should assertively exercise its discretion, consider limiting the number of rounds in which bidders may withdraw bids, and prevent bidders from bidding on a particular market if the Bureau finds that a bidder is abusing the Commission's bid withdrawal procedures.

29. Applying this reasoning, the Bureau proposes to limit each bidder in Auction No. 22 to withdrawals in no more than two rounds during the course of the auction. To permit a bidder to withdraw bids in more than two rounds would likely encourage insincere bidding or the use of withdrawals for anti-competitive strategic purposes. The two rounds in which withdrawals are utilized will be at the bidder's discretion; withdrawals otherwise must be in accordance with the Commission's rules. There is no limit on the number of standing high bids that may be withdrawn in either of the rounds in which withdrawals are utilized. Withdrawals will remain subject to the bid withdrawal payment provisions specified in the Commission's rules. The Bureau seeks comment on this proposal.

f. Stopping Rule

30. For Auction No. 22, the Bureau proposes to employ a simultaneous stopping approach. The Bureau has

discretion ''to establish stopping rules before or during multiple round auctions in order to terminate the auction within a reasonable time.'' *See*, Section 1.2104 of the Commission's Rules, 47 CFR 1.2104(c). A simultaneous stopping rule means that all licenses remain open until the first round in which no new acceptable bids, proactive waivers, or withdrawals are received. After the first such round, bidding closes simultaneously on all licenses. Thus, unless circumstances dictate otherwise, bidding would remain open on all licenses until bidding stops on every license.

31. The Bureau seeks comment on a modified version of the simultaneous stopping rule. The modified stopping rule would close the auction for all licenses after the first round in which no bidder submits a proactive waiver, a withdrawal, or a new bid on any license on which it is not the standing high bidder. Thus, absent any other bidding activity, a bidder placing a new bid on a license for which it is the standing high bidder would not keep the auction open under this modified stopping rule. The Bureau further seeks comment on whether this modified stopping rule should be used unilaterally or only in stage three of the auction.

32. The Commission proposes that the Bureau retain the discretion to keep an auction open even if no new acceptable bids or proactive waivers are submitted and no previous high bids are withdrawn. In this event, the effect will be the same as if a bidder had submitted a proactive waiver. The activity rule, therefore, will apply as usual; and a bidder with insufficient activity will either lose bidding eligibility or use a remaining activity rule waiver.

33. Finally, the Commission proposes that the Bureau reserve the right to declare that the auction will end after a specified number of additional rounds (''special stopping rule''). If the Bureau invokes this special stopping rule, it will accept bids in the final round(s) only for licenses on which the high bid increased in at least one of the preceding specified number of rounds. The Bureau proposes to exercise this option only in certain circumstances, such as, for example, where the auction is proceeding very slowly, there is minimal overall bidding activity, or it appears likely that the auction will not close within a reasonable period of time. Before exercising this option, the Bureau is likely to attempt to increase the pace of the auction by, for example, moving the auction into the next stage (where bidders would be required to maintain a higher level of bidding activity), increasing the number of bidding rounds per day, and/or increasing the amount of the minimum bid increments for the limited number of licenses where there is still a high level of bidding activity. The Bureau seeks comment on these proposals.

g. Information Relating to Auction Delay, Suspension or Cancellation

34. For Auction No. 22, the Commission proposes that, by public notice or by announcement during the auction, the Bureau may delay, suspend or cancel the auction in the event of natural disaster, technical obstacle, evidence of an auction security breach, unlawful bidding activity, administrative or weather necessity, or for any other reason that affects the fair and competitive conduct of competitive bidding. In such cases, the Bureau, in its sole discretion, may elect to: resume the auction starting from the beginning of the current round; resume the auction starting from some previous round; or cancel the auction in its entirety. Network interruption may cause the Bureau to delay or suspend the auction. The Commission emphasizes that exercise of this authority is solely within its discretion, and its use is not intended to be a substitute for situations in which bidders may wish to apply their activity rule waivers. The Bureau seeks comment on this proposal.

Federal Communications Commission.

Daniel B. Phythyon,

Chief, Wireless Telecommunications Bureau.

[FR Doc. 98–32015 Filed 11–27–98; 11:51 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[DA 98–2337; Report No. AUC–98–22–B (Auction No. 22)]

Additional Information Regarding Broadband PCS Spectrum Included in the Auction Scheduled for March 23, 1999; Comment Sought on Auction Procedural Issues

AGENCY: Federal Communications Commission.

ACTION: Notice; seeking comment.

SUMMARY: This Public Notice provides additional and corrected information about the broadband personal communications services (''PCS'') spectrum to be included in Auction No. 22, including the addition of three D, six E, and five F block broadband PCS licenses.

DATES: Comments are due on or before November 30, 1998, and reply comments are due on or before December 7, 1998.

ADDRESSES: To file formally, parties must submit an original and four copies to the Office of the Secretary, Federal Communications Commission, Room TWA–325, 445 Twelfth Street S.W., Washington, D.C. 20554. In addition, parties must submit one copy to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, Room 5202, 2025 M Street N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Public Reference Room, Room 239, 1919 M Street N.W., Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: For further information contact Audrey Bashkin, Bob Reagle, or Jeff Garretson, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, at (202) 418–0660.

SUPPLEMENTARY INFORMATION: This Public Notice was released on November 19, 1998, and is available in its entirety, including the Attachment, for inspection and copying during normal business hours in the Wireless Telecommunications Bureau Reference Center, Room 5608, 2025 M Street N.W., Washington, D.C., and also may be purchased from the Commission's copy contractor, International Transcription Services, (202) 857–3800, fax (202) 857–3805, 1231 20th Street, N.W., Washington, D.C. 20036. It is also available on the Commission's website at http://www.fcc.gov.

Synopsis

1. This Public Notice provides additional and corrected information about the broadband personal communications services (''PCS'') spectrum to be included in Auction No. 22, including the addition of three D, six E, and five F block broadband PCS licenses. See *C Block PCS Spectrum Auction Scheduled for March 23, 1999, Comment Sought on Auction Procedural Issues, Public Notice, DA 98–2318* (November 12, 1998) (''*Procedural Public Notice*''). In addition, the *Procedural Public Notice* listed as part of the auction certain spectrum blocks associated with the cancelled licenses of DCR PCS, Inc. (''DCR''), a licensee currently in bankruptcy. DCR's licenses were subject to a preliminary injunction preventing the alienation of those licenses through November 16, 1998. That injunction has been removed, and the relevant spectrum blocks are listed in the Attachment to the Public Notice,

as released by the Wireless Telecommunications Bureau, with an update reflecting this change in status. As a general matter, the Attachment contains an updated inventory of all licenses that will be made available in Auction No. 22. Future public notices could include information about other Commission licenses in conjunction with Auction No. 22. Additionally, in this Public Notice, the Bureau seeks comment on procedural issues relating to the auction of the D, E, and F block licenses in Auction No. 22.

I. Reserve Price or Minimum Opening Bid

2. Based on the approach taken in the *Procedural Public Notice,* for each D, E, and F block license for which there was a winning bidder in the 1996 D, E, and F block auction, the Bureau proposes to establish as the minimum opening bid an amount equal to ten percent of the corresponding net high bid for the market in the 1996 auction, but in no event lower than the upfront payment for that license in Auction No. 22. For each D, E, and F block license for which there was no winning bidder in the 1996 auction, the Bureau proposes to establish as the minimum opening bid an amount equal to 3.33 percent of the most recent net high bid for the C block license in the same Basic Trading Area (''BTA''), but in no event lower than the upfront payment amount for that license in Auction No. 22. Thus, for licenses with minimum opening bids that otherwise would be lower than upfront payment amounts, the Bureau proposes to establish minimum opening bids that equal the upfront payment amounts. Minimum opening bid amounts are provided in the Attachment.

II. Upfront Payments and Initial Maximum Eligibility for Each Bidder

3. The Bureau proposed in the *Procedural Public Notice* to set the upfront payment amount for each license in Auction No. 22 at $0.06 * MHz * Population (''Pops'') (rounded up to the next dollar). The Bureau seeks comment on its proposal to apply the same upfront payment amount to each of the D, E, and F block licenses to be auctioned.

4. In accordance with the Commission rule governing C block applicants, the Bureau stated in the *Procedural Public Notice* that the upfront payment amount for ''former defaulters'' (i.e., applicants that have ever been in default on any Commission licenses or have ever been delinquent on any non-tax debt owed to any Federal agency) will be fifty percent more than the normal amount required to be paid. Consistent with this rule, any former defaulter that applies to bid on ''all markets'' or designates D, E, or F block licenses *in addition to* at least one C block license will be subject to the higher upfront payment requirement. Former defaulters that apply to bid *only* on D, E, or F block licenses will not be subject to the higher upfront payment requirement.

5. In the *Procedural Public Notice,* the Bureau proposed that the amount of the upfront payment submitted by a bidder will determine the initial maximum eligibility (as measured in bidding units) for each bidder. Upfront payments will not be attributed to specific licenses, but instead will be translated into bidding units to define a bidder's initial maximum eligibility, which cannot be increased during the auction. Thus, in calculating the upfront payment amount, an applicant must determine the *maximum* number of bidding units it may wish to bid on (or hold high bids on) in any single round, and submit an upfront payment covering that number of bidding units. The Bureau seeks comment on its proposal to use this same approach for the D, E, and F block licenses to be auctioned.

III. Attribution Rules

5. As stated in the *Procedural Public Notice,* the attribution rules set forth in Section 24.709 of the Commission's rules will apply to Auction No. 22.

IV. Other Auction Procedural Issues

6. In the *Procedural Public Notice,* the Bureau set forth proposals for Auction No. 22 with respect to the following issues: (1) Auction sequence and license groupings; (2) structure of bidding rounds, activity requirements, and criteria for determining reductions in eligibility; (3) minimum accepted bids; (4) activity rule waivers and reducing eligibility; (5) information regarding bid withdrawal and bid removal; (6) stopping rule; and (7) information relating to auction delay, suspension or cancellation. Because the remaining D, E, and F block licenses will be included in Auction No. 22, the Bureau proposes to adopt these same proposals for the auction of these licenses.

Federal Communications Commission.

Daniel B. Phythyon,

Chief, Wireless Telecommunications Bureau.

[FR Doc. 98–32016 Filed 11–27–98; 11:51 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Statement of Policy Pursuant to Section 19 of the Federal Deposit Insurance Act Concerning Participation in the Conduct of the Affairs of an Insured Institution by Persons Who Have Been Convicted of Crimes Involving Dishonesty, Breach of Trust or Money Laundering or Who Have Entered Pretrial Diversion Programs For Such Offenses

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final policy statement.

SUMMARY: The FDIC is updating its statement of policy (SOP), which is issued pursuant to section 19 of the Federal Deposit Insurance Act (12 U.S.C. 1829). Section 19 prohibits, without the prior written consent of the FDIC, any person from participating in banking who has been convicted of a crime of dishonesty or breach of trust or money laundering, or who has entered a pretrial diversion in connection with such an offense. Section 19 was significantly expanded by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101–73, 103 Stat.183 (1989) and the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990 (Crime Control Act), Pub. L. No. 101–647, 104 Stat. 4789 (1990). As a result, the two existing policy statements for section 19 are outdated, and the new SOP is intended to replace them and to supersede prior guidelines. While the SOP maintains the FDIC's current requirement that an application seeking the FDIC's consent must be filed by an insured depository institution (insured institution), it provides blanket approval for certain de minimis crimes, and allows for a waiver of the institution filing requirement where an individual can demonstrate substantial good cause for such a waiver. Other significant provisions include the exclusion from section 19's coverage of a conviction that has been completely expunged, pretrial diversion and similar programs entered before November 29, 1990, and youthful offender adjudgments. The SOP clarifies that the scope of section 19's coverage applies to employees of an insured institution, and also to other persons who are in a position to influence or control the management or affairs of an insured institution.

EFFECTIVE DATE: December 1, 1998.

FOR FURTHER INFORMATION CONTACT: James M. Orlowsky, Review Examiner, Division of Supervision (202) 898–6763

or Andrea Winkler, Counsel, Legal Division (202) 898–3727, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429.

SUPPLEMENTARY INFORMATION:

I. Background

As amended by FIRREA and the Crime Control Act, section 19 prohibits, without the prior written consent of the FDIC, a person convicted of any criminal offense involving dishonesty or breach of trust or money laundering (covered offenses), or who has entered into a pretrial diversion or similar program in connection with a prosecution for such offense, from becoming or continuing as an institution-affiliated party, owning or controlling, directly or indirectly an insured institution, or otherwise participating, directly or indirectly, in the conduct of the affairs of an insured institution. In addition, the law forbids an insured institution from permitting such a person to engage in any conduct or to continue any relationship prohibited by section 19. It imposes a ten-year ban against the FDIC's consent for a person convicted of certain crimes enumerated in Title 18 of the United States Code, absent a motion by the FDIC and approval by the sentencing court.

A proposed SOP was published in the **Federal Register** on July 24, 1997 (62 FR 39840 (1997)). The FDIC invited comments on all aspects of the proposal, as well as on a number of specific aspects of the SOP. Comments were due by September 22, 1997. The FDIC received a total of 19 comment letters: 12 from banks, savings associations or bank holding companies; two from law firms; one from a state banking department; and four from trade associations. Based upon the comments, as discussed below, the final SOP is a significant revision of the proposal.

II. Final Statement of Policy

A. Scope of Section 19

(1) Participation

Section 19 covers institution-affiliated parties, as defined by 12 U.S.C. 1813(u), and others who are participants in the conduct of the affairs of an insured depository institution. Therefore, all employees of an insured institution fall within the scope of section 19. The proposed SOP indicated that, additionally, persons employed by an institution's holding company or an affiliate, subsidiary or joint venture of an insured institution or of its holding company may be within the scope of section 19 where such person is engaged in performing banking or banking-related activities on a regular and material basis. For independent contractors, the proposal indicated that participation by an independent contractor or an employee of an independent contractor would occur where either is performing banking or banking-related activities on behalf of, or for the benefit of, an insured institution on a regular and material basis so as to be involved in the ordinary course of operations or to be exercising control over such operations. The proposal did not define what constitutes such activities. The SOP stated that ''person,'' for purposes of section 19, means a natural person, and does not include a corporation, firm, or other business entity.

The FDIC received fourteen comments relevant to what constitutes ''participation'' and what classes of individuals should be considered ''participants.'' Ten of the comments were received from banks, savings associations or bank holding companies; one from a law firm; one from a state banking department; and two from trade associations. In general, the commenters expressed the view that the FDIC's definition of participation was overly broad and ambiguous, particularly with regard to affiliates and independent contractors, and did not adequately consider the risk of particular positions to the safety and soundness of an insured institution or its depositors. For example, one commenter indicated that under the proposal, section 19 could cover a computer technician employed by the institution's holding company who periodically performs routine maintenance at the institution's facilities, despite the low level of risk associated with the position. Concern was expressed that the proposal might have a crippling effect on independent contractors who employ large numbers of employees. Commenters felt that although independent contractors engage in activities that are related to banking, many do not exercise any decision-making authority with regard to the activities of the insured institution, and thus should not be subject to section 19. For example, if having access to sensitive bank data is a banking-related activity, then providers of automated teller machines and securities systems firms might arguably be included within the scope of section 19. Commenters requested that the FDIC specifically define the positions or types of independent contractors and activities that are covered by section 19.

After considering the comments, the FDIC believes that it is not the purpose of the SOP to define precisely what activities constitute ''participation.'' Rather, agency and court decisions should provide the guide as to what standards should be applied. As a general proposition, participation will be determined by the degree of influence or control over the management or affairs of an insured institution. Furthermore, given the changes in banking, including financial modernization and the rapid pace of technology, a listing of activities in the SOP is neither practical nor advisable. The FDIC must maintain flexibility in such determinations, and in reaching such determinations, the FDIC will consider the facts and circumstances and the degree of involvement of the individual in the institution's affairs. Under this standard, persons who function as ''de facto'' employees regardless of their relationship to the institution, will be covered by section 19. Likewise, the SOP need not specifically define what activities constitute direct as distinguished from indirect participation. The relevant inquiry is whether the individual personally participates in an institution's affairs, or whether the individual does so through another person or entity, i.e., ''indirectly.''

The final SOP adopts the standard that whether persons, other than institution-affiliated parties of an insured institution, are participants covered by section 19 depends upon their degree of influence or control over the management or affairs of an insured institution. It retains the definition of ''person'' set forth in the proposed SOP as not including corporations, firms or other business entities. Thus, section 19 would not apply to persons who are simply employees of a bank holding company, but would apply if those persons were in a position to influence or control the management or affairs of the insured institution. To the extent that the holding company's officers and directors have the power to define and direct the policies of the subsidiary insured institution, such persons would be deemed to be participants in the affairs of those subsidiaries, and therefore covered by section 19.

Similarly, directors and officers of affiliates, subsidiaries or joint ventures of an insured institution or its holding company will be covered if they are in a position to influence or control the management or affairs of the insured institution. In those cases in which such individuals exercise policymaking functions for the insured institution, they should be deemed ''participants.'' For example, officers of an electronic data processing (EDP) affiliate would not typically exercise a controlling

influence to the extent that the affiliate simply provides a processing service to the bank. On the other hand, if a mortgage banking affiliate sends loans to an insured institution that the institution is obligated to purchase, then the officers of the affiliate may be participants in the insured institution's affairs. Where an employee of an EDP service has access to sensitive bank records and the ability to manipulate data so as to influence or control the management or affairs of an insured institution, that person will be covered by section 19. The degree of such influence may be controlled by reliance upon the safeguards and internal controls put in place by the affiliate and the bank.

Insured depository institutions continue to out source increasing numbers of banking tasks. To the extent that independent contractors are utilized, an analysis similar to that for affiliates may be applied. Typically an independent contractor does not have a relationship with the insured institution other than the activity contracted for by the depository institution. Independent contractors are not considered institution-affiliated parties unless they knowingly or recklessly participate in violations, unsafe or unsound practices or breaches of fiduciary duty which result in the consequences set forth in 12 U.S.C. 1813(u). Those who do so, and who have been convicted of or entered pretrial diversion programs for covered offenses would, of course, be covered by section 19. In terms of participation, however, the typical independent contractor does not influence or control the bank's management or affairs. This would also be true of consultants who perform a specific defined task for the insured institution. Additionally, it has been determined that ''person'' within the context of section 19 means individuals, but not companies. This approach may eliminate coverage for many independent contractors. It would eliminate, for example, marketers of special promotions and similar independent contractors whose activity is not commonly thought to pose a risk to the operation of a financial institution. To the extent that any officer of such a company or any individual contractor attempts to use their position to influence or control the management or affairs of a financial institution, they would be covered as participants.

The FDIC is aware that an effort can be made to evade the coverage of section 19 by ''converting'' an employee to an independent contractor. In those cases, generally applicable standards of employment law will be used to identify such arrangements, and to find that the person is a ''de facto'' employee. This same analysis will be used where an individual is employed by the holding company simply to avoid section 19 coverage.

The FDIC believes that the approach adopted in the final SOP preserves the distinction between employees and independent contractors for contractual, regulatory and tax purposes, and avoids the criticism that the FDIC is imposing an excessive regulatory burden upon institutions without commensurate benefit. Furthermore, the FDIC expects that the relationship between an independent contractor and an insured institution is to be governed by a written contract, through which the insured institution may require typical safeguards such as warranties and bond coverage.

(2) ''Ownership'' and ''Control''

Section 19 specifically prohibits a person subject to its coverage from owning or controlling an insured institution. The proposed SOP did not specifically define ''own'' or ''control,'' although the accompanying Preamble indicated that the FDIC was using the definition of ''control'' set forth in Regulation Y (12 CFR Part 225) which the Board of Governors of the Federal Reserve System (Federal Reserve Board) uses to implement the Change in Bank Control Act (CBCA) (12 U.S.C. 1817(j)). The proposal stated that a controlling shareholder or a member of a control group subject to section 19 could not, without the prior written consent of the FDIC engage in the following conduct: (i) exercise any voting rights in any shares of stock of an insured institution or its holding company; (ii) own or control such shares of stock so as to result in controlling the management or policies of an insured institution; (iii) control such shares of stock so as to result in controlling the management or policies of an insured institution; (iv) solicit, procure, transfer, or attempt to transfer, vote, or attempt to vote any proxy, consent or authorization with respect to any voting rights in any insured institution; or (v) modify or set aside any voting agreement previously approved by the appropriate federal banking agency.

The FDIC received six comments regarding the issue of ownership and control-three from depository institutions; one from a state banking department; and two from trade associations. Most commenters supported the conclusion that ''control'' should have the same meaning as set forth in the CBCA. Generally, the commenters indicated that absent an influence on the operations of an insured operation, mere ownership should not impose a section 19 obligation, nor should the ownership of a *de minimis* interest in the outstanding shares of an institution.

As a general rule, since the 1990 Crime Control Act amendments, the FDIC has followed the interpretation found in the CBCA regarding ''control.'' ''Control'' under the CBCA occurs where the person has the power to direct the management or policies of an institution (12 U.S.C. 1817(j)(8)(B)). The statute and the FDIC's implementing regulation (12 CFR Part 303) deem the power to vote 25 percent or more of a class of voting securities to constitute such control. In addition, the FDIC's regulation creates a presumption of control, i.e., that the person can direct management or policies of the institution, where the person owns, controls, or has the power to vote ten percent or more of the institution's voting securities if that person is the largest shareholder.

The FDIC agrees with the commenters that ''own'' must mean more than simply owning a few shares. In order to give meaning to the ownership prohibition contained in section 19, the FDIC will apply the 25 percent limitation regarding the power to vote shares to include an ownership limitation of 25 percent. The FDIC will also apply the ten percent limitation to ownership of voting shares where that person is the largest shareholder. Consequently, a person would be prohibited from owning or having the power to vote 25 percent or more of an institution's voting shares, or ten percent of those shares where that person is the largest shareholder. These standards would also apply to an individual acting in concert with others so as to have such ownership or control. The FDIC believes that this approach will avoid the absurd result of requiring a convicted person who owns one share or ten shares of stock in a large publicly traded insured depository institution from having to divest his or her ownership interest.

Absent the FDIC's consent, persons subject to the prohibitions of section 19 will be required to divest their ownership of shares above the foregoing limits. Section 19 does not contain specific statutory prohibitions regarding specific activities relating to the voting of stock. Therefore, the FDIC has decided not to incorporate into the final SOP any prohibitions on specific voting activities other than the aforementioned limitations regarding ownership, control, and participation.

It should be noted that while the Preamble accompanying the proposed

SOP referred to the Federal Reserve Board's Regulation Y (12 CFR Part 225) as enunciating the standards for ''own'' and ''control,'' the FDIC has decided that use of its own regulations in this area would be more appropriate. Regulation Y has wide reaching attribution rules for stock ownership among family members. An attempt to restrict ownership or control of shares by family members simply because of a person's conviction raises significant due process issues that are best avoided, however, control of a convicted person's shares by family members may be precluded where such control is detrimental to the bank, based upon the facts in a particular case.

B. Standards for Determining Whether an Application Is Required

The Proposed SOP contained the requirement that an application seeking the consent of the FDIC prior to engaging in banking activities be submitted in all cases in which any adult or minor treated as an adult was convicted or entered into a pretrial diversion program with regard to a covered offense. As discussed more fully in section (5), below, based upon its experience in processing section 19 applications, and in light of comments received, the final SOP reflects the FDIC's determination that it will provide automatic approval and dispense with the application requirement in certain cases involving *de minimis* crimes.

(1) Convictions

The proposal required that there be a conviction of record, and excluded arrests, pending cases not brought to trial, acquittals, or any conviction which has been reversed on appeal. Under the proposed SOP, a conviction with regard to which an appeal is pending required an application until or unless reversed. The proposal stated that a conviction which has been expunged, or for which a pardon has been granted, required an application.

The FDIC received seven comments regarding the issue of expunged convictions—five from depository institutions; one from a law firm; and one from a trade association. The commenters overwhelmingly favored excluding expunged convictions from section 19's coverage. As the commenters pointed out, under most state laws, an expunged conviction is deemed not to have occurred, and is not a conviction ''of record.'' Further problems arise regarding the ability of an institution to discover whether someone has an expunged criminal record, and in some states, laws prohibit and punish disclosure of information regarding expunged records.

Historically, the FDIC has taken the position that convictions which have been completely expunged are not covered by section 19. The FDIC proposed a change in that position in the proposed SOP based upon the rationale that the Crime Control Act amendments require a person who has entered into a pre-trial diversion or similar program to file a section 19 application. This requirement appears to create an anomalous result when compared with the FDIC policy that those with expunged convictions need not file.

Based upon the comments, however, and because it appears that expunged convictions do not constitute convictions of record, the final SOP excludes expunged convictions from the coverage of section 19. Furthermore, institutions have been advised in the past that expunged convictions were not covered by section 19. Excluding expunged convictions would avoid the significant practical problems of a change in policy which would require those previously allowed to work at institutions to now file section 19 applications. Therefore, the final SOP adopts the FDIC's current interpretation that persons with completely expunged convictions are not required to file section 19 applications.

(2) Pretrial Diversions

The proposed SOP defined a pretrial diversion as a program entry, as determined by relevant federal, state or local law, whether formal or informal, which is characterized by a suspension or eventual dismissal of charges or criminal prosecution upon agreement by the accused to treatment, rehabilitation, restitution, or other noncriminal or nonpunitive alternatives. The FDIC received two comments on the issue of what should constitute a ''pretrial diversion program,'' one from a law firm and one from a trade association. Each made suggestions as to whether certain specific programs ought to be included in the definition.

The FDIC believes that it would be impractical to attempt to identify in the SOP all of the specific programs which might constitute pretrial diversion programs. As is the current practice, the final SOP states that the FDIC will continue to determine whether a program constitutes a pretrial diversion on a case-by-case basis. In addition, in 1990, the Crime Control Act amendments made pretrial diversion programs subject to section 19 for the first time. Persons working in financial institutions at the time of the 1990 amendments who had previously entered into a pre-trial diversion program would be unaware that they were suddenly prohibited from working in banking. In order to avoid the issue of retroactive application, and to provide a ''bright line'' test, the FDIC has decided to except pre-trial diversions entered before November 29, 1990, from section 19's coverage. In addition, since most offenses eligible for pre-trial diversion are relatively minor, and since only those offenses more than seven and a half years old would be excluded from coverage, the risk to financial institutions from this proposal is slight.

(3) Covered Offenses Involving Dishonesty or Breach of Trust

The proposed SOP indicated that for section 19 to apply, the conviction or program entry must be for a criminal offense involving dishonesty, breach of trust or money laundering. Under the proposal, ''dishonesty'' was defined as directly or indirectly to cheat or defraud; to cheat or defraud for monetary gain or its equivalent; or wrongfully to take property belonging to another in violation of any criminal statute. Dishonesty includes acts involving want of integrity, lack of probity, or a disposition to distort, cheat, or act deceitfully or fraudulently, and may include crimes which federal, state or local laws define as dishonest. ''Breach of trust'' means a wrongful act, use, misappropriation or omission with respect to any property or fund which has been committed to a person in a fiduciary or official capacity, or the misuse of one's official or fiduciary position to engage in a wrongful act, use, misappropriation or omission.

The proposed SOP made clear that all convictions for offenses concerning the illegal manufacture, sale, distribution of or trafficking in controlled substances required an application (drug offenses). The proposal indicated that a ''controlled substance'' shall mean those so defined by federal law. While the proposal acknowledged that use of a controlled substance does not per se constitute a covered offense, the circumstances of the offense may contain elements of dishonesty or breach of trust or money laundering, and that the FDIC would determine on a case-by-case basis whether to approve an application regarding a person convicted of such an offense.

The FDIC received three comments regarding the definitions of ''dishonesty'' and ''breach of trust''—two from insured institutions and one from a law firm. The commenters requested clarification of what

constitutes a conviction involving ''dishonesty'' and ''breach of trust,'' and requested that the SOP contain a specific list of crimes to which section 19 will apply, or safe harbors to which it will not apply. Concern was expressed that crimes of violence may not be covered, while one expressed the view that all crimes are dishonest.

With regard to drug offenses, the FDIC received four comments-three from insured institutions and one from a bank holding company-all of which were generally unfavorable regarding the approach the proposal took regarding drug offenses. The commenters felt that no application should be required of those convicted of using or possessing drugs, citing concerns regarding laws pertaining to disabilities and rehabilitation. In addition, concern was expressed regarding the proposed case-by-case method of reviewing the underlying circumstances of each drug offense to determine whether an application should be approved.

After considering the comments, the FDIC has altered its approach in the final SOP. The FDIC has generally acknowledged that not all crimes are covered by section 19, and that many crimes involving violence do not have dishonesty and breach of trust as elements. The FDIC believes that whether a crime involves ''dishonesty'' or ''breach of trust'' must be determined from the statutory elements of the crime itself, rather than the factual circumstances surrounding a crime, and the final SOP adopts this approach. To do otherwise would require insured institutions and the FDIC to analyze the factual background of every conviction, including such offenses as disturbing the peace. For many convictions, records of a factual background are not available. All convictions for offenses concerning the illegal manufacture, sale, distribution of or trafficking in controlled substances shall require an application. A ''controlled substance'' shall mean those so defined by federal law.

(4) Youthful Offender Adjudgments

The proposed SOP indicated that an adjudgment by a court against a person as a ''youthful offender'' under any youth offender law, or any adjudgment as a ''juvenile delinquent'' by any court having jurisdiction over minors as defined by state law does not require an application. Such adjudications are not considered convictions for criminal offenses.

The FDIC received three comments-all from insured institutions, which strongly favored the stated approach. Historically, the FDIC has followed the approach of exempting youthful offender adjudgments from the coverage of section 19, with no perceived ill effects upon institutions. Furthermore, it is questionable whether the institution or the FDIC would be able to obtain records regarding such adjudgments. Therefore, the final SOP adopts, without change, the position set forth in the proposed SOP.

(5) *De minimis* Offense

The proposed SOP required any person with a conviction or program entry concerning a covered offense to submit an application. The FDIC received six comments—four from insured institutions or holding companies, one from a law firm and one from a trade association—regarding whether there should be an exemption for a *de minimis* crime. All commenters favored an approach whereby a *de minimis* crime would not require an application, although there was no general consensus as to the precise definition of such offenses.

Suggestions were made that a *de minimis* offense should include any misdemeanor committed by a juvenile, any one-time crime of dishonesty or breach of trust where the amount of loss was small, and a single misdemeanor committed by an adult. Further, commenters suggested that there should be a distinction between felonies and misdemeanors, and consideration of the time that has elapsed since the conviction, a person's present integrity and the risk associated with the position sought. A list of the specific crimes or the factors which should be taken into account in determining whether an offense is *de minimis* was requested. An alternative suggestion was a streamlined approach with a shortened approval period based upon the level of risk the person's position presents to the institution.

Section 19 applies, without exception, to convictions for crimes involving dishonesty or breach of trust. The FDIC, therefore, must provide prior written consent before covered persons may participate in banking. However, based upon the comments, and in light of its experience in processing and approving many applications involving minimal offenses, the FDIC has determined to grant blanket approval, through the final SOP, to certain defined categories of offenses. Such offenses are considered to be of such a minimal nature and of such low risk that the affected person may be employed at any institution, in any position. The foregoing approach would have the advantage of addressing a large number of pretrial diversion applicants, since in most cases, the crimes involved in such programs are not serious ones which would involve risk to an insured institution.

The final SOP provides that approval is automatically granted and application will not be required where the covered offense is considered *de minimis*, because it meets the following criteria: there is only one conviction or program entry of record for a covered offense; the offense was punishable by imprisonment for a term of less than one year and/or a fine of less than $1000, and the individual did not serve time in jail; the conviction or program was entered at least five years prior to the application; and the offense did not involve an insured institution or insured credit union. The above factors generally encompass offenses that are less than felonies. This exception represents the FDIC's view that an individual should generally not be prohibited from participating in banking because of a singular offense of lesser consequence. The basic underlying premise of section 19 is to prevent risk to the safety and soundness of an insured institution or the interests of its depositors, and to prevent impairment of public confidence in the insured institution. We find it incongruous to accord blanket approval to individuals who have previously committed an offense against an insured institution or insured credit union, and an application therefore will be required in such cases. Any person who meets the foregoing criteria shall be covered by a fidelity bond to the same extent as others in similar positions, and shall disclose the presence of the conviction or program entry to all insured institutions in the affairs of which he or she wishes to participate.

C. Procedures

The proposed SOP indicated in the section regarding procedures that section 19 imposes a duty upon the insured institution to make a reasonable inquiry regarding an applicant's history, which consists of taking steps appropriate under the circumstances, consistent with applicable law, to avoid hiring or permitting participation in its affairs by a person who has a conviction or program entry for a covered offense. It stated that an institution might believe that undertaking a minimal inquiry might not be necessary in certain circumstances, however, the FDIC believes that at a minimum, each insured institution should establish a screening process which provides the insured institution with information concerning any conviction or program entry pertaining to a job applicant. The

proposed SOP provided examples of what would constitute a reasonable inquiry, including, the completion of a written employment application which requires a listing of all convictions and program entries; (2) fingerprinting and (3) periodic inquiries to determine whether a person has a conviction or program entry. The proposed SOP indicated that the foregoing were not requirements, and that the FDIC would look to the circumstances of each situation to determine whether the inquiry is reasonable.

The procedures set forth in the proposed SOP were that upon notice of a conviction or program entry, an application seeking the FDIC's consent prior to the person's participation must be filed. When an application is required, forms and instructions should be obtained from, and the application filed with, the appropriate FDIC Regional Director.

The proposed SOP stated that the application must be filed by an insured institution on behalf of a person, but contained an exception to this requirement for a shareholder seeking to exercise voting rights if the insured institution has refused to file an application on that person's behalf. Where a person currently employed by an insured institution is discovered to have a conviction or program entry, the proposed SOP allowed that, upon request, the Regional Director could grant a conditional approval pending the processing of the application.

Fourteen comments were received pertaining to whether the screening process, including the idea of fingerprinting, was burdensome—nine from depository institutions, one from a bank holding company, one from a law firm and three from trade associations. The comments were generally not favorable, or found the proposed SOP confusing about what was being required. One commenter took exception to the FDIC imposing any duty upon insured depository institutions for making a reasonable inquiry into whether a person has a conviction or program entry based upon the argument that section 19 imposes no duty to discover such offenses, it only demands action once the presence of a conviction becomes known. The FDIC believes that the commenter's approach does not comport with the intent of the law which is designed as a preventive measure to protect against risk to the safety and soundness of insured institutions and their depositors.

(1) Fingerprinting

The issue of fingerprinting generated more discussion than any other. It is apparent that fingerprinting as a recommended practice, even though explicitly not required in the SOP, is not welcomed by the banking community. The smaller banks, especially, appear to be opposed to the practice. They maintain that because of the smaller communities they serve, they are familiar with their applicants and view fingerprinting as an unnecessary burden. Many commenters expressed concern that a recommendation or guideline that fingerprinting is advocated would be interpreted as an industry standard, and by field examiners as mandatory.

Others feared that bankers would deem fingerprinting a requirement and feared liability for any loss which could have been prevented by fingerprinting. Others suggested that a written application listing previous convictions or program entries would suffice, but that the screening process must be coordinated with the standards in the institution's fidelity bond to avoid any loss of insurance. One commenter stated that the SOP should only contain minimum standards, and that institutions should be encouraged to develop even stricter standards. Others suggested restricting fingerprinting to high-risk positions, or using bonding or other companies to perform such screening. The remainder of the comments addressed the difficulty of obtaining criminal background information and fingerprints, the delay and cost inherent in fingerprinting, the burdensome impact of the process would have upon small institutions, and the need to ensure that requirement of criminal background checks was consistent with other laws which protect against disclosure of criminal or arrest information.

After considering the comments, the FDIC has decided not to address fingerprinting in the final SOP. Instead, the FDIC will allow each insured institution to determine what screening methods it will use, and will look to the circumstances of each situation to determine whether an inquiry was reasonable. The FDIC believes that at a minimum, each institution should have a screening process to uncover information regarding a job applicant's convictions and program entries, which would include, for example, a written application listing such convictions and program entries, although other alternatives may be appropriate. The final SOP reflects this guidance.

(2) Periodic Inquiries

Seven commenters addressed the issue of periodic inquiries. The majority of comments were not favorable, and indicated that using periodic inquiry to determine whether current employees were subject to recent convictions would be burdensome on institutions and that such an inquiry was not mandated by section 19. Others stated that periodic inquires on recent convictions were not useful because employees would be afraid of losing their jobs. Others stated that there are regular channels by which institutions learn about recent convictions or program entries by their employees other than having routine inquires. Alternatively it was suggested that periodic inquiries should be optional or limited to high-risk positions, only required at the beginning of employment or only conducted at lengthy intervals such as every ten years.

Similar to the analysis regarding fingerprinting, after considering the comments, the FDIC believes that whether periodic background checks are used should be optional, and that the major responsibility should be upon the individual to bring to the institution's attention any change in ''conviction'' status for purposes of section 19.

(3) Who May Be an Applicant?

The proposed SOP requires that an application be filed by an institution rather than an individual. This policy is based upon the rationale that in determining whether to approve a section 19 application, the FDIC must assess whether the person's participation in an insured institution constitutes a risk to the safety and soundness of the insured institution or its depositors or impairs public confidence in the institution. In making this determination, the FDIC has traditionally considered the position the person will occupy at the institution, the extent of the supervision of the person that the institution will provide, the size and condition of the institution and the fidelity bond coverage by the institution's bonding company. Where an individual is filing an application without institution sponsorship, the FDIC may not have the foregoing information available to it. Furthermore, an application may be filed by an individual who has no prospect of employment by an insured institution, and is merely seeking agency certification for potential employment. On the other hand, the FDIC is mindful that such a requirement may be unfair to an individual in certain circumstances. Therefore, the notice accompanying the proposed SOP sought comments whether the FDIC should change this longstanding policy.

There were ten comments on this issue-seven from depository institutions, one from a bank holding company and two from trade associations. Only one commenter believed that individuals should be permitted to file a section 19 application, although one indicated that independent contractors, if covered by section 19, might be allowed to file applications without bank sponsorship since the FDIC would be able to assess from the application what services the independent contractor provides for the financial institution.

The remaining comments were opposed to permitting an individual to file a section 19 application without institution sponsorship. The reasons generally were that insured institutions should maintain control over the process because they are in the best position to have available information to determine when section 19 applications should be submitted on behalf of an individual based upon the person's position and the risk to the institution. Further, the FDIC's resources should be available to handle section 19 applications filed by institutions on an expedited basis, and such handling should not be delayed because the FDIC is reviewing applications by individuals who may or may not have a legitimate interest in working for an insured institution. Another concern expressed was that if an individual filed an application without institution sponsorship and received approval for a particular position, the individual could later be employed in that position at another institution without the prior notice or consent of the FDIC.

After considering the comments, the FDIC has decided to maintain its requirement that an institution file a section 19 application on behalf of an individual. However, the FDIC is aware that many institutions will not file applications on behalf of a convicted individual under any circumstance. For those with relatively minor convictions this appears to be a harsh result, and the FDIC has attempted to lessen this harsh effect by adopting the de minimis exception discussed above. In addition, the FDIC is mindful that others may not fall within the de minimis exception, yet the institution filing requirement may result in a harsh result. Therefore, while the final SOP retains the institution filing requirement, it provides that an individual may seek a waiver of this requirement where substantial good cause for granting a waiver is shown. For example, a waiver is likely to be granted where the person requesting consent is a shareholder seeking to exercise voting rights and the insured institution has refused to file an application on his or her behalf. The FDIC expects that waivers will be granted on an infrequent basis, and only in truly meritorious cases.

(4) Conditional Approvals

The proposed SOP provided for a conditional approval by the Regional Director upon request, pending the processing of an application. Two comments received from depository institutions strongly supported this approach. At the time the proposed SOP was issued, the FDIC had not proposed a de minimis exception to filing. In light of the fact that under this new approach, the number of applications will decrease, the FDIC believes it will be able to act in an expedited manner on an application where necessary. Therefore, there is no provision for conditional approval in the final SOP.

D. Evaluation of Section 19 Applications

The proposed SOP stated that the essential criteria in assessing an application are whether the person has demonstrated his or her fitness to participate in the conduct of the affairs of an insured institution, and whether the affiliation, ownership, control or participation by the person in the conduct of the affairs of the insured institution may constitute a threat to the safety and soundness of the insured institution or the interests of its depositors or threaten to impair public confidence in the insured institution. Factors listed as relevant to this determination were the conviction or program entry and the specific nature and circumstances of the covered offense; evidence of rehabilitation including the person's reputation since the conviction or program entry, the person's age at the time of conviction or program entry, and the time which has elapsed since the conviction or program entry; the position to be held or the level of participation by the person at an insured institution; the amount of influence and control the person will be able to exercise over the management or affairs of an insured institution; the ability of management of the insured institution to supervise and control the person's activities; the degree of ownership the person will have of the insured institution; the applicability of the insured institution's fidelity bond coverage to the person; the opinion or position of the primary Federal and/or state regulator; and any additional factors in the specific case that appear relevant.

The proposed SOP indicated that the foregoing criteria will also be applied by the FDIC to determine whether the interests of justice are served in seeking an exception in the appropriate court when an application is made to terminate the ten-year ban prior to its expiration date. The proposal stated that approval orders will be subject to the condition that the person shall be covered by a fidelity bond to the same extent as others in similar positions, and that when deemed appropriate, approval orders may also be subject to the condition that the prior consent of the FDIC will be required for any proposed significant changes in the person's duties and/or responsibilities. Such proposed changes may, in the discretion of the Regional Director, require a new application. In situations in which an approval has been granted for a person to participate in the affairs of a particular insured institution and that person subsequently seeks to participate at another insured institution, approval does not automatically follow. In such cases, another application must be submitted. The proposed SOP also indicated in its introduction that some applications can be approved without an extensive review because the person will not be in a position to constitute any substantial risk to the safety and soundness of the insured institution. Persons who will occupy clerical, maintenance, service or purely administrative positions, generally fall into this category. A more detailed analysis will be performed in the case of persons who will be in a position to influence or control the management or affairs of the insured institution.

Only one comment was received, which requested that the FDIC define what constitutes a substantial change in duties so as to require a new application. The FDIC believes, however, that an institution should itself be aware whether a person's duties have changed to the extent that their influence and risk upon the institution would require a section 19 application.

The final SOP incorporates all of the standards and factors set forth in the proposed SOP. In addition, it addresses the policy regarding a waiver by stating that in cases in which a waiver of the institution filing requirement has been granted to an individual, approval of the application will be conditioned upon that person disclosing the presence of the conviction to all insured institutions in the affairs of which he or she wishes to participate. The FDIC believes this is essential to ensuring that institutions are aware of the potential risks to safety and soundness posed by their employees and participants, and are

able to fully apprise their fidelity insurers of such risks.

The Board of Directors of the FDIC has rescinded two earlier policy statements regarding section 19—Consent to Service of Persons Convicted of Offenses Involving Dishonesty or Breach of Trust as Directors, Officers or Employees of Insured Banks (41 FR 42699 (Sept. 22, 1976)) and Applications Under Section 19 of the Federal Deposit Insurance Act (March 31, 1980), and adopted the following Statement of Policy for Section 19 of the FDI Act:

FDIC Statement of Policy for Section 19 of the FDI Act

Section 19 of the Federal Deposit Insurance Act (12 U.S.C. 1829) prohibits, without the prior written consent of the Federal Deposit Insurance Corporation (FDIC), a person convicted of any criminal offense involving dishonesty or breach of trust or money laundering (covered offenses), or who has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such offense, from becoming or continuing as an institution-affiliated party, owning or controlling, directly or indirectly an insured depository institution (insured institution), or otherwise participating, directly or indirectly, in the conduct of the affairs of an insured institution. In addition, the law forbids an insured institution from permitting such a person to engage in any conduct or to continue any relationship prohibited by section 19. It imposes a ten-year ban against the FDIC's consent for persons convicted of certain crimes enumerated in Title 18 of the United States Code, absent a motion by the FDIC and court approval.

Section 19 imposes a duty upon the insured institution to make a reasonable inquiry regarding an applicant's history, which consists of taking steps appropriate under the circumstances, consistent with applicable law, to avoid hiring or permitting participation in its affairs by a person who has a conviction or program entry for a covered offense. The FDIC believes that at a minimum, each insured institution should establish a screening process which provides the insured institution with information concerning any convictions or program entry pertaining to a job applicant. This would include, for example, the completion of a written employment application which requires a listing of all convictions and program entries. The FDIC will look to the circumstances of each situation to determine whether the inquiry is reasonable. Upon notice of a conviction or program entry, an application seeking the FDIC's consent prior to the person's participation must be filed.

Section 19 applies, by operation of law, as a statutory bar to participation absent the written consent of the FDIC. The purpose of an application is to provide the applicant an opportunity to demonstrate that, notwithstanding the bar, a person is fit to participate in the conduct of the affairs of an insured institution without posing a risk to its safety and soundness or impairing public confidence in that institution. The burden is upon the applicant to establish that the application warrants approval.

A. Scope of Section 19

Section 19 covers institution-affiliated parties, as defined by 12 U.S.C. 1813(u), and others who are participants in the conduct of the affairs of an insured institution. Therefore, all employees of an insured institution fall within the scope of section 19. In addition, those deemed to be de facto employees as determined by the FDIC based upon generally applicable standards of employment law, will also be subject to section 19. Whether other persons who are not institution-affiliated parties are covered depends upon their degree of influence or control over the management or affairs of an insured institution. For example, section 19 would not apply to persons who are merely employees of an insured institution's holding company, but would apply to its directors and officers to the extent that they have the power to define and direct the policies of the insured institution. Similarly, directors and officers of affiliates, subsidiaries or joint ventures of an insured institution or its holding company will be covered if they are in a position to influence or control the management or affairs of the insured institution. Those who exercise major policymaking functions of an insured institution would be deemed participants in the affairs of that institution and covered by section 19. Typically, an independent contractor does not have a relationship with the insured institution other than the activity for which the insured institution has contracted. Under 12 U.S.C. 1813(u), independent contractors are institution-affiliated parties if they knowingly or recklessly participate in violations, unsafe or unsound practices or breaches of fiduciary duty which are likely to cause significant loss to, or a significant adverse effect on, an insured institution. In terms of participation, an independent contractor who influences or controls the management or affairs of the insured institution, would be covered by section 19. In addition, ''person'' for purposes of section 19 means an individual, and does not include a corporation, firm or other business entity.

Section 19 specifically prohibits a person subject to its coverage from owning or controlling an insured institution. For purposes of defining ''control'' and ''ownership'' under section 19, the FDIC has adopted the definition of ''control set forth in the Change in Bank Control Act (12 U.S.C. 1817(j)(8)(B)). A person will be deemed to exercise ''control'' if that person has the power to vote 25 percent or more of the voting shares of an insured institution (or ten percent of the voting shares if no other person has more shares) or the ability to direct the management or policies of the insured institution. Under the same standards, person will be deemed to ''own'' an insured institution if that person owns 25 percent or more of the insured institution's voting stock, or ten percent of the voting shares if no other person owns more. These standards would also apply to an individual acting in concert with others so as to have such ownership or control. Absent the FDIC's consent, persons subject to the prohibitions of section 19 will be required to divest their ownership of shares above the foregoing limits.

B. Standards for Determining Whether an Application Is Required

Except as indicated in paragraph (5), below, an application must be filed where there is present a conviction by a court of competent jurisdiction for a covered offense by any adult or minor treated as an adult, or where such person has entered a pretrial diversion or similar program regarding that offense.

(1) Convictions. There must be present a conviction of record. Section 19 does not cover arrests, pending cases not brought to trial, acquittals, or any conviction which has been reversed on appeal. A conviction with regard to which an appeal is pending will require an application until or unless reversed. A conviction for which a pardon has been granted will require an application. A conviction which has been completely expunged is not considered a conviction of record and will not require an application.

(2) Pretrial Diversion or Similar Program. Program entry, whether formal or informal, is characterized by a suspension or eventual dismissal of charges or criminal prosecution upon agreement by the accused to treatment, rehabilitation, restitution, or other noncriminal or nonpunitive

alternatives. Whether a program constitutes a pretrial diversion is determined by relevant federal, state or local law, and will be considered by the FDIC on a case-by-case basis. Program entries prior to November 29, 1990, are not covered by section 19.

(3) Dishonesty or Breach of Trust. The conviction or program entry must be for a criminal offense involving dishonesty, breach of trust or money laundering. ''Dishonesty'' means directly or indirectly to cheat or defraud; to cheat or defraud for monetary gain or its equivalent; or wrongfully to take property belonging to another in violation of any criminal statute. Dishonesty includes acts involving want of integrity, lack of probity, or a disposition to distort, cheat, or act deceitfully or fraudulently, and may include crimes which federal, state or local laws define as dishonest. ''Breach of trust'' means a wrongful act, use, misappropriation or omission with respect to any property or fund which has been committed to a person in a fiduciary or official capacity, or the misuse of one's official or fiduciary position to engage in a wrongful act, use, misappropriation or omission.

Whether a crime involves dishonesty or breach of trust will be determined from the statutory elements of the crime itself. All convictions for offenses concerning the illegal manufacture, sale, distribution of or trafficking in controlled substances shall require an application.

(4) Youthful Offender Adjudgments. An adjudgment by a court against a person as a ''youthful offender'' under any youth offender law, or any adjudgment as a ''juvenile delinquent'' by any court having jurisdiction over minors as defined by state law does not require an application. Such adjudications are not considered convictions for criminal offenses.

(5) *De minimis* Offenses. Approval is automatically granted and an application will not be required where the covered offense is considered *de minimis*, because it meets all of the following criteria:

- There is only one conviction or program entry of record for a covered offense;
- The offense was punishable by imprisonment for a term of less than one year and/or a fine of less than $1000, and the individual did not serve time in jail;
- The conviction or program was entered at least five years prior to the date an application would otherwise be required; and
- The offense did not involve an insured depository institution or insured credit union.

Any person who meets the foregoing criteria shall be covered by a fidelity bond to the same extent as others in similar positions, and shall disclose the presence of the conviction or program entry to all insured institutions in the affairs of which he or she intends to participate.

C. Procedures

When an application is required, forms and instructions should be obtained from, and the application filed with, the appropriate FDIC Regional Director. The application must be filed by an insured institution on behalf of a person unless the FDIC grants a waiver of that requirement. Such waivers will be considered on a case-by-case basis where substantial good cause for granting a waiver is shown.

D. Evaluation of Section 19 Applications

The essential criteria in assessing an application are whether the person has demonstrated his or her fitness to participate in the conduct of the affairs of an insured institution, and whether the affiliation, ownership, control or participation by the person in the conduct of the affairs of the insured institution may constitute a threat to the safety and soundness of the insured institution or the interests of its depositors or threaten to impair public confidence in the insured institution. In determining the degree of risk, the FDIC will consider:

(1) The conviction or program entry and the specific nature and circumstances of the covered offense;

(2) Evidence of rehabilitation including the person's reputation since the conviction or program entry, the person's age at the time of conviction or program entry, and the time which has elapsed since the conviction or program entry;

(3) The position to be held or the level of participation by the person at an insured institution;

(4) The amount of influence and control the person will be able to exercise over the management or affairs of an insured institution;

(5) The ability of management of the insured institution to supervise and control the person's activities;

(6) The degree of ownership the person will have of the insured institution

(7) The applicability of the insured institution's fidelity bond coverage to the person;

(8) The opinion or position of the primary Federal and/or state regulator; and (9) Any additional factors in the specific case that appear relevant.

The foregoing criteria will also be applied by the FDIC to determine whether the interests of justice are served in seeking an exception in the appropriate court when an application is made to terminate the ten-year ban prior to its expiration date.

Some applications can be approved without an extensive review because the person will not be in a position to constitute any substantial risk to the safety and soundness of the insured institution. Persons who will occupy clerical, maintenance, service or purely administrative positions, generally fall into this category. A more detailed analysis will be performed in the case of persons who will be in a position to influence or control the management or affairs of the insured institution. Approval orders will be subject to the condition that the person shall be covered by a fidelity bond to the same extent as others in similar positions. In cases in which a waiver of the institution filing requirement has been granted to an individual, approval of the application will be conditioned upon that person disclosing the presence of the conviction to all insured institutions in the affairs of which he or she wishes to participate. When deemed appropriate, approval orders may also be subject to the condition that the prior consent of the FDIC will be required for any proposed significant changes in the person's duties and/or responsibilities. Such proposed changes may, in the discretion of the Regional Director, require a new application. In situations in which an approval has been granted for a person to participate in the affairs of a particular insured institution and subsequently seeks to participate at another insured institution, approval does not automatically follow. In such cases, another application must be submitted.

By order of the Board of Directors.

Dated at Washington, DC, this 17th day of November, 1998.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 98–31915 Filed 11–30–98; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than December 15, 2998.

A. Federal Reserve Bank of Cleveland (Paul Kaboth, Banking Supervisor) 1455 East Sixth Street, Cleveland, Ohio 44101-2566:

1. Elmo Greer; Phyllis Greer Eversole; Elmo Lee Greer; Marsha Greer; Jason Greer; Randell Greer; Rex Greer; Peggy Greer; Verdie Greer; Warren Greer; Don L. Young; all of London, Kentucky, and Jerry D. Greer; Carolyn Greer; Lanny Greer, all of East Bernstadt, Kentucky, to retain voting shares of Cumberland Valley Financial Corporation, London, Kentucky, and thereby indirectly retain voting shares of Cumberland Valley National Bank & Trust Company, London, Kentucky.

2. Margaret C. Fouts, and the Estate of John C. Fouts, both of Lacey, Washington; G.W. Griffin, Jr.; George William Griffin; W.R. Griffin; Winston Robert Griffin; and Laurel Grocery Co.; all of London, Kentucky; Linda Griffin, Lexington, Kentucky; Margaret Griffin, Atlanta, Georgia; Martha Griffin, Naples, Florida; Marynell G. Halbleib, and Ross Halbleib, both of Corbin, Kentucky; Elizabeth Griffin McCoy, Hal McCoy, both of Hopkinsville, Kentucky; and Gale G. Warburton, Wilmore, Kentucky; all to retain voting shares of Cumberland Valley Financial Corporation, London, Kentucky, and thereby indirectly retain voting shares of Cumberland Valley National Bank & Trust Company, London, Kentucky.

Board of Governors of the Federal Reserve System, November 25, 1998.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 98–31978 Filed 11–30–98; 8:45 am]

BILLING CODE 6210–01–F

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act. Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 24, 1998.

A. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63102-2034:

1. Area Bancshares Corporation, Owensboro, Kentucky; to acquire 100 percent of the voting shares of Alliance Bank, Somerset, Kentucky. This action will take place following the conversion of Alliance Bank, FSB, Somerset, Kentucky, from a federal savings bank, to a state nonmember bank.

2. First Security Bancorp, Searcy, Arkansas; to acquire an additional 75.88 percent, for a total of 100 percent, of the voting shares of Baxter County Bancshares, Inc., Mountain Home, Arkansas, and thereby indirectly acquire Peoples Bank and Trust Company, Mountain Home, Arkansas.

Board of Governors of the Federal Reserve System, November 25, 1998.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 98–31977 Filed 11–30–98; 8:45 am]

BILLING CODE 6210–01–F

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act. Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 17, 1998.

A. Federal Reserve Bank of Minneapolis (JoAnne F. Lewellen, Assistant Vice President) 90 Hennepin Avenue, P.O. Box 291, Minneapolis, Minnesota 55480-0291:

1. Superior Financial Holding Corporation, Minneapolis, Minnesota; to become a bank holding company by acquiring 100 percent of the voting shares of Commercial State Bancorporation, Two Harbors, Minnesota, and thereby indirectly acquire Commercial State Bank of Two Harbors, Two Harbors, Minnesota.

In connection with this application, Applicant also has applied to acquire Commercial State Insurance Agency, Inc., Two Harbors, Minnesota, and thereby engage in general insurance agency activities in a place with a population not exceeding 5,000, pursuant to § 225.28(b)(11)(iii) of Regulation Y.

In addition, Applicant has also applied to engage directly in extending

credit and servicing loans, pursuant to 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System, November 24, 1998.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 98–31848 Filed 11–30–98; 8:45 am]

BILLING CODE 6210–01–F

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 7, 1998.

A. Federal Reserve Bank of Cleveland (Paul Kaboth, Banking Supervisor) 1455 East Sixth Street, Cleveland, Ohio 44101-2566:

1. Mellon Bank Corporation, Pittsburgh, Pennsylvania; to engage *de novo* through its subsidiary, Mellon Financial Markets, Inc., Pittsburgh, Pennsylvania, in underwriting and dealing in all types of debt and equity securities on a limited basis, pursuant to the conditions set forth in 12 CFR 225.200; in agency transaction services for customer investments, pursuant to § 225.28(b)(7) of Regulation Y; in investment transactions as principal, pursuant to § 225.28(b)(8) of Regulation Y; and in providing financial and investment advice, pursuant to § 225.28(b)(6) of Regulation Y.

B. Federal Reserve Bank of San Francisco (Maria Villanueva, Manager of Analytical Support, Consumer Regulation Group) 101 Market Street, San Francisco, California 94105-1579:

1. Philippine Commercial International Bank, Manila, Philippines; to engage *de novo* through its subsidiary, PCI Express Padala (Hawaii), Honolulu, Hawaii (in organization) in money remittance activities. See, *Philippine Commercial International Bank*, 77 Fed. Res. Bull. 270 (1991); *Bergen Bank A/S*, 76 Fed. Res. Bull. 457 (1990); and *Norwest Corporation*, 81 Fed. Res. Bull. 974 (1995).

Board of Governors of the Federal Reserve System, November 24, 1998.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 98–31847 Filed 11–30–98; 8:45 am]

BILLING CODE 6210–01–F

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, December 7, 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.federalreserve.gov for an electronic announcement that not only lists applications, but also indicates procedural and other information about the meeting.

Dated: November 27, 1998.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 98–32144 Filed 11–27–98; 3:44 pm]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Agency Information Collection Activities: Proposed Collections; Comment Request

The Department of Health and Human Services, Office of the Secretary will periodically publish summaries of proposed information collections projects and solicit public comments in compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995. To request more information on the project or to obtain a copy of the information collection plans and instruments, call the OS Reports Clearance Officer on (202) 690–6207.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information or respondents, including through the use of automated collection techniques or other forms of information technology.

Title and Description of Information Collection: Multi-site Evaluation of the Welfare-to-Work Grants Program—Baseline Forms—NEW—As required by the Balanced Budget Act of 1997, DHHS is planning a four-year project to evaluate the effectiveness of welfare-to-work initiatives undertaken through competitive and formula grants awarded by the US Department of Labor. DHHS' Office of the Assistant Secretary for Planning and Evaluation, in conjunction with DoL and the US Department of Housing and Urban Development (HUD), has designed an evaluation that will involve several rounds of data collection from grantees and grant program participants. The information collection instruments in this request for OMB approval consist of a sample intake form, a contact information form, and a study participation consent form to be used to gather baseline and administrative information on study participants.

Respondents: Individuals, State and Local Governments, Businesses or Other For-profit Organizations, Not-for-profit Institutions; Burden Information for the Intake Form—*Number of Respondents:* 10,000; *Number of Responses per*

Respondent: one; *Average Burden per Response:* 5 minutes; *Total Burden for Intake Form:* 830 hours—Burden Information for the Contact Information Form—*Number of Respondents:* 10,000; *Number of Responses per Respondent:* one; *Average Burden per Response:* 3 minutes; *Total Burden for Contact Information Form:* 500 hours—Burden Information for the Consent Form—*Number of Respondents:* 10,000; *Number of Responses per Respondent:* one; *Average Burden per Response:* 2 minutes; *Total Burden for Consent Form:* 330 hours. Total Burden: 1,660 hours.

Send comments to Cynthia Agens Bauer, OS Reports Clearance Officer, Room 503H, Humphrey Building, 200 Independence Avenue S.W., Washington, DC, 20201. Written comments should be received within 60 days of this notice.

Dated: November 23, 1998.

Dennis P. Williams,

Deputy Assistant Secretary, Budget.

[FR Doc. 98–31863 Filed 11–30–98; 8:45 am]

BILLING CODE 4150–04–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

The Health Impact of Chemical Exposure During the Gulf War: A Research Planning Conference

The National Center for Environmental Health (NCEH) of the Centers for Disease Control and Prevention (CDC), in coordination with the Office of Public Health and Science (Department of Health and Human Services), the National Institutes of Health, and the Agency for Toxic Substances and Disease Registry announces the following meeting:

Name: The Health Impact of Chemical Exposures During the Gulf War: A Research Planning Conference.

Times and Dates: 8 a.m.–9 p.m., February 28, 1999. 8 a.m.–10 p.m., March 1, 1999. 8 a.m.–12 noon, March 2, 1999.

Place: Crowne Plaza Hotel—Atlanta Airport, 1325 Virginia Avenue, Atlanta, Georgia 30344. Telephone 404/768–6660.

Status: Open to the public, limited only by the space available. The meeting space accommodates approximately 500 people.

Purpose: The purpose of this conference is to provide a forum for broad public input into the development of a multi-year research plan for investigating the relationship between chemical exposures during the Gulf War and illnesses affecting Gulf War veterans.

Matters To Be Discussed: Agenda items include a discussion of the current research findings on the health impact of the Gulf War; a panel discussion of the experience of Gulf War veterans; possible health outcomes of low level chemical exposures; research and clinical findings regarding multiple chemical sensitivity among Gulf War veterans and civilian populations; possible mechanisms of action of chemical exposures; methodological considerations in studying the health impact of chemical exposures during the Gulf War.

Concurrent workgroups will be held to develop research recommendations in the areas of pathophysiology/etiology of illnesses among Gulf War veterans; the most appropriate methods for assessing and diagnosing the health impact of chemical exposures; the most appropriate treatment approaches; and the prevention of similar illnesses in future military deployments.

There will be a special Veterans Forum on Sunday, February 28, 1999 at 7:00 p.m. This will serve as an opportunity for veterans to provide input regarding research priorities. In addition, a social is scheduled for 8:00 p.m. on Monday, March 1, 1999. Additional information and registration material is available at our website: http://www.cdc.gov/nceh/meetings/1999/gulfwar/.

Agenda items are subject to change as priorities dictate.

Contact Person for More Information: Phillip M. Talboy, Deputy Chief, Veterans' Health Activity Working Group, Division of Environmental Hazards and Health Effects, National Center for Environmental Health, Centers for Disease Control and Prevention (CDC), m/s F–28, 4770 Buford Highway, NE, Atlanta, Georgia 30341–3724. Telephone 770/488–3546, e-mail,pmt0@cdc.gov.

The Director, Management Analysis and Services office has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: November 24, 1998.

Julia M. Fuller,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention (CDC).

[FR Doc. 98–31908 Filed 11–30–98; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 84G–0218]

American Feed Industry Association; Withdrawal of Generally Recognized as Safe (GRAS) Petition

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the withdrawal, without prejudice to a future filing, of the petition (GRASP MF–3891) proposing affirmation that selenium (as sodium selenite or selenate) is generally recognized as safe (GRAS) when used in animal feeds as a nutritional supplement in accordance with current good manufacturing and feeding practices. The petition also proposes removal of the selenium food additive regulation.

FOR FURTHER INFORMATION CONTACT: Sharon A. Benz, Center for Veterinary Medicine (HFV–228), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–827–6657.

SUPPLEMENTARY INFORMATION: In a notice published in the **Federal Register** of June 29, 1984 (49 FR 26814), FDA announced that a GRAS affirmation petition (GRASP MF–3891) had been filed by American Feed Manufacturers Association, Inc., 1701 North Fort Myer Dr., Arlington, VA 22209. The American Feed Manufacturers Association, Inc., has since changed its name and address to American Feed Industry Association, 1501 Wilson Blvd., suite 1100, Arlington, VA 22209. The petition proposed to: (1) Amend the regulations for affirmation of GRAS status in part 582 (21 CFR part 582) of Subpart F—Nutrients and/or Dietary Supplements to affirm that selenium (as sodium selenite or selenate) is GRAS when used in animal feeds as a nutritional supplement in accordance with current good manufacturing and feeding practices and (2) remove the selenium food additive regulation at 21 CFR 573.920. The American Feed Industry Association has withdrawn the petition without prejudice to a future filing.

Dated: November 5, 1998.

Stephen F. Sundlof,

Director, Center for Veterinary Medicine.

[FR Doc. 98–31853 Filed 11–30–98; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health; Office of the Director; Notice of Call for Nominations for the Director's Council of Public Representatives

The National Institutes of Health (NIH), the Federal government's primary agency for supporting and conducting medical research leading to the improvement in the nation's health, has established a new national advisory council—the Director's Council of Public Representatives (COPR). The Chair of the COPR is the Director of the National Institutes of Health. This notice lays out a process for the

selection of members of the first COPR and seeks nominations.

Background

On September 23, 1998, the NIH Director chaired a meeting on public participation in NIH activities (FR Doc. 98–24463 Filed 9–10–98; 8:45 a.m.). At the meeting, 23 individual public participants invited by the NIH discussed future activities and responsibilities of the proposed NIH Director's Council of Public Representatives (COPR), which will serve as a forum for discussing issues and concerns and exchanging viewpoints that are important to NIH policies, programs, and research priorities. The individual participants at the meeting also discussed the processes, mechanisms, and criteria that should be used for identifying appropriate candidates to serve on the COPR. A notice about the creation of the COPR was published in the **Federal Register** on November 17, 1998 (FR Doc. 98–30695 Filed 11–16–98; 8:45 a.m.).

The COPR will help bring to NIH the concerns and interests of the many external publics that have a stake in the agency's activities, programs, policies, and research. In addition to serving as a forum, the COPR will assist the NIH in enhancing the participation of the public in myriad NIH activities that have an impact upon the public, in increasing public understanding of the NIH and its programs, and in bringing important matters of public interest forward for discussion in public settings.

The COPR will consist of up to 20 individuals who have an interest in the NIH's mission. The NIH will bring together these individuals from diverse backgrounds approximately twice each year, enabling them to interact directly with NIH leaders on a wide range of programs and issues. In addition to these two meetings annually, the COPR may suggest other activities, subject to approval by the Chair of the COPR, the Director of the NIH. Members of the first COPR will serve one, two, or three-year terms. In subsequent years, members will serve three-year terms.

Eligibility Requirements for Individual Members

To serve on the COPR, an individual must meet the following *minimum* eligibility requirements:

- Have some interest in the work of the NIH, for example, as a patient or family member of a patient; a health care professional; a member of a patient advocacy group; an individual who works as a volunteer in the health field; a scientist or a student of science; a communicator in health, medicine, or science; an individual in public service, academia, or in a professional society touching the medical field. These examples are not meant to limit nominations to those listed—any member of the public with special interests in the NIH may be nominated or may nominate themselves.
- Be in a position (formally or informally) to communicate regularly with the broader public or segments of the public about the activities of the COPR and the NIH.

Another essential requirement is a commitment to participating fully in activities of the COPR, including possibly in subcommittee activities that may take time in addition to meeting attendance. In addition, members—while participating in COPR activities—will have to agree to subordinate disease-specific or program-specific interests to broader, cross-cutting matters of importance to the NIH and its commitment to public representation. These additional requirements will not be used in the initial screening of nominees, but will be assessed as part of a more in-depth evaluation of qualified candidates.

A. Criteria for Evaluating Individual Candidates

Nominees who meet the minimum eligibility requirements will be further assessed on the following criteria:

1. Interest in NIH's research, programs, activities, and policies broadly, and some understanding of, or familiarity with, the NIH mission and medical science.
2. Ability to communicate effectively.
3. Ability to consider broad issues and think ''globally,'' beyond narrow personal or professional interests.
4. Ability to contribute to an effective group process (e.g., cooperative, constructive, flexible, innovative).
5. Leadership ability (members of the COPR are not required to hold a formal leadership position within any organized group, but must have leadership skills).
6. Understanding of, and ability to express or represent, a ''public'' view of issues.
7. Ability to identify a problem, analyze it, and put forth solutions.

B. Characteristics of the COPR as a Group

In addition to the criteria for individual candidates, the following characteristics of the COPR as a group are intended to ensure that it reflects the breadth and diversity of the publics interested in the NIH:

1. Multi-cultural diversity.
2. A broad spread across the various ''publics'' interested in the NIH (see examples cited in the minimum eligibility requirements above).
3. Representation of the medically underserved (examples might include the medically uninsured or underinsured, people who for various reasons do not have adequate access to good medical care, and people who do not take advantage of available medical services).
4. A range of organizations (if applicable), local/regional and national.
5. Men and women.
6. Age diversity.
7. Geographic diversity (rural/urban mix; nationwide spread).

Screening, Scoring and Review Process

After nominees are screened for basic eligibility they will be reviewed and scored in terms of the criteria for evaluating individual candidates (as listed in section A.1–7) by external people familiar with the responsibilities of the COPR. A list of highly qualified candidates who reflect balance and diversity of representation will be forwarded to the Director of NIH for selection of COPR members. The Director may determine to interview candidates (possibly in groups) prior to final selection.

Nomination Process

The call for nominations is being disseminated through this **Federal Register** notice and through ancillary distribution to a broad range of groups, including national organizations, to encourage nominations of candidates reflecting the diversity sought for the COPR.

Nominations may come from organizations or from individuals. Self-nominations will be accepted. Interviews may be conducted with the most qualified candidates during the selection process.

Each nomination package must include:

1. A brief cover letter stating why the individual nominated wants to be a member of the COPR and comments about what they can contribute to fulfilling the mission of the COPR. This letter should address the individual's particular interests in the work of the NIH. Because the COPR will represent the varied publics served by NIH, it will be important to include information about the public, or segments of the public, with which the nominee would communicate, i.e., describe the group briefly in terms of geographic location, age, gender, ethnicity, whether or not the group includes the medically

underserved, and if it is local, regional, or national (for guidance, see characteristics of the COPR and minimum eligibility requirements above).

2. Brief comments relevant to *each* of the 7 criteria cited above under A. 1–7. All 7 criteria should be addressed in no more than 3 pages.

3. Two letters of recommendation from individuals familiar with the nominee (these individuals may be contacted during the selection process).

4. A statement of assurance that, if selected, the individual will: (a) agree to participate fully in activities of the COPR, and (b) subordinate individual disease-specific or program-specific interests to broader, cross-cutting matters of importance to the NIH and its commitment to public representation.

5. *If the nomination is from a third party,* verification that the individual nominated is cognizant that he or she is being nominated and wishes to be considered for membership on the COPR.

The items noted above in ''Nomination Process'' (1–5) should be mailed to: Palladian Partners, Inc., Call for Nominations (COPR), 7315 Wisconsin Avenue, Suite 440W, Bethesda, Maryland 20814. Nominations must be postmarked by the January 15, 1999, closing date. Incomplete or late nomination packages will not be considered. If you have any questions, please call the NIH Office of Communications [and Public Liaison] at the National Institutes of Health: (301) 496–4461.

Final selections will be made by the NIH Director. The schedule calls for contacting selected members in February 1999. The first COPR meeting is planned for late April 1999.

Dated: November 19, 1998.

Anne Thomas,

Associate Director for Communications, NIH.

[FR Doc. 98–31919 Filed 11–30–98; 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; Opportunity for a Cooperative Research and Development Agreement (CRADA) to Develop Eosinophil-Derived Neutralizing Agent (EDNA) to Treat Infections in Children and the Elderly Caused by Respiratory Syncytical Virus and Parainfluenza Virus

AGENCY: National Institutes of Health, Public Health Service, DHHS.

ACTION: Notice.

SUMMARY: The National Institute of Allergy and Infectious Diseases (NIAID) of the National Institutes of Health (NIH) is seeking capability statements from parties interested in entering into a Cooperative Research and Development Agreement (CRADA) to develop eosinophil-derived neutralizing agent (EDNA) for the treatment of infections in children and/or the elderly caused by respiratory syncytical virus (RSV) and parainfluenza virus (PIV). RSV and PIV are medically the most important single-stranded enveloped RNA viruses; infections caused by these viruses hospitalize over 100,000 infants per year in the U.S.

EDNA is the major eosinophil ribonuclease. Recombinant human EDNA is envisioned as an agent for direct inhalation therapy in patients with established RSV or PIV bronchiolitis, in those with a high index of suspicion, and as prophylactic therapy in children with predisposing conditions (prematurity, bronchopulmonary, dysplasia, congenital heart disease, and immunodeficiency).

Recombinant human EDNA has been produced in bacterial and baculovirus expression systems and is not toxic to respiratory epithelial cells. ENDA is a soluble and thermostable low molecular weight protein not requiring demanding conditions for storage or administration. *In vitro* experiments have shown it to have potent antiviral activity against RSV (Domachowske, JB et al. 1998. J. Infect. Dis. 177:1458–1464). Initial studies in the Balb/C mouse model of RSV infection support its effectiveness against this virus. This project is part of the study of ribonucleases and host defense in the Laboratory of Host Defenses (LHD), Division of Intramural Research, NIAID.

DATES: Only written capability statements received by the NIAID on or before March 1, 1999 will be considered.

ADDRESSES: Capability statements should be submitted to Dr. Michael R. Mowatt, Office of Technology Development, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 31 Center Drive MSC 2137, Building 31, Room 3B62, Bethesda, MD 20892–2137; Tel: 301/496–2644, Fax: 301/402–7132; Electronic mail: mmowattanih.gov.

SUPPLEMENTARY INFORMATION: Under the CRADA the production of biologically active recombinant human EDNA will be optimized and the agent evaluated in a series of preclinical studies in animals as well as initial safety testing in humans. Positive outcomes of these studies will indicate continued clinical development aimed at supporting regulatory approval of a product to be labeled for use in children and/or the elderly. The Public Health Service (PHS) has filed patent applications both in the U.S. and internationally related to this technology. Notice of the availability of the patent application for licensing was first published in the **Federal Register** (Vol. 62, No. 219, page 60909) on November 13, 1997.

NIAID's principal investigator has extensive experience with recombinant technology as applied to ribonucleases, their purification and testing. The Collaborator in this endeavor is expected to assist NIAID in evaluating its current system for producing recombinant EDNA and to develop and optimize an alternative expression system, if necessary, to manufacture sufficient quantities of the product for preclinical testing in animals and initial safety studies in humans. The Collaborator must have experience in the manufacture of recombinant protein products according to applicable FDA guidelines and Points to Consider documents to include Good Manufacturing Procedures (GMP). In addition, it is expected that the Collaborator would provide funds to supplement the LHD's research budget for the project and to support the preclinical and initial human testing.

The capability statement should include detailed descriptions of: (1) Collaborator's expertise in the expression of recombinant proteins, (2) Collaborator's ability to manufacture sufficient quantities of the product according to FDA guidelines and Points to Consider documents, (3) the technical expertise of the Collaborator's principal investigator and laboratory group in preclinical safety testing (e.g., expertise in *in vitro* and *in vivo* toxicity and

pharmacology studies) and initial human safety studies, and (4) Collaborator's ability to provide adequate funding to support preclinical and initial human safety studies required for marketing approval.

Dated: November 17, 1998.

Mark Rohrbaugh,

Director, Office of Technology Development, NIAID.

[FR Doc. 98–31920 Filed 11–30–98; 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 Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in section 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: Center for Scientific Review Special Emphasis Panel.

Date: November 30, 1998.

Time: 1:00 PM to 2:00 PM.

Agenda: To review and evaluate grant applications.

Place: NIH, Rockledge 2, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Richard Panniers, PHD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5148, 7842, Bethesda, MD 20892, (301) 435–1741.

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.

Name of Committee: Center for Scientific Review Special Emphasis Panel.

Date: December 3, 1998.

Time: 11:00 AM to 12:30 PM.

Agenda: To review and evaluate grant applications.

Place: NIH, Rockledge 2, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: William C. Branche, PHD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4182, MSC 7808, Bethesda, MD 20892, (301) 435–1148.

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. 93.306, Comparative Medicine, 93.306; 93.333, Clinical Research, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 25, 1998.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 98–31926 Filed 11–30–98; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; 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 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 contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel. A contract proposal concerning the use of 2-deoxyglucose as an anti-aging agent.

Date: December 11, 1998.

Time: 1:00 PM to 3:00 PM.

Agenda: To review and evaluate contract proposals.

Place: 7201 Wisconsin, Suite 502C, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Arthur D. Schaerdel, DVM, Scientific Review Administrator, The Bethesda Gateway Building, 7201 Wisconsin Avenue/Suite 2C212, Bethesda, MD 20892, (301) 496–9666.

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. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: November 24, 1998.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 98–31921 Filed 11–30–98; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; 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 Mental Health Special Emphasis Panel.

Date: December 9, 1998.

Time: 2:00 PM to 3:00 PM.

Agenda: To review and evaluate grant applications.

Place: Parklawn Building—Room 9C–26, 5600 Fishers Lane, Rockville, MD 20857, (Telephone Conference Call).

Contact Person: Mary Sue Krause, MEDS, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Parklawn Building, 5600 Fishers Lane, Room 9C–26, Rockville, MD 20857, 301–443–6470.

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. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: November 24, 1998.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 98–31922 Filed 11–30–98; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; 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 the 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 Mental Health Special Emphasis Panel.

Date: December 4, 1998.

Time: 10:30 AM to 11:30 AM.

Agenda: To review and evaluate grant applications.

Place: Parklawn Building—Room 9C—26, 5600 Fishers Lane, Rockville, MD 20857, (Telephone Conference Call).

Contact Person: Sheila O'Malley, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Parklawn Building, 5600 Fishers Lane, Room 9C–26, Rockville, MD 20857, 301–443–6470.

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. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: November 24, 1998.

LaVerne Y. Stringfield,

Committee Management Officer, NIH

[FR Doc. 98–31923 Filed 11–30–98; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Child Health and Human Development; 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 a meeting of the Board of Scientific Counselors, NICHD.

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 as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Institute of Child Health and Human Development, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, NICHD.

Date: December 4, 1998.

Open: 8:00 AM to 12:00 PM.

Agenda: For the review of intramural research programs and scientific presentations.

Place: NICHD Conference Room, Building 31, Room 2A52, Bethesda, MD 20892.

Closed: 1:00 PM to Adjournment.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: NICHD Conference Room, Building 31, Room 2A52, Bethesda, MD 20892.

Contact Person: Igor B. Dawid, MD, Acting Scientific Director, NICHD, Division of Intramural Research, National Institutes of Child Health and Human Development, NIH, 9000 Rockville Pike, Building 31, Room 2A50, Bethesda, MD 20892.

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. 93.209, Contraception and Infertility Loan Repayment Program; 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research, National Institutes of Health, HHS)

Dated: November 24, 1998.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 98–31924 Filed 11–30–98; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institute of Health

National Institute of Child Health and Human Development; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Advisory Board on Medical Rehabilitation Research.

The meeting will be open to the public, 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.

Name of Committee: National Advisory Board on Medical Rehabilitation Research. National Advisory Board for Medical Rehabilitation Research—December Meeting.

Date: December 1, 1998.

Time: 7:30 AM to 5:00 PM.

Agenda: A report on fiscal issues concerning the NCMRR and NICHD; (2) reports on the program activities of the Center; (3) a discussion of general priority areas of research for the Center; and (4) a discussion of support for medical rehabilitation research by government agencies.

Place: Double Tree Hotel, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Mary Ellen Cheung, PhD, Chief, Biological Sci. & Career Dev. Prog., National Ctr. for Medical Rehabilitation Research, National Institute of Child Health and Human Development, National Institutes of Health, 6100 Executive Blvd., Rm. 2A03, Bethesda, MD 20892 (301) 402–2242.

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. 93.209, Contraception and Infertility Loan Repayment Program; 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research, National Institutes of Health, HHS)

Dated: November 24, 1998.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 98–31925 Filed 11–30–98; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration; Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given of the following

meeting of the SAMHSA Special Emphasis Panel I in December 1998.

A summary of the meeting and a roster of the members may be obtained from: Ms. Dee Herman, Committee Management Liaison, SAMHSA, Office of Policy and Program Coordination, Division of Extramural Activities, Policy, and Review, 5600 Fishers Lane, Room 17–89, Rockville, Maryland 20857. Telephone: 301–443–7390.

Substantive program information may be obtained from the individual named as Contact for the meeting listed below.

The meeting will include the review, discussion and evaluation of individual grant applications. These discussions could reveal personal information concerning individuals associated with the applications. Accordingly, this meeting is concerned with matters exempt from mandatory disclosure in Title 5 U.S.C. 552b(c)(6) and 5 U.S.C. App.2, § 10(d).

Committee Name: SAMHSA Special Emphasis Panel I (SEP I).

Meeting Dates: December 14–16, 1998.

Place: Hyatt Regency Hotel, Diplomat/Ambassador Room, One Bethesda Metro Center, Bethesda, MD 20814.

Closed: December 14–15, 1998, 8:30 a.m.–5:00 p.m., December 16, 1998, 8:30 a.m.–adjournment.

Panel: Substance Abuse and Mental Health Services Administration Knowledge Dissemination Conference Grants PA 98–090.

Contact: Peggy Thompson, Room 17–89, Parklawn Building, Telephone: 301–443–9912 and FAX: 301–443–3437.

Dated: November 24, 1998.

Jeri Lipov,

Committee Management Officer, Substance Abuse and Mental Health Services Administration.

[FR Doc. 98–31864 Filed 11–30–98; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given of the following teleconference meeting of the SAMHSA Special Emphasis Panel II in December 1998.

A summary of the meeting and a roster of the members may be obtained from: Ms. Dee Herman, Committee Management Liaison, SAMHSA Office of Extramural Activities Review, 5600 Fishers Lane, Room 17–89, Rockville, Maryland 20857. Telephone: 301–443–7390.

Substantive program information may be obtained from the individual named as Contact for the meeting listed below.

The meeting will include the review, discussion and evaluation of individual grant applications. The discussion could reveal personal information concerning individuals associated with the applications. Accordingly, this meeting is concerned with matters exempt from mandatory disclosure in Title 5 U.S.C. 552b(c)(6) and 5 U.S.C. App.2, § 10(d).

Committee Name: SAMHSA Special Emphasis Panel II (SEP II).

Meeting Dates: December 2, 1998, 2:00 p.m.–4:00 p.m.

Place: Parklawn Building, Room 17–89—Telephone Conference, 5600 Fishers Lane, Rockville, Maryland 20852

Closed: December 2, 1998 2:30 p.m.–4:00 p.m.

Panel: FEMA—The Del Rio Flood Recovery Project

Contact: Sarah Silverman, Review Administrator, Room 17–89, Parklawn Building, Telephone: 301–443–6092 and FAX: 301–443–3437.

This notice is being published less than 15 days prior to the meeting due to the urgent need to meet timing limitations imposed by the review and funding cycle.

Dated: November 24, 1998.

Jeri Lipov,

Committee Management Officer, Substance Abuse and Mental Health Services Administration.

[FR Doc. 98–31865 Filed 11–30–98; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4430–D–01]

Order of Succession

AGENCY: Office of Policy Development and Research, HUD.

ACTION: Notice of Order of Succession.

SUMMARY: In this notice, the Deputy Secretary for the Department of Housing and Urban Development designates the Order of Succession for the Office of Assistant Secretary for Policy Development and Research, and revokes all prior Orders of Succession for this office.

EFFECTIVE DATE: November 19, 1998.

FOR FURTHER INFORMATION CONTACT: John P. Opitz, Assistant General Counsel for Procurement and Administrative Law, Department of Housing and Urban Development, Room 10176, 451 7th Street, S.W., Washington, D.C. 20410, (202) 708–0622. (This is not a toll-free number). This number may be accessed via TTY by calling the Federal Information Relay Service at 1–800–877–8339. (Toll-free).

SUPPLEMENTARY INFORMATION: The Deputy Secretary for the Department of Housing and Urban Development is issuing this Order of Succession of officials authorized to perform the functions and duties of the Office of the Assistant Secretary when, by reason of absence, disability, or vacancy in office, the Assistant Secretary is not available to exercise the powers or perform the duties of the office.

Accordingly, the Deputy Secretary designates the following Order of Succession:

Section A. Order of Succession

During any period when, by reason of absence, disability, or vacancy in office, the Assistant Secretary is not available to exercise the powers or perform the duties of the Office of Assistant Secretary for Policy Development and Research, the following are hereby designated to exercise the powers and perform the duties of the Office:

(1) Deputy Assistant Secretary for Policy Development;

(2) Deputy Assistant Secretary for Research, Evaluation, and Monitoring;

(3) General Deputy Assistant Secretary;

(4) Deputy Assistant Secretary for Economic Affairs.

These officials shall perform the functions and duties of the Office in the order specified herein, and no official shall serve unless all the other officials, whose position titles precede his/hers in this order, are unable to act by reason of absence, disability, or vacancy in office.

Section B. Authority Revoked

The Order of Succession revokes all prior Orders of Succession of the Office of Assistant Secretary for Policy Development and Research.

Authority: Section 7(d), Department of Housing and Urban Development Act, 42 U.S.C. § 3535(d).

Dated: November 19, 1998.

Saul Ramirez,

Deputy Secretary.

[FR Doc. 98–31943 Filed 11–30–98; 8:45 am]

BILLING CODE 4210–62–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–3918–N–17]

Privacy Act of 1974; Notice of a Computer Matching Program

AGENCY: Office of the Assistant Secretary for Administration, HUD.

ACTION: Notice of a Computer Matching Program—HUD and Department of Justice (DOJ).

SUMMARY: In accordance with the Privacy Act of 1974 (5 U.S.C. 552a), as amended by the Computer Matching and Privacy Protection Act of 1988 (Pub. L. 100–503), Office of Management and Budget (OMB) Guidelines on the Conduct of Matching Programs (54 FR 25818 (June 19, 1989)), and OMB Bulletin 89–22, ''Instructions on Reporting Computer Matching Programs to the Office of Management and Budget (OMB), Congress and the Public,'' the Department of Housing and Urban Development (HUD) is issuing a public notice of its intent to conduct a computer matching program with the Department of Justice (DOJ) to utilize a computer information system of HUD, the Credit Alert Interactive Voice Response System (CAIVRS), with DOJ's debtor files. The CAIVRS data base now includes delinquent debt information from the Departments of Agriculture, Education and Veterans Affairs and the Small Business Administration. This match will allow prescreening of applicants for debts owed or loans guaranteed by the Federal Government to ascertain if the applicant is delinquent in paying a debt owed to or insured by the Federal Government. Before granting a loan, a lending agency and/or an authorized lending institution will be able to interrogate the CAIVRS debtor file which contains the Social Security Numbers (SSNs) of HUD's delinquent debtors and defaulters and debtor files of the DOJ and verify that the loan applicant is not in default on a Federal judgment or delinquent on direct or guaranteed loans of participating Federal programs. As a result of the information produced by this match, the authorized users may not deny, terminate, or make a final decision of any loan assistance to an applicant or take other adverse action against such applicant, until an officer or employee of such agency has independently verified such information.

DATES: Effective date: Computer matching is expected to begin 40 days after publication of this notice in the **Federal Register** unless comments are received which will result in a contrary determination, or 40 days from the date a computer matching agreement is signed, whichever is later. Comments due by: December 31, 1998.

ADDRESSES: Interested persons are invited to submit comments regarding this notice to the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410. Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection and copying between 7:30 a.m. and 5:30 p.m. weekdays at the above address.

FOR PRIVACY ACT INFORMATION AND FOR FURTHER INFORMATION FROM RECIPIENT AGENCY CONTACT: Jeanette Smith, Departmental Privacy Act officer, Department of Housing and Urban Development, 451 7th Street, SW, Washington, DC 20410, telephone number (202) 708–2374. (This is not a toll-free number.)

FOR FURTHER INFORMATION FROM SOURCE AGENCY CONTACT: Diane J. Watson, Debt Collection Management, Department of Justice, 10th and Constitution Avenue. NW, Washington, DC 20530. Telephone number (202) 514–5343. [This is not a toll-free number.]

REPORTING: In accordance with Pub. L. 100–503, the Computer Matching and Privacy Protection Act of 1988, as amended, and Office of Management and Budget Bulletin 89–22, ''Instructions on Reporting Computer Matching Programs to the Office of Management and Budget (OMB), Congress and the Public;'' copies of this Notice and report are being provided to the Committee on Government Reform and Oversight of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget.

AUTHORITY: The matching program will be conducted under the authority of 28 U.S.C. 2301(e) (section 3611 of the Federal Debt Collection Procedures Act of 1990, Pub. L. 101–647), and Office of Management and Budget (OMB) Circular A–129, Policies for Federal Credit Programs and Non-Tax Receivables. One of the purposes of all Executive departments and agencies—including HUD—is to implement efficient management practices for Federal credit programs.

OBJECTIVES TO BE MET BY THE MATCHING PROGRAM: By identifying those individuals or corporations against whom the DOJ has filed a judgment, the Federal Government can expand the prescreening search of their loan applicants to further avoid lending to applicants who are credit risks.

RECORD TO BE MATCHED: HUD will utilize its system of records entitled, Accounting Records, HUD/DEPT–2. The debtor files for HUD programs involved are included in this system of records. HUD's debtor files contain information on borrowers and coborrowers who are currently in default (at least 90 days delinquent on their loans); or who have any outstanding claims paid during the last three years on Title II insured or guaranteed home mortgage loans; or individuals who have defaulted on Section 312 rehabilitation loans; or individuals who have had a claim paid in the last three years on a Title I loan. For the CAICVRS match, HUD/DEPT–2, System of Records, receives its program inputs from HUD/DEPT–28, Property Improvement and Manufactured (Mobile) Home Loans—Default; HUD/DEPT–32, Delinquent/Default/Assigned Temporary Mortgage Assistance Payments (TMAP) Program; and HUD/CPD–1, Rehabilitation Loans—Delinquent/Dafault.

The DOJ will provide HUD with its debtor files contained in its system of records entitled, Debt Collection Management System, JUSTICE/JMD–006. HUD is maintaining DOJ's records only as a ministerial action on behalf of DOJ, not as a part of HUD's HUD/DEPT–2 system of records. DOJ's data contain information on individuals or corporations who have defaulted on Federal judgments. The DOJ will retain ownership and responsibility for their system of records that they place with HUD. HUD serves only as a record location and routine use recipient for DOJ's data.

NOTICE PROCEDURES: HUD will notify individuals at the time of application (ensuring that routine use appears on the application form) for guaranteed or direct loans that their records will be matched to determine whether they are delinquent or in default on a Federal debt. HUD and the DOJ will also publish notices concerning routine use disclosures in the **Federal Register** to inform individuals that a computer match may be performed to determine loan applicant's credit status with the Federal Government.

CATEGORIES OF RECORDS/INDIVIDUALS INVOLVED: The debtor records include these data elements: SSN, claim number, program code, and indication of indebtedness. Categories of records include: records of claims and defaults, repayment agreements, credit reports, financial statement, records of foreclosures, and Federal judgment liens.

Categories of individuals include: Former mortgagors and purchasers of HUD-owned properties, manufactured (mobile) home and home improvement loan debtors who are delinquent or in default on their loans, rehabilitation loan debtors who are delinquent or in default on their loan, and individuals or

corporations against whom judgments have been filed by DOJ.

PERIOD OF THE MATCH: Matching will begin at least 40 days from the date copies of the signed (by both Data Integrity Boards) computer matching agreement are sent to both Houses of Congress or at least 40 days from the date this notice is published in the **Federal Register**, whichever is later, providing no comments are received which would result in a contrary determination. The matching program will be in effect and continue for 18 months with an option to renew for 12 additional months unless one of the parties to the agreement advises the other in writing to terminate or modify the agreement.

Dated: November 23, 1998.

Leslie H. Graham, Jr.

Deputy Director, Office of Information Technology.

[FR Doc. 98–31944 Filed 11–30–98; 8:45 am]

BILLING CODE 4210–01–M

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Notice of Deadline for Submitting Completed Applications to Begin Participation in the Tribal Self-Governance Program in Fiscal Year 2000 or Calendar Year 2000

AGENCY: Office of Self-Governance, Office of the Secretary, Interior.

ACTION: Notice of application deadline.

SUMMARY: In this notice, the Office of Self-Governance (OSG) establishes a March 1, 1999, deadline for tribes/consortia to submit completed applications to begin participation in the tribal self-governance program in fiscal year 2000 or calendar year 2000.

DATES: Completed application packages must be received by the Director, Office of Self-Governance by March 1, 1999.

ADDRESSES: Application packages for inclusion in the applicant pool should be sent to the Director, Office of Self-Governance, U.S. Department of the Interior, Mail Stop 2548, 1849 C Street NW, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Dr. Kenneth D. Reinfeld, U.S. Department of the Interior, Office of Self-Governance, 1849 C Street NW, Mail Stop 2548, Washington, DC 20240, 202–219–0240.

SUPPLEMENTARY INFORMATION: Under the Tribal Self-Governance Act of 1994 (Pub. L. 103–413), as amended by the Fiscal Year 1997 Omnibus Appropriations Bill (Pub. L. 104–208), the Director, Office of Self-Governance may select up to 50 additional participating tribes/consortia per year for the tribal self-governance program, and negotiate and enter into an annual written funding agreement with each participating tribe. The Act mandates that the Secretary submit copies of the funding agreements at least 90 days before the proposed effective date to the appropriate committees of the Congress and to each tribe that is served by the Bureau of Indian Affairs (BIA) agency that is serving the tribe that is a party to the funding agreement. Initial negotiations with a tribe/consortium located in an area and/or agency which has not previously been involved with self-governance negotiations, will take approximately two months from start to finish. Agreements for an October 1 to September 30, fiscal year need to be signed and submitted by July 1. Agreements for a January 1 to December 31 fiscal year need to be signed and submitted by October 1.

Background

On February 15, 1995, an interim rule was published in the **Federal Register** announcing the criteria for tribes to be included in an applicant pool and the establishment of the selection process for tribes/consortia to negotiate agreements pursuant to the Tribal Self-Governance Act of 1994. This interim rule was added to Title 25 of the Code of Federal Regulations at part 1001 of Chapter VI. While it may be changed by later rulemaking, the Act stipulates that the lack of promulgated regulations will not limit its effect. It should be noted that a proposed rulemaking was negotiated between tribal and Federal members of a self-governance negotiated rulemaking committee and published in the **Federal Register** on February 12, 1998, for review and comment. Comments on the proposed rulemaking have been received. Final rules are being negotiated by the self-governance negotiated rulemaking committee and are not expected to be promulgated before spring 1999.

Purpose of Notice

The interim rules established at 25 CFR 1001.1 to 1001.5 will be used to govern the application and selection process for tribes/consortia to begin their participation in the tribal self-governance program in fiscal year 2000 and calendar year 2000. Applicants should be guided by the requirements in 25 CFR 1001.1 to 1001.5 in preparing their applications. Copies of the interim rules published in the **Federal Register** on February 15, 1995, may be obtained from the information contact person identified in this notice.

Tribes/consortia wishing to be considered for participation in the tribal self-governance program in fiscal year 2000 or calendar year 2000 must respond to this notice, except for those which are (1) currently involved with negotiations with the Department; (2) one of the 66 tribal entities with signed agreements; or (3) one of the tribal entities already included in the applicant pool as of the date of this notice.

The Director's decision on the actual number of tribes that will enter negotiations will be made at a later date. Tribes already in the applicant pool will retain their existing ranking with tribes entering the applicant pool under these rules receiving a lower ranking. Being in the applicant pool will not guarantee that a tribe will actually be provided the opportunity to negotiate in any given year. However, it does mean that a tribe will not be passed over by a tribe with a lower ranking in the applicant pool or by a tribe not in the applicant pool, with the exception of a tribe already in the negotiation process.

For example, if the Department determines that five tribes will be afforded the opportunity to negotiate self-governance agreements for fiscal year 2000 and calendar year 2000, the five tribes with the highest rankings would be notified and negotiations would be scheduled. The tribe ranked sixth on the list would then have the highest ranking to negotiate a self-governance agreement for 2001 or might enter negotiations for 2000 if one of the first five tribes discontinued negotiations. In such a case, the tribe that discontinued negotiations would remain in the applicant pool with its original ranking and would be the first to be selected in 2000 for negotiating agreements commencing in 2001.

Dated: November 25, 1998.

William A. Sinclair,

Director, Office of Self-Governance.

[FR Doc. 98–31961 Filed 11–30–98; 8:45 am]

BILLING CODE 4310–02–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA–350–1020–00]

Notice of Resource Advisory Council Meeting

AGENCY: Bureau of Land Management, Northeast California Resource Advisory Council, Susanville, California.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committees Act

(Public Law 92–463) and the Federal Land Policy and Management Act (Public Law 94–579), the U. S. Bureau of Land Management's Northeast California Resource Advisory Council will meet Thursday and Friday, Jan. 7 and 8, 1999, at the Bureau of Land Management's Eagle Lake Field Office, 2950 Riverside Drive, Susanville, CA.

SUPPLEMENTARY INFORMATION: On Thursday, Jan. 7, the council will convene at 10 a.m. in the Conference Room of the Eagle Lake Field Office. Agenda items include orientation matters, discussion of healthy rangeland standards and guidelines, an update on grazing permit renewal, a status report on development of the BLM-California strategic plan, a status report on geothermal development at Medicine Lake and reports from the BLM's Alturas, Eagle Lake and Surprise field offices. The council will also elect new officers. Time has been set aside at 3:45 p.m. for public comments. Depending on the number of persons wishing to speak, a time limit may be imposed.

On Friday, Jan. 8, the council will convene at 8 a.m. at the Eagle Lake Field Office and depart immediately for a field tour of the BLM Wild Horse and Burro Corrals at Litchfield, California. Discussion of wild horse and burro management will be the topic during the tour. Members of the public are welcome on the tour, but they must provide their own transportation.

FOR ADDITIONAL INFORMATION: Contact Jeff Fontana, public affairs officer, at (530) 257–5381.

Linda D. Hansen,

Eagle Lake Field Manager.

[FR Doc. 98–31910 Filed 11–30–98; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–921–1430–00; WYW 82535]

Notice Providing for Opening of Public Land; Wyoming; Correction

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice; correction.

SUMMARY: This notice will correct an error in the land description published in the **Federal Register**, Vol. 63, No. 219, page 63491, on November 13, 1998.

EFFECTIVE DATE: December 1, 1998.

FOR FURTHER INFORMATION CONTACT: Tamara Gertsch, BLM Wyoming State Office, P.O. Box 1828, Cheyenne, Wyoming 82003–1828, 307–775–6115.

Correction

The land description published in the **Federal Register**, Vol. 63, No. 219, page 63491, on November 13, 1998, is hereby corrected as follows:

In the opening order notice, on page 63491, column 1, line 34, the legal description which reads T. 36 N., R. 108 W., is changed to read T. 34 N., R. 108 W.

Dated: November 24, 1998.

Tamara Gertsch,

Realty Specialist.

[FR Doc. 98–31907 Filed 11–30–98; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

National Park Service

Public Notice

AGENCY: National Park Service.

ACTION: Public notice.

SUMMARY: On November 13, 1998, the National Park Service Concessions Management Improvement Act of 1998 was signed into law, repealing the National Park Service Concessions Policy Act (16 U.S.C. 20 *et seq.*). The new legislation requires substantive changes in the manner in which the National Park Service awards concession contracts and permits, as well as changed in the terms and conditions of future concession contracts and permits. As a result of the new legislation, the Nation Park Service is cancelling all outstanding solicitations for concession contracts and permits. The only statutory exception to this cancellation is the prospectus issued February 19, 1998, under which concession permits will be open for competition for the operation of cruise ship services within Glacier Bay National Park and Preserve. The cancellation applies to all concession contracting or permitting actions that have not been executed on behalf of the National Park Service prior to November 13, 1998, except as provided above.

EFFECTIVE DATE: November 13, 1998.

FOR FURTHER INFORMATION CONTACT: For further information on this action, contact Robert Yearout, Concession Program Manager, National Park Service (202) 565–1212, or Wendelin Mann, Senior Concession Contract Analyst, National Park Service (202) 565–1219.

Dated: November 23, 1998.

Robert K. Yearout,

Concession Program Manager.

[FR Doc. 98–31894 Filed 11–30–98; 8:45 am]

BILLING CODE 4310–70–M

DEPARTMENT OF THE INTERIOR

National Park Service

Draft Environmental Impact Statement/ General Management Plan, Death Valley National Park, California; Notice of Extension of Public Comment Period

SUMMARY: Pursuant to § 102(2)(C) of the National Environmental Policy Act of 1969 (P.L. 91–190 as amended), the National Park Service, Department of the Interior, has prepared a Draft Environmental Impact Statement (DEIS) assessing three alternatives for, and potential impacts of, a proposed General Management Plan for Death Valley National Park, California. In deference to public interest expressed by local governmental agencies, organizations, and other interested parties, the original 90-day public comment period has been extended an additional five weeks through January 15, 1999.

SUPPLEMENTARY INFORMATION: Copies of the DEIS can be reviewed at local libraries, and internet access is available at www.nps.gov/deva. A limited number of copies may still be available upon phone request at (760) 786–2331. All written comments must be postmarked *not later than January 15, 1999,* and should be sent to the Superintendent, Death Valley National Park, Furnace Creek, CA 92328.

Dated: November 20, 1998.

Cynthia L. Ip,

Acting Regional Director, Pacific West.

[FR Doc. 98–31896 Filed 11–30–98; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF THE INTERIOR

National Part Service

Draft Environmental Impact Statement/ General Management Plan, Mojave National Preserve, California; Notice of Extension of Public Comment Period

SUMMARY: Pursuant to § 102(2)(C) of the National Environmental Policy Act of 1969 (P.L. 91–190 as amended), the National Park Service, Department of the Interior, has prepared a Draft Environmental Impact Statement (DEIS) assessing three alternatives for, and potential impacts of, a proposed General Management Plan for Mojave National Preserve, California. In deference to public interest expressed by local governmental agencies, organizations, and other interested parties, the original 90-day public comment period has been extended an additional five weeks through January 15, 1999.

SUPPLEMENTARY INFORMATION: Copies of the DEIS can be reviewed at local libraries, and internet access it available at ''www.nps.gov/moja''. A limited number of copies may still be available upon phone request at (760) 255–8800. All written comments must be postmarked *not later than January 15, 1999*, and should be sent to the Superintendent, Mojave National Preserve, 222 E. Main St., Suite 202, Barstow, CA 92311.

Dated: November 11, 1998.

Cynthia L. Ip,

Acting Regional Director, Pacific West.

[FR Doc. 98–31895 Filed 11–30–98; 8:45 am]

BILLING CODE 4311–70–M

DEPARTMENT OF THE INTERIOR

National Park Service

Boston Harbor Islands Advisory Council; Notice of Meeting

Notice is hereby given in accordance with the Federal Advisory Committee Act (Pub. L. 92–463) that the Boston Harbor Islands Advisory Council will meet on Thursday, December 3, 1998. The meeting will convene at 7:00 p.m. in the Conference Center of New England Aquarium Exploration Center, First Floor of the Boston Garage at India Wharf, Boston, Massachusetts.

The Advisory Council was appointed by the Director of National Park Service pursuant to Public Law 104–333. The 28 members represent business, educational, cultural, and environmental entities; municipalities surrounding Boston Harbor; and Native American interests. The purpose of the Council is to advise and make recommendations to the Boston Harbor Islands Partnership with respect to the development and implementation of a management plan, and the operation of the Boston Harbor Islands National Recreation Area.

The Agenda for this meeting is as follows:

1. Review of minutes of September 10 meeting.
2. Presentation on Council activities and update on planning for the Boston Harbor Islands.
3. Public Comment.

The meeting is open to the public. Further information concerning Council meetings may be obtained from the Superintendent, Boston Harbor Islands. Interested persons may make oral/written presentations to the Council or file written statements. Such requests should be made at least seven days prior to the meeting to: Superintendent, Boston Harbor Islands NRA, 408 Atlantic Ave., Boston, MA, telephone 617–223–8667.

Dated: November 23, 1998.

George Price,

Superintendent, Boston Harbor Islands NRA.

[FR Doc. 98–31897 Filed 11–30–98; 8:45 am]

BILLING CODE 4310–70–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 November 21, 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 December 16, 1998.

Carol D. Shull,

Keeper of the National Register.

ARKANSAS

Sharp County

Bates, Sherman, House (Hardy, Arkansas MPS), Jct. of US 63 and Echo Ln., Hardy, 98001515

Carter, Fred, House (Hardy, Arkansas MPS), School Ave., N of jct. with 4th St., Hardy, 98001510

Daugherty, Ernest, House (Hardy, Arkansas MPS), Third St., W of jct. with Kelly Ave., Hardy, 98001513

Jackson, Floyd, House (Hardy, Arkansas MPS), Jackson St., Hardy, 98001516

Locke, Esther, House (Hardy, Arkansas MPS), Jct. of Spring and Third Sts., Hardy, 98001509

Long, Web, House and Motel (Hardy, Arkansas MPS), US 63, E of jct. with Springwood Rd., Hardy, 98001512

Shaver, William, House (Hardy, Arkansas MPS), School Ave., N of jct. with 4th St., Hardy, 98001511

Sherrill, Silas, House (Hardy, Arkansas MPS), Jct. of 4th and Spring Sts., Hardy, 98001514

Weaver, Lee, House (Hardy, Arkansas MPS), Jct. of Main and Cope Sts., Hardy, 98001508

COLORADO

Denver County

Motor Coach Division Building—Denver Tramway Company, 3500 Gilpin St., Denver, 98001517

GEORGIA

Barrow County

Statham Historic District, Roughly bounded by Elizabeth, 8th, and 1st Sts., and CSX RR tracks, Statham, 98001521

Glynn County

Needwood Baptist Church and School, US 17, 1 mi. S of Hofwyl-Broadfield Plantation State Historic Site., Brunswick vicinity, 98001520

Troup County

Fannin—Trutti—Handley Place, 2159 Whitesville Rd., GA 219, LaGrange vicinity, 98001541

INDIANA

Bartholomew County

Haw Creek Leather Company, Jct. of Washington and First Sts., Columbus, 98001526

Carroll County

Delphi City Hall, 105–109 Washington St., Delphi, 98001525

Marshall County

Plymouth Downtown Historic District, Roughly bounded by Center, Washington, and Water Sts., and Yellow R., Plymouth, 98001524

Vanderburgh County

Ohio Street Bridge, Ohio St. over Pigeon Cr., Evansville, 98001523

Wayne County

Wescott Stock Farm, 36 East North St., Centerville, 98001522

NEW YORK

Essex County

Frazier Bridge (Ticonderoga MRA), Champlain Ave., at Lachute R., Ticonderoga, 98001540

Otsego County

Hyde Hall Covered Bridge, East Lake Rd., over Shadow Brook, East Springfield vicinity, 98001539

Ulster County

Grant Mills Covered Bridge, Mill Brook Rd., over Mill Brook, Hardenbergh vicinity, 98001538

NORTH CAROLINA

Buncombe County

Camp, William Nelson, Jr., House, 92 Flat Top Mountain Rd., Fairview, 98001530

Gaston County

Hoyle, Eli, House, 1111 Dallas-Stanley Hwy, Dallas, 98001529

Orange County

West Chapel Hill Historic District, Roughly bounded by W. Cameron Ave., Malette St., Ranson St., Pittsboro St., University Dr. and the Westwood Subdivision, Chapel Hill, 98001528

TENNESSEE

Shelby County

Fountain Court Historic District (Memphis MPS), 1155–1229 Fountain Court, Memphis, 98001531

St. Paul Avenue Historic District (Memphis MPS), 751–53 to 775–77 St. Paul Ave., and 558 Boyd St., Memphis, 98001533

Strathmore Place Historic District (Memphis MPS), Strathmore Circle East, North, and South, and 280 and 292 East Parkway, Memphis, 98001532

UTAH

Salt Lake County

Morrison—Merrill Lumber Company Office and Warehouse (Salt Lake City Business District MRA), 205 North 400 West, Salt Lake City, 98001534

Utah County

Lehi Commerical and Savings Bank—Lehi Hospital (Lehi, Utah MPS), 206 E. State St., Lehi, 98001537

WISCONSIN

Milwaukee County

Miwaukee County Home for Dependent Children School, 9658 Watertown Plank Rd., Wauwatosa, 98001535

WYOMING

Natrona County

Casper Federal Building, 111 S. Wolcott St., Casper, 98001536

A Request for Removal has been made for the following Resource:

WASHINGTON

Clark County

Anderson—Beletski Prune Farm 4119 N.W. McCann Rd. Vancouver, 86001100

[FR Doc. 98–31912 Filed 11–30–98; 8:45 am]

BILLING CODE 4310–70–P

INTERNATIONAL DEVELOPMENT COOPERATION AGENCY

Overseas Private Investment Corporation

Public Hearing

AGENCY: Overseas Private Investment Corporation.

ACTION: Notice of public hearing.

SUMMARY: This notice sets forth the schedule and requirements for participation in an annual public hearing to be conducted by the Overseas Private Investment Corporation (OPIC) on December 15, 1998. This hearing is required by the OPIC Amendments Act of 1985, and this notice is being published to facilitate public participation. The notice also describes OPIC and the subject matter of the hearing.

DATES: The hearing will be held on December 15, 1998, and will begin promptly at 10:00 a.m. Prospective participants must submit to OPIC before close of business December 8, 1998, notice of their intent to participate.

ADDRESSES: The location of the hearing will be: Overseas Private Investment Corporation, 1100 New York Avenue, N.W., 12th Floor, Washington, D.C. Notices and prepared statements should be sent to Harvey Himberg, Financial Management and Statutory Review Department, Overseas Private Investment Corporation, 1100 New York Avenue, N.W., Washington, D.C. 20527.

Procedure: (a) Attendance; Participation. The hearing will be open to the public. However, a person wishing to present views at the hearing must provide OPIC with advance notice on or before December 8, 1998. The notice must include the name, address and telephone number of the person who will make the presentation, the name and address of the organization which the person represents (if any) and a concise summary of the subject matter of the presentation.

(b) Prepared Statements. Any participant wishing to submit a prepared statement for the record must submit it to OPIC with the notice or, in any event, not later than 5 p.m. on December 11, 1998. Prepared statements must be typewritten, double spaced and may not exceed twenty-five (25) pages.

(c) Duration of Presentations. Oral presentations will in no event exceed ten (10) minutes, and the time for individual presentations may be reduced proportionately, if necessary, to afford all prospective participants on a particular subject an opportunity to be heard or to permit all subjects to be covered.

(d) Agenda. Upon receipt of the required notices, OPIC will prepare an agenda for the hearing setting forth the subject or subjects on which each participant will speak and the time allotted for each presentation. OPIC will provide each prospective participant with a copy of the agenda.

(e) Publication of Proceedings. A verbatim transcript of the hearing will be compiled. The transcript will be available to members of the public at the cost of reproduction.

SUPPLEMENTARY INFORMATION: OPIC is a U.S. Government agency which provides, on a commercial basis, political risk insurance and financing in friendly developing countries and emerging democracies for environmentally sound projects which confer positive developmental benefits upon the project country while creating employment in the U.S. OPIC is required by section 231A(b) of the Foreign Assistance Act of 1961, as amended (''the Act'') to hold at least one public hearing each year.

Among other issues, OPIC's annual public hearing has, in previous years, provided a forum for testimony concerning section 231A(a) of the Act. This section provides that OPIC may operate its programs only in those countries that are determined to be ''taking steps to adopt and implement laws that extend internationally recognized worker rights to workers in that country (including any designated zone in that country).''

Based on consultations with Congress, OPIC complies with annual determinations made by the Executive Branch with respect to worker rights for countries that are eligible for the Generalized System of Preferences (GSP). Any country for which GSP eligibility is revoked on account of its failure to take steps to adopt and implement internationally recognized worker rights is subject concurrently to the suspension of OPIC programs until such time as a favorable worker rights determination can be made.

For non-GSP countries in which OPIC operates its programs, OPIC reviews any country which is the subject of a formal challenge at its annual public hearing. To qualify as a formal challenge, testimony must pertain directly to the worker rights requirements of the law as defined in OPIC's 1985 reauthorizing legislation (P.L. 99–204) with reference to the Trade Act of 1974, as amended, and be supported by factual information.

FOR FURTHER INFORMATION ABOUT THE PUBLIC HEARING CONTACT: Harvey A. Himberg, Financial Management and Statutory Review Department, Overseas Private Investment Corporation, 1100 New York Avenue, N.W., Washington, D.C. 20527 (202) 336–8614 or by facsimile at (202) 218–0177.

Dated: November 24, 1998.

Richard C. Horanburg,

Office of Congressional and Intergovernmental Affairs.

[FR Doc. 98–31911 Filed 11–30–98; 8:45 am]

BILLING CODE 3210–01–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated July 16, 1998, and published in the **Federal Register** on

July 29, 1998, (63 FR 40542), American Radiolabeled Chemical, Inc., 11624 Bowling Green Drive, St. Louis, Missouri 63146, made application by letter to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed below.

Drug	Schedule
Dimethyltryptamine (7435)	I
Dihydromorphine (9145)	I
Cocaine (9041)	II
Morphine (9300)	II

The firm plans to bulk manufacture small quantities of the listed controlled substances as radiolabeled compounds.

No comments or objections have been received. DEA has considered the factors in Title 21, United States Code, Section 823(a) and determined that the registration of American Radiolabeled Chemical, Inc. to manufacture the listed controlled substances is consistent with the public interest at this time. DEA has investigated American Radiolabeled Chemical, Inc. on a regular basis to ensure that the company's continued registration is consistent with the public interest. These investigations have included inspection and testing of the company's physical security system, audits of the company's records, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. § 823 and 28 C.F.R. 0.100 and 0.104, the Deputy Assistant Administrator, Office of Diversion Control, hereby orders that the application submitted by the above firm for registration as a bulk manufacturer of the basic classes of controlled substances listed above is granted.

Dated: November 17, 1998.

John H. King,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 98–31968 Filed 11–30–98; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to section 1301.33(a) of title 21 of the Code of Federal Regulations (CFR), this is notice that on August 27, 1998, Celgene Corporation, 7 Powder Horn Drive, Warren, New Jersey 07059, made application by renewal to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
2, 5-Dimethoxyamphetamine (7396).	I
4-Methoxyamphetamine (7411)	I
Amphetamine (1100)	II
Methylphenidate (1724)	II

The firms plans to manufacture amphetamine for distribution of the bulk active substances to its customers, 4-methoxyamphetamine as an intermediate in the manufacturer of a non-controlled substance, methylphenidate for product research and development and 2,5-dimethoxyamphetamine to develop, manufacture and sell compounds to pharmaceutical and agrochemical industries.

Any other such applicant and any person who is presently registered with DEA to manufacture such substances may file comments or objections to the issuance of the proposed registration.

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Adminstrator, Office of Diversion Control, Drug Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA Federal Register Representative (CCR), and must be filed no later than February 1, 1999.

Dated: November 18, 1998.

John H. King,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 98–31969 Filed 11–30–98; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Withdrawal

As set forth in the **Federal Register** (FR Doc. 98–8085) Vol. 63, No. 59 at page 14964, dated March 27, 1998, Inhalon Pharmaceuticals, Inc., 3998 Schelden Circle, Bethlehem, Pennsylvania 18017 made application to the Drug Enforcement Administration for registration as a bulk manufacturer of amphetamine (1100) and methylphenidate (1724).

A registered bulk manufacturer of methylphenidate submitted an objection to the proposed registration of Inhalon Pharmaceuticals for the manufacture of methylphenidate. Inhalon Pharmaceuticals has requested that its application be withdrawn. Therefore, Inhalon Pharmaceuticals application to manufacture amphetamine and methylphenidate is hereby withdrawn.

Dated: November 18, 1998.

John H. King,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 98–31967 Filed 11–30–98; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[DEA–172N]

Special Surveillance List of Chemicals, Products, Materials and Equipment Used in the Clandestine Production of Controlled Substances or Listed Chemicals

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Publication of Proposed Special Surveillance List.

SUMMARY: On October 3, 1996, the Comprehensive Methamphetamine Control Act of 1996 (MCA) was signed into law. The MCA provides for a civil penalty of not more than $250,000 for the distribution of a laboratory supply to a person who uses, or attempts to use, that laboratory supply to manufacture a controlled substance or a listed chemical, if that distribution was made with reckless disregard for the illegal uses to which such laboratory supply will be put. The term ''laboratory supply'' is defined as ''a listed chemical or any chemical, substance, or item on a special surveillance list published by the Attorney General which contains chemicals, products, materials, or equipment used in the manufacture of controlled substances and listed chemicals.'' DEA is hereby providing notice of its intent to publish this Special Surveillance List. Upon review of written comments or objections, DEA will publish the Special Surveillance List in a final notice.

DATES: Written comments or objections must be received no later than December 31, 1998.

ADDRESSES: Comments and objections should be submitted in quintuplicate to the Acting Deputy Administrator, Drug Enforcement Administration, Washington, DC, Attention: DEA Federal Register Representative/CCR.

FOR FURTHER INFORMATION CONTACT:

Frank Sapienza, Chief, Drug and Chemical Evaluation Section, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537, Telephone (202) 307–7183.

SUPPLEMENTARY INFORMATION: On October 3, 1996, the Comprehensive Methamphetamine Control Act of 1996 (MCA) was signed into law. The MCA broadens controls on listed chemicals used in the production of methamphetamine and other controlled substances, increases penalties for the trafficking and manufacturing of methamphetamine and listed chemicals, and expands regulatory controls to include the distribution of lawfully marketed drug products which contain the listed chemicals ephedrine, pseudoephedrine and phenylpropanolamine. The MCA (Section 205) also provides for the publication of a Special Surveillance List by the Attorney General. The proposed Surveillance List identifies laboratory supplies which are used in the manufacture of controlled substances or listed chemicals. The MCA defines ''laboratory supply'' as ''a listed chemical or any chemical, substance, or item on a special surveillance list published by the Attorney General which contains chemicals, products, materials, or equipment used in the manufacture of controlled substances and listed chemicals.'' (21 U.S.C. 842 (a))

The MCA provides for a civil penalty of not more than $250,000 for the distribution of a laboratory supply to a person who uses, or attempts to use, that laboratory supply to manufacture a controlled substance or a listed chemical, if that distribution was made with ''reckless disregard'' for the illegal uses to which such a laboratory supply would be put. For purposes of this provision, the term ''distribution'' includes the exportation of a laboratory supply. For any succeeding violation, the MCA provides for a civil fine of not more than $250,000 or double the last previously imposed penalty, whichever is greater.

Section 205 of the MCA further states that, for purposes of 21 U.S.C. 842(a)(11), there is a ''rebuttable presumption of reckless disregard at trial if the Attorney General notifies a firm in writing that a laboratory supply sold by the firm, or any other person or firm, has been used by a customer of the notified firm, or distributed further by that customer, for the unlawful production of controlled substances or listed chemicals a firm distributes and 2 weeks or more after the notification the notified firm distributes a laboratory supply to the customer.''

The CSA contains other sections relating to the illegal manufacture of controlled substances. Section 841(d)(2) of Title 21 provides that any person who knowingly or intentionally distributes a listed chemical knowing, or having reasonable cause to believe, that it will be used in the illegal manufacture of a controlled substance, is subject to criminal prosecution. Section 843(a)(7) of Title 21 provides that any person who distributes any chemical, product, equipment or material which may be used to manufacture a controlled substance or listed chemical, knowing, or having reasonable cause to believe, that it will be used in the illegal manufacture of a controlled substance or listed chemical, is subject to criminal prosecution.

In developing the proposed Special Surveillance List, the DEA consulted with both DEA and State/Local law enforcement and forensic laboratory authorities. The DEA examined clandestine laboratory seizure reports for information regarding (1) illicit drug production methods; (2) chemicals actually used in clandestine production of controlled substances and listed chemicals; and (3) the role and importance of chemicals used in the syntheses. In addition, the DEA considered the legitimate uses and market for these chemicals.

The proposed Special Surveillance List focuses on chemicals used in the domestic production of controlled substances and listed chemicals. Therefore the list includes those chemicals used not only in the production of methamphetamine, but also of controlled substances such as PCP, LSD, methcathinone and amphetamine. The list does not focus on chemicals used in the production of heroin or cocaine since these drugs are seldom produced domestically. However, the proposed Special Surveillance List includes all listed chemicals as specified in 21 CFR 1310.02 (a) or (b). The phrase ''all listed chemicals'' includes all chemical mixtures and all over-the-counter (OTC) pharmaceutical products and dietary supplements which contain a listed chemical, regardless of their dosage form or packaging and regardless of whether the chemical mixture, drug product or dietary supplement is exempt from regulatory controls.

The following is the proposed Special Surveillance List for laboratory supplies used in the manufacture of controlled substances and listed chemicals:

Special Surveillance List Published Pursuant to Title 21, United States Code, Section 842(a)(11)

Chemicals

All listed chemicals as specified in 21 CFR 1310.02 (a) or (b). This includes all chemical mixtures and all over-the-counter (OTC) products and dietary supplements which contain a listed chemical, regardless of their dosage form or packaging and regardless of whether the chemical mixture, drug product or dietary supplement is exempt from regulatory controls.

Ammonia Gas
Ammonium Formate
Bromobenzene
1,1-Carbonyldiimidazole
Cyclohexanone
1,1-Dichloro-1-fluoroethane (e.g. Freon 141B)
Diethylamine and its salts
2,5-Dimethoxyphenethylamine and its salts
Formamide
Formic Acid
Hypophosphorous Acid
Lithium Metal
Lithium Aluminum Hydride
Magnesium Metal (Turnings)
Mercuric Chloride
N-Methylformamide
Organomagnesium Halides (Grignard Reagents) (e.g. ethylmagnesium bromide and phenylmagnesium bromide)
Phenylethanolamine and its salts
Phosphorus Pentachloride
Potassium Dichromate
Pyridine and its salts
Red Phosphorus
Sodium Dichromate
Sodium Metal
Thionyl Chloride
ortho-Toluidine
Trichloromonofluoromethane (e.g. Freon-11, Carrene-2)
Trichlorotrifluoroethane (e.g. Freon 113)

Equipment

Hydrogenators
Tableting Machines
Encapsulating Machines
22 Liter Heating Mantels

Individuals and firms which distribute listed chemicals and chemicals, products, materials, or equipment on the above list, are hereby officially notified that these materials may be used in the illicit production of certain controlled substances or listed chemicals.

The Attorney General has delegated authority under the CSA and all subsequent amendments to the CSA to the Administrator of the DEA pursuant to 28 CFR 0.100. The Administrator, in turn, has redelegated this authority to the Deputy Administrator pursuant to 28 CFR 0.104.

This surveillance list may be revised as appropriate. The list will be re-published as changes occur. While publication in the **Federal Register** satisfies the notification requirements for the Surveillance List, DEA is attempting to disseminate the list as widely as possible. Therefore, copies of

the list will be sent to appropriate industry associations and trade journals, and to the extent practical, to individual manufacturers and distributors of ''laboratory supplies.'' In addition, a current surveillance list will be available on the DEA homepage at http://www.usdoj.gov/dea/.

Small Business Impact and Regulatory Flexibility Concerns

The proposed Special Surveillance List applies to all individuals and firms which distribute the listed chemicals and laboratory supplies (chemicals, products, materials, or equipment) on the list. The notice does not impose any recordkeeping or reporting requirements for any of the laboratory supplies which are not listed chemicals. Thus the suveillance list will have a negligible impact on affected parties.

The notice serves two purposes. First, it informs individuals and firms of the potential use of the items on the list for the production of listed chemicals and illicit drugs. Second, it advises individuals and firms that civil penalties may be imposed on them if they distribute a laboratory supply to a person anytime after the two week period following receipt of written notification by the Attoney General that the person has used, attempted to use, or distributed the laboratory supply further for the unlawful production of controlled substances or listed chemicals.

DEA chose to limit the number of chemicals on the proposed Special Surveillance List to those most frequently used in the clandestine production of controlled substances or listed chemicals. Limiting the number of chemicals on the list minimizes the impact on wholesalers and retailers of the chemicals.

The Acting Deputy Administrator hereby certifies that this proposed notice has been drafted in a manner consistent with the principles of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This proposed notice will provide an increased level of law enforcement control to prevent the diversion of laboratory supplies used for the production of listed chemicals and controlled substances. It will not however impose any new regulatory burden on the public. This proposed notice fulfills the requirement imposed by section 205 of the Methamphetamine Control Act (MCA) of 1996 that the Attorney General shall publish a special surveillance list which contains chemicals, products, materials, or equipment used in the manufacture of listed chemcials and controlled substances. A copy of this proposed notice has been provided to the Chief Counsel for Advocacy at the Small Business Administration.

This proposed notice has been drafted and reviewed in accordance with Executive Order 12866. This proposed notice has not been determined to be a significant action. Therefore, this proposed notice has not been reviewed and approved by the Office of Management and Budget.

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

This proposed notice 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 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.

This proposed notice is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This proposed notice 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.

Dated: July 24, 1998.

Donnie R. Marshall,

Acting Deputy Administrator.

[FR Doc. 98–31962 Filed 11–30–98; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Office of Justice Programs

Agency Information Collection Activities: Extension of a Currently Approved Collection; Comment Request

AGENCY: Notice of Information Collection Under Review; Extension of a currently approved collection.

Drug Court Grantee Data Collection Survey

The Department of Justice, Office of Justice Programs, has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. Office of Management and Budget approval is being sought for the information collection listed below. This proposed information collection was previously published in the **Federal Register** on March 26, 1998, allowing for a 60-day public comment period.

The purpose of this notice is to allow an additional 30 days for public comment until December 31, 1998. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarded the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Department of Justice Desk Officer, Washington, DC 20530. Additionally, comments may be submitted to OMB via facsimile to (202) 395–7285. Comments may also be submitted to the Department of Justice (DOJ), Justice Management Division, Information Management and Security Staff, Attention: Department Deputy Clearance Officer, Suite 850, 1001 G Street, NW, Washington, DC 20530.

Written comments and/or suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information:

(1) *Type of information collection:* Extension of previously approved collection.

(2) *The title of the form/collection:* Drug Courts Grantee Data Collection Survey.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form Number: none. Drug Courts Program Office, Office of Justice Programs, United States Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Federal Government, State, Local or Tribal.

Other: none. This survey will assist in the National Evaluation of Drug Courts. The data to be collected will assist in determining the effectiveness of those grants and the information will be shared with the drug court field to improve program quality.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* 300 respondents to complete a 1–1.5 hour survey semi-annually.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 600 annual hours.

If additional information is required contact: Ms. Brenda E. Dyer, Deputy Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, Suite 850, Washington Center, 1001 G Street, NW, Washington, DC 20530.

Dated: November 24, 1998.

Brenda E. Dyer,

Department Deputy Clearance Officer, United States Department of Justice.

[FR Doc. 98–31899 Filed 11–30–98; 8:45 am]

BILLING CODE 4410–18–M

DEPARTMENT OF JUSTICE

Office of Justice Program

Office for Victims of Crime; Agency Information Collection Activities: Extension of a Currently Approved Collection; Comment Request

ACTION: Notice of Information Collection Under Review; (Reinstatement, without change, of a previously approved collection for which approval has expired).

Victims of Crime Act, Crime Assistance Grant Program, Sub-Grant Award Report

The Department of Justice, Office of Justice Programs, Office for Victims of Crime, has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. Office of Management and Budget approval is being sought for the information collection listed below. This proposed information collection was previously published in the **Federal Register** on August 28, 1998, allowing for a 60-day public comment period.

The purpose of this notice is to allow an additional 30 days for public comment until December 31, 1998. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Department of Justice Desk Officer, Washington, DC 20530. Additionally comments may be submitted to OMB via facsimile to (202) 395–7285. Comments may also be submitted to the Department of Justice (DOJ), Justice Management Division, Information Management and Security Staff, Attention: Department Deputy Clearance Officer, Suite 850, 1001 G Street, NW, Washington, DC 20530.

Written comments and/or suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of 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.

Overview of this information:

(1) *Type of information collection:* Extension of previously approved collection.

(2) *The title of the form/collection:* Victims of Crime, Crime Victim Assistance Grant Program, Subgrant Award Report.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form number is OJP Admin Form 7390/2A (Rev. 11–95) Office of Justice, United States Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* State Government.

Other: none. The information requested is necessary to ensure compliance with statutory criteria which allows the Director of OVC to collect performance data from recipients of VOCA victim assistance grant funds. The affected public include up to 57 states and territories administering the crime victim assistance provisions of the Victims of Crime Act.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* 53 respondents to complete a 3 minute subgrant award report, however a State can be responsible for entering subgrant data for as many as 186 programs to as few as 10 programs. Additionally, 4 respondents will be submitting 14 subgrant award reports manually, estimated time 2 hours per report.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The combined estimated hours (manual and electronic submission) for the 57 respondents to submit information is 189 hours (159 electronic submissions +28 hours manual submissions).

If additional information is required contact: Ms. Brenda E. Dyer, Deputy Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, Suite 850, Washington Center, 1001 G Street, NW, Washington, DC 20530.

Dated: November 24, 1998.

Brenda E. Dyer,

Department Deputy Clearance Officer, United States Department of Justice.

[FR Doc. 98–31898 Filed 11–30–98; 8:45 am]

BILLING CODE 4410–18–M

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

Maritime Advisory Committee for Occupational Safety and Health; Notice of Meeting

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Maritime Advisory Committee for Occupational Safety and Health: Notice of Meeting.

SUMMARY: The Maritime Advisory Committee for Occupational Safety and Health (MACOSH), established under Section 7 of the Occupational Safety and Health Act of 1970 to advise the

Secretary of Labor on issues relating to occupational safety and health programs, policies, and standards in the maritime industries in the United States, will meet in New Orleans, Louisiana.

DATES: The Committee will meet: on January 13, 1999, from 9:00 a.m. until approximately 5:00 p.m. and on January 14, 1999, from 8:30 a.m. until approximately 5:00 p.m.

ADDRESSES: The Committee will meet in the Carmen/Otello Rooms at the Best Western Inn on Bourbon, 541 Bourbon Street, New Orleans, LA 70130; telephone (504) 524–7611.

Mail comments, views, or statements in response to this notice to Larry Liberatore, Maritime Facilitator, Office of Maritime Standards, OSHA, U.S. Department of Labor, Room N–3621, 200 Constitution Avenue, NW, Washington, D.C. 20210. Phone: (202) 693–2086; fax: (202) 693–1663.

FOR FURTHER INFORMATION CONTACT: Bonnie Friedman, Director, Office of Information and Consumer Affairs, OSHA; Phone (202) 693–1999.

SUPPLEMENTARY INFORMATION: All interested persons are invited to attend the public meetings of MACOSH at the time and place indicated above. Individuals with disabilities wishing to attend should contact Theda Kenney at (202) 693–2222 no later than January 5, 1999, to obtain appropriate accommodations.

Meeting Agenda

This meeting will include discussion of the OSHA shipyard strategic planning goals; vertical tandem lifts in the marine cargo handling environment; ship scrapping initiatives and developments; training partnerships; and a general OSHA update (including a standards update and an update on the shipyard fire protection negotiated rulemaking committee). MACOSH subgroups will also present overviews of their activities.

Public Participation

Written data, views, or comments for consideration by MACOSH on the various agenda items listed above may be submitted, preferably with copies, to Larry Liberatore. Submissions received by December 31, 1998, will be provided to the members of the committee and will be included in the record of the meeting. Requests to make oral presentations to the Committee may be granted if time permits. Anyone wishing to make an oral presentation to the Committee on any of the agenda items noted above should notify Larry Liberatore. The request should state the amount of time desired, the capacity in which the person will appear, and a brief outline of the content of the presentation.

Authority: This notice is issued under the authority of sections 6(b)(1) and 7(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655, 656), the Federal Advisory Committee Act (5 U.S.C. App. 2), and 29 CFR part 1912.

Signed at Washington, DC this 25th day of November 1998.

Charles N. Jeffress,

Assistant Secretary of Labor.

[FR Doc. 98–31947 Filed 11–30–98; 8:45 am]

BILLING CODE 4510–26–M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Notice [98–167]

Notice of Prospective Patent License

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Prospective Patent License.

SUMMARY: NASA hereby gives notice that Eclypse International Corporation of Ontario, California, has applied for an exclusive license to practice the invention described and claimed in NASA Case No. KSC–11866 entitled ''Non-Intrusive Impedance-Based Cable Tester,'' which is assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. Written objections to the prospective grant of a license should be sent to Kennedy Space Center.

DATES: Responses to this notice must be received by February 1, 1999.

FOR FURTHER INFORMATION CONTACT: Ms. Beth A. Vrioni, John F. Kennedy Space Center, Mail Code MM–E, Kennedy Space Center, FL 32899, telephone (407) 867–6225.

Dated: November 23, 1998.

Edward A. Frankle,

General Counsel.

[FR Doc. 98–31868 Filed 11–30–98; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Notice [98–165]

Notice of Prospective Patent License

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Prospective Patent License.

SUMMARY: NASA hereby gives notice that the partnership of Joel D. Goldhar and Jonathan E. Jaffe, of Chicago, Illinois, has applied for an exclusive patent license to practice the invention described and claimed in U.S. Patent Number 5,499,294, entitled ''Digital Camera with Apparatus for Authentication of Images Produced from an Image File,'' which is assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. Written objections to the prospective grant of a license to Messrs. Goldhar and Jaffe should be sent to John H. Kusmiss, Assistant Patent Counsel of the NASA Management Office at the Jet Propulsion Laboratory.

DATES: Responses to this notice must be received by February 1, 1999.

FOR FURTHER INFORMATION CONTACT: John H. Kusmiss, Patent Attorney, NASA Management Office-JPL, 4800 Oak Grove Drive, Mail Stop 180–801, Pasadena, CA 91109, telephone (818) 354–7770.

Dated: November 23, 1998.

Edward A. Frankle,

General Counsel.

[FR Doc. 98–31866 Filed 11–30–98; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Notice [98–166]

Notice of Prospective Patent License

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Prospective Patent License.

SUMMARY: NASA hereby gives notice that Polaroid Corporation, of Memorial Drive, Cambridge, Massachusetts has applied for an exclusive license to practice the invention described and claimed in U.S. Patent Number 5,499,294, entitled ''Digital Camera with Apparatus for Authentication of Images Produced from an Image File,'' which is assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. Written objections to the prospective grant of a license to Polaroid Corporation should be sent to John H. Kusmiss, Assistant Patent Counsel of the NASA Management Office at the Jet Propulsion Laboratory.

DATES: Responses to this notice must be received by February 1, 1999.

FOR FURTHER INFORMATION CONTACT: John H. Kusmiss, Patent Attorney, NASA

Management Office-JPL, 4800 Oak Grove Drive, Mail Stop 180–801, Pasadena, CA 91109, telephone (818) 354–7770.

Dated: November 23, 1998.

Edward A. Frankle,

General Counsel.

[FR Doc. 98–31867 Filed 11–30–98; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration, Office of Records Services—Washington, DC.

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before January 15, 1999. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be provided once the appraisal is completed. Requesters will be given 30 days to submit comments.

ADDRESSES: To request a copy of any records schedule identified in this notice, write to the Life Cycle Management Division (NWML), National Archives and Records Administration (NARA), 8601 Adelphi Road, College Park, MD 20740–6001. Requests also may be transmitted by FAX to 301–713–6852 or by e-mail to records.mgt@arch2. nara.gov.

Requesters must cite the control number, which appears in parentheses after the name of the agency which submitted the schedule, and must provide a mailing address. Those who desire appraisal reports should so indicate in their request.

FOR FURTHER INFORMATION CONTACT: Michael L. Miller, Director, Modern Records Programs (NWM), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001. Telephone: (301) 713–7110. E-mail: records.mgt@arch2.nara.gov.

SUPPLEMENTARY INFORMATION: Each year Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA approval, using the Standard Form (SF) 115, Request for Records Disposition Authority. These schedules provide for the timely transfer into the National Archives of historically valuable records and authorize the disposal of all other records after the agency no longer needs the records to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

No Federal records are authorized for destruction without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and whether or not they have historical or other value.

Besides identifying the Federal agencies and any subdivisions requesting disposition authority, this public notice lists the organizational unit(s) accumulating the records or indicates agency-wide applicability in the case of schedules that cover records that may be accumulated throughout an agency. This notice provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction). It also includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit level as well as their disposition. If NARA staff has prepared an appraisal memorandum for the schedule, it too includes information about the records. Further information about the disposition process is available on request.

Schedules Pending

1. Department of Commerce, National Institute of Standards and Technology (N1–167–98–2, 2 items, 2 temporary items). Records of the NIST Library in Boulder, Colorado. The records consist primarily of correspondence, reports, memorandums, meeting minutes, and expenditure reports that document Library operations during the period 1955 to 1971.

2. Department of Commerce, National Oceanic and Atmospheric Administration (N1–370–99–2, 3 items, 3 temporary items). Records relating to agreements and memorandums of understanding between NOAA and other public and private entities covering data sharing, technical assistance, and other program support responsibilities. The records include agreements, background and progress reports, change and revision documentation, and correspondence and other reports related to the agreements. Also included are electronic copies of documents created using electronic mail and word processing.

3. Department of Commerce, National Oceanic and Atmospheric Administration (N1–370–99–4, 6 items, 6 temporary items). Records relating to National Weather Service sites at airports. Included are photographs of equipment and buildings, maps, cost estimates, Federal Aviation Administration permits, licenses for using real property, site engineering drawings, notices of proposed construction or alteration, and related correspondence. Also included are electronic copies of documents created using electronic mail and word processing.

4. Department of Defense, Defense Logistics Agency (N1–361–99–1, 6 items, 6 temporary items). Electronic copies of records relating to contracts created using electronic mail and word processing. Recordkeeping copies were previously approved for disposal.

5. Department of Health and Human Services, National Institutes of Health (N1–443–98–1, 7 items, 7 temporary items). Microfilmed copies of prescriptions. This schedule also increases the retention period for logs, requisitions, and other pharmacy

records which were previously approved for disposal.

6. Department of Health and Human Services, National Institutes of Health (N1–443–98–2, 4 items, 4 temporary items). Forms and attendance records relating to radiation safety training. This schedule also increases the retention period for records relating to the handling of radioactive material which were previously approved for disposal.

7. Department of Justice, Executive Office of the United States Attorneys (N1–60–99–1, 5 items, 2 temporary items). Input documents and ad hoc reports associated with automated case management systems used to record case status and compile statistical reports. The annual compiled national data set, with documentation, and annual statistical reports are proposed for permanent retention.

8. Department of Justice, United States Attorney District Offices (N1–118–99–1, 6 items, 6 temporary items). Automated case management systems used to record case status and compile statistical reports. Annual compilations of data accumulated by the Executive Office of the United States Attorneys are proposed for permanent retention in schedule number N1–60–99–1 (item 7 of this notice).

9. Department of Justice, Office of the Solicitor General (N1–60–98–11, 2 items, 2 temporary items). Docket cards dating between 1927 and 1992, and a subsequent electronic tracking system, which serve as an index to cases referred to the Solicitor General. The OSG returns case files to the originating litigation division upon completion of OSG action so the cards and tracking system do not serve as an index to OSG records.

10. Department of Justice, Immigration and Naturalization Service (N1–85–99–1, 2 items, 2 temporary items). Reduction in retention period of clinical records of illegal aliens detained at INS Servicing and Processing Centers, which were previously approved for disposal. The request also includes electronic copies of records created using electronic mail and word processing.

11. Department of the Treasury, United States Secret Service (N1–87–98–1, 1 item, 1 temporary item). Investigative case files of the Inspection Division where the investigation reveals that the office having jurisdiction is the Office of Investigations. Procedurally or historically significant case files of the Office of Investigations are permanent in a previously approved schedule.

12. Department of Veterans Affairs, Veterans Health Administration (N1–15–98–4, 6 items, 6 temporary items). Files relating to applications for grants to providers of services for the homeless, including funds for acquisition of facilities, purchase of vans, and per diem expenses. Also included are electronic copies of documents created using electronic mail and word processing.

13. Environmental Protection Agency, Office of Pesticide Programs (N1–412–95–2, 48 items, 43 temporary items). Electronic and textual records that document review and approval processes relating to the registration of pesticides, including electronic copies of documents created using electronic mail and word processing. Temporary records include Pesticide Registration Documents and Reregistration Case Files, Notice of Supplemental Distribution of Registered Product, Novel Microbial Pesticide Files, Child-Resistant Packaging Files, Pesticide Chemical Inert Ingredient Master Files, Reregistration Fees Case Files, Pesticide Registration Maintenance Fee Records, Company Name and Address Correspondence Files, Requests for EPA Company Number, Laboratory Test Reports, and the Pesticide Product Label System. Series proposed for permanent retention include the Endangered Species Map Files, Label Use Information System Files, Established Tolerances Files, State Plans for Applicator Certification Files, and Preliminary Qualitative Biological Usage Analysis of Pesticide Active Ingredients Files.

14. Export-Import Bank (N1–275–98–1, 1 item, 1 temporary item). Draft loan agreements reflecting technical changes. Records relating to policy issues, minutes of meetings, and final loan cases are permanent in a previously approved schedule.

15. National Aeronautics and Space Administration (N1–255–97–1, 22 items, 22 temporary items). Magnetic tapes pertaining to the Pioneer 10, Pioneer 11, and Pioneer 12 spacecraft projects. The records consist of master data record tapes containing real-time telemetry data and electronic information concerning spacecraft location during orbit (trajectory and engineering data).

16. National Science Foundation, Agency-wide (N1–307–98–1, 2 items, 2 temporary items). Reduction in retention period for Congressional Correspondence Files and Congressional Correspondence Routing Sheet Files, which were previously approved for disposal. Records consist of correspondence from the Congress with replies from NSF and a reference card file to incoming correspondence from the Congress.

17. President's Advisory Board on Race (N1–220–99–1, 17 items, 6 temporary items). Audio and video tapes of meetings for which written transcripts were created, routine administrative correspondence, calendars and invitations, and web site and related design and management records. Also proposed for disposal are electronic copies of records created using electronic mail and word processing. Transcripts of meetings, reports, general correspondence, and other program records are proposed for permanent retention.

18. Securities and Exchange Commission, Office of International Affairs and Office of Investor Education and Assistance (N1–266–98–1, 10 items, 10 temporary items). Routine correspondence, such as public inquiries and complaints and SEC requests for information from foreign governments, including electronic copies of documents created using electronic mail and word processing; requests for technical assistance from the United States Agency for International Development; paper working copies of foreign utility company reports filed electronically; commercial and financial information submitted in confidence; and duplicate copies of records relating to treaty negotiations with Switzerland (originals are held as permanent by the Department of State).

Dated: November 24, 1998.

Michael J. Kurtz,

Assistant Archivist for Record Services—Washington, DC.

[FR Doc. 98–31979 Filed 11–30–98; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Meetings of Humanities Panel

AGENCY: The National Endowment for the Humanities.

ACTION: Notice of meetings.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Public Law 92–463, as amended), notice is hereby given that the following meetings of the Humanities Panel will be held at the Old Post Office, 1100 Pennsylvania Avenue, N.W., Washington, D.C. 20506.

FOR FURTHER INFORMATION CONTACT: Nancy E. Weiss, Advisory Committee Management Officer, National Endowment for the Humanities, Washington, D.C. 20506; telephone (202) 606–8322. Hearing-impaired

individuals are advised that information on this matter may be obtained by contacting the Endowment's TDD terminal on this matter may be obtained by contacting the Endowment's TDD terminal on (202) 606–8282.

SUPPLEMENTARY INFORMATION: The proposed meetings are for the purpose of panel review, discussion, evaluation and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including discussion of information given in confidence to the agency by the grant applicants. Because the proposed meetings will consider information that is likely to disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential and/or information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, pursuant to authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee meetings, dated July 19, 1993, I have determined that these meetings will be closed to the public pursuant to subsections (c) (4), and (6) of section 552b of Title 5, United States Code.

1. *Date:* December 1, 1998.
Time: 9:00 a.m. to 5:00 p.m.
Room: 415.
Program: This meeting will review applications for the National Heritage Preservation Program, submitted to the Division of Preservation and Access at the July 1, 1998 deadline.

2. *Date:* December 4, 1998.
Time: 9:00 a.m. to 5:00 p.m.
Room: 415.
Program: This meeting will review applications for the Library & Archival Preservation and Access/Reference Materials, submitted to the Division of Preservation and Access at the July 1, 1998 deadline.

3. *Date:* December 7, 1998.
Time: 8:30 a.m. to 5:00 p.m.
Room: 430.
Program: This meeting will review applications for Education Development and Demonstration in Literature and the Arts, submitted to the Division of Research and Education at the October 15, 1998 deadline.

4. *Date:* December 8, 1998.
Time: 9:00 a.m. to 5:30 p.m.
Room: 315.
Program: This meeting will review applications for Collaborative Research in Music and Literature, submitted to the Division of Research and Education at the September 1, 1998 deadline.

5. *Date:* December 9, 1998.
Time: 8:30 a.m. to 5:00 p.m.
Room: 430.
Program: This meeting will review applications for Education Development and Demonstration in World History and Geography, submitted to the Division of Research and Education at the October 15, 1998 deadline.

6. *Date:* December. 10, 1998.
Time: 9:00 a.m. to 5:30 p.m.
Room: 315.
Program: This meeting will review applications for Collaborative Research in African, Pacific, and Asian Studies, submitted to the Division of Research and Education at the September 1, 1998 deadline.

7. *Date:* December 11, 1998.
Time: 9:00 a.m. to 5:30 p.m.
Room: 415.
Program: This meeting will review applications for Humanities Projects in Media, submitted to the Division of Public Programs at the November 2, 1998 deadline.

8. *Date:* December 11, 1998.
Time: 8:30 a.m. to 5:00 p.m.
Room: 430.
Program: This meeting will review applications for Education Development and Demonstration in Civics and Philosophy, submitted to the Division of Research and Education at the October 15, 1998 deadline.

9. *Date:* December 11, 1998.
Time: 9:00 a.m. to 5:30 p.m.
Room: 315.
Program: This meeting will review applications for Collaborative Research in Philosophy and History of Science, submitted to the Division of Research and Education at the September 1, 1998 deadline.

10. *Date:* December 14, 1998.
Time: 8:30 a.m. to 5:00 p.m.
Room: 430.
Program: This meeting will review applications for Education Development and Demonstration in Western Civilization, submitted to the Division of Research and Education at the October 15, 1998 deadline.

11. *Date:* December 16, 1998.
Time: 8:30 a.m. to 5:00 p.m.
Room: 430.
Program: This meeting will review applications for Education Development and Demonstration in American Studies I, submitted to the Division of Research and Education at the October 15, 1998 deadline.

Nancy E. Weiss,
Advisory Committee Management Officer.

[FR Doc. 98–31980 Filed 11–30–98; 8:45 am]
BILLING CODE 7536–01–M

NUCLEAR REGULATORY COMMISSION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of pending NRC action to submit an information collection request to OMB and solicitation of public comment.

SUMMARY: The NRC is preparing a submittal to OMB for review of continued approval of information collections under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Information pertaining to the requirement to be submitted:

1. *The title of the information collection:* 10 CFR Part 36—Licenses and Radiation Safety Requirements for Irradiators.

2. *Current OMB Approval Number:* 3150–0158.

3. *How often the collection is required:* There is a one-time submittal of information to receive a license. Once a specific license has been issued, there is a 10-year resubmittal of the information for renewal of the license. In addition, recordkeeping must be performed on an on-going basis, and reports of accidents and other abnormal events must be reported on an as-necessary basis.

4. *Who is required or asked to report:* Irradiators licensed by NRC or an Agreement State.

5. *The number of annual respondents:* 32 NRC licensees and 64 Agreement State licensees.

6. *The number of hours needed annually to complete the requirement or request:* 44,768 (approximately 466 per licensee).

7. *Abstract:* 10 CFR Part 36 contains requirements for the issuance of a license authorizing the use of sealed sources containing radioactive materials in irradiators used to irradiate objects or materials for a variety of purposes in research, industry, and other fields. The subparts cover specific requirements for obtaining a license or license exemption; design and performance criteria for irradiators; and radiation safety requirements for operating irradiators, including requirements for operator training, written operating and emergency procedures, personnel monitoring, radiation surveys, inspection, and maintenance. Part 36 also contains the recordkeeping and reporting requirements that are necessary to ensure that the irradiator is

being safely operated so that it poses no danger to the health and safety of the general public and the irradiator employees.

Submit, by February 1, 1999, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the burden estimate accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

A copy of the draft supporting statement may be viewed free of charge at the NRC Public Document Room, 2120 L Street, NW, (Lower Level), Washington, DC. OMB clearance requests are available at the NRC worldwide web site (http://www.nrc.gov/NRC/NEWS/OMB/index.html). The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions about the information collection requirements may be directed to the NRC Clearance Officer, Brenda Jo. Shelton, U.S. Nuclear Regulatory Commission, T–6 F33, Washington, DC, 20555–0001, or by telephone at 301–415–7233, or by Internet electronic mail at BJS1@NRC.GOV.

Dated at Rockville, Maryland, this 23rd day of November, 1998.

For the U.S. Nuclear Regulatory Commission.

Brenda Jo. Shelton,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 98–31934 Filed 11–30–98; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: U. S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of pending NRC action to submit an information collection request to OMB and solicitation of public comment.

SUMMARY: The NRC is preparing a submittal to OMB for review of continued approval of information collections under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Information pertaining to the requirement to be submitted:

1. *The title of the information collection:* 10 CFR Part 54, ''Requirements for Renewal of Operating Licenses for Nuclear Power Plants''.

2. *Current OMB approval number:* 3150–0155.

3. *How often the collection is required:* One-time submission with application for renewal of an operating license for a nuclear power plant and occasional collections for holders of renewed licenses.

4. *Who is required or asked to report:* Commercial nuclear power plant licensees who wish to renew their operating licenses.

5. *The number of annual respondents:* 1–2 respondents based on an estimate of 4 renewal applications during the requested 3-year clearance period.

6. *The number of hours needed annually to complete the requirement or request:* Approximately 89,333 hours (85,333 hours one-time reporting burden and 4,000 hours recordkeeping burden).

7. *Abstract:* 10 CFR Part 54 of the NRC regulations, ''Requirements for Renewal of Operating Licenses for Nuclear Power Plants,'' specifies the procedures, criteria, and standards governing nuclear power plant license renewal, including information submittal and recordkeeping requirements, so that the NRC may make determinations necessary to promote the health and safety of the public.

Submit, by February 1, 1999, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the burden estimate accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

A copy of the draft supporting statement may be viewed free of charge at the NRC Public Document Room, 2120 L Street, NW (lower level), Washington, DC. OMB clearance requests are available at the NRC worldwide web site (http://www.nrc.gov/NRC/NEWS/OMB/index.html). The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions about the information collection requirements may be directed to the NRC Clearance Officer, Brenda Jo. Shelton, U.S. Nuclear Regulatory Commission, T–6 F33, Washington, DC, 20555–0001, or by telephone at 301–415–7233, or by Internet electronic mail at BJS1@NRC.GOV.

Dated at Rockville, Maryland, this 24th day of November, 1998.

For the Nuclear Regulatory Commission.

Michael D. Collins,

Acting NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 98–31935 Filed 11–30–98; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–412]

Duquesne Light Company, Ohio Edison Company, The Cleveland Electric Illuminating Company; The Toledo Edison Company; Notice of Withdrawal of Application For Amendment To Facility Operating License

The U.S. Nuclear Regulatory Commission (the Commission) has granted the request of Duquesne Light Company, et al. (the licensee) to withdraw its October 16, 1998, application for proposed amendment to Facility Operating License No. NPF–73 for the Beaver Valley Power Station, Unit No. 2, located in Beaver County, Pennsylvania.

The proposed amendment would have extended on a one-time only basis, the surveillance interval for technical specifications 4.8.1.1.1.b and 4.8.1.2 until the first entry into Mode 4 following the seventh refueling outage (2R7), but not later than May 1, 1999.

The Commission had previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on November 4, 1998 (63 FR 59591). However, by letter dated November 10, 1998, the licensee withdrew the proposed change.

For further details with respect to this action, see the application for amendment dated October 16, 1998, and the licensee's letter dated November 10, 1998, which withdrew the application for license 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 room located at the B. F. Jones Memorial

Library, 663 Franklin Avenue, Aliquippa, PA 15001.

Dated at Rockville, Maryland, this 24th day of November, 1998.

For the Nuclear Regulatory Commission.

Donald S. Brinkman,

Senior Project Manager, Project Directorate I–2, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 98–31932 Filed 11–30–98; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–302]

Florida Power Corporation; Notice of Withdrawal of Application for Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (the Commission) has granted a request by the Florida Power Corporation (FPC) to withdraw its October 31, 1997, application for an amendment to Facility Operating License No. DPR 72, issued to FPC for operation of the Crystal River Nuclear Generating Unit 3 (CR3) located in Citrus County, Florida. Notice of consideration of issuance of this amendment was published in the **Federal Register** on November 12, 1997 (62 FR 60735).

The proposed amendment would have revised the CR3 Technical Specifications (TS) relating to decay heat removal requirements in Mode 4. The proposed modification would have revised the TS and associated Bases to require in Mode 4, one operable emergency feedwater (EFW) train and associated equipment, including the EFW tank, emergency feedwater initiation and control actuation instrumentation for EFW, post accident monitoring instrumentation, and the turbine bypass valves. Additionally, the TS and associated Bases would have been revised to require in Mode 4, a low-pressure injection (LPI) train, dedicated to the borated water storage tank, and to reflect that the available loops for decay heat removal do not include this dedicated LPI train. Editorial changes would also have been made to clarify the description of Mode 4 accidents requiring emergency core cooling system injection, and to revise the title of TS limiting condition for operation 3.7.5.

FPC's letter of November 18, 1998, informed the staff that the request was being withdrawn because the NRC staff had indicated that the subject of reactor decay heat removal requirements during Mode 4 operation would be treated as a generic industry issue. In this letter, FPC committed to continue to maintain administrative controls for the additional equipment and capability to remove decay heat identified in the October 31, 1997, request during Mode 4 operation of CR–3.

For further details with respect to this action, see the application for amendment dated October 31, 1997, and FPC's withdrawal letter dated November 18, 1998, which are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC and at the local public document room located at the Coastal Region Library, 8619 W. Crystal Street, Crystal River, Florida.

Dated at Rockville, Maryland, this 24th day of November, 1998.

For the Nuclear Regulatory Commission.

Leonard A. Wiens,

Senior Project Manager, Project Directorate II–3, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 98–31936 Filed 11–30–98; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Application for a License To Export Special Nuclear Material

Pursuant to 10 CFR 110.70(b) ''Public notice of receipt of an application'', please take notice that the Nuclear Regulatory Commission has received the following application for an export license. Copies of the application are on file in the Nuclear Regulatory Commission's Public Document Room located at 2120 L Street, N.W., Washington, D.C.

A request for a hearing or petition for leave to intervene may be filed within 30 days after publication of this notice in the **Federal Register**. Any request for hearing or petition for leave to intervene shall be served by the requestor or petitioner upon the applicant, the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555; the Secretary, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555; and the Executive Secretary, U.S. Department of State, Washington, D.C. 20520.

The information concerning the application follows.

NRC EXPORT LICENSE APPLICATION

Name of applicant, date of application, date received, application No.	Description of material		End use	Country
	Material type	Total qty		
Transnuclear, Inc., October 30, 1998, November 2, 1998, XSNM03060.	High-enriched Uranium (93.3%).	130.65 kg	Production of medical isotopes.	Canada.

For the Nuclear Regulatory Commission.

Dated this 24th day of November 1998 at Rockville, Maryland.

Ronald D. Hauber,

Director, Division of Nonproliferation, Exports and Multilateral Relations, Office of International Programs.

[FR Doc. 98–31929 Filed 11–30–98; 8:45 am]

BILLING CODE 7590–01–M

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–338 and 50–339]

Virginia Electric and Power Company; Notice of Withdrawal of Application For Amendment To Facility Operating License

The U.S. Nuclear Regulatory Commission (the Commission) has granted the request of Virginia Electric and Power Company (the licensee) to withdraw its March 21, 1996, application for proposed amendments to Facility Operating License Nos. NPF–4 and NPF–7 for the North Anna Power Station, Unit Nos. 1 and 2, located in Louisa County, Virginia.

The proposed amendments would have clarified the requirements for testing charcoal adsorbent in the Waste Gas Charcoal Filter System, the Control Room Emergency Habitability System, and the Safeguards Area Ventilation System.

The Commission had previously issued a Notice of Consideration of

Issuance of Amendment published in the **Federal Register** on April 24, 1996 (61 FR 18175). However, by letter dated November 23, 1998, the licensee withdrew the proposed change.

For further details with respect to this action, see the application for amendment dated March 21, 1996, and the licensee's letter dated November 23, 1998, which withdrew the application for license 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 room located at The Alderman Library, Special Collections Department, University of Virginia, Charlottesville, Virginia 22903–2498.

Dated at Rockville, Maryland, this 25th day of November, 1998.

For the Nuclear Regulatory Commission.

Nageswaran Kalyanam,

Project Manager, Project Directorate II–2, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 98–31930 Filed 11–30–98; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Nuclear Regulatory Commission.

DATE: Weeks of November 30, December 7, 14, and 21, 1998.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED

Week of November 30

Monday, November 30

2:00 p.m.
Meeting on DC Cook (Public Meeting) (Contact: John Stang, 301–415–1345)

3:30 p.m.
Affirmation Session (Public Meeting) (if needed)

Week of December 7—Tentative

Tuesday, December 8

9:00 a.m.
Briefing on EEO Program (Public Meeting) (Contact: Irene Little, 301–415–7380)

11:00 a.m.
Affirmation Session (Public Meeting) (if needed)

Week of December 14—Tentative

Tuesday, December 15

11:00 a.m.
Affirmation Session (Public Meeting) (if needed)

Week of December 1—Tentative

There are no meetings scheduled for the week of December 21, 1998.

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.

* * * * *

ADDITIIONAL INFORMATION: By a vote of 5–0 on November 22, the Commission determined pursuant to U.S.C. 552b(e) and § 9.107(a) of the Commission's rules that ''Affirmation of (a) Final Rule, Part 2, Subpart J, 'Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository', (b) International Uranium (USA) Corporation Commission Review Of Presiding Officer's Memorandum and Order (Aug 19, 1998) Dismissing Envirocare, (c) Final Rule, Part 2, Subpart M; Public Notification, Availability Documents and Records, Hearing Requests and Procedures for Hearings on License Transfer Applications, and (d) North Atlantic Energy Corporation (Seabrook Station Unit No. 1); Motion to Withdraw Applications and to Terminate Proceedings'' (PUBLIC MEETING) be held on November 22, and on less than one week's notice to the public.

* * * * *

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, D.C. 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: November 27, 1998.

William M. Hill, Jr.,

SECY Tracking Officer, Office of the Secretary.

[FR Doc. 98–32110 Filed 11–27–98; 3:01 pm]

BILLING CODE 7590–01–M

OFFICE OF PERSONNEL MANAGEMENT

Federal Prevailing Rate Advisory Committee; Open Committee Meetings

According to the provisions of section 10 of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given that a meeting of the Federal Prevailing Rate Advisory Committee will be held on Thursday, December 10, 1998.

The meeting will start at 10:00 a.m. and will be held in Room 5A06A, Office of Personnel Management Building, 1900 E Street, NW., Washington, DC.

The Federal Prevailing Rate Advisory Committee is composed of a Chair, five representatives from labor unions holding exclusive bargaining rights for Federal blue-collar employees, and five representatives from Federal agencies. Entitlement to membership on the Committee is provided for in 5 U.S.C. 5347.

The Committee's primary responsibility is to review the Prevailing Rate System and other matters pertinent to establishing prevailing rates under subchapter IV, chapter 53, 5 U.S.C., as amended, and from time to time advise the Office of Personnel Management.

This scheduled meeting will start in open session with both labor and management representatives attending. During the meeting either the labor members or the management members may caucus separately with the Chair to devise strategy and formulate positions. Premature disclosure of the matters discussed in these caucuses would unacceptably impair the ability of the Committee to reach a consensus on the matters being considered and would disrupt substantially the disposition of its business. Therefore, these caucuses will be closed to the public because of a determination made by the Director of the Office of Personnel Management under the provisions of section 10(d) of the Federal Advisory Committee Act (Pub. L. 92–463) and 5 U.S.C. 552b(c)(9)(B). These caucuses may, depending on the issues involved, constitute a substantial portion of a meeting.

Annually, the Chair compiles a report of pay issues discussed and concluded recommendations. These reports are available to the public, upon written request to the Committee's Secretary.

The public is invited to submit material in writing to the Chair on Federal Wage System pay matters felt to be deserving of the Committee's attention. Additional information on this meeting may be obtained by contacting the Committee's Secretary,

Office of Personnel Management, Federal Prevailing Rate Advisory Committee, Room 5559, 1900 E Street, NW., Washington, DC 20415 (202) 606–1500.

Dated: November 24, 1998.

John F. Leyden,

Chairman, Federal Prevailing Rate Advisory Committee.

[FR Doc. 98–31892 Filed 11–30–98; 8:45 am]

BILLING CODE 6325–01–P

SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC–23545; File No. 812–11196]

Aetna Variable Fund, et al.; Notice of Application

November 23, 1998.

AGENCY: Securities and Exchange Commission (''SEC'' or ''Commission'').

ACTION: Notice of application for an order pursuant to Section 6(c) of the Investment Company Act of 1940 (the ''1940 Act'').

SUMMARY OF APPLICATION: Applicants seek an order pursuant to Section 6(c) of the 1940 Act for exemptions from the provisions of Sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act, and Rules 6e–2(b)(15) and 6e–3(T)(b)(15) thereunder, to the extent necessary to permit shares of any current or future series of each Fund and shares of any other investment company that is offered as a funding medium for insurance products and for which ALIAC, Aeltus, or any of their affiliates, may now or in the future serve as investment adviser, principal underwriter or administrator (each Fund and such other investment companies referred to collectively as the ''Funds'') to be offered and sold to, and held by (1) variable annuity and variable life insurance separate accounts of both affiliated and unaffiliated life insurance companies (''Participating Insurance Companies''), (2) qualified pension and retirement plans held outside of the separate account context (''Qualified Plans'' or ''Plans''), and (3) the investment adviser of any Fund or any of the Adviser's affiliates (the ''Adviser'' and collectively, the ''Advisers'').

APPLICANTS: Aetna Variable Fund, Aetna Income Shares, Aetna Variable Encore Fund, Aetna Balanced VP, Inc., Aetna Generation Portfolios, Inc., Aetna Variable Portfolios, Inc., Aetna Get Fund, Portfolio Partners, Inc., Aetna Life Insurance and Annuity Company (''ALIAC'') and Aeltus Investment Management, Inc. (''Aeltus'') (collectively, the ''Applicants'').

FILING DATE: The application was originally filed on June 25, 1998, and an amended and restated application was filed on November 20, 1998.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Secretary of the SEC and serving Applicants with a copy of the request, in person or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 18, 1998, and should be accompanied by proof of service on Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification of a hearing by writing to the Secretary of the SEC.

ADDRESSES: Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicants, c/o Amy R. Doberman, Aetna Life Insurance and Annuity Company, 151 Farmington Avenue, Hartford, Connecticut 06156–8962.

FOR FURTHER INFORMATION CONTACT: Megan L. Dunphy, Attorney, or Mark Amorosi, Special Counsel, Office of Insurance Products, Division of Investment Management, at (202) 942–0670.

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application is available for a fee from the Public Reference Branch of the SEC, 450 Fifth St., N.W., Washington, D.C. 20549 (tel. (202) 942–8090).

Applicants' Representations

1. Each Fund is an open-end management investment company. Aetna Variable Fund, Aetna Income Shares, Aetna Variable Encore Fund, and Aetna Get Fund are each organized as a Massachusetts business trust. Aetna Balanced V.P., Inc., Aetna Generation Portfolios, Inc., Aetna Variable Portfolios, Inc., and Portfolio Partners, Inc., are each organized as a Maryland Corporation. Certain of the Funds issue shares in multiple series. Additional series of these Funds may be established in the future.

2. ALIAC, a registered broker-dealer and member of the National Association of Securities Dealers, Inc., serves as the investment adviser and administrator for Portfolio Partners, Inc., and as the principal underwriter for each Fund. Aeltus, which is registered with the Commission as an investment adviser, serves as the investment adviser and administrator for each Fund other than Portfolio Partners, Inc. ALIAC and Aeltus are both indirect wholly-owned subsidiaries of Aetna Inc.

3. Shares of each Fund are currently offered to separate accounts of ALIAC and its affiliates to serve as the investment medium for variable annuity contracts and variable life insurance policies issued by ALIAC and its affiliates. The Funds also may in the future offer shares of their existing and future series to separate accounts of other insurance companies, including insurance companies that are not affiliated with ALIAC, to serve as the investment vehicle for various types of insurance products, which may include, among others, variable annuity contracts, variable group life insurance contracts, scheduled premium variable life insurance contracts, single premium and modified single premium variable life insurance contracts, and flexible premium variable life insurance contracts (collectively, ''Variable Contracts''). Insurance companies whose separate account or accounts may in the future own shares of the Funds are referred to herein as ''Participating Insurance Companies.''

4. Each Fund may offer its shares directly to Qualified Plans described in Treasury Regulation § 1.817–5(f)(3)(iii). Fund shares sold to Qualified Plans would be held by the trustee(s) of the Plan. No Adviser will act as investment adviser to any Qualified Plan which purchases shares of a Fund advised by that investment adviser, unless permitted under the Employment Retirement Income Security Act (''ERISA'').

5. Shares of each Fund may also be offered to an Adviser or any of its affiliates for purposes of providing necessary capital required by Section 14(a) of the 1940 Act. Any shares in a Fund purchased by an Adviser or its affiliate will be automatically redeemed if and when the Adviser's investment advisory agreement with that Fund terminates.

Applicants' Legal Analysis

1. Applicants request that the Commission issue an order pursuant to Section 6(c) of the 1940 Act exempting the Applicants and the Participating Insurance Companies and their separate accounts (and, to the extent necessary, any investment adviser, principal underwriter, sponsor, or depositor for such accounts) from the provisions of Sections 9(a), 13(a), 15(a) and 15(b) thereof, and Rules 6e–2(b)(15) and 6e–3(T)(b)(15) thereunder, to the extent necessary to permit shares of each Fund to be offered and sold to, and held by

(1) variable annuity and variable life insurance separate accounts of the same life insurance company or of any affiliated life insurance company (''mixed funding''); (2) separate accounts of unaffiliated life insurance companies (including both variable annuity and variable life separate accounts) (''shared funding''); (3) Qualified Plans; and (4) any Adviser or its affiliates.

2. In connection with the funding of scheduled premium variable life insurance contracts issued through a separate account registered under the 1940 Act as a unit investment trust, Rule 6–2(b)(15) provides partial exemptions from Sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act. These exemptions are available only where all of the assets of the separate account consist of the shares of one or more management investment companies which offer their shares exclusively to variable life insurance separate accounts of the life insurer or any affiliated life insurance company. Therefore, the relief granted by Rule 6–2(b)(15) is not available with respect to a scheduled premium variable life insurance separate account that owns shares of an underlying fund that also offers its shares to a variable annuity or a flexible premium variable life insurance separate account of the same company or an affiliated life insurance company. The relief granted by Rule 6e–2(b)(15) also is not available if the variable life insurance separate account owns shares of an underlying fund that also offers its shares to separate accounts of unaffiliated life insurance companies, Qualified Plans, and Advisers or their affiliates.

3. In connection with the funding of flexible premium variable life insurance contracts issued through a separate account registered under the 1940 Act as a unit investment trust, Rule 6e–3(T)(b)(15) provides partial exemptions from Sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act. These exemptions are available only where all of the assets of the separate account consist of the shares of one or more registered management investment companies which offers their shares exclusively to separate accounts of the life insurer, or of any affiliated life insurance company, offering either scheduled or flexible premium variable life insurance contracts, or both; or which also offer their shares to variable annuity separate accounts of the life insurer or of an affiliated life insurance company. Therefore, the exemptions provided by Rule 6e–3(T)(b)(15) are available if the underlying fund is engaged in mixed funding, but are not available if the underlying fund is engaged in shared funding or sells its shares to Qualified Plans or Advisers and their affiliates.

4. Applicants state that the current tax law permits the Funds to increase their asset base through the sale of shares to Plans. Section 817(h) of the Internal Revenue Code of 1986, as amended (the ''Code''), imposes certain diversification standards on the underlying assets of separate accounts funding variable contracts. The Code provides that such contracts shall not be treated as an annuity contract or life insurance contract for any period in which the underlying assets are not adequately diversified as prescribed by the Treasury Department. To meet the diversification requirements, all of the beneficial interests in an investment company must be held by the segregated asset accounts of one or more insurance companies. The regulations contain certain exceptions to this requirements, however, one of which permits shares of an investment company to be held by the trustee of a qualified pension or retirement plan without adversely affecting the ability of shares in the same investment company also to be held by the separate accounts of insurance companies in connection with their variable annuity and variable life insurance contracts (Treas. Reg. § 1.817–5(f)(3)(iii)).

5. Applicants state that the promulgation of Rules 6e–2 and 6e–3(T) preceded the issuance of these Treasury regulations. Applicants assert that, given the then current tax law, the sale of shares of the same underlying investment company to separate accounts and to Qualified Plans could not have been envisioned at the time of the adoption of Rules 6e–2(b)(15) and 6e–3(T)(b)(15).

6. Applicants request relief for a class or classes of persons and transactions consisting of Participating Insurance Companies and their separate accounts (and Investment advisers, principal underwriters, and sponsors or depositors of such separate accounts) investing in any of the Funds.

7. Section 6(c) of the 1940 Act authorizes the Commission, to grant exemptions from the provisions of the 1940 Act, and rules thereunder, if and to the extent that an exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act. Applicants assert that the requested exemptions are appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

Disqualification

8. Section 9(a)(3) of the 1940 Act provides that it is unlawful for any company to act as investment adviser to or principal underwriter of any registered open-end investment company if an affiliated person of that company is subject to a disqualification enumerated in Section 9(a)(1) or (2). Rules 6e–2(b)(15)(i) and (ii), and 6e–3(T)(b)(15)(i) and (ii) provide partial exemptions from Section 9(a) under certain circumstances, subject to the limitations on mixed and shared funding. These exemptions limit the application of the eligibility restrictions to affiliated individuals or companies that directly participate in the management or administration of the underlying investment company.

9. Applicants state that the relief from Section 9(a) provided by Rules 6e–2(b)(15) and 6e–3(T)(b)(15), in effect, limits the amount of monitoring necessary to ensure compliance with Section 9 to that which is appropriate in light of the policy and purposes of Sections 9. Applicants assert that it is not necessary for the protection of investors of the purposes fairly intended by the policy and provisions of the 1940 Act to apply the provisions of Section 9(a) to many individuals in a large insurance company complex, most of whom will have no involvement in matters pertaining to investment companies managed, administered, or invested in by that organization. Applicants also assert that it is unnecessary to apply the restrictions of Section 9(a) to individuals in various unaffiliated insurance companies (or affiliated companies of Participating Insurance Companies) that may utilize the Funds as the funding medium for variable contracts.

10. Applications maintain that there is no regulatory purpose in extending the monitoring requirements because of mixed or shared funding and sales to Qualified Plans. Applicants do not expect the Participating Insurance Companies and Qualified Plans to play any role in the management or administration of the Funds. Those individuals who participate in the management or administration of the Funds will remain the same regardless of which separate accounts, insurance companies or Qualified Plans use the Funds. The increased monitoring costs would reduce the net rates of return realized by contract owners and Plan participants. In addition, since the Plans are not investment companies and will not be deemed affiliated by virtue of

their shareholdings, no additional relief is required with respect to Qualified Plans.

11. Applicants further state that no regulatory purpose is served by extending the Section 9(a) monitoring requirements in the context of the Funds selling shares to an Adviser or its affiliate. Rules 6e–2 and 6e–3(T) provide relief from the eligibility restrictions of Section 9(a) only for officers, directors or employees of Participating Insurance Companies or their affiliates. The eligibility restrictions of Section 9(a) will still apply to any officers, directors or employees of the Adviser or an affiliate who participate in the management or administration of the Fund. Applicants maintain that the monitoring requirement should not extend to all officers, directors, and employees of the Participating Insurance Companies and their affiliates simply because the Funds sell certain shares to an Adviser or its affiliate. This monitoring would not benefit contract owners and Plan participants and would only increase costs, thereby reducing net rates of return.

Pass-Through Voting

12. Rules 6e–2(b)(15)(iii) and 6e–3(T)(b)(15)(iii) assume the existence of a ''pass-through voting' requirement with respect to management investment company shares held by a separate account. Rules 6e–2(b)(15)(iii)(A) and 6e–3(T)(b)(15)(iii)(A) provide that an insurance company may disregard the voting instructions of its contract owners with respect to the investments of an underlying fund or any contract between an investment company and its investment adviser, when required to do so by an insurance regulatory authority, subject to certain conditions. In addition, Rules 6e–2(b)(15)(iii)(B) and 6e–3(T)(b)(15)(iii)(A)(*2*) provide that an insurance company may disregard voting instructions of contract owners in favor of any change in the investment company's investment policies, principal underwriter or investment adviser, provided that such disregard of voting instructions is reasonable and complies with the other provisions of Rules 6e–2 and 6e–3(T).

13. Rule 6e–2 recognizes that a variable life insurance contract has important elements unique to insurance contracts; and is subject to extensive state regulations. applicants assert that in adopting Rule 6e–2(b)(15)(iii), the Commission expressly recognized that state insurance regulators have authority, pursuant to state insurance laws or regulations, to disapprove or require changes in investment policies, investment advisers, or principal underwriters. The Commission also expressly recognized that state insurance regulators have authority to require an insurer to draw from its general account to cover costs imposed upon the insurer by a change approved by contract owners over the insurer's objection. The Commission therefore deemed such exemptions necessary ''to assure the solvency of the life insurer and performance of its contractual obligations by enabling an insurance regulatory authority or the life insurer to act when certain proposals reasonably could be expected to increase the risks undertaken by the life insurer.'' Applicants state that, in this respect, flexible premium variable life insurance contracts are identical to scheduled premium variable life insurance contracts; therefore, the corresponding provisions of Rule 6e–3(T) were adopted in recognition of the same factors.

14. Applicants further represent that the offer and sale of the fund shares to Qualified Plans and Advisers and their affiliates will not have any impact on the relief requested in this regard. Shares of the funds sold to Qualified Plans would be held by the trustees of such Plans. The exercise of voting rights by Qualified Plans, whether by the trustees, by participants, or by investment managers engaged by the Plans, does not present the type of issues respecting the disregard of voting rights that are presented by variable life separate accounts. In this respect, the voting rights to be exercised by the qualified Plans will be no different than the exercise of voting rights with respect to ''retail'' mutual funds that are available to the public. Similarly, the exercise of voting rights by Advisers and their affiliates do not present the type of issues respecting the disregard of voting rights that are presented by variable life separate accounts. Accordingly, Applicants note that, unlike the case with insurance company separate accounts, the issue of the resolution of material irreconcilable conflicts with respect to voting is not present with respect to Qualified Plans or Advisers and their affiliates.

Conflicts of Interest

15. Applicants state that the prohibitions on mixed and shared funding may reflect some concern with possible divergent interests among different classes of investors. Applicants submit that shared funding does not present any issues that do not already exist where a single insurance company is licensed to do business in several states. In this regard, Applicants note that a particular state insurance regulatory body could require action that is inconsistent with the requirements of other states in which the insurance company offers its policies. Accordingly, the Applicants submit that the fact that different Participating Insurance Companies may be domiciled in different states does not create a significantly different or enlarged problem.

16. Applicants submit that shared funding by unaffiliated Participating Insurance Companies, in this respect, is no different than the use of the same investment company as the funding vehicle for affiliated insurers, which Rules 6e–2(b)(15) and 6e–3(T)(15) permit. Affiliated Participating Insurance Companies may be domiciled in different states and be subject to differing state law requirements. Applicants state that affiliation does not reduce the potential, if any exists, for differences in state regulatory requirements. In any event, the conditions set forth in the application and later in this notice are designed to safeguard against, and provide procedures for resolving, and adverse effects that differences among state regulatory requirements may produce.

17. Rules 6e–2(b)(15) and 6e–3(T)(b)(15) give the insurance company the right to disregard the voting instructions of the contract owners. This right does not raise any issues different from those raised by the authority of state insurance administrators over separate accounts. Affiliation does not eliminate the potential for divergent judgments as to the advisability or legality of a change in investment policies, principal underwriter, or investment adviser initiated by contract owners. The potential for disagreement is limited by the requirements in Rules 6e–2 and 6e–3(T) that the insurance company's disregard of voting instructions be reasonable and based on specified good faith determinations.

18. A particular Participating Insurance Company's disregard of voting instructions nevertheless could conflict with the majority of contract owner voting instructions. If the Participating Insurance Company's judgment represents a minority position or would preclude a majority vote, then the Participating Insurance Company may be required, at the election of a Fund, to withdraw its separate account's investment in the Fund, and no charge or penalty would be imposed as a result of such withdrawal.

19. Applicants believe that it is possible to provide an equitable means of giving such voting rights to contract owners and to Qualified Plans. Applicants represent that the transfer agent for the Funds will inform each

shareholder including each variable contract and each Qualified Plan, of its respective share of ownership in the respective Fund. Each Participating Insurance Company will then solicit voting instructions in accordance with the ''pass-through'' voting requirement.

20. Applicants submit that investment by the Plans in any of the Portfolios will present no conflict. Applicants assert that the likelihood that voting instructions of insurance company separate account holders will be disregarded or the possible withdrawal referred to immediately above is extremely remote and this possibility will be known, through prospectus disclosure to any Qualified Plan choosing to invest in a Fund. Moreover, Applicants state that even if a material irreconcilable conflict involving Qualified Plans arises, the Plans may simply redeem their shares and make alternative investments.

21. Applicants submit that investments by the Adviser or an affiliate will similarly present no conflict. Applicants state that each Adviser or its affiliate, as applicable, will agree to vote its shares of Fund in the same proportion as all contract owners having voting rights with respect to that fund for in such other manner as may be required by the Commission or its staff.

22. Applicants state that there is no reason why the investment policies of a Fund would or should be materially different from what those policies would or should be if such Fund funded only variable annuity contracts or variable life insurance policies, whether flexible premium or scheduled premium contracts. In this regard, Applicants note that each type of insurance product is designed as a long-term investment program. Moreover, Applicants submit that each Fund will be managed to achieve its investment objective, and not to favor or disfavor any particular Participating Insurance Company or type of insurance product or other investor. Applicants note that the success of all variable insurance products depends, in part, on satisfactory investment performance, which provides an incentive for the participating insurance company to seek optimal investment performance.

23. Applicants submit that no one investment strategy can be identified as appropriate to a particular insurance product. Each pool of variable annuity and variable life insurance contract owners is composed of individuals of diverse financial status, age, insurance and investment goals. A fund supporting even one type of insurance product must accommodate these diverse factors in order to attract and retain purchasers.

24. Applicants submit that permitting mixed and shared funding will provide economic justification for the growth of the Funds. In addition, permitting mixed and shared funding will facilitate the establishment of additional series of Funds serving diverse goals, since a broader base of contract owners can be expected to provide economic justification for the creation of additional Funds with a greater variety of investment objectives and policies.

25. Applicants further note that Section 817(h) of the Code imposes certain diversification standards on the underlying assets of variable annuity contracts and variable life insurance contracts held in the portfolios of management investment companies. Treasury Regulation § 1.817–5(f)(3)(iii) specifically permits ''qualified pension or retirement plans'' and insurance company separate accounts to share the same underlying management investment company. Therefore, Applicants have concluded that neither the Code, nor the Treasury regulations, nor the revenue rulings thereunder present any inherent conflicts of interest if Plans, variable annuity separate accounts, and variable life separate accounts all invest in the same management investment company.

26. Applicants note that while there are differences in the manner in which distribution for variable annuity contracts, variable life insurance contracts and Qualified Plans are taxed, these differences do not raise any conflicts of interest. When distributions are to be made, and a separate account or Qualified Plan cannot net purchase payments to make the distributions, the separate account or the Plan will redeem shares of the Funds at their net asset value. The Qualified Plan will then make distributions in accordance with the terms of the Plan, and the insurance company will make distributions in accordance with the terms of the variable contract.

27. Applicants submit that the ability of the Funds to sell their shares directly to Qualified Plans and Advisers and their affiliates does not create a ''senior security,'' as such term is defined under Section 18(g) of the 1940 Act, with respect to any contract owner as opposed to a participant under a Plan or an Adviser or its affiliate. Regardless of the rights and benefits of participants under the Plans, or contract owners under their variable contracts, the Plans, Advisers and their affiliates, and the separate accounts have rights only with respect to their respective shares of the Funds. Such shares may be redeemed only at net asset value. No shareholder of any of the Funds has any preference over any other shareholder with respect to distribution of assets or payments of dividends.

28. Finally, Applicants state that there are no conflicts between contract owners and the participants under Plans with respect to the state insurance commissioner's powers over investment objectives. The basic premise of shareholder voting is that not all shareholders may agree with a particular proposal. The state insurance commissioners have been given the veto power in recognition of the fact that insurance companies cannot simply redeem their separate accounts out of one fund and invest in another. Complex and time-consuming transactions must be undertaken to accomplish such redemption and transfers. Conversely, trustees of Plans may redeem shares from a Fund, and reinvest in another funding vehicle without the same regulatory impediments; most Plans may even hold cash pending suitable investment. Based on the foregoing, Applicants represent that should issues arise where the interests of variable contract owners and the interests of Plans are in conflict, the issues can be almost immediately resolved because the trustees of the Plans can, on their own, redeem shares out of the Fund.

29. Applicants submit that mixed and shared funding should provide benefits to contract owners by eliminating a significant portion of the costs of establishing and administering separate funds. Participating Insurance Companies and Qualified Plans will benefit not only from the investment and administrative expertise available through the Funds, but also from the cost efficiencies and investment flexibility afforded by a larger pool of assets. Mixed and shared funding also would permit a greater amount of assets available for investment, thereby promoting economies of scale, permitting greater diversification, and making the addition of new portfolios more feasible. Additionally, making the Funds available for mixed and shared funding and permitting the purchase of Fund shares by Qualified Plans may encourage more insurance companies to offer variable contracts, and this should result in increased competition with respect to both variable contract design and pricing, which can be expected to result in more product variation and lower charges.

30. Applicants assert that there is no significant legal impediment to permitting mixed and shared funding and sales of Fund shares to Qualified

Plans and an Adviser or its affiliates. Separate accounts organized as unit investment trusts have historically been employed to accumulate shares of mutual funds which have not been affiliated with the depositor or sponsor of the separate account. Applicants do not believe that mixed and shared funding, and sales to Qualified Plans or an Adviser or its affiliates will have any adverse federal income tax consequences.

Applicants' Conditions

Applicants have consented to the following conditions:

1. A majority of each the Board of Trustees or Board of Directors (the ''Board'') of each Fund shall consist of persons who are not ''interested persons'' of the Fund, as defined by Section 2(a)(19) of the 1940 Act and the rules thereunder and as modified by any applicable orders of the Commission, except that if this condition is not met by reason of the death, disqualification, or bona fide resignation of any trustee or director, then the operation of this condition shall be suspended: (i) for a period of 45 days, if the vacancy or vacancies may be filled by the Board; (ii) for a period of 60 days, if a vote of shareholders is required to fill the vacancy or vacancies; or (iii) for such longer period as the Commission may prescribe by order upon application.

2. Each Board will monitor the Fund for the existence of any material irreconcilable conflict among and between the interests of the contract owners of all separate accounts and of Plan participants investing in the Funds, and determine what action, if any, should be taken in response to such conflicts. A material irreconcilable conflict may arise for a variety of reasons, including: (i) an action by any state insurance regulatory authority; (ii) a change in applicable federal or state insurance, tax, or securities laws or regulations, or a pubic ruling, private letter ruling, no-action or interpretive letter, or any similar action by insurance, tax, or securities regulatory authorities; (iii) an administrative or judicial decision in any relevant proceeding; (iv) the manner in which the investments of any Fund or series are being managed; (v) a difference in voting instructions given by variable annuity contract owners, variable life insurance contract owners, and Plan trustees; (vi) a decision by a Participating Insurance Company to disregard the voting instructions of contract owners; or (vii) if applicable, a decision by a Qualified Plan to disregard the voting instructions of Plan participants.

3. The Participating Insurance Companies, the Adviser or an affiliate, and any Qualified Plan that executes a fund participation agreement upon becoming an owner of 10% or more of the assets of a Fund (collectively, ''Participants'') will report any potential or existing conflicts to the Board. Participants and the Adviser will be responsible for assisting the Board in carrying out its responsibilities under these conditions by providing the Board with all information reasonably necessary for the Board to consider any issues raised. This includes, but is not limited to, an obligation by each Participating Insurance Company to inform the Board whenever contract owner voting instructions are disregarded and, if pass-through voting is applicable, an obligation by each Qualified Plan that is a Participant to inform the Board whenever it has determined to disregard Plan participant voting instructions. The responsibility to report such information and conflicts and to assist the Board will be a contractual obligation of all Participating Insurance Companies and Qualified Plans investing in a Fund under their agreements governing participation in the Fund, and such agreements shall provide that such responsibilities will be carried out with a view only to the interests of the contract owners and, if applicable, Plan participants.

4. If it is determined by a majority of the Board of the Fund, or a majority of its disinterested trustees or directors, that a material irreconcilable conflict exists, the relevant Participating Insurance Companies, and Qualified Plans, shall, at their expense and to the extent reasonably practicable (as determined by a majority of the disinterested trustees or directors), take whatever steps are necessary to remedy or eliminate the material irreconcilable conflict, up to and including: (i) withdrawing the assets allocable to some or all the separate accounts from the relevant Fund or any series therein and reinvesting such assets in a different investment medium (including another series, if any, of such Fund); (ii) in the case of Participating Insurance Companies, submitting the question of whether such segregation should be implemented to a vote of all affected contract owners and, as appropriate, segregating the assets of any appropriate group (i.e., variable annuity contract owners or variable life insurance contract owners of one or more Participating Insurance Companies) that votes in favor of such segregation, or offering to the affected contract owners the option of making such a change; and (iii) establishing a new registered management investment company or managed separate account. If a material irreconcilable conflict arises because of a participating insurance company's decision to disregard contract owner voting instructions and that decision represents a minority position or would preclude a majority vote, the participating insurance company may be required, at the Fund's election, to withdraw its separate account's investment in the Fund, and no charge or penalty will be imposed as a result of such withdrawal. If a material irreconcilable conflict arises because of a Qualified Plan's decision to disregard Plan participant voting instructions, if applicable, and that decision represents a minority position or would preclude a majority vote, the Qualified Plan may be required, at the election of the Fund, to withdraw its investment in the Fund, and no charge or penalty will be imposed as a result of such withdrawal. The responsibility to take remedial action in the event of a Board determination of a material irreconcilable conflict and to bear the cost of such remedial action shall be a contractual obligation of all Participating Insurance Companies and Qualified Plans under their agreements governing participation in the Fund, and these responsibilities will be carried out with a view only to the interests of the contract owners and, as applicable, Plan participants.

For purposes of Condition 4, a majority of the disinterested members of the Board shall determine whether or not any proposed action adequately remedies any material irreconcilable conflict, but in no event will the Fund or the Adviser be required to establish a new funding medium for any variable contract. No Participating Insurance Company shall be required by this Condition 4 to establish a new funding medium for any variable contract if an offer to do so has been declined by a vote of a majority of contract owners materially and adversely affected by the material irreconcilable. No Qualified Plan shall be required by Condition 4 to establish a new funding medium for such Qualified Plan if (a) a majority of Plan participants materially and adversely affected by the material irreconcilable conflict vote to decline such offer or (b) pursuant to governing Plan documents and applicable law, the Plan makes such decision without Plan participant vote.

5. The Board's determination of the existence of a material irreconcilable conflict and its implications shall be

made known promptly in writing to all Participants.

6. Participating Insurance Companies will provide pass-through voting privileges to all variable contract owners whose contracts are funded through a registered separate account for so long as the Commission continues to interpret the 1940 Act as requiring pass-through voting privileges for variable contract owners. Accordingly, such Participating Insurance Companies will vote shares of each Fund or series thereof held in their registered separate accounts in a manner consistent with timely voting instructions received from such contract owners. Each Participating Insurance Company will vote shares of each Fund or series held in its registered separate accounts for which no timely voting instructions are received, as well as shares it owns, in the same proportion as those shares for which voting instructions are received. Participating Insurance Companies shall be responsible for assuring that each of their separate accounts investing in a Fund calculates voting privileges in a manner consistent with all other Participating Insurance Companies. The obligation to vote a Fund's shares and to calculate voting privileges in a manner consistent with all other registered separate accounts investing in a Fund shall be a contractual obligation of all Participating Insurance Companies under their agreements governing participation in the Fund. Each Plan will vote as required by applicable law and governing Plan documents.

7. As long as the Commission continues to interpret the Act as requiring pass-through voting privileges for contract owners whose contracts are funded through a registered separate account, the Adviser, or, if applicable, any of its affiliates, will vote shares of any Fund or series thereof in the same proportion as all variable contract owners having voting rights with respect to that Fund or series thereof; provided, however, that the Adviser or any such affiliates shall vote its shares in such other manner as may be required by the Commission or its staff.

8. A Fund will notify all Participating Insurance Companies that separate account prospectus disclosure regarding potential risks of mixed and shared funding may be appropriate. Each Fund shall disclose in its prospectus that (1) shares of the Fund are offered to insurance company separate accounts which fund both annuity and life insurance contracts, and to Qualified Plans, (2) due to differences of tax treatment or other considerations, the interests of various contract owners participating in the Fund and the interests of Qualified Plans investing in the Fund might at some time be in conflict, and (3) the Board will monitor the Fund for any material conflicts and determine what action, if any should be taken.

9. All reports received by the Board of potential or existing conflicts, and all Board action with regard to determining the existence of a conflict, notifying Participants of a conflict, and determining whether any proposed action adequately remedies a conflict, will be properly recorded in the minutes of the Board or other appropriate records, and such minutes or other records shall be made available to the Commission upon request.

10. If and to the extent Rule 6e–2 and Rule 6e–3(T) under the 1940 Act are amended, or Rule 6e–3 is adopted, to provide exemptive relief from any provision of the 1940 Act or the rules thereunder with respect to mixed and shared funding on terms and conditions materially different from any exemptions granted in the order requested in the application, then each Fund and/or the Participants, as appropriate, shall take such steps as may be necessary to comply with Rule 6e–2 and Rule 6e–3(T), as amended, and Rule 6e–3, as adopted, to the extent such rules are applicable.

11. Each Fund will comply with all provisions of the 1940 Act requiring voting by shareholders (which, for these purposes, shall be the persons having a voting interest in the shares of the Fund), and in particular each Fund will either provide for annual meetings (except insofar as the Commission may interpret Section 16(c) of the 1940 Act not to require such meetings) or comply with Section 16(c) of the 1940 Act (although the Fund is not one of the trusts described in Section 16(c) of the 1940 Act), as well as with Section 16(a) of the 1940 Act and, if and when applicable, Section 16(b) of the 1940 Act. Further, each Fund will act in accordance with the Commission's interpretation of the requirements of Section 16(a) with respect to periodic elections of directors (or trustees) and with whatever rules the Commission may promulgate with respect thereto.

12. The Participants shall at least annually submit to the Board of a Fund such reports, materials or data as the Board may reasonably request so that it may fully carry out the obligations imposed upon it by the conditions contained in the application and said reports, material and data shall be submitted more frequently if deemed appropriate by the Board. The obligations of a Participant (not including an Adviser or affiliate) to provide these reports, materials, and data to the Board of the Fund when it so reasonably requests, shall be a contractual obligation of all Participants under their agreements governing participation in each Fund.

13. If a Qualified Plan should become an owner of 10% or more of the assets of a Fund, such Plan will execute a participation agreement with such Fund which includes the conditions set forth in the application to the extent applicable. A Qualified Plan will execute an application containing an acknowledgment of this condition upon such Plan's initial purchase of the shares of any Fund.

Conclusion

For the reasons summarized above, Applicants assert that the requested exemptions are appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–31891 Filed 11–30–98; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–23571; 812–10868]

Baker, Fentress & Company, et al; Notice of Application

November 24, 1998.

AGENCY: Securities and Exchange Commission (the ''SEC'').

ACTION: Notice of application for an order under sections 6(c) and 17(b) of the Investment Company Act of 1940 (the ''Act'') granting an exemption from section 17(a) of the Act; under section 6(c) granting an exemption from sections 18(d) and 23(a) and (b) of the Act, under section 23(c) of the Act granting an exemption from section 23(c) of the Act; and under section 17(d) of the Act and rule 17d–1 under the Act.

SUMMARY OF APPLICATION: Baker, Fentress & Company (''BKF'') and Levin Management Co., Inc. (''Levco,'' together with BKF, ''applicants'') request an order to permit applicants to adopt an equity-based employee compensation plan.

FILING DATES: The application was filed on November 12, 1997 and amended on September 28, 1998.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 21, 1998 and should be accompanied by proof of service on applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549; Baker, Fentress & Co., Attn. James P. Gorter, Chairman, 200 West Madison Street, Suite 3510, Chicago, Illinois 60606; and Levin Management Co., Inc., Attn. John A. Levin, Chairman, One Rockefeller Center, 25th Floor, New York, New York 10020.

FOR FURTHER INFORMATION CONTACT: Deepak T. Pai, Attorney Adviser, at (202) 942–0574, or Edward P. Macdonald, Branch Chief, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application is available for a fee from the SEC's Public Reference Branch, 450 Fifth Street, N.W., Washington, D.C. 20549 (tel. 202–942–8090).

Applicants' Representations

1. BKF is a non-diversified closed-end management investment company registered under the Act. BKF's common stock is traded on the New York Stock Exchange (''NYSE''). Levco, a Delaware corporation, is a wholly-owned subsidiary of BKF. John A. Levin & Co., Inc. (''Adviser''), a wholly-owned subsidiary of Levco, is an investment adviser registered under the Investment Advisers Act of 1940 and serves as BKF's investment adviser. The Adviser also provides investment advisory services to other clients and has two wholly-owned subsidiaries, one of which is a broker-dealer registered under the Securities Exchange Act of 1934 (''Exchange Act''), and the other is a commodity pool operator registered under the Commodity Exchange Act.

2. As an internally managed investment company, BKF has 10 employees. The Adviser and its subsidiaries have 70 employees. Applicants propose to implement an equity-based employee compensation plan (''Plan'') for officers, directors and employees of BKF and the Adviser (''Participants'').

3. Applicants state that, in order for BKF and the Adviser to be successful, they must be able to offer their professional staff compensation packages that are comparable to those offered by other investment advisory firms. Applicants assert that top professionals in the investment management business have come to expect to receive equity-based compensation, and that asset management firms offer it generously. Applicants have been advised by an executive compensation consulting firm that BKF and the Adviser will suffer a competitive disadvantage if they are unable to provide equity-based compensation to key executives, portfolio managers, traders, analysts, marketing professionals and other personnel.

4. The Plan has been approved by BKF's board of directors (''Board''), including a majority of the independent directors (''Independent Directors''). The Plan will be submitted to BKF's shareholders for their initial approval and subsequent reapproval five years after the Plan is adopted. The Plan will be administered by a committee of at least two Independent Directors (''Committee''). The Committee will consist exclusively of Independent Directors.

5. Pursuant to the Plan, the Committee will have the discretion to grant both non-qualified and incentive stock options for BKF and Levco common stock,[1] stock appreciation rights (''SARs''),[2] as well as make various types of grants of BKF and Levco common stock (collectively, ''Awards''). The number of shares available for issuance under the Plan would be 10% of BKF's shares outstanding on the effective date of the Plan,[3] and 20% of Levco's outstanding shares.

6. Under the Plan, the Independent Directors would receive only automatic grants of options on BKF's stock. Automatic option grants will be made to each Independent Director (i) on the date of approval of the Plan by BKF's shareholders; (ii) on the effective date of any new Independent Director's initial election to the Board ((i) and (ii) collectively, ''Initial Option''); and (iii) annually on the date of final adjournment of each annual meeting of BKF's shareholders (''Annual Option''). Applicants state that this compensation method is designed to assure that director and shareholder interests are aligned.

7. Pursuant to the Plan, options and SARs expire ten years from the date of grant and expire immediately upon termination of employment, unless the Committee determines otherwise. The Awards will be nontransferable except by gift or as permitted by the Committee for estate planning purposes.

8. The Board will review the Plan at least annually. The Committee periodically, but in no event less frequently than annually, and prior to any decision to grant the Awards, will review the potential impact that the grant, exercise, or vesting of the Awards could have on BKF's and Levco's earnings and NAV per share. The Committee will be authorized to take appropriate steps to assure that the grant, exercise or vesting of the Awards would not have an effect contrary to the interests of BKF's shareholders. This authority will include the authority to prevent or limit the grant of additional Awards.

9. Under the Plan, when a Participant exercises an option for Levco stock or otherwise receives Levco stock pursuant to an Award, the Participant may require BKF to repurchase the stock at its then FMV (''Repurchase Right''). The Committee may determine to pay the Participant with BKF's stock and/or cash. The Plan also provides that BKF may make loans to Participants in connection with the Awards, such as to enable a Participant to exercise an option or pay income taxes relating to an Award (''Participant Loans''). The Plan also permits a Participant to pay for an Award with a previous Award, for example, by paying the exercise price for an option on BKF stock with shares of Levco received as a previous Award.

[1] Under the Plan, the exercise price of the stock options would be equal to the fair market value (''FMV'') of BKF or Levco stock, as applicable, on the date of grant. The FMV of BKF stock will equal the closing price on the NYSE on the date of grant of the option. The FMV of Levco stock will be the value at which BKF carries the stock for purposes of calculating BKF's net asset value (''NAV'').

[2] Under the Plan, SARs would be granted based on the excess of the FMV of BKF or Levco stock, as relevant, on the date of exercise over the SAR's grant price. Stock issued when an SAR is settled (or, in the case of an SAR settled for cash, stock that would have been issued if the SAR were settled in stock) will be deducted from the number of shares available for issuance under the Plan.

[3] That number could be increased (or decreased) in proportion to the changes in the number of BKF's shares outstanding resulting from any stock split or reverse split, stock dividend, recapitalization or similar corporate event, or in connection with stock issuances other than those in connection with the Plan (*i.e.*, dividend reinvestments or an acquisition that is paid for with BKF stock).

Applicants' Legal Analysis

1. Applicants request an order exempting them from various provisions of the Act to implement the Plan. The requested order would supersede a prior order with respect to the incentive compensation plan.[4]

Sections 18(d) and 23(a) and (b) of the Act

2. Section 18(d) of the Act generally prohibits a registered management investment company from issuing rights to purchase the company's shares.[5] Applicants state that section 18(d) would prohibit the issuance of options and SARs for BKF's stock under the Plan.

3. Section 23(a) of the Act generally prohibits a registered closed-end investment company from issuing securities for services. Applicants state that this provision would prohibit the issuance of Awards for BKF's stock under the Plan as compensation for employees' services.

4. Section 23(b) of the Act prohibits a registered closed-end investment company from selling common stock at below its current NAV. Applicants state that, since BKF's stock historically has traded at a discount to its NAV, and Awards under the Plan will be valued at the current market price of BKF's stock, section 23(b) would prohibit the issuance of the Awards.

5. Section 6(c) of the Act provides, in part, that the SEC may, by order upon application, conditionally or unconditionally exempt any person, security, or transaction, or any class or classes thereof, from any provision of the Act, if and to the extent that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants request an exemption under section 6(c) from sections 18(d) and 23(a) and (b) of the Act to the extent necessary to implement the Plan.

6. Applicants state that the concerns underlying those sections included (i) preferential treatment of investment company insiders and the use of options and other rights by insiders to obtain control of the investment company; (ii) complication of the investment company's structure that made it difficult to determine the value of the company's shares; and (iii) dilution of shareholders' equity in the investment company. Applicants state that the Plan does not raise the concern about preferential treatment of BKF's insiders because the Plan is a bona fide employee compensation plan of the type that is common among corporations generally. BKF also asserts that the Plan would not become a means for insiders to obtain control of BKF because the number of shares of BKF issuable under the Plan would be limited to 10% of BKF's outstanding shares. Moreover, as a condition to the requested order, no individual Participant could be issued more the 35% of shares reserved for issuance under the Plan.

7. Applicants further state that the Plan will not unduly complicate BKF's structure because equity-based employee compensation arrangements are widely used among corporations and commonly known to investors. Applicants note that the Plan will be submitted to BKF's shareholders for their approval. Applicants represent that a concise, ''plain English'' description of the Plan, including its potential dilutive effect, will be provided in the proxy materials that will be submitted to BKF's shareholders. Applicants also state that they will comply with the proxy disclosure requirements in Item 10 of Schedule 14A under the Exchange Act. Applicants further note that the Plan will be disclosed to investors in accordance with the requirements of Form N–2 registration statement for closed-end investment companies, and pursuant to the standards and guidelines adopted by the Financial Accounting Standards Board for operating companies. In addition, as a condition to the requested order, BKF will comply with the disclosure requirements for executive compensation plans applicable to operating companies under the Exchange Act. BKF thus concludes that the Plan will be adequately disclosed to investors and appropriately reflected in the market value of BKF's shares.

8. Applicants acknowledge that, while Awards granted under the Plan would have a dilutive effect on the shareholders' equity in BKF, that effect would be outweighed by the anticipated benefits of the Plan to BKF and its shareholders. Applicants assert that they need the flexibility to provide the requested equity-based employee compensation in order to be able to compete effectively with other financial services firms for talented professionals. These professionals, applicants suggest, in turn are likely to increase BKF's and the Adviser's performance and shareholder value. Applicants also assert that equity-based compensation would more closely align the interests of BKF's and the Adviser's employees with those of BKF's shareholders.

9. In addition, applicants state that BKF's shareholders will be further protected by the conditions to the requested order that assure continuing oversight of the operation of the Plan by BKF's Board. Under these conditions, the Board will review the Plan at least annually. In addition, the Committee periodically will review the potential impact that the grant, exercise, or vesting of Awards could have on BKF's earnings and NAV per share, such review to take place prior to any decisions to grant stock options, but in no event less frequently than annually. Adequate procedures and records will be maintained to permit such review. The Committee will be authorized to take appropriate steps to ensure that neither the grant nor the exercise or vesting of Awards would have an effect contrary to the interests of BKF's shareholders. This authority will include the authority to prevent or limit the grant of additional Awards.

Section 17(a) of the Act

10. Section 17(a)(1) of the Act generally prohibits an affiliated person of a registered investment company, or an affiliated person of that person (''second-tier affiliate''), acting as principal, from selling any security to the company. Section 2(a)(3) of the Act, in relevant part, defines an affiliated person of another person to include any officer, director or employee of that person and, in the case of an investment company, the investment adviser.

11. Applicants state that officers, directors and employees of BKF are deemed affiliated persons of BKF, and officers, directors and employees of the Adviser are deemed second-tier affiliates of BKF. Thus section 17(a)(1) would prohibit the Repurchase Rights under the Plan (i.e., prohibit BKF from purchasing from a Participant Levco stock received as an Award under the Plan).

12. Section 17(a)(2) of the Act generally prohibits an affiliated person or second-tier affiliate of a registered investment company, acting as principal, from purchasing any security from the company. Applicants state that this provision would prohibit transactions contemplated under the Plan that would enable a Participant to pay for an Award with a prior Award, such as paying the exercise price for an option for BKF's stock with Levco stock received as a prior Award.

[4] Baker, Fentress & Company, Investment Company Act Release Nos. 21890 (Apr. 15, 1996) (notice) and 21949 (May 10, 1996) (order).

[5] Section 18(d) permits a fund to issue only warrants or rights, ratably to a class of shareholders, that have an exercise period of no more than 120 days or in exchange for warrants in connection with a reorganization.

13. Section 17(a)(3) of the Act prohibits an affiliated person or second-tier affiliate of a registered investment company from borrowing money or other property from the company. Applicants state that this provision would prohibit Participant Loans.

14. Section 17(b) of the Act provides that the SEC may, by order upon application, exempt a proposed transaction from section 17(a). Section 17(b) further provides that the SEC shall grant the exemption if evidence establishes that (a) the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned; (b) the proposed transaction is consistent with the policy of the registered investment company concerned, as recited in its registration statement and reports filed under the Act; and (c) the proposed transaction is consistent with the general purposes of the Act. Applicants request an order under sections 6(c) and 17(b) of the Act permitting transactions incident to the Plan described above.

15. Applicants state that valuation of the Awards for purposes of the Repurchase Right and to permit a Participant to pay for an Award with a previous Award will be fair and reasonable and will not involve overreaching on the part of any person concerned because BKF's shares will be valued in accordance with the Act and Levco stock will be valued in the same manner as it is valued for purposes of calculating BKF's NAV. Applicants also state that these transactions will be consistent with BKF's policies and with general purposes of the Act.

16. With regard to Participant Loans, applicants state that the terms of the Loans will be fair to BKF because the Loans will be recourse loans that must be secured by collateral acceptable to the Committee, will bear a rate at least equal to the ''applicable federal rate'' as defined by the Internal Revenue Code of 1986, as amended (''IRC''), and will have a maturity of less than five years. Applicants also state that, because BKF's fundamental investment restrictions might prohibit Participant Loans, BKF will seek shareholder approval to amend that investment restriction to specifically permit Participant Loans. Applicants also state that the Participant Loans, Repurchase Rights, and the ability to pay for an Award with a previous Award are typical transactions incident to corporate equity-based compensation plans.

Section 17(d) of the Act

17. Section 17(d) of the Act and rule 17d–1 under the Act generally prohibit an affiliated person of a registered investment company or second-tier affiliate from participating in a joint enterprise, joint arrangement or profit-sharing plan in which the company is a participant, unless the SEC by order approves the transactions. Rule 17d–1(c) defines a joint enterprise to include any stock option or stock purchase plan. Rule 17d–1(b) provides that, in considering relief pursuant to the rule, the SEC will consider (i) whether the participation of the registered investment company in a joint enterprise is consistent with the Act's policies and purposes and (ii) the extent to which that participation is on a basis different from or less advantageous than that of other participants.

18. Applicants request an order pursuant to section 17(d) and rule 17d–1 to permit the Plan. Applicants state that the Plan, although benefiting the Participants and BKF in different ways, is in the interests of BKF's shareholders because the Plan will help BKF attract and retain talented professionals, help align the interests of BKF's employees with those of its shareholders, and in turn help produce a better return to BKF's shareholders. Thus, applicants assert that the Plan is consistent with the policies and purposes of the Act and that BKF's participation in the Plan will be on a basis no less advantageous than that of other participants.

Section 23(c) of the Act

19. Section 23(c) of the Act prohibits a registered closed-end investment company from purchasing any securities of which it is the issuer except in the open market, pursuant to tender offers, or under other circumstances as the SEC may permit to insure that the purchase is made on a basis which does not unfairly discriminate against any holders of the class or classes of securities to be purchased.

20. Applicants state that a purchase by BKF of BKF stock from a Participant in connection with an Award might be prohibited by section 23(c) and request an order under section 23(c) to permit these purchases. Applicants state that these purchases will be made on a basis which does not unfairly discriminate against BKF shareholders because BKF will purchase its shares from the Participants at their market price on the date of the repurchase, the same price at which all other shareholders of BKF could sell their shares on the NYSE.

Applicant's Conditions

Applicants agree that the order granting the requested relief will be subject to the following conditions:

1. BKF will not dispose of the capital stock of Levco or the Adviser if as a result thereof, BKF would own, directly or indirectly, 50% or less of the outstanding capital stock of each of Levco and the Adviser, unless BKF disposes of 100% of its interest in the Adviser.

2. The Board will maintain Audit, Compensation, and Nominating Committees, none of the members of which will be ''interested persons'' of BKF as defined in the Act and as modified by the Prior Order. The Committee will administer the Plan and will be composed of two or more directors of BKF who are not interested persons of BKF or Levco and who are (i) non-employee directors within the meaning of rule 16b–3 under the Exchange Act, and (ii) outside directors as defined under section 162(m) of the IRC.

3. The Board will review at least annually the investment management business of BKF and the Adviser to determine whether the benefits derived by BKF warrant the continuation of such business and BKF's ownership, directly or indirectly, of the Adviser and, if appropriate, approve at least annually such continuation.

4. The cash incentive plan covered by the Prior Order will be approved and administered by the Compensation Committee of the Board. No new cash incentive awards will be made under that plan after approval of the Plan by BKF's shareholders.

5. The Plan will not be implemented unless the Plan has been approved by the holders of a majority of BKF's outstanding common stock present at a meeting called to consider the Plan. Any amendment to the Plan will be subject to the approval of BKF's stockholders to the extent such approval is required by law or the Board otherwise determines. Unless terminated or amended, during the fifth year of the Plan (and each fifth year thereafter), the Plan shall be resubmitted for reapproval to BKF's stockholders and the SEC and all Awards made during that year shall be contingent upon stockholder reapproval and receipt of an SEC exemptive order. BKF will not implement the Plan until stockholders have approved a new investment advisory agreement that describes the possible indirect compensation that the Adviser may receive if its officers, director and employees receive Awards.

6. Awards are not transferable or assignable, except as the Committee shall specifically approve to facilitate estate planning or to a beneficiary upon a Participant's death or by will or the laws of descent and distribution.

7. The existence and nature of the Awards granted will be disclosed in accordance with standards or guidelines adopted by the Financial Accounting Standards Board for operating companies and the requirements of the SEC under Item 402 of Regulation S–K, Item 8 of Schedule 14A under the Exchange Act and Item 18 of Form N–2.

8. The maximum number of shares of BKF stock available for delivery in connection with Awards under the Plan shall be (i) 10% of BKF stock outstanding on the effective date of the Plan, plus (ii) 10% of the number of shares of BKF stock issued or delivered by BKF (other than pursuant to compensation plans) during the term of the Plan, subject to adjustment for corporate transactions. The maximum number of shares of Levco stock available for delivery in connection with Awards under the Plan shall be (i) 2,498, plus (ii) 19.99% of the number of shares of the Levco stock issued or delivered by Levco (other than pursuant to compensation plans) during the term of the Plan. The total amount of shares of BKF stock and Levco stock with respect to which incentive stock options may be granted shall not exceed three million and two thousand respectively.

9. The Board will review the Plan at least annually. In addition, the Committee periodically will review the potential impact that the grant, exercise, or vesting of Awards could have on BKF's and Levco's earnings and NAV per share, such review to take place prior to any decisions to grant Awards, but in no event less frequently than annually. Adequate procedures and records will be maintained to permit such review, and the Committee will be authorized to take appropriate steps to ensure that neither the grant nor the exercise or vesting of Awards would have any effect contrary to the interests of BKF's investors. This authority will include the authority to prevent or limit the grant of additional Awards. All records maintained pursuant to this condition will be subject to examination by the SEC and its staff.

10. Awards are issuable only to BKF's directors, officers and employees and the officers and employees of certain of its subsidiaries. No one person shall be granted Awards relating to more than 35% of the shares reserved for issuance under the Plan. In any fiscal year, no person may be granted Awards related to more than one million shares of BKF stock and 1,000 shares of Levco stock, which amounts may be adjusted by the Committee as it deems equitable to reflect certain corporate transactions or events that affect the stock of BKF and/or Levco.

11. The maximum amount of BKF stock subject to each Independent Director Initial Option is 1,000, and the maximum number of shares of BKF stock subject to each Independent Director Annual Option is 250, subject to adjustments for corporate transactions. The exercise price per share of BKF stock purchasable upon exercise of a director option will be equal to 100% of the FMV of a share of BKF stock on the date of grant of such option. A director option will expire at the earlier of (i) ten years from the date of grant or (ii) three months after the date the Independent Director ceases to serve as director of BKF for any reason.

12. Any loan made pursuant to the Plan will be required to be made with recourse against the borrower and be secured by the BKF stock and/or Levco stock to be acquired or other acceptable collateral. Furthermore, no loan may have a maturity of more than five years or bear interest at a rate below the ''applicable federal rate'' as defined in section 1274(d) of the IRC.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–31940 Filed 11–30–98; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 23548; 812–11248]

Bankers Trust Company et al.; Notice of Application

November 24, 1998.

AGENCY: Securities and Exchange Commission (''SEC'').

ACTION: Notice of application for an order under section 12(d)(1)(J) of the Investment Company Act of 1940 (the ''Act'') exempting applicants from sections 12(d)(1)(A) and (B) of the Act, under sections 6(c) and 17(b) of the Act exempting applicants from section 17(a) of the Act, and under section 17(d) of the Act and rule 17d–1 under the Act.

SUMMARY OF APPLICATION: Applicants seeks an order that would permit registered open-end management investment companies to invest their uninvested cash in affiliated money market funds.

APPLICANTS: Bankers Trust Company; Cash Management Portfolio, Treasury Money Portfolio, Tax Free Money Portfolio, NY Tax Free Money Portfolio, International Equity Portfolio, Equity 500 Index Portfolio, Short/Intermediate U.S. Government Securities Portfolio, Asset Management Portfolio, Capital Appreciation Portfolio, Intermediate Tax Free Portfolio, BT Investment Portfolios, BT Institutional Funds, BT Insurance Funds Trust, BT Pyramid Mutual Funds, BT Alex. Brown Cash Reserve Fund, Inc., Flag Investors Communications Fund, Inc., Flag Investors International Fund, Inc., Flag Investors Emerging Growth Fund, Inc., Flag Investors Short-Intermediate Income Fund, Inc., Flag Investors Value Builder Fund, Inc., Flag Investors Real Estate Securities Fund, Inc., and Flag Investors Equity Partners Fund, Inc. (and each of their current series and each subsequently created series), and any other currently existing or subsequently created registered open-end management investment company advised or sub-advised by Bankers Trust Company or an entity controlling, controlled by, or under common control with Bankers Trust Company (''Bankers Trust'') (collectively, the ''Affiliated Funds'').

FILING DATES: The application was filed on August 5, 1998, and amended on November 24, 1998.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 17, 1998, and should be accompanied by proof or service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, NW, Washington, DC 20549. Applicants, One Bankers Trust Plaza, 31st Floor, New York, New York 10006.

FOR FURTHER INFORMATION CONTACT: Mary Kay Frech, Branch Chief, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's

Public Reference Branch, 450 Fifth Street, NW, Washington, DC 20549 (tel. 202–942–8090).

Applicants' Representations

1. The Affiliated Funds are open-end management investment companies registered under the Act. Nine of the Affiliated Funds are money market funds subject to rule 2a–7 under the Act (together with any future money market Affiliated Fund, the ''Money Market Funds''). The remaining Affiliated Funds are variable net asset value funds (together with any future variable net asset value Affiliated Fund, the ''Non-Money Market Funds'').

2. Bankers Trust serves as investment adviser to the Affiliated Funds. Bankers Trust, a New York banking corporation, is exempt from registration as an investment adviser under section 202(a)(11)(A) of the Investment Advisers Act of 1940. Bankers Trust and any entity controlling, controlled by, or under common control with Bankers Trust that serves as investment adviser to the Affiliated Funds are referred to as the ''Investment Adviser.'' Bankers Trust also serves as custodian to all of the Affiliated Funds.

3. Each of the Affiliated Funds has, or may be expected to have, cash reserves that have not been invested in portfolio securities (''Uninvested Cash'') in an account at its custodian that either may be invested directly in individual short-term money market instruments or may not otherwise be invested in any portfolio securities. Uninvested Cash may result from a variety of sources, including dividends or interest received or portfolio securities, unsettled securities transactions, reserves held for investment strategy purposes, scheduled maturity of investments, liquidation of investment securities to meet anticipated redemptions and dividend payments, or new monies received from investors. Uninvested Cash of the Affiliated Funds which are Money Market Funds also may result from a variety of sources, including late trades on portfolio securities, unsettled securities transactions, or new monies received from investors.

4. Applicants seek an order that would permit each of the Affiliated Funds, including the Money Market Funds, to utilize their Uninvested Cash to purchase shares of one or more of the Money Market Funds (the ''Underlying Money Market Funds'') (each Affiliated Fund purchasing shares of the Money Market Funds, an ''Investing Fund,'' and collectively, ''Investing Funds''), and would permit the Underlying Money Market Funds to sell their shares to, and redeem shares from, the Investing Funds. Applicants state that the proposed transactions may reduce transaction costs, create more liquidity, increase returns on the Uninvested Cash, and diversify holdings.

Applicants' Legal Analysis

1. Section 12(d)(1)(A) of the Act provides that a registered investment company may not acquire securities of another investment company if such securities represent more than 3% of the acquired company's outstanding voting stock, more than 5% of the acquiring company's total assets, or if such securities, together with the securities of other acquired investment companies, represent more than 10% of the acquiring company's total assets. Section 12(d)(1)(B) of the Act provides that no registered open-end investment company may sell its securities to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be owned by investment companies.

2. Section 12(d)(1)(J) of the Act provides that the SEC may exempt any persons or transactions from section 12(d)(1) if and to the extent the exemption is consistent with the public interest and the protection of investors. Applicants request an order under section 12(d)(1)(J) to permit the Investing Funds to purchase and redeem shares of the Underlying Money Market Funds in excess of the limits in sections 12(d)(1)(A) and (B), provided however, that in all cases each Investing Fund's aggregate investment of Uninvested Cash in shares of the Underlying Money Market Funds will not exceed 25% of the Investing Fund's total assets at any time.

3. Applicants maintain that the proposed arrangement will not result in the abuses that sections 12(d)(1)(A) and (B) were intended to address. Applicants submit that the Underlying Money Market Funds contain a highly liquid portfolio and there would be no undue influence from an Investing Fund. Applicants state that the proposed arrangement will not result in an inappropriate layering of fees because shares of the Underlying Money Market Funds sold to the Investing Funds will not be subject to a sales load, redemption fee, asset-based distribution fee, or service fee. In addition, the Investment Adviser will waive its advisory fee for each Investing Fund in an amount that offsets the amount of the advisory fees of an Underlying Money Market Fund incurred by the Investing Fund.

4. Section 17(a) of the Act makes it unlawful for any affiliated person of a registered investment company, acting as principal, to sell or purchase any security to or from the company. Section 2(a)(3) of the Act defines ''affiliated person'' to include persons under common control. Section 2(a)(9) of the Act defines ''control'' to mean the power to exercise a controlling influence over the management or policies of a company. Because the Affiliated Funds share a common investment adviser, each of the Affiliated Funds may be deemed to be under common control with the other Affiliated Funds. Accordingly, applicants state that the sale of shares of the Underlying Money Market Funds to the Investing Funds would be prohibited under section 17(a) of the Act.

5. Section 17(b) of the Act authorizes the SEC to exempt a transaction from section 17(a) if the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policy of each investment company concerned and the general purposes of the Act. Section 6(c) authorizes the Commission to exempt persons or transactions from the provisions of the Act to the extent that such exemptions are appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the Act.

6. Applicants state that the terms of the proposed transactions meet the standards of sections 6(c) and 17(b). Applicants state that the shares of the Underlying Money Market Funds will be purchased and redeemed at their net asset value, which is the same consideration paid and received for the shares by any other shareholder. Applicants also state that the Investing Funds will retain their ability to invest their Uninvested Cash directly in money market instruments if they believe they can obtain a higher return. Applicants assert that the purchase of shares of the Underlying Money Market Funds by the Investing Funds will be effected in accordance with each Investing Fund's investment policies and that the proposed transactions are consistent with the general purposes of the Act.

7. Section 17(d) of the Act and rule 17d–1 prohibit an affiliated person of a registered investment company, acting as principal, from participating in any joint arrangement within the investment company unless the SEC has issued an order authorizing the arrangement.

Applicants state that the Investing Funds, by purchasing shares of the Underlying Money Market Funds, the Investment Adviser, by managing the assets of the Investing Funds invested in the Underlying Money Market Funds, and the Underlying Money Market Funds could be deemed to be participating in a joint arrangement within the meaning of section 17(d) and rule 17d–1.

8. Rule 17d–1 under the Act permits the SEC to approve a joint transaction covered by the terms of section 17(d). In determining whether to permit a transaction, the SEC considers whether the investment company's participation in the joint enterprise is consistent with the provisions, policies, and purposes of the Act, and the extent to which such participation is on a basis different from or less advantageous than that of other participants. Applicants assert that the investment by the Investing Funds in shares of the Underlying Money Market Funds will be on the same basis as any other shareholder and will be consistent with the policies and purposes of the Act.

Applicants' Conditions

Applicants agree that the order granting the requested relief will be subject to the following conditions:

1. Shares of the Underlying Money Market Funds sold to and redeemed from the Investing Funds will not be subject to a sales load, redemption fee, distribution fee under a plan adopted in accordance with rule 12b–1 under the Act, or service fee (as defined in Rule 2830 of the NASD's Conduct Rules).

2. The Investment Adviser will waive its advisory fee for each Investing Fund in an amount that offsets the amount of the advisory fees of an Underlying Money Market Fund incurred by the Investing Fund.

3. Each Investing Fund will invest Uninvested Cash in, and hold shares of, the Underlying Money Market Funds only to the extent that the Investing Fund's aggregate investment in the Underlying Money Market Funds does not exceed 25% of the Investing Fund's total assets. For purposes of this limitation, each Investing Fund or series thereof will be treated as a separate investment company.

4. Investment in shares of the Underlying Money Market Funds will be in accordance with each Investing Fund's respective investment restrictions, if any, and will be consistent with each Investing Fund's policies as set forth in its prospectus and statement of additional information.

5. Each Investing Fund, each Underlying Money Market Fund, and any future fund that may rely on the order shall be advised by the Investment Adviser, or a person controlling, controlled by, or under common control with the Investment Adviser.

6. No Underlying Money Market Fund shall acquire securities of any other investment company in excess of the limits contained in section 12(d)(1)(A) of the Act.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–31938 Filed 11–30–98; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 23549; 812–11392]

MFS Institutional Trust; Notice of Application

November 24, 1998.

AGENCY: Notice of application under section 17(b) of the Investment Company Act of 1940 (''Act'') for an exemption from section 17(a) of the Act.

SUMMARY OF APPLICATION: Applicant, MFS Institutional Trust (''Trust'') on behalf of MFS Institutional Emerging Equities Fund (''Fund''), seeks an order to permit an in-kind redemption of shares of the Fund by an affiliated person of the Fund.

FILING DATES: The application was filed on October 30, 1998. Applicant has agreed to file an amendment to the application during the notice period, the substance of which is reflected in this notice.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing request should be received by the Commission by 5:30 p.m. on December 18, 1998, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Commission's Secretary.

ADDRESSES: Secretary, Commission, 450 Fifth Street, NW., Washington, DC 20549. Applicants, 500 Boylston Street, Boston, Massachusetts 02116.

FOR FURTHER INFORMATION CONTACT: Edward P. Macdonald, Branch Chief, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Branch, 450 5th Street, NW., Washington, DC 20549 (tel. no. 202–942–8090).

Applicant's Representations

1. The Trust, organized as a Massachusetts business trust, is registered under the Act as an open-end management investment company. The Fund is a series of the Trust. Massachusetts Financial Services Company (''Adviser''), registered under the Investment Advisers Act of 1940 (''Advisers Act''), is the Fund's investment adviser.

2. ICMA Retirement Trust (''Affiliated Shareholder'') is a retirement trust for deferred compensation plans and qualified retirement plans established by state and local governments and their agencies and instrumentalities for their employees. The Affiliated Shareholder is not registered under the Act in reliance upon section 2(b) of the Act. The ICMA Retirement Corporation (''Retirement Corporation''), registered under the Advisers Act, serves as the investment adviser to the Affiliated Shareholder. The Affiliated Shareholder owns approximately 20.02% of the outstanding shares of the Fund.

3. The Retirement Corporation, acting in its fiduciary capacity with respect to the Affiliated Shareholder, has concluded that the assets of the Affiliated Shareholder invested in the Fund should be managed directly by the Adviser. Consequently, the Affiliated Shareholder has notified the Fund that it expects to redeem all of its shares of the Fund and place the proceeds in a separate account managed by the Retirement Corporation and subadvised by the Adviser. On October 28, 1998, the Fund's board of trustees, including all of the independent trustees, and the Adviser determined that it would be in the best interests of the Fund and its shareholders to redeem the shares of the Affiliated Shareholder in-kind.

Applicant's Legal Analysis

1. Section 17(a)(2) of the Act generally prohibits an affiliated person of a registered investment company, acting as principal, form knowingly purchasing any security from the company. Section 2(a)(3)(A) of the Act defines ''affiliated person'' of another person to include any person owning

5% or more of the outstanding voting securities of the other person.

2. Section 17(b) of the Act provides that, notwithstanding section 17(a) of the Act, the Commission shall exempt a proposed transaction from section 17(a) of the Act if evidence establishes that: (a) the terms of the proposed transaction are reasonable and fair and do not involve overreaching; (b) the proposed transaction is consistent with the policy of each registered investment company involved; and (c) the proposed transaction is consistent with the general purposes of the Act.

3. Applicant states that the Affiliated Shareholder is an affiliated person of the Fund under section 2(a)(3)(A) of the Act because it owns beneficially in excess of 5% of the Fund's shares. To the extent that the proposed in-kind redemption would be considered to involve the ''purchase'' of the Fund's portfolio securities by the Affiliated Shareholder, applicant states that the proposed in-kind redemption would be prohibited by section 17(a)(2) of the Act.

4. Applicant submits that the terms of the proposed in-kind redemption meet the standards set forth in section 17(b) of the Act. Applicant asserts that neither the Adviser nor the Affiliated Shareholder will have any opportunity to select the specific portfolio securities to be distributed. Applicant further states that the portfolio securities to be distributed to the Affiliated Shareholder will be valued according to an objective, verifiable standard and that the in-kind redemption is consistent with the investment polices of the Fund. Applicant also states that the proposed in-kind redemption is consistent with the general purposes of the Act.

Applicant's Conditions

Applicant agrees that any order granting the requested relief will be subject to the following conditions:

1. The portfolio securities of the Fund distributed to the Affiliated Shareholder pursuant to the in-kind redemption (the ''In-Kind Securities'') will be limited to securities that are traded on a public securities market or for which quoted bid prices are available.

2. The In-Kind Securities will be distributed by the Fund on a pro rata basis after excluding: (a) securities which, if distributed, would be required to be registered under the Securities Act of 1933; and (b) certain portfolio assets (such as futures and options contracts and repurchase agreements) that, although they may be liquid and marketable, must be traded through the marketplace or with the counterparty to the transaction in order to effect a change in beneficial ownership. Cash will be paid for that portion of the Fund's assets represented by cash equivalents (such as certificates of deposit, commercial paper, and repurchase agreements) and other assets which are not readily distributable (including receivables and prepaid expenses), net of all liabilities (including accounts payable). In addition, the Fund will distribute cash in lieu of securities held in its portfolio not amounting to round lots (or which would not amount to round lots if included in the in-kind distribution), fractional shares, and accruals on such securities.

3. The In-Kind Securities distributed to the Affiliated Shareholder will be valued in the same manner as they would be valued for purposes of computing the Fund's net asset value which, in the case of securities traded on a public securities market for which quotations are available, is the last reported sales price on the exchange on which the securities are primarily traded or at the last sales price on the national securities market, or, if the securities are not listed on an exchange or the national securities market or if there is no such reported price, the most recent bid price.

4. The Fund will maintain and preserve for a period of not less than six years from the end of the fiscal year in which the proposed in-kind redemption occurs, the first two years in an easily accessible place, a written record of the redemption setting forth a description of each security distributed, the terms of the distribution, and the information or materials upon which the valuation was made.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–31939 Filed 11–30–98; 8:45 am]

BILLING CODE 8010–01–M

SMALL BUSINESS ADMINISTRATION

Reporting and Recordkeeping Requirements Under OMB Review

AGENCY: Small Business Administration.

ACTION: Notice of reporting requirements submitted for OMB review.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35), agencies are required to submit proposed reporting and recordkeeping requirements to OMB for review and approval, and to publish a notice in the **Federal Register** notifying the public that the agency has made such a submission.

DATES: Submit comments on or before December 31, 1998. If you intend to comment but cannot prepare comments promptly, please advise the OMB Reviewer and the Agency Clearance Officer before the deadline.

COPIES: Request for clearance (OMB 83–1), supporting statement, and other documents submitted to OMB for review may be obtained from the Agency Clearance Officer.

ADDRESSES: Address all comments concerning this notice to: *Agency Clearance Officer,* Jacqueline White, Small Business Administration, 409 3rd Street, S.W., 5th Floor, Washington, D.C. 20416; and *OMB Reviewer,* Victoria Wassmer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, D.C. 20503.

FOR FURTHER INFORMATION CONTACT: Jacqueline White, Agency Clearance Officer, (202) 205–6629.

SUPPLEMENTARY INFORMATION:

Title: Disaster Business Loan Application.

Form No's: 5,739A, and 1368.

Frequency: On Occasion.

Description of Respondents: Small Businesses.

Annual Responses: 16,853.

Annual Burden: 48,561.

Dated: November 23, 1998.

Jacqueline White,

Chief, Administrative Information Branch.

[FR Doc. 98–31918 Filed 11–30–98; 8:45 am]

BILLING CODE 8025–01–P

SOCIAL SECURITY ADMINISTRATION

Information Collection Activities; Proposed Collection Requests and Comment Requests

This notice lists information collection packages that will require submission to the Office of Management and Budget (OMB), as well as information collection packages submitted to OMB for clearance, in compliance with Public Law 104–13 effective October 1, 1995, The Paperwork Reduction Act of 1995.

I. The information collection(s) listed below require(s) extension(s) of the current OMB approval(s) or are proposed new collection(s):

1. Organization Profile–0960–NEW. The Social Security Administration (SSA) will use the information collected on the Organization Profile questionnaire to create a database of third party stakeholders. This database will support the delivery of information

about Social Security programs to these interested parties, and enable SSA to target relevant information to those organizations while restricting unwanted material. The respondents are community organizations, state and local government agencies, advocacy groups, community service organizations.

Number of Respondents: 10,000.

Frequency of Response: 1.

Average Burden Per Response: 7 minutes.

Estimated Annual Burden: 1,167 hours.

Written comments and recommendations regarding the information collection(s) should be sent within 60 days from the date of this publication, directly to the SSA Reports Clearance Officer at the following address: Social Security Administration, DCFAM, Attn: Frederick W. Brickenkamp, 6401 Security Blvd., 1–A–21 Operations Bldg., Baltimore, MD 21235.

In addition to your comments on the accuracy of the agency's burden estimate, we are soliciting comments on the need for the information; its practical utility; ways to enhance its quality, utility and clarity; and on ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology.

II. The information collection(s) listed below have been submitted to OMB:

1. Time Report of Personnel Services for Disability Determinination Services—0960–0408. Form SSA–4514 is used by the Social Security Administration (SSA) to collect data necessary for detailed analysis and evaluation of costs incurred by State Disability Determination Services (DDS) in making determinations of disability for SSA. The data are also used in determining funding levels for each DDS. The respondents are State DDSs making determinations of disability for SSA.

Number of Respondents: 54.

Frequency of Response: 4.

Average Burden Per Response: 30 minutes.

Estimated Annual Burden: 108 hours.

Written comments and recommendations regarding the information collection(s) should be directed within 30 days to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses:

(OMB) Office of Management and Budget, OIRA, Attn: Desk Officer for SSA, New Executive Office Building, Room 10230, 725 17th St., NW., Washington, DC 20503

(SSA) Social Security Administration, DCFAM, Attn: Frederick W. Brickenkamp, 1–A–21 Operations Bldg., 6401 Security Blvd., Baltimore, MD 21235.

To receive a copy of any of the forms or clearance packages, call the SSA Reports Clearance Officer on (410) 965–4145 or write to him at the address listed above.

Dated: November 24, 1998.

Frederick W. Brickenkamp,

Reports Clearance Officer, Social Security Administration.

[FR Doc. 98–31903 Filed 11–30–98; 8:45 am]

BILLING CODE 4190–29–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Approval of Noise Compatibility Program, Amarillo International Airport, Amarillo, TX

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its findings on the noise compatibility program submitted by the City of Amarillo, Texas, for Amarillo International Airport, under the provisions of Title 49, USC, Chapter 475 and CFR Part 150. These findings are made in recognition of the description of Federal and nonfederal responsibilities in Senate Report No. 96–52 (1980). On April 30, 1998, the FAA determined that the noise exposure maps submitted by the City of Amarillo under Part 150 were in compliance with applicable requirements. On October 26, 1998, the Administrator approved the noise compatibility program. All of the recommendations of the programs were approved.

EFFECTIVE DATE: The effective date of the FAA's approval of the Amarillo International Airport noise compatibility program is October 26, 1998.

FOR FURTHER INFORMATION CONTACT: Linda Stoltz, Department of Transportation, Federal Aviation Administration, 2601 Meacham Boulevard, Fort Worth, Texas 76137, (817) 222–5608. Documents reflecting this FAA action may be reviewed at this same location.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA has given its overall approval to the noise compatibility program for Amarillo International Airport effective October 26, 1998.

Under Title 49 USC, Section 47504 (hereinafter referred to as ''Title 49''), an airport operator who has previously submitted a noise exposure map may submit to the FAA a noise compatibility program which sets forth the measures taken or proposed by the airport operator for the reduction of existing noncompatible land uses within the area covered by the noise exposure maps. Title 49 requires such programs to be developed in consultation with interested and affected parties including local communities, government agencies, airport users, and FAA personnel.

Each airport noise compatibility program developed in accordance with Federal Aviation Regulations (FAR) Part 150 is a local program, not a Federal Program. The FAA does not substitute its judgment for that of the airport proprietor with respect to which measures should be recommended for action. The FAA's approval or disapproval of FAR Part 150 program recommendations is measured according to the standards expressed in Part 150 and Title 49 and is limited to the following determinations:

a. The noise compatibility program was developed in accordance with the provisions and procedures of FAR Part 150;

b. Program measures are reasonably consistent with achieving the goals of reducing existing noncompatible land uses around the airport and preventing the introduction of additional noncompatible land uses;

c. Program measures would not create an undue burden on interstate or foreign commerce, unjustly discriminate against types or classes of aeronautical uses, violate the terms of airport grant agreements, or intrude into areas preempted by the Federal Government; and

d. Program measures relating to the use of flight procedures can be implemented within the period covered by the program without derogating safety, adversely affecting the efficient use and management of the navigable airspace and air traffic control systems, or adversely affecting other powers and responsibilities of the Administrator prescribed by law.

Specific limitations with respect to FAA's approval of an airport noise compatibility program are delineated in FAR Part 150, section 150.5. Approval is not a determination concerning the acceptability of land uses under Federal, state, or local law. Approval does not by itself constitute an FAA implementing action. A request for Federal action or

approval to implement specific noise compatibility measures may be required, and an FAA decision on the request may require an environmental assessment of the proposed action. Approval does not constitute a commitment by the FAA to financially assist in the implementation of the program nor a determination that all measures covered by the program are eligible for grant-in-aid funding from the FAA. Where Federal funding is sought, requests for project grants must be submitted to the FAA Airports Division Office in Fort Worth, Texas.

The City of Amarillo submitted to the FAA on December 16, 1997, the noise exposure maps, descriptions, and other documentation produced during the noise compatibility planning study conducted from June 4, 1996, through October 26, 1998. The Amarillo International Airport noise exposure maps were determined by FAA to be in compliance with applicable requirements on April 30, 1998. Notice of this determination was published in the **Federal Register** on May 13, 1998.

The Amarillo International Airport Part 150 study contains a proposed noise compatibility program comprised of actions designed for phased implementation by airport management and adjacent jurisdictions from the date of study completion to the year 2003. It was requested that the FAA evaluate and approve this material as a noise compatibility program as described in Title 49. The FAA began its review of the program on April 30, 1998, and was required by a provision of the Act to approve or disapprove the program within 180 days (other than the use of new flight procedures for noise control). Failure to approve or disapprove such program within the 180-day period shall be deemed to be an approval of such program.

The submitted program contained four proposed actions for noise mitigation (on and/or off) the airport. The FAA completed its review and determined that the procedural and substantive requirements of Title 49 and FAR Part 150 have been satisfied. The overall program, therefore, was approved by the Administrator effective October 26, 1998.

Outright approval was granted for all of the four specific program elements. The approved elements constitute a continuation of noise compatibility programs and the implementation of a new, voluntary flight procedure for military and other training operations which would reduce the numbers of people exposed to overflights within the DNL 65dB noise contour.

These determinations are set forth in detail in a Record of Approval endorsed by the Administrator on October 26, 1998. The Record of Approval, as well as other evaluation materials and the documents comprising the submittal, are available at the FAA office listed above and at the administrative offices of the Amarillo International Airport, 10801 Airport Boulevard, Amarillo, TX 79111–1211.

Issued in Fort Worth, Texas, November 16, 1998.

Naomi L. Saunders,

Manager, Airports Division.

[FR Doc. 98–31942 Filed 11–30–98; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Application To Impose and Use a Passenger Facility Charge (PFC) at San Luis Obispo County Airport-McChesney Field, San Luis Obispo, CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent to rule on application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use a PFC at San Luis Obispo County Airport-McChesney Field under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Public Law 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

DATES: Comments must be received on or before December 31, 1998.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Federal Aviation Administration, Airports Division, 15000 Aviation Blvd., Lawndale, CA 90261, or San Francisco Airports District Office, 831 Mitten Road, Room 210, Burlingame, CA 94010–1303. In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Ms. Klaasje Nairne, Airport Administrative Officer of the San Luis Obispo Airport-McChesney Field, at the following address: County of San Luis Obispo, County Government Center, Room 460, San Luis Obispo, CA 93408. Air carriers and foreign air carriers may submit copies of written comments previously provided to the County of San Luis Obispo under section 158.23 of Part 158.

FOR FURTHER INFORMATION CONTACT: Marlys Vandervelde, Airports Program Analyst, San Francisco Airports District Office, 831 Mitten Road, Room 210, Burlingame, CA 94010–1303, Telephone: (650) 876–2806. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at San Luis Obispo County Airport-McChesney Field under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

On October 29, 1998, the FAA determined that the application to impose and use a PFC submitted by the County of San Luis Obispo was substantially complete within the requirements of section 158.25 of Part 158. The FAA will approve or disapprove the application, in whole or in part, no later than January 29, 1999.

The following is a brief overview of the impose and use application No. 99–05–C–00–SBP:

Level of proposed PFC: $3.00.

Proposed charge effective date: July 1, 2012.

Proposed charge expiration date: June 30, 2015.

Total estimated PFC revenue: $1,229,113.

Brief description of the proposed projects: Land Acquisition and Master Plan Environmental Assessment and Environmental Impact Report.

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: Unscheduled Part 135 Air Taxi Operators.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT** and at the FAA Regional Airports Division located at: Federal Aviation Administration, Airports Division, 15000 Aviation Blvd., Lawndale, CA 90261. In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the County of San Luis Obispo.

Issued in Hawthorne, California, on November 3, 1998.

Ellsworth L. Chan,

Acting Manager, Airports Division, Western-Pacific Region.

[FR Doc. 98–31941 Filed 11–30–98; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Caldwell and Guadalupe Counties, Texas

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an Environmental Impact Statement will be prepared for a proposed new location highway/tollway project in Caldwell and Guadalupe Counties, Texas.

FOR FURTHER INFORMATION CONTACT: Walter C. Waidelich, District Engineer, Federal Highway Administration, Room 850, Federal Building, 300 East 8th Street, Austin, Texas 78701. David Kopp, P.E., Texas Turnpike Authority Division, Texas Department of Transportation, 125 E. 11th Street, Austin, Texas 78701–2483.

SUPPLEMENTARY INFORMATION: State Highway 130, as currently envisioned, is a proposed controlled access highway which will extend from IH 35 at State Highway 195 north or Georgetown in Williamson County, Texas, to IH 10 near Seguin in Guadalupe County, Texas. State Highway 130 will be located generally parallel to and east of Interstate Highway 35 and the urban areas of Austin, San Marcos, and New Braunfels. The total length of the proposed facility is 143.5 kilometers (89 miles). The proposed State Highway 130 facility is being developed by the FHWA in cooperation with the Texas Turnpike Authority Division (TTA) of the Texas Department of Transportation (TxDOT). It is being developed in three projects with each project having logical termini and independent utility. FHWA and TTA will prepare an Environmental Impact Statement for each of the three independent projects.

This Notice of Intent (NOI) focuses on the southern project, Segment C, of State Highway 130. As announced herein, the FHWA in cooperation with TTA will prepare an Environmental Impact Statement on a proposal to construct Segment C of State Highway 130. Segment C of proposed State Highway 130 extends from the junctions of US Highway 183 and Farm-to-Market Road 1185 north of Lockhart in Caldwell County, Texas, to Interstate Highway 10 near Seguin in Guadalupe County, Texas. The length of Segment C varies depending on the alternative selected. The proposed action is intended to relieve congestion on Interstate 35 by providing an alternative route for those who commute between the metropolitan areas of Austin or San Antonio and surrounding areas as well as drivers desiring to bypass Austin and other central Texas cities located along the heavily traveled Interstate 35 corridor. The proposed action will also provide improved access and increased mobility to urbanized areas in the proposed corridor; help support planned business and residential growth in various areas throughout the project corridor; and provide needed freeway access from surrounding areas to the proposed Austin Bergstrom International Airport.

A Major Investment Study, addressing the entire length of the proposed State Highway 130, was endorsed in July 1997 by the Austin Transportation Study Policy Advisory Committee, the metropolitan planning organization for the Austin, Texas area.

The proposed Segment C facility is being developed as a candidate toll road; thus, in conjunction with the EIS and selection of a preferred alternative, the TTA will conduct a toll feasibility study to evaluate the ability of developing the selected alternative as a toll road and financing it, in whole or part, through the issuance of revenue bonds. The toll road designation will not influence the selection of a preferred alternative. Proposed alternatives, including alternative alignments, will be evaluated for how well they meet the stated purpose and need for the proposed project. Any impacts owing to the toll road designation will be discussed in the environmental impact statement.

The draft EIS for Segment C will address a build alternative including multiple alternative alignments. Alternatives to the proposed action, which will also be discussed in the EIS, will include (1) taking no action, or the ''no build'' alternative, and (2) improving existing roadways in the project area. The build alternatives include multiple alternative alignments along new location and existing highway rights-of-way within the Segment C project limits.

Impacts caused by the construction and operation of Segment C of State Highway 130 will vary according to the alternative alignment utilized. Generally, impacts would include the following: transportation impacts (construction detours, construction traffic, and mobility improvement); air and noise impacts from construction and operation of the roadway; water quality impacts from construction activities and roadway storm water runoff; impacts to waters of the United States including wetlands from right-of-way encroachment; and impacts to residences and businesses.

Letters describing the proposed action and soliciting comments have been sent to appropriate Federal, State, and local agencies, and to private organizations and citizens who have previously expressed interest in the proposal. Public meetings for the Segment C project were held in June and September 1997 in Seguin, Texas and in June and September 1997 in Lockhart, Texas. At these meetings, public comments on the proposed action and alternatives were requested.

In continuation of the scoping process for Segment C of State Highway 130, an additional set of public meetings has been scheduled. These meetings will be held on Wednesday, December 2, 1998, at the Sequin Coliseum, 810 South Guadalupe Street, Sequin, Texas, and on Tuesday, December 8, 1998, in the cafeteria of Plum Creek Elementary School, 710 Flores Street, Lockhart, Texas. Two meeting are planned for the convenience of those wishing to attend. TTA, and its consultants, will present the same information at each meeting. From 6:00 to 7:00 pm, displays showing the preliminary alternative corridors will be available for review. During this period, TTA staff will be available to answer questions. Beginning at 7:00 pm, a formal presentation of the project will be made and will be followed by a public comment period. All interested persons are encouraged to attend one or both of these public meetings.

A public hearing will be held for the Segment C project subsequent to publication of the Draft EIS. Public notice will be given of the time and place of the hearing. The Draft EIS will be available for public and agency review and comment prior to the public hearing.

To ensure that the full range of issues related to proposed Segment C of State Highway 130 are addressed and all significant issues identified, comments and suggestions are invited from all parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA or TTA at the addresses provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: November 18, 1998.

Walter C. Waidelich,

District Engineer, Austin, Texas.

[FR Doc. 98–31872 Filed 11–30–98; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA Docket No. FHWA–98–4334]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of petitions and intent to grant applications for exemption; request for comments.

SUMMARY: This notice announces the FHWA's preliminary determination to grant the applications of 24 individuals for an exemption from the vision requirements in the Federal Motor Carrier Safety Regulations. Granting the exemptions will enable these individuals to qualify as drivers of commercial motor vehicles (CMVs) in interstate commerce without meeting the vision standard prescribed in 49 CFR 391.41(b)(10).

DATES: Comments must be received on or before December 31, 1998.

ADDRESSES: Your written, signed comments must refer to the docket number at the top of this document, and you must submit the comments to the Docket Clerk, U.S. DOT Dockets, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590–0001. All comments will be available for examination at the above address between 10 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped envelope or postcard.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Thomas, Office of Motor Carrier Research and Standards, (202) 366–8786, or Ms. Judith Rutledge, Office of the Chief Counsel, (202) 366–0834, Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

Internet users can access all comments received by the U.S. DOT Dockets, Room PL–401, by using the universal resource locator (URL): http://dms.dot.gov. It is available 24 hours each day, 365 days each year. Please follow the instructions online for more information and help.

An electronic copy of this document may be downloaded using a modem and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512–1661. Internet users may reach the **Federal Register**'s home page at: http://www.nara.gov/fedreg and the Government Printing Office's database at: http://www.access.gpo.gov/nara.

Background

Twenty-four individuals have requested a waiver of the vision requirement in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce. Their requests were filed with the FHWA on various dates before June 9, 1998. When they were filed, the FHWA was authorized by 49 U.S.C. 31136(e) to waive application of the vision standard if the agency determined the waiver was consistent with the public interest and the safe operation of CMVs. Because the statute did not limit the effective period of a waiver, the agency had discretion to issue waivers for any period warranted by the circumstances of a request.

On June 9, 1998, the FHWA's waiver authority changed with enactment of the Transportation Equity Act for the 21st Century (TEA–21), Pub. L. No. 105–178, 112 Stat.107. Section 4007 of TEA–21 amended the waiver provisions of 49 U.S.C. 31136(e) and 31315 to change the standard for evaluating waiver requests, to distinguish between a waiver and an exemption, and to establish term limits for both. Under revised section 31136(e), the FHWA may grant a waiver for a period of up to 3 months or an exemption for a renewable 2-year period. The 24 applications in this proceeding fall within the scope of an exemption request under the revised statute.

The amendments to 49 U.S.C. 31136(e) also changed the criteria for exempting a person from application of a regulation. Previously an exemption was appropriate if it was consistent with the public interest and the safe operation of CMVs. Now the FHWA may grant an exemption if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' According to the legislative history, Congress changed the statutory standard to give the agency greater discretion to consider exemptions. The previous standard was judicially construed as requiring an advance determination that absolutely no reduction in safety would result from an exemption. Congress revised the standard to require that an ''equivalent'' level of safety be achieved by the exemption, which would allow for more equitable resolution of such matters, while ensuring safety standards are maintained. (See H.R. Conf. Rep. No. 105–550, at 489 (1998)).

Although the 24 petitions in this proceeding were filed before enactment of TEA–21, the FHWA is required to apply the law in effect at the time of its decision unless (1) its application will result in a manifest injustice or (2) the statute or legislative history directs otherwise. *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696 (1974). There is nothing in the statute, its history, or the facts in this proceeding which meets either of these two tests. In fact, the new standard is more equitable as it allows an exemption to be based on a reasonable expectation of equivalent safety, rather than requiring an absolute determination that safety will not be diminished. In addition, the ''public interest'' finding required under the previous standard is not necessary under the new exemption standard. These changes enhance the FHWA's discretion to consider exemptions, thus benefitting the 24 applicants rather than causing an injustice.

Although applying TEA–21's new exemption standard does not adversely affect the applicants, subjecting their applications to the new procedural requirements would adversely affect them. Section 4007 requires the Secretary of Transportation to promulgate regulations specifying the procedures by which a person may request an exemption. The statute lists four items of information an applicant must submit with an exemption petition and gives the Secretary 180 days to implement the new procedural regulations. Although the FHWA intends to meet that deadline, it would be manifestly unjust to the 24 applicants to delay publication of this notice until the new procedural regulations are in place, and then at that time, require them to submit conforming information to support their exemption request. To avoid this delay and injustice, we will not apply the new procedural requirements of Section 4007 to exemption petitions filed before its effective date, June 9, 1998.

Accordingly, the FHWA has evaluated each of the 24 exemption requests on its merits, as required by the decision in *Rauenhorst* v. *United States Department of Transportation, Federal Highway Administration*, 95 F.3d 715 (8th Cir. 1996), applying the new exemption standard in 49 U.S.C. 31136(e). Based on our evaluation, we have made a preliminary determination that exempting these 24 applicants from the vision requirement in 49 CFR 391.41(b)(10) is likely to achieve a level

of safety equal to, or greater than, the level that would be achieved without the exemption.

Qualifications of Applicants

1. Gary R. Andersen

Mr. Andersen is a 34-year-old individual who has operated CMVs for 15 years.

A congenital irregularity called amblyopia was discovered in his left eye when he was about 9 years old, and his optometrist believes the condition was present much earlier. Because of this condition, Mr. Andersen is unable to meet the vision requirement of 49 CFR 391.41(b)(10).

A 1997 letter from the optometrist states Mr. Andersen has 20/20 vision in his right eye without glasses and 20/200 unaided in the left eye. In the optometrist's opinion, Mr. Andersen can perform the tasks necessary to operate a CMV.

Mr. Andersen holds a Nebraska commercial driver's license (CDL) with a tank vehicle endorsement. He has driven straight trucks and tractor-trailer combinations almost 1 million miles since 1982, and his driving record contains no traffic violations and no accidents in such vehicles. One of his previous employers, Gerhold Concrete Company, says Mr. Andersen ''operated equipment safely'' while in its employ.

2. Joe F. Arnold

Mr. Arnold, 40, has been blind in his right eye since he was 6 months old. A 1997 medical report indicates he has 20/20 vision in his left eye without glasses. In his optometrist's opinion, Mr. Arnold is capable of operating a CMV.

Mr. Arnold has been a professional truck driver for 22 years and has operated straight trucks and tractor-trailer combinations. He holds an Arkansas CDL, and his official State driving record reflects no moving violations in any vehicle. His CMV was in a collision with an automobile in February 1996. There were no injuries, and Mr. Arnold did not receive a citation.

3. Jack E. Atkinson

Mr. Atkinson is 59 years old and has been employed as a commercial truck driver for 36 years. He has a macular defect in his left eye which prevents him from meeting the vision requirement of 49 CFR 391.41(b)(10). His optometrist believes the defect is ''long standing.''

A 1997 examination indicates Mr. Atkinson has 20/20 vision in his right eye and 20/60 in the left eye with corrective lenses. In the optometrist's opinion, Mr. Atkinson is capable of operating a CMV. Because the eye condition is an old one, he has had many years to adapt his driving skills to accommodate his vision deficiency.

Mr. Atkinson holds a Missouri CDL with tank vehicle and double- and triple-trailer endorsements. He has driven CMVs more than 1.2 million miles since 1961. His official driving record for the past 3 years reflects no traffic violations in a CMV and no accidents in any vehicle. Mr. Atkinson has operated straight trucks and tractor-trailer combinations for Southern Supply Company since 1981; the president of the company calls him ''an outstanding employee.''

4. Gary A. Barrett

Mr. Barrett, 46, was born with amblyopia in his left eye. The vision in his right eye was 20/20 with glasses in a 1998 examination. His optometrist says Mr. Barrett is able to perform the tasks necessary to operate a CMV.

Mr. Barrett has an Iowa CDL with hazardous materials and tank vehicle endorsements. He received his first commercial license in 1969 and has driven straight trucks and tractor-trailer combinations more than 900,000 miles. His official State record for the past 3 years contains no accidents and one citation for failure to obey a traffic signal.

5. Ivan L. Beal

Mr. Beal, 63, has been employed as a commercial truck driver for 29 years. He has had amblyopia in his right eye since he was a child. Because of this eye condition, Mr. Beal is unable to meet the Federal vision requirement.

A 1997 medical report indicates Mr. Beal has 20/200 vision in his right eye and 20/20 vision in the left eye with corrective lenses. His optometrist states Mr. Beal has the skills to operate a CMV safely. Having had amblyopia since childhood, he has had almost his entire life to adapt to it.

He has driven tractor-trailer combinations and straight trucks approximately 2.4 million miles since 1968. He has a Nebraska CDL and his driving record for the past 3 years reflects no traffic violations and no accidents. Mr. Beal operates CMVs for his family's company and intends to continue driving for it if his exemption is granted.

6. Johnny A. Beutler

Mr. Beutler, 53, has amblyopia of the right eye and cannot meet the Federal vision standard. A 1997 examination by an optometrist revealed the vision in his left eye to be 20/20 without correction; the amblyopic right eye measures 20/400 unaided. The optometrist stated Mr. Beutler has had the condition for many years and has had ''no difficulty performing the appropriate driving skills'' in a CMV.

Mr. Beutler is self-employed and holds a South Dakota CDL. He has driven more than 2.6 million miles in a 35-year professional driving career and has operated straight trucks and tractor-trailer combinations. His official State driving record reflects no traffic citations in any vehicle for the past 5 years. In 1996, his CMV was involved in an accident. There was property damage but there were no injuries, and he did not receive a citation.

7. Richard D. Carlson

Mr. Carlson lost the sight in his right eye when he was 11 years old. Now 51, his vision in the left eye is 20/15 without glasses, according to a 1997 examination. His ophthalmologist states Mr. Carlson can operate a CMV.

Mr. Carlson holds a Minnesota CDL with hazardous materials and tank vehicle endorsements. He is a self-employed owner-operator who has driven tractor-trailer combination vehicles for 20 years and 2 million miles. His official State driving record reveals no traffic citations or accidents in a CMV.

8. David John Collier

Mr. Collier, 42, has been blind in his right eye since 1970. His left eye was measured at 20/20 with glasses in a 1998 examination, and the optometrist says Mr. Collier has ''adapted very well'' to his condition and can perform the tasks required to operate a CMV.

David Collier has an Iowa CDL with a tank vehicle endorsement. He has operated tractor-trailer combination vehicles for 4 years and has driven them more than 400,000 miles. His official State driving record lists no moving violations and no accidents in a CMV. Like the other applicants, Mr. Collier's safe driving record indicates he has adjusted successfully to his vision impairment.

9. Tomie L. Estes

Mr. Estes is a 40-year-old individual who has been blind in his left eye since he was 10. He has 20/25 unaided vision in his right eye and 20/15 with corrective lenses, according to a 1998 examination. The optometrist who conducted the examination asserts Mr. Estes is able to drive a CMV.

Mr. Estes has 24 years' experience operating tractor-trailer combinations and 10 years of experience driving straight trucks. For the past 7 years, he

has operated CMVs for a company which calls him one of its top five drivers and lauds his job performance and safety record. Mr. Estes holds a Missouri CDL and has no traffic violations or accidents in the past 3 years on his official State driving record.

10. Jay E. Finney

Mr. Finney is a 50-year-old man who lost his left eye in an accident when he was 6. He has 20/25 vision in his right eye with corrective lenses. An optometrist examined him in November 1997 and asserted Mr. Finney ''is able to perform the driving tasks required to operate a truck.''

Mr. Finney has 20 years of experience operating straight trucks and tractor-trailer combinations. He holds a Missouri CDL with a tank vehicle endorsement and has driven more than 1 million miles in commercial vehicles. He has no traffic citations or accidents on his official driving record. Mr. Finney is a self-employed dump truck driver.

11. Britt D. Hazelwood

Mr. Hazelwood, 34, has had amblyopia in his right eye since early childhood. The vision in his left eye is 20/20 without glasses. His ophthalmologist states Mr. Hazelwood is able to perform the duties of a CMV driver.

Mr. Hazelwood has a Missouri CDL and has operated tractor-trailer combinations for 12 years and straight trucks for 16 years. He has accumulated more than 750,000 miles behind the wheel. His official State driving record reveals no accidents or citations in a CMV. This safe driving record indicates Mr. Hazelwood has adapted successfully to a vision impairment he has had almost all his life. His employer, for whom he has driven since 1987, calls him a ''valuable employee.''

12. Jon R. Houston

Mr. Houston, 33, has had amblyopia in his left eye since he was 4 years old. The vision in his right eye was 20/20 without glasses in a 1998 examination. His optometrist says Mr. Houston ''has excellent peripheral vision'' and is able to perform the tasks necessary to operate a CMV.

Mr. Houston has an Iowa CDL with a tank vehicle endorsement. He has 3 years' experience driving straight trucks and has driven tractor-trailer combinations for 11 years and more than 1 million miles. His official State driving record contains one speeding ticket and no accidents in a CMV in the past 3 years.

13. Jerome R. Jessen

Mr. Jessen, 53, has partial amblyopia in the right eye which makes him unable to meet the Federal vision standard. The condition has existed since childhood. His ophthalmologist examined him in 1997 and found Mr. Jessen's vision in the left eye to be 20/20 with glasses. The doctor says Mr. Jessen is able to perform the tasks required to operate a CMV.

Mr. Jessen is a self-employed dump truck driver with a Minnesota CDL and intrastate vision waiver. He has been a professional truck driver for 10 years and has driven 500,000 miles. There are no traffic violations or accidents in any vehicle in the past 3 years on his official driving record.

14. Chad M. Kallhoff

Mr. Kallhoff had an accident when he was 12 which left him blind in his left eye. The vision in his right eye is 20/20 without glasses. His optometrist states Mr. Kallhoff is able to perform the duties of a CMV driver.

Mr. Kallhoff, 28, has a Nebraska CDL and has operated tractor-trailer combinations for 7 years and straight trucks for 10 years. He has accumulated more than 1 million miles behind the wheel. His official driving record for the past 3 years reveals no accidents and one speeding ticket in a CMV. This safe driving record indicates Mr. Kallhoff has adapted successfully to a vision impairment he has had for more than half his life.

15. Loras G. Knebel

Mr. Knebel is a 59-year-old individual whose scar on the cornea in his left eye prevents him from meeting the vision requirement of 49 CFR 391.41(b)(10). The scar is a result of a 1981 accident. Mr. Knebel has 20/20 vision in his right eye with corrective lenses, according to a 1997 examination. The ophthalmologist who conducted the examination asserts Mr. Knebel ''is able to drive any vehicle and perform any tasks'' driving might require.

Mr. Knebel has 25 years' experience operating straight trucks. For the past 2 years, he has operated tractor-trailer combinations for an Iowa company and averaged 60,000 miles annually in those vehicles. He holds an Iowa CDL and has one speeding ticket and no accidents in a CMV on his official State driving record.

16. Rodney D. Lemburg

Mr. Lemburg, 41, has had amblyopia in his left eye since childhood. A 1998 examination by an ophthalmologist confirmed vision in the right eye to be 20/20 without glasses. The doctor believes Mr. Lemburg is able to perform the tasks required to operate a CMV and is ''a proper candidate to drive.''

Mr. Lemburg has a South Dakota CDL with hazardous materials and tank vehicle endorsements. He has been a professional truck driver for 14 years and has driven straight trucks and tractor-trailer combination vehicles more than 2 million miles. There are no traffic violations or accidents in the past 3 years on his official driving record.

17. Dexter L. Myhre

Mr. Myhre, 54, has been blind in his left eye since 1994. His right eye was measured at 20/20 without glasses in a January 1998 examination, and the optometrist asserts Mr. Myhre can perform the tasks required to operate a CMV.

Dexter Myhre has a Minnesota CDL and intrastate vision waiver. He has operated tractor-trailer combination vehicles for almost 13 years. In the 3 years since he lost the sight in his left eye, Mr. Myhre has driven those vehicles more than 200,000 miles and has not received any traffic citations or been involved in an accident. He received a driving safety award from his employer's insurance company in 1996. Mr. Myhre has been employed by the same motor carrier since 1985; a member of its safety department says he has ''excellent safety habits'' and is a very capable driver whom the company would like to have on the road more frequently.

18. James H. Oppliger

Mr. Oppliger, 52, has been a commercial truck driver for 36 years. He has had an artificial right eye since 1973 and cannot meet the Federal vision requirement. He has had almost half his life to adapt to his medical condition.

A 1998 medical report indicates Mr. Oppliger has 20/20 vision in the left eye without corrective lenses. His optometrist states Mr. Oppliger can perform the tasks required to operate a CMV.

He has driven tractor-trailer combinations and straight trucks approximately 700,000 miles in his career. He has a Nebraska CDL with a tank vehicle endorsement, and his driving record for the past 3 years reflects no traffic violations and no accidents in a CMV. Mr. Oppliger is a self-employed professional driver who hauls grain and feed.

19. Stephanie D. Randels

Ms. Randels has had amblyopia of the left eye since birth. Her vision in the eye with corrective lenses has generally varied between 20/50 and 20/60 in the

past 12 years, but this is not sufficient to meet the vision standard of 49 CFR 391.41(b)(10). According to a 1998 examination, her right eye is correctable to 20/20. Her optometrist states

Ms. Randels can perform the tasks associated with driving a CMV.

Ms. Randels is 39 years old and holds a Missouri CDL with a hazardous materials endorsement. She has operated tractor-trailer combinations for 18 years and driven more than 2 million miles. She has driven for the same company for the past 10 years and has not received a moving violation or been involved in an accident. The company's safety director calls Ms. Randels ''one of the safest, most conscientious drivers on the road.''

20. Duane L. Riendeau

Mr. Riendeau, 50, has amblyopia in the right eye which makes him unable to meet the Federal vision standard. The condition has existed since childhood. An optometrist examined him in 1997 and found Mr. Riendeau's vision in the left eye to be 20/30 unaided and 20/20 with glasses. The doctor recommends Mr. Riendeau be permitted to continue operating a CMV.

Mr. Riendeau holds a North Dakota CDL with a tank vehicle endorsement. He has been a professional truck driver for 25 years and has driven straight trucks and combination vehicles more than 1.5 million miles. There are no traffic violations or accidents in any vehicle on his official driving record.

21. Darrell Rohlfs

Mr. Rohlfs, 38, had his left eye removed in 1988 due to a cancerous tumor. The vision in his right eye was 20/20 without glasses in a 1997 examination. His optometrist says Mr. Rohlfs is able to perform tasks necessary to operate a CMV.

Mr. Rohlfs has an Iowa CDL and has driven straight trucks and tractor-trailer combinations almost 900,000 miles in a 19-year professional driving career. Several of his employers lauded his safe driving practices. His official State record for the past 3 years contains two speeding tickets in a CMV; in each case, Mr. Rohlfs was going less than 15 miles per hour over the posted limit. He has had no accidents in any vehicle.

22. Marvin L. Swillie

Mr. Swillie is a 53-year-old man with a retinal scar in his left eye, making him unable to meet the Federal vision standard. He has 20/20 vision in his right eye with corrective lenses. An ophthalmologist examined him in 1998 and asserted Mr. Swillie is capable of driving a CMV.

Mr. Swillie has 25 years of experience operating tractor-trailer combinations; he has driven them more than 3 million miles. He holds a Nebraska CDL with hazardous materials and tank vehicle endorsements. He has no traffic citations or accidents in a CMV on his official driving record. Mr. Swillie has driven for the same company since 1987 and will continue there if his exemption is granted.

23. Larry Waldner

Mr. Waldner, 43, lost the sight in his left eye when he was 6 years old. A 1998 examination by an optometrist revealed the vision in his right eye to be 20/20 without correction. The optometrist stated Mr. Waldner ''could certainly operate a commercial vehicle'' despite his condition.

Mr. Waldner holds a South Dakota CDL. He has 15 years' experience operating straight trucks and has operated tractor-trailer combinations for the past 3 years. He has driven for the same company since February 1995 and intends to continue with it if he is granted an exemption. Mr. Waldner's official State driving record reflects no traffic citations or accidents in a CMV.

24. Ronald Watt

Mr. Watt, 66, lost the vision in his right eye in 1992 due to an injury. A 1997 medical report indicates he has 20/20 vision in his left eye with glasses. In his ophthalmologist's opinion, Mr. Watt is capable of operating a CMV.

Mr. Watt has operated straight trucks since he was a teenager and tractor-trailer combinations professionally since 1975. He has driven the combination vehicles 2 million miles. Mr. Watt has a North Dakota CDL with tank vehicle and double-and triple-trailer endorsements. His driving record for the past 3 years reflects no traffic violations in a CMV and no accidents in any vehicle.

Basis for Preliminary Determination To Grant Exemptions

Independent studies support the principle that past driving performance is a reliable indicator of an individual's future safety record. The studies are filed in FHWA Docket No. FHWA–97–2625 and discussed at 63 FR 1524, 1525 (January 9, 1998). We believe we can properly apply the principle to monocular drivers because data from the vision waiver program clearly demonstrates the driving performance of monocular drivers in the program is better than that of all CMV drivers collectively. (See 61 FR 13338, March 26, 1996). That monocular drivers in the waiver program demonstrated their ability to drive safely supports a conclusion that other monocular drivers, with qualifications similar to those required by the waiver program, can also adapt to their vision deficiency and operate safely.

The 24 applicants have qualifications similar to those possessed by drivers in the waiver program. Their experience and safe driving record operating CMVs demonstrate that they have adapted their driving skills to accommodate their vision deficiency. For that reason, the FHWA believes exempting these individuals from 49 CFR 391.41(b)(10) is likely to achieve a level of safety equal to, or greater than, the level that would be achieved without the exemption as long as vision in their better eye continues to meet the standard specified in Section 391.41(b)(10). As a condition of the exemption, therefore, the FHWA proposes to impose requirements on the individuals similar to the grandfathering provisions in 49 CFR 391.64(b) applied to drivers who participated in the agency's former vision waiver program.

These requirements are (1) that each individual be physically examined every year (a) by an ophthalmologist or optometrist who attests that vision in the better eye meets the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests he or she is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to his or her employer for retention in its driver qualification file or keep a copy in his or her driver qualification file if he or she becomes self-employed. The driver must also have a copy of the certification when driving so it may be presented to a duly authorized Federal, State, or local enforcement official.

In accordance with revised 49 U.S.C. 31136(e), the proposed exemption for each person will be valid for 2 years unless revoked earlier by the FHWA. The exemption will be revoked if: (1) the person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136. If the exemption is effective at the end of the 2-year period, the person may apply to the FHWA for a renewal under procedures in effect at that time.

Request for Comments

In accordance with 49 U.S.C. 31136(e), the FHWA is requesting public comment from all interested parties on the exemption petitions and the matters discussed in this notice. All comments received before the close of business on the closing date indicated above will be considered and will be available for examination in the docket room at the above address. Comments received after the closing date will be filed in the docket and will be considered to the extent practicable, but the FHWA may issue exemptions from the vision requirement to the 24 applicants and publish in the **Federal Register** a notice of final determination at any time after the close of the comment period. In addition to late comments, the FHWA will also continue to file in the docket relevant information which becomes available after the closing date. Interested persons should continue to examine the docket for new material.

Authority: 49 U.S.C. 31136 and 31315; 23 U.S.C. 315; 49 CFR 1.48.

Issued on: November 20, 1998.

Kenneth R. Wykle,

Federal Highway Administration Administrator.

[FR Doc. 98–31927 Filed 11–30–98; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–98–4805]

Notice of Receipt of Petition for Decision That Nonconforming 1999 Harley Davidson FX, FL, and XL Motorcycles Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice of receipt of petition for decision that nonconforming 1999 Harley Davidson FX, FL, and XL motorcycles are eligible for importation.

SUMMARY: This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that 1999 Harley Davidson FX, FL, and XL motorcycles that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because (1) they are substantially similar to vehicles that were originally manufactured for sale in the United States and that were certified by their manufacturer as complying with the safety standards, and (2) they are capable of being readily altered to conform to the standards.

DATES: The closing date for comments on the petition is December 31, 1998.

ADDRESSES: Comments should refer to the docket number and notice number, and be submitted to: Docket Management, Room PL–401, 400 Seventh St., SW, Washington, DC 20590. [Docket hours are from 10 am to 5 pm].

FOR FURTHER INFORMATION CONTACT: George Entwistle, Office of Vehicle Safety Compliance, NHTSA (202–366–5306).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR Part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

Champagne Imports of Lansdale, Pennsylvania (''Champagne'') (Registered Importer 90–009) has petitioned NHTSA to decide whether non-U.S. certified 1999 Harley Davidson FX, FL, and XL motorcycles are eligible for importation into the United States. The vehicles which Champagne believes are substantially similar are 1999 Harley Davidson FX, FL, and XL motorcycles that were manufactured for sale in the United States and certified by their manufacturer as conforming to all applicable Federal motor vehicle safety standards.

The petitioner claims that it carefully compared non-U.S. certified 1999 Harley Davidson FX, FL, and XL motorcycles to their U.S. certified counterparts, and found the vehicles to be substantially similar with respect to compliance with most Federal motor vehicle safety standards.

Champagne submitted information with its petition intended to demonstrate that non-U.S. certified 1999 Harley Davidson FX, FL, and XL motorcycles, as originally manufactured, conform to many Federal motor vehicle safety standards in the same manner as their U.S. certified counterparts, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that non-U.S. certified 1999 Harley Davidson FX, FL, and XL motorcycles are identical to their U.S. certified counterparts with respect to compliance with Standard Nos. 106 *Brake Hoses*, 111 *Rearview Mirrors*, 116 *Brake Fluid*, 119 *New Pneumatic Tires for Vehicles other than Passenger Cars*, and 122 *Motorcycle Brake Systems*.

Petitioner additionally contends that the vehicles are capable of being readily altered to meet the following standard, in the manner indicated:

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* (a) installation of U.S.-model head lamp assemblies; and (b) Installation of U.S.-model taillamp assemblies and front and rear side reflectors if the vehicles are not already so equipped.

Standard No. 120 *Tire Selection and Rims for Vehicles other than Passenger Cars:* Installation of a tire information label.

Standard No. 123 *Motorcycle Controls and Displays*: Installation of a U.S.-model speedometer/odometer calibrated in miles per hour.

The petitioner also states that a vehicle identification number plate will be affixed to the vehicle to meet the requirements of 49 CFR Part 565.

Comments should refer to the docket number and be submitted to: Docket Management, Room PL–401, 400 Seventh Street, S.W., Washington, DC 20590. It is requested but not required that 10 copies be submitted.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal**

Register pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: November 24, 1998.

Marilynne Jacobs,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 98–31900 Filed 11–30–98; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–98–4804]

Notice of Receipt of Petition for Decision That Nonconforming 1991 Honda Accord Passenger Cars Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice of receipt of petition for decision that nonconforming 1991 Honda Accord passenger cars are eligible for importation.

SUMMARY: This notice announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that the 1991 Honda Accord that was not originally manufactured to comply with all applicable Federal motor vehicle safety standards is eligible for importation into the United States because (1) it is substantially similar to a vehicle that was originally manufactured for importation into and sale in the United States and that was certified by its manufacturer as complying with the safety standards, and (2) it is capable of being readily altered to conform to the standards.

DATES: The closing date for comments on the petition is December 31, 1998.

ADDRESSES: Comments should refer to the docket number and notice number, and be submitted to: Docket Management, Room PL–401, 400 Seventh St., SW, Washington, DC 20590. [Docket hours are from 9 a.m. to 5 p.m.]

FOR FURTHER INFORMATION CONTACT: George Entwistle, Office of Vehicle Safety Compliance, NHTSA (202–366–5306).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR Part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

Champagne Imports of Lansdale, Pennsylvania (''Champagne'') (Registered Importer 90–009) has petitioned NHTSA to decide whether 1991 Honda Accord passenger cars are eligible for importation into the United States. The vehicle which Champagne believes is substantially similar is the 1991 Honda Accord that was manufactured for importation into, and sale in, the United States and certified by its manufacturer as conforming to all applicable Federal motor vehicle safety standards.

The petitioner claims that it carefully compared the non-U.S. certified 1991 Honda Accord passenger cars to its U.S. certified counterpart, and found the two vehicles to be substantially similar with respect to compliance with most Federal motor vehicle safety standards.

Champagne submitted information with its petition intended to demonstrate that the non-U.S. certified 1991 Honda Accord, as originally manufactured, conforms to many Federal motor vehicle safety standards in the same manner as its U.S. certified counterpart, or is capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that the non-U.S. certified 1991 Honda Accord is identical to its U.S. certified counterpart with respect to compliance with Standard Nos. 102 *Transmission Shift Lever Sequence* * * *, 103 *Defrosting and Defogging Systems,* 104 *Windshield Wiping and Washing Systems,* 105 *Hydraulic Brake Systems,* 106 *Brake Hoses,* 109 *New Pneumatic Tires,* 113 *Hood Latch Systems,* 116 *Brake Fluid,* 124 *Accelerator Control Systems,* 201 *Occupant Protection in Interior Impact,* 202 *Head Restraints,* 204 *Steering Control Rearward Displacement,* 205 *Glazing Materials,* 206 *Door Locks and Door Retention Components,* 207 *Seating Systems,* 209 *Seat Belt Assemblies,* 210 *Seat Belt Assembly Anchorages,* 212 *Windshield Retention,* 216 *Roof Crush Resistance,* 219 *Windshield Zone Intrusion,* and 302 *Flammability of Interior Materials.*

Additionally, the petitioner states that the non-U.S. certified 1991 Honda Accord complies with the Bumper Standard found in 49 CFR Part 581 and with the Theft Prevention Standard found in 49 CFR Part 541.

Petitioner also contends that the vehicle is capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays:* (a) substitution of a lens marked ''Brake'' for a lens with a noncomplying symbol on the brake failure indicator lamp; (b) installation of a seat belt warning lamp that displays the appropriate symbol; (c) recalibration of the speedometer/odometer from kilometers to miles per hour.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* (a) installation of U.S.-model headlamp assemblies that incorporate headlamps with DOT markings; (b) installation of U.S.-model front and rear sidemarker/reflector assemblies; (c) installation of U.S.-model taillamp assemblies; (d) installation of a high-mounted stop lamp if the vehicle is not already so equipped.

Standard No. 110 *Tire Selection and Rims:* installation of a tire information placard.

Standard No. 111 *Rearview Mirror:* replacement of the passenger side rearview mirror with a U.S.-model component.

Standard No. 114 *Theft Protection:* installation of a warning buzzer microswitch in the steering lock assembly and a warning buzzer.

Standard No. 118 *Power Window Systems:* rewiring of the power window system so that the window transport is inoperative when the ignition is switched off.

Standard No. 208 *Occupant Crash Protection:* (a) installation of a U.S.-model seat belt in the driver's position, or a belt webbing-actuated microswitch inside the driver's seat belt retractor; (b) installation of an ignition switch-actuated seat belt warning lamp and buzzer; (c) replacement of the driver's side air bag and knee bolster with U.S.-model components if the vehicle is not already so equipped. The petitioner

states that the vehicle is equipped with combination lap and shoulder restraints that adjust by means of an automatic retractor and release by means of a single push button at both front designated seating positions, with combination lap and shoulder restraints that release by means of a single push button at both rear outboard designated seating positions, and with a lap belt in the rear center designated seating position.

Standard No. 214 *Side Impact Protection:* installation of reinforcing beams.

Standard No. 301 *Fuel System Integrity:* installation of a rollover valve in the fuel tank vent line between the fuel tank and the evaporative emissions collection canister.

The petitioner also states that a vehicle identification number plate must be affixed to the vehicle to meet the requirements of 49 CFR Part 565.

Interested persons are invited to submit comments on the petition described above. Comments should refer to the docket number and be submitted to: Docket Section, National Highway Traffic Safety Administration, Room 5109, 400 Seventh Street, S.W., Washington, DC 20590. It is requested but not required that 10 copies be submitted.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141 (a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: November 24, 1998.

Marilynne Jacobs,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 98–31901 Filed 11–30–98; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–98–3869; Notice 02]

Western Star Trucks, Inc.; Grant of Application for Decisions of Inconsequential Noncompliance

Western Star Trucks Inc. (Western Star) of Kelowna, British Columbia, Canada, has determined that some of its vehicles fail to comply with the labeling requirements of 49 CFR 571.205, Federal Motor Vehicle Safety Standard (FMVSS) No. 205, ''Glazing Materials,'' and has filed an appropriate report pursuant to 49 CFR Part 573 ''Defect and Noncompliance Reports.'' Western Star has also applied to be exempted from the notification and remedy requirements of 49 U.S.C. Chapter 301—''Motor Vehicle Safety'' on the basis that the noncompliance is inconsequential to motor vehicle safety.

Notice of receipt of the application was published with a 30-day comment period, on June 12, 1998, in the **Federal Register** (63 FR 33434). NHTSA received no comments on this application.

FMVSS 205, paragraph S6 *Certification and marking,* requires that each piece of glazing material shall be marked in accordance to section 6 of the American National Standard ''Safety Code for Safety Glazing Materials for Glazing Motor Vehicles Operating on Land Highways'' Z–26.1–1977, January 26, 1977, as supplemented by Z26.1a July 3, 1980 (ANS Z26). This specifies all safety glazing materials shall be legibly and permanently marked in letters and numerals at least 0.070 inch (1.78 mm) in height, with the words ''American National Standard'' or the characters ''AS'' and, in addition, with a model number that will identify the type of construction of the glazing material. They shall also be marked with the manufacturer's distinctive designation or trademark. In addition, FMVSS 205, paragraph S6.2 requires that each piece of glazing material be marked with the symbol ''DOT.''

From January 17, 1996, to February 3, 1998, Western Star Trucks manufactured approximately 891 Western Star Constellation series truck/tractors equipped with 58 inches or 72 inches sleeper windows which were not marked per the requirements of S6 of FMVSS 205.

Western Star supports its application for inconsequential noncompliance with the following:

1. All performance requirements of FMVSS 205 are met or exceeded.

2. The sleeper window is located out of the truck/tractor driver's compartment in an area not requisite for driver visibility.

NHTSA has reviewed Western Star's application and, for the reasons discussed below, concludes that the noncompliance of the Western Star windows is inconsequential to motor vehicle safety. Western Star has provided documentation that the windows do comply with all other safety performance requirements of the standard, except the labeling. This documentation is a surrogate for the certification labeling. NHTSA believes that the lack of labeling would not result in inadvertent replacement of the windows with the wrong glazing. Broken tempered glass can readily be identified as tempered glass, rather than plastic or laminated glass. Anyone who intended to replace the window with an identical tempered glass window would have to contact Western Star for the proper part, since tempered glass windows cannot be easily manufactured by small field facilities. At that point, Western Star, or their representative, would be able to provide the correct replacement window by use of their parts system.

In consideration of the foregoing, NHTSA has decided that the applicant has met its burden of persuasion that the noncompliance it describes is inconsequential to safety.

Accordingly, its application is granted, and the applicant is exempted from providing the notification of the noncompliance that is required by 49 U.S.C. 30118, and from remedying the noncompliance, as required by 49 U.S.C. 30120.

Authority: 49 U.S.C. 30118, delegations of authority at 49 CFR 1.50 and 501.8.

Issued: November 24, 1998.

L. Robert Shelton,

Associate Administrator for Safety Performance Standards.

[FR Doc. 98–31928 Filed 11–30–98; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Customs Service

Privacy Act of 1974; System of Records

AGENCY: Customs Service, Treasury.

ACTION: Notice of proposed new Privacy Act system of records.

SUMMARY: The Treasury Department, Customs Service, gives notice of a proposed new system of records which is subject to the Privacy Act of 1974, as amended, (5 U.S.C. 552a).

DATES: Comments must be received no later than December 31, 1998. This new system of records will be effective January 11, 1999, unless comments are received which result in a contrary determination.

ADDRESSES: Comments (preferably in triplicate) may be submitted to the Office of Regulations and Rulings, Disclosure Law Branch, U.S. Customs

Service, 1300 Pennsylvania Ave. NW., Washington, DC 20229. Comments will be available for inspection and copying at the Disclosure Law Branch, 1300 Pennsylvania Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Assistant Commissioner, Office of Information and Technology, U.S. Customs Service, (202) 927-0800.

SUPPLEMENTARY INFORMATION: The Office of Information and Technology is redesigning their non-integrated tracking systems: The Seized Currency Tracking System, Seized Property Management System, Seized Property Tracking System, and the Automated Commercial System Module for Fines, Penalties and Forfeitures to be replaced by the Seized Asset and Case Tracking System (SEACATS). The purpose of the newly proposed system of records is to provide Customs and the Treasury Forfeiture Fund with a comprehensive system for tracking seized and forfeited property, penalties, and liquidated damages from case initiation to final resolution.

The Seized Asset and Case Tracking System (SEACATS), as a computerized database, has terminals located at Customs Management Centers and ports of entry located throughout the United States, at U.S. Secret Service, Bureau of Alcohol, Tobacco and Firearms, Internal Revenue Service, Executive Office of Asset Forfeiture and the field and headquarters offices of the contractor custodian of all seized property. The system will permit the retrieval of information related to internal review and consideration of request for relief related to property that was seized by components of the Department of the Treasury and the names and other identifying information for persons and businesses who purchase forfeited property from the government.

Exemption from provisions of the Privacy Act is claimed in a separate document. The system notice is published in its entirety below.

Dated: November 19, 1998.

Shelia Y. McCann,

Deputy Assistant Secretary (Administration).

Treasury/Customs .213

SYSTEM NAME:

Seized Asset and Case Tracking System (SEACATS).

SYSTEM LOCATION:

Office of Information and Technology, U.S. Customs Service, 1300 Pennsylvania Ave. NW., Washington, DC 20229.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

(1) Owners, claimants, and other interested parties to seized property; (2) those who have been administratively or criminally charged with violations of Customs laws and regulations, and other laws and regulations enforced by the Customs Service, U.S. Secret Service, Bureau of Alcohol, Tobacco and Firearms, and the Internal Revenue Service; (3) purchasers of forfeited property.

CATEGORIES OF RECORDS IN THE SYSTEM:

Includes records containing information related to property that was forfeited or seized by the U.S. Customs Service, the U.S. Secret Service, the Bureau of Alcohol, Tobacco and Firearms, such as: (1) Individual and business names, (2) phone numbers, (3) identifying numbers, (4) dates, (5) types of violations, (6) parties entitled to legal notice, (7) parties who are legally liable, (8) case information pertaining to violation, (9) bond information, (10) entry documentation, (11) petitions and supplemental petitions, (12) reports of investigation concerning the fine, penalty or forfeiture, (13) information related to internal review and consideration of request for relief, (14) offer information.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; Treasury Department Order No. 165, Revised, as amended. 19 U.S.C. 66, 1618, 1624; 19 CFR parts 171 and 172.

PURPOSE(S):

The purpose is to provide Customs and the Treasury Executive Office of Asset Forfeiture with a comprehensive system for tracking seized and forfeited property, penalties, and liquidated damages from case initiation to final resolution.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

These records and information in the records may be used to: (1) Disclose pertinent information to appropriate Federal, State, local or foreign agencies responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, or license, where the disclosing agency becomes aware of an indication of a violation or potential violation of civil or criminal law or regulation;

(2) Disclose information to a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosure to opposing counsel or witnesses in the course of civil discovery, litigation or settlement negotiations, or in response to a subpoena, in connection with criminal law proceedings;

(3) Disclose information to a Federal, State, or local agency, maintaining civil, criminal or other relevant enforcement information or other pertinent information, which has requested information relevant to or necessary to the requesting agency's or bureau's hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit;

(4) Provide information to third parties during the course of an investigation to the extent necessary to obtain information pertinent to the investigation;

(5) Provide information to the news media in accordance with guidelines contained in 28 CFR 50.2 which relates to an agency's functions relating to civil and criminal proceedings.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Magnetic media.

RETRIEVABILITY:

By identification codes, name, phone number, identifying number, and date and type of violation.

SAFEGUARDS:

Access to the computer area is controlled by a security pass arrangement and personnel not connected with the operation of the computer are prohibited from entering. At ports of processing, terminal rooms are under close supervision during working hours and locked after the close of business. Users gain access to the system by unique identification code and password. Access is on a need-to-know basis only. Passwords are changed frequently to enhance security.

RETENTION AND DISPOSAL:

Files are periodically updated to reflect changes and are disposed of in accordance with the requirements of the National Archives and Records Administration's record retention schedule.

SYSTEM MANAGER(S) AND ADDRESS:

Assistant Commissioner, Office of Information and Technology, U.S. Customs Service, 1300 Pennsylvania Ave. NW., Washington, DC 20229.

NOTIFICATION PROCEDURE:

This system of records may not be accessed for purposes of determining if the system contains a record pertaining

to a particular individual. (See 5 U.S.C. 552a (e)(4)(G) and (f)(1).)

RECORD ACCESS PROCEDURES:

This system of records may not be accessed under the Privacy Act for the purpose of inspection.

CONTESTING RECORD PROCEDURES:

Since this system of records may not be accessed for purposes of determining if the system contains a record pertaining to a particular individual and those records, if any, cannot be inspected, the system may not be accessed under the Privacy Act for the purpose of contesting the content of the record.

RECORD SOURCE CATEGORIES:

This system of records is exempt from the Privacy Act provision which requires that record source categories be reported. (See ''Exemptions Claimed for the System,'' below.)

EXEMPTIONS CLAIMED FOR THE SYSTEM:

This system is exempt from 5 U.S.C. 552a (c)(3), (c)(4), (d)(1), (d)(2), (d)(3), (d)(4), (e)(1), (e)(2), (e)(3), (e)(4) (G), (H) and (I), (e)(5) and (8), (f) and (g) of the Privacy Act pursuant to 5 U.S.C. 552a (j)(2) and (k)(2).

[FR Doc. 98–31870 Filed 11–30–98; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF THE TREASURY

Fiscal Service

Surety Companies Acceptable on Federal Bonds: Worcester Insurance Company

AGENCY: Financial Management Service, Fiscal Service, Department of the Treasury.

ACTION: Notice.

SUMMARY: This is Supplement No. 1 to the Treasury Department Circular 570; 1998 Revision, published July 1, 1998, at 63 FR 36080.

FOR FURTHER INFORMATION CONTACT: Surety Bond Branch at (202) 874–6905.

SUPPLEMENTARY INFORMATION: A Certificate of Authority as an acceptable surety on Federal bonds is hereby issued to the following Company under 31 U.S.C. 9304 to 9308. Federal bond-approving officers should annotate their reference copies of the Treasury Circular 570, 1998 Revision, on page 36113 to reflect this addition:

Company Name: Worcester Insurance Company. Business address: 120 Front Street, Suite 500, Worcester, MA 01608–1408. Phone: (508) 751–8100. Underwriting limitation b/: $8,000,000. Surety licenses c/: CT, ME, MA, MI, NH, NY, RI, VT. Incorporated in: Massachusetts.

Certificates of Authority expire on June 30 each year, unless revoked prior to that date. The Certificates are subject to subsequent annual renewal as long as the companies remain qualified (31 CFR Part 223). A list of qualified companies is published annually as of July 1 in Treasury Department Circular 570, with details as to underwriting limitations, areas in which licensed to transact surety business and other information.

The Circular may be viewed and downloaded through the Internet at http://www.fms.treas.gov/c570/index.html. A hard copy may be purchased from the Government Printing Office (GPO) Subscription Service, Washington, DC, Telephone (202) 512–1800. When ordering the Circular from GPO, use the following stock number: 048–000–00516–1.

Questions concerning this Notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Financial Accounting and Services Division, Surety Bond Branch, 3700 East-West Highway, Room 6A04, Hyattsville, MD 20782.

Dated: November 16, 1998.

Judith R. Tillman,

Director, Financial Accounting and Services Division, Financial Management Service.

[FR Doc. 98–31948 Filed 11–30–98; 8:45 am]

BILLING CODE 4810–35–M

UNITED STATES INFORMATION AGENCY

Culturally Significant Objects Imported for Exhibition Determinations, ''Letters in Gold: Ottoman Calligraphy from the Sakib Sabanci Collection''

Republication FR98–13767 published @ Page 28452 in the **Federal Register** of May 22, 1998 is republished in its entirety.

ACTION: Notice.

This 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 F.R. 13359, March 29, 1978), and Delegation Order No. 85–5 of June 27, 1985 (50 F.R. 27393, July 2, 1985), I hereby determine that the objects on the list specified below, to be included in the exhibit, ''Letters in Gold: Ottoman Calligraphy from the Sakib Sabanci Collection'', Istanbul. (See List), imported from abroad for the temporary exhibition without profit within the United States, are of cultural significance.

These objects are imported pursuant to a loan agreement with the foreign lenders.

I also determine that the exhibition or display of the listed exhibit objects at the Metropolitan Museum of Art, New York, New York, from on or about September 10, 1998, to on or about December 13, 1998, and at the Los Angeles County Museum of Art, Los Angeles, California, from on or about February 25, 1999, to on or about May 17, 1999, and the Harvard University Art Museums from on or about October 9, 1999 through on or about January 12, 2000 is in the national interest. Public Notice of these determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT:

A copy of this list may be obtained by contacting Ms. Jacqueline Caldwell, Assistant General Counsel, at (202) 619–6982. The address is U.S. Information Agency, 301 4th Street, S.W., Room 700, Washington, D.C. 20547–0001.

Dated: November 25, 1998.

R. Wallace Stuart,

Deputy General Counsel.

[FR Doc. 98–31975 Filed 11–30–98; 8:45 am]

BILLING CODE 8230–01–M

Corrections

Federal Register

Vol. 63, No. 230

Tuesday, December 1, 1998

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

[DOCKET 49-98]

Foreign-Trade Zone 1–New York, New York; Application for Subzone Pfizer Inc. (Pharmaceutical Products), Brooklyn, New York

Correction

In notice document 98–30415, beginning on page 63451, in the issue of Friday, November 13, 1998, make the following correction:

On page 63454, in the second column, in the second full paragraph, in the sixth and seventh lines, ''[60 days from date of publication]'' should read, ''January 12, 1999''.

BILLING CODE 1505-01-D

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Intelligence Agency, Science and Technology Advisory Board Closed Panel Meeting

Correction

In notice document 98–30621, beginning on page 63916, in the issue of Tuesday, November 17, 1998, make the following correction:

On page 63917, in the first column, in the fourth line, under the heading **DATES:**, ''December 1998 (800 am to 1600 pm) '' should read ''December 3, 1998 (800 am to 1600 pm) ''.

BILLING CODE 1505-01-D

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

10 CFR Part 432

[Docket No. EE–TP–98–550]

RIN 1904–AA85

Energy Conservation Program: Test Procedures for Distribution Transformers

Correction

In proposed rule document 98–30140, beginning on page 63360, in the issue of Thursday, November 12, 1998, make the following correction:

On page 63366, in the first column, in Table 3, in the table column heading, ''Low voltage, > 1.2 kV'' should read ''Low voltage, ≤ 1.2 kV'' and ''Medium voltage, ≤ 1.2 kV'' should read ''Medium voltage, > 1.2 kV''.

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 98-ACE-40]

Amendment to Class E Airspace; Pittsburg, KS

Correction

In rule document 98–30930, appearing on page 64179, in the issue of Thursday, November 19, 1998, make the following correction:

On page 64179, in the third column, the subject line is corrected to read as set forth above.

BILLING CODE 1505-01-D

federal register

Tuesday
December 1, 1998

Part II

Department of Labor

Occupational Safety and Health Administration

29 CFR Parts 1910, 1915, 1917, 1918, and 1926

Powered Industrial Truck Operator Training; Final Rule

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Parts 1910, 1915, 1917, 1918, and 1926

[Docket S–008]

RIN 1218–AB33

Powered Industrial Truck Operator Training

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Final rule.

SUMMARY: The Occupational Safety and Health Administration (OSHA) is revising its existing requirements for powered industrial truck operator training (codified at 29 CFR 1910.178(l)) and issuing new requirements to improve the training of these operators. The new requirements are intended to reduce the number of injuries and deaths that occur as a result of inadequate operator training. They apply to all industries (general industry, construction, shipyards, marine terminals, and longshoring operations) in which the trucks are being used, except agricultural operations.

These provisions mandate a training program that bases the amount and type of training required on: the operator's prior knowledge and skill; the types of powered industrial trucks the operator will operate in the workplace; the hazards present in the workplace; and the operator's demonstrated ability to operate a powered industrial truck safely. Refresher training is required if: the operator is involved in an accident or a near-miss incident; the operator has been observed operating the vehicle in an unsafe manner; the operator has been determined during an evaluation to need additional training; there are changes in the workplace that could affect safe operation of the truck; or the operator is assigned to operate a different type of truck. Evaluations of each operator's performance are required as part of the initial and refresher training, and at least once every three years.

OSHA estimates that this rule will prevent 11 deaths and 9,422 injuries per year. OSHA estimates that the annualized cost of this rule is approximately $16.9 million for all affected industries.

DATES: Effective Date: The effective date is March 1, 1999.

Compliance Dates: The dates by which powered industrial truck operators must be trained are shown on the following table.

If the employee was hired	The initial training and evaluation of that employee must be completed
Before December 1, 1999.	By December 1, 1999.
After December 1, 1999.	Before the employee is assigned to operate a powered industrial truck.

On November 18, 1998, the Office of Management and Budget granted approval of the information collection requirements under Office of Management and Budget Control Number 1218–0242.

ADDRESSES: Send petitions for review of the provisions of this standard to the Associate Solicitor for Occupational Safety and Health; Office of the Solicitor, Room S–4004; U.S. Department of Labor; 200 Constitution Avenue, N.W.; Washington, D.C. 20210.

For additional copies of this publication contact USDOL, OSHA, Office of Publications, Room N3101; 200 Constitution Avenue, N.W.; Washington, D.C. 20210; telephone (202) 219–4667, FAX (202) 219–9266.

FOR FURTHER INFORMATION CONTACT:

Direct press inquiries to: Bonnie Friedman, Director, Office of Information and Consumer Affairs; OSHA, U.S. Department of Labor, Room N3637; 200 Constitution Avenue, N.W., Washington, D.C. 20210; telephone (202) 693–1999, FAX (202) 693–1634.

Direct technical inquiries to: Richard Sauger, OSHA, Directorate of Safety Standards Programs, Room N3621; telephone (202) 693–2082; FAX (202)693–1663; Larry Liberatore, OSHA, Office of Maritime Safety Standards, Room N3621; telephone (202) 693–2086; FAX (202) 693–1663; or Laurence Davey; OSHA, Office of Construction Standards and Compliance Assistance, Room N3621; telephone (202) 693–2073; FAX (202) 219–6599, all at U.S. Department of Labor, 200 Constitution Avenue, N.W.; Washington, D.C. 20210.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background
A. General Industry
B. Shipyards and Marine Cargo Handling
C. Construction
D. Development of the Proposal
E. Updated Consensus Standard
II. Powered Industrial Truck Characteristics
III. Powered Industrial Truck Hazards
IV. Studies of Accident and Injury Data and Training Effectiveness
A. Accident and Injury Data
B. Studies Measuring the Effectiveness of Powered Industrial Truck Safety Training Programs
V. Basis for Agency Action
VI. Training
VII. The Issues
VIII. Summary and Explanation of the Final Standard
A. General
B. Scope
C. Safe Operation—Paragraph (l)(1)
D. Training Program Implementation—Paragraph (l)(2)
E. Training Program Content—Paragraph (l)(3)
F. Refresher Training and Evaluation—Paragraph (l)(4)
G. Avoidance of Duplicative Training—Paragraph (l)(5)
H. Certification—Paragraph (l)(6)
I. Compliance Dates—Paragraph (l)(7)
J. Appendix
IX. Statutory Considerations
X. Economic Analysis
XI. Environmental Impact
XII. OMB Review under the Paperwork Reduction Act
XIII. State Plan Standards
XIV. Federalism and Children's Executive Order
XV. List of Subjects
XVI. Authority
XVII. Regulatory Text

I. Background

A. General Industry

On May 29, 1971 (36 FR 10466), OSHA adopted many existing Federal standards and national consensus standards as OSHA standards under Section 6(a) of the Occupational Safety and Health Act (OSH Act) (29 U.S.C. 655 et al.). Section 6(a) permitted OSHA to adopt these standards without rulemaking for a period of two years after the effective date of the OSH Act.

One of the consensus standards that was adopted under the Section 6(a) procedure was the American National Standards Institute (ANSI) B56.1–1969, *Safety Standard for Powered Industrial Trucks.* Among the provisions adopted from that consensus standard was the operator training requirement subsequently codified by OSHA at 29 CFR 1910.178(l). That requirement states:

> ''Only trained and authorized operators shall be permitted to operate a powered industrial truck. Methods shall be devised to train operators in the safe operation of powered industrial trucks.''

In that consensus standard, a powered industrial truck is defined as a mobile, power-driven vehicle used to carry, push, pull, lift, stack, or tier material. Vehicles that were commonly referred to as high lift trucks, counterbalanced trucks, cantilever trucks, rider trucks, forklift trucks; high lift platform trucks; low lift trucks, low lift platform trucks; motorized hand trucks, pallet trucks; narrow aisle rider trucks, straddle trucks; reach rider trucks; single side loader rider trucks; high lift order picker rider trucks; motorized hand/rider trucks; or counterbalanced front/side loader lift trucks [1] are included. Vehicles used for earth moving or over-the-road haulage are excluded from the scope of the consensus standard, and consequently from coverage by the OSHA standard.

B. Shipyards and Marine Cargo Handling

In 1958, Congress amended the Longshore and Harbor Workers' Compensation Act (LHWCA) (33 U.S.C. 901 *et seq.*) to provide maritime employees with a safe work environment. The amendments (Pub. L. 85–742, 72 Stat. 835) required employers covered by the LHWCA to ''furnish, maintain and use'' equipment and to establish safe working conditions in accordance with regulations promulgated by the Secretary of Labor. Two years later, the Bureau of Labor Standards issued the first set of safety and health regulations for shipyards as parts 6, 7, and 8, and longshoring activities as 29 CFR part 9 (25 FR 1565, February 20, 1960). However, the longshoring regulations only covered those activities taking place aboard vessels.

As discussed earlier, the OSH Act authorized the Secretary of Labor to adopt established Federal standards issued under other statutes, including the LHWCA, as occupational safety and health standards. Accordingly, the Secretary adopted the existing shipyards and longshoring regulations (39 FR 22074, June 19, 1974). These regulations are at 29 CFR part 1915 for shipyards and 29 CFR part 1918 for longshoring. Because the OSH Act comprehensively covers all private employments, the longshoring standards also were applied to shoreside cargo handling operations (i.e., marine terminal operations). (See 29 CFR 1910.16.) OSHA's requirements for using mechanically powered vehicles aboard vessels were codified at § 1918.97, which includes a general requirement for the training of all vehicle operators.

In addition, in accordance with established policy codified at 29 CFR 1910.5(c)(2), OSHA has applied its general industry standards to shoreside activities not covered by its older longshoring rules. Under section 1910.5(c)(2), a general industry standard covering a hazardous condition applies to shoreside activities not covered by a specific standard addressing that hazard. Shipyards are covered by the general industry standard.

On July 5, 1983 (48 FR 30886), OSHA published its final standard for Marine Terminals (29 CFR part 1917). This rule was intended to further address the shoreside segment of marine cargo handling. Section 1917.27, Personnel, states:

(a) *Qualifications of machinery operators.*

(1) Only those employees determined by the employer to be competent by reason of training or experience, and who understand the signs, notices and operating instructions and are familiar with the signal code in use shall be permitted to operate a crane, winch or other power operated cargo handling apparatus, or any power operated vehicle, or give signals to the operator of any hoisting apparatus.

Exception: Employees being trained and supervised by a designated person may operate such machinery and give signals to operators during training.

The marine terminals standard also includes requirements for powered industrial trucks at § 1917.43, Powered industrial trucks. However, these requirements are for operating, maintaining, and outfitting these vehicles and do not expand on the training requirements found at § 1917.27.

On July 25, 1997, OSHA published in the **Federal Register** (62 FR 40147) final rules revising the marine terminals standard (29 CFR part 1917) and the longshoring standard (29 CFR part 1918). Those final rules left to this rulemaking the issue of improving the training requirements for powered industrial truck operators in the marine cargo handling industries. Accordingly, the final rule being published today includes requirements for the training of powered industrial truck operators in shipyards, longshoring operations, and marine terminals to ensure that all covered employees operating such vehicles have improved protection.

C. Construction

In 1969, Congress amended the Contract Work Hours Standards Act (CWHSA) (40 U.S.C. 327 *et seq.*) by adding a new section 107 (40 U.S.C. 333) to provide employees in the construction industry with a safer work environment and to reduce the frequency and severity of construction accidents and injuries. The amendment, commonly known as the Construction Safety Act (CSA) (Pub. L. 91–54; August 9, 1969), significantly strengthened employee protection by providing for the adoption of occupational safety and health standards for employees of the building trades and construction industry working on Federally financed or Federally assisted construction projects. Accordingly, the Secretary of Labor issued safety and health regulations for construction at 29 CFR part 1518 (36 FR 7340, April 17, 1971) pursuant to section 107 of the CWHSA.

As noted earlier, the OSH Act authorized the Secretary of Labor to adopt existing Federal standards issued under other statutes as occupational safety and health standards. Accordingly, in 1971, the Secretary of Labor adopted the standards that had been issued under the CWHSA at 29 CFR 1518 as OSHA construction standards. These standards were redesignated as part 1926 on December 30, 1971 (36 FR 25232). The provisions pertaining to powered industrial trucks used in construction are contained at § 1926.602(c). Paragraph 1926.602(c)(1)(vi) states:

(vi) All industrial trucks in use shall meet the applicable requirements of design, construction, stability, inspection, testing, maintenance, and operation, as defined in American National Standards Institute B56.1–1969, Safety Standards for Powered Industrial Trucks.

Therefore, by incorporating by reference the same ANSI standard that was the source document for 29 CFR 1910.178, this provision imposes the identical truck operator training requirements on the construction industry as they apply to general industry.

D. Development of Proposal

Since promulgation of the OSHA standards for powered industrial trucks in 1971, interested persons have requested that OSHA improve its training requirements for powered industrial truck operators. In the interval since 1971, the ASME B56.1 Committee has also substantially upgraded its training provisions for powered industrial truck operators.

On March 15, 1988, the Industrial Truck Association (ITA) petitioned

[1] The use of a single characteristic to describe a truck, such as ''high lift'' truck, does not fully describe a single type of truck but rather defines a group of different trucks that have that same characteristic. A given truck can only be accurately described by referring to all of its characteristics. For example, the common type of truck used in a warehouse is a high lift, counterbalanced, sit-down rider truck.

OSHA to revise its standard for the training of powered industrial truck operators (Ex. 3–2). The petition contained suggested language for a proposed requirement and a model operator training program that would meet the ITA-recommended requirement. OSHA responded to the petition on April 8, 1988, stating that it would revise the OSHA powered industrial truck operator training requirements when it completed work on other priority rulemaking projects.

Congress has expressed a special interest in this rulemaking. A resolution urging OSHA to revise its regulations on powered industrial truck operator training was introduced in the Senate during the 103rd Congress. Senate Concurrent Resolution 17 had 55 cosponsors and broad bipartisan support. Its companion measure in the House of Representatives, H. Con. Res. 92, had 236 cosponsors from both parties. No formal vote was ever taken on either resolution, however.

On March 14, 1995, OSHA published in the **Federal Register** (60 FR 13782) a notice of proposed rulemaking (NPRM) to revise the training requirement of the general industry standard for powered industrial trucks (§ 1910.178(l)). This notice also proposed to add training requirements for powered industrial truck operators in the shipyard industry (1915.120(a)), marine terminal industry (1917.43(i)), and the longshoring industry (1918.77(a)).

OSHA provided copies of a draft of the March 14, 1995, **Federal Register** NPRM to the Advisory Committee on Construction Safety and Health (ACCSH) at the Committee's meetings on February 28 and March 1, 1995. The Committee advised OSHA that it would like additional time to study the proposal and would finalize its recommendations by its next meeting on May 25–26, 1995. Because ACCSH had provided no recommendations or other information, OSHA decided to delay proposing the revision of the training requirements for powered industrial truck operators in the construction industry until the Committee had concluded its deliberations.

ACCSH met on May 25–26, 1995, at which time the Committee prepared its comments and recommendations. The Committee recommended that OSHA propose somewhat different requirements for powered industrial truck operator training for construction workers than the Agency had proposed for general industry, longshoring, shipyards, and marine terminals. OSHA reviewed the ACCSH recommendations and determined that these changes might be appropriate for other industries as well. OSHA decided that the most effective way to fully consider the Committee's recommendations was to raise a series of issues in the preamble of the proposed training requirements for construction and to invite public comment.

On Jan. 30, 1996, OSHA published an NPRM in the **Federal Register** (61 FR 3094) proposing to adopt as a new paragraph 1926.602(d) essentially the same training requirements for powered industrial truck operators in the construction industry as had been proposed for general industry and the shipyard and marine cargo handling industries. OSHA also published in that notice the following four issues that responded to the ACCSH recommendations:

1. In the construction industry, should an employer be allowed to accept the certification of training by a third party such as a union, manufacturer, consultant, or other private or public organization? Since OSHA does not accredit certifiers, what criteria should be used to establish their credibility?

2. What type of testing should be conducted during initial training to judge the competency of the trainee (performance testing and oral and/or written tests)?

A. If tests are administered, what subjects should be tested, and what methods, if any, should be used to judge that the tests are reliable and address the subject matter adequately?

B. What, if any, should be the acceptable pass/fail requirement for the tests?

3. Are some of the listed training subjects not needed?

4. Should an employee receive refresher or remedial training only if operating a vehicle unsafely or if involved in an accident? Is there any fixed operator retraining frequency suitable for the construction industry?

In a companion **Federal Register** notice (61 FR 3092), OSHA announced that a public hearing would be held. The hearing was to cover all industry sectors. That notice also advised the public that the issues raised in the construction notice should be considered for general industry and the shipyard and marine cargo handling industries and invited public comment. The hearing was held on April 30 through May 2, 1996.

There were 109 commenters who responded to the proposals outlined above and 22 participants at the public hearing. The presiding Administrative Law Judge allowed 60 days for post-hearing comments and an additional 30 days for post-hearing briefs. All comments, transcripts, and other evidence have been placed in the rulemaking record and are available for public inspection and copying. The rulemaking record was closed and certified as complete and final by the Administrative Law Judge on June 1, 1998. In preparing these final rules, OSHA has considered the entire rulemaking record and has made changes to the general industry, construction, shipyard, and marine cargo handling industries standards, as appropriate, based on the comments, testimony, and other evidence received.

As the following discussion demonstrates, OSHA concludes that upgrading the training requirements for powered industrial truck operators will substantially reduce the significant risk of death and injury caused by the unsafe operation of powered industrial trucks driven by untrained or inadequately trained operators.

E. Updated Consensus Standard

Since promulgation of the OSHA safety and health standards in 1971, the consensus standard (ANSI B56.1–1969) (now ASME B56.1) on which the general industry powered industrial truck standard was based has undergone four complete revisions (dated 1975, 1983, 1988, and 1993). The current edition standard, ASME B56.1–1993 (Ex. 3–1), addresses truck operator training as follows.

4.19 Operator Training

4.19.1 Personnel who have not been trained to operate powered industrial trucks may operate a truck for the purposes of training only, and only under the direct supervision of the trainer. This training should be conducted in an area away from other trucks, obstacles, and pedestrians.

4.19.2 The operator training program should include the user's policies for the site where the trainee will operate the truck, the operating conditions for that location, and the specific truck the trainee will operate. The training program shall be presented to all new operators regardless of previous experience.

4.19.3 The training program shall inform the trainee that:

(a) The primary responsibility of the operator is to use the powered industrial truck safely following the instructions given in the training program.

(b) Unsafe or improper operation of a powered industrial truck can result in: death or serious injury to the operator or others; damage to the powered industrial truck or other property.

4.19.4 The training program shall emphasize safe and proper operation to

avoid injury to the operator and others and prevent property damage, and shall cover the following areas:

(a) Fundamentals of the powered industrial truck(s) the trainee will operate, including:

(1) characteristics of the powered industrial truck(s), including variations between trucks in the workplace;

(2) similarities to and differences from automobiles;

(3) significance of nameplate data, including rated capacity, warnings, and instructions affixed to the truck;

(4) operating instructions and warnings in the operating manual for the truck, and instructions for inspection and maintenance to be performed by the operator;

(5) type of motive power and its characteristics;

(6) method of steering;

(7) braking method and characteristics, with and without load;

(8) visibility, with and without load, forward and reverse;

(9) load handling capacity, weight and load center;

(10) stability characteristics with and without load, with and without attachments;

(11) controls—location, function, method of operation, identification of symbols;

(12) load handling capabilities; forks, attachments;

(13) fueling and battery charging;

(14) guards and protective devices for the specific type of truck;

(15) other characteristics of the specific industrial truck.

(b) Operating environment and its effect on truck operation, including:

(1) floor or ground conditions including temporary conditions;

(2) ramps and inclines, with and without load;

(3) trailers, railcars, and dockboards (including the use of wheel chocks, jacks, and other securing devices);

(4) fueling and battery charging facilities;

(5) the use of ''classified'' trucks in areas classified as hazardous due to risk of fire or explosion, as defined in ANSI/NFPA 505;

(6) narrow aisles, doorways, overhead wires and piping, and other areas of limited clearance;

(7) areas where the truck may be operated near other powered industrial trucks, other vehicles, or pedestrians;

(8) use and capacity of elevators;

(9) operation near edge of dock or edge of improved surface;

(10) other special operating conditions and hazards which may be encountered.

(c) Operation of the powered industrial truck, including:

(1) proper preshift inspection and approved method for removing from service a truck which is in need of repair;

(2) load handling techniques, lifting, lowering, picking up, placing, tilting;

(3) traveling, with and without loads; turning corners;

(4) parking and shutdown procedures;

(5) other special operating conditions for the specific application.

(d) Operating safety rules and practices, including:

(1) provisions of this Standard in Sections 5.1 to 5.4 addressing operating safety rules and practices;

(2) provisions of this Standard in Section 5.5 addressing care of the truck;

(3) other rules, regulations, or practices specified by the employer at the location where the powered industrial truck will be used.

(e) Operational training practice, including;

(1) if feasible, practice in the operation of powered industrial trucks shall be conducted in an area separate from other workplace activities and personnel;

(2) training practice shall be conducted under the supervision of the trainer;

(3) training practice shall include the actual operation or simulated performance of all operating tasks such as load handling, maneuvering, traveling, stopping, starting, and other activities under the conditions which will be encountered in the use of the truck.

4.19.5 Testing, Retraining, and Enforcement

(a) During training, performance and oral and/or written tests shall be given by the employer to measure the skill and knowledge of the operator in meeting the requirements of the Standard. Employers shall establish a pass/fail requirement for such tests. Employers may delegate such testing to others but shall remain responsible for the testing. Appropriate records shall be kept.

(b) Operators shall be retrained when new equipment is introduced, existing equipment is modified, operating conditions change, or an operator's performance is unsatisfactory.

(c) The user shall be responsible for enforcing the safe use of the powered industrial truck according to the provisions of this Standard.

Note: Information on operator training is available from such sources as powered industrial truck manufacturers, government agencies dealing with employee safety, trade organizations of users of powered industrial trucks, public and private organizations, and safety consultants.

Since 1971, the national consensus committee has adopted other volumes [2] for specific types of vehicles that fall within the broad definition of a powered industrial truck. Supplementary volumes have been developed and adopted for: guided industrial vehicles; rough terrain forklift trucks; industrial crane trucks; personnel and burden carriers; operator controlled industrial tow tractors; and manually propelled high lift industrial trucks. The training provisions OSHA is adopting are performance-oriented and could be applied to operator training for all types of industrial trucks. However, this final rule covers only those types of powered industrial trucks that fall within the scope of 29 CFR 1910.178(a) for general industry, construction, and shipyards. That scope includes some types of powered industrial trucks that have supplementary ASME volumes, such as rough terrain forklift trucks, but does not include earth moving equipment or vehicles for over-the-road haulage, for which ASME has also developed specific volumes.

II. Powered Industrial Truck Characteristics

The term ''powered industrial truck'' is defined in the ASME B56.1 (formerly the ANSI B56.1) standard as a ''mobile, power propelled truck used to carry, push, pull, lift, stack, or tier material.'' Vehicles that are used for earth moving and over-the-road hauling are excluded.

Powered industrial trucks are classified by their manufacturers according to their individual characteristics. There are seven classes of powered industrial trucks:

Class 1—Electric Motor, Sit-down Rider, Counter-Balanced Trucks (Solid and Pneumatic Tires).

Class 2—Electric Motor Narrow Aisle Trucks (Solid Tires).

Class 3—Electric Motor Hand Trucks or Hand/Rider Trucks (Solid Tires).

Class 4—Internal Combustion Engine Trucks (Solid Tires).

Class 5—Internal Combustion Engine Trucks (Pneumatic Tires).

Class 6—Electric and Internal Combustion Engine Tractors (Solid and Pneumatic Tires).

Class 7—Rough Terrain Forklift Trucks (Pneumatic Tires).

Each of the different types of powered industrial trucks has its own unique characteristics and some inherent hazards. To be most effective, training must address the unique characteristics

[2] The national consensus committees call the standards for different pieces of equipment ''volumes'' and all of the volumes produced by the committee the ''standard.''

of the type of vehicle(s) the employee is being trained to operate.

Powered industrial trucks may operate on almost any type of surface, from smooth and level floors to rocky, uneven ground, provided they were manufactured to operate on that type of floor or ground and the surface does not have an excessive slope. For example, construction forklift trucks (most commonly, those that are classified as Class 7, rough terrain forklifts) are more often operated on uneven, ungraded terrain than is the case for trucks in other industries.

Different trucks are designed and manufactured to operate in different work environments. Some powered industrial trucks are used for moving material in a particular type of workplace. For example, high lift trucks can be used to raise loads up to 30 or 40 feet above the ground, deposit the material on a rack, mezzanine, roof under construction, scaffold, or another elevated location, and subsequently retrieve and lower the material. Some vehicles are used to raise a palletized load just a few inches above the floor and move that load to another location in a warehouse or other indoor workplace.

Powered industrial trucks can be equipped with, or can be modified to accept, attachments that permit the truck to move odd-shaped material or carry out tasks that may not have been envisioned when the truck was designed and manufactured. Many of these attachments are added to or installed on the vehicle by the dealer or the employer. For example, there are powered industrial truck attachments for grasping barrels or drums of material. Some of these attachments not only grasp a barrel or drum but allow the vehicle operator to rotate the barrel or drum to empty it or lay it on its side.

OSHA recognizes that certain attachments may limit the safe use of the vehicle. To ensure that modifications or additions do not adversely affect the safe use of the vehicle, OSHA requires at § 1910.178(b)(4) that:

(ii) Modifications and additions which affect capacity and safe operation shall not be performed by the customer or user without manufacturer's prior written approval. Capacity, operation, and maintenance instruction plates, tags, or decals shall be changed accordingly.

Note: A similar provision for construction is contained at § 1926.602(c)(1)(ii).

When a powered industrial truck is used with specialized attachments, or when the truck is used for hazardous operations (such as when the truck is used to lift people), operator training must include instruction on the safe conduct of those operations so that the operator knows and understands the restrictions or limitations imposed on vehicle operation in these situations.

III. Powered Industrial Truck Hazards

Powered industrial trucks are used in almost all industries. They can be used to move, raise, lower, or remove large objects or a number of smaller objects on pallets or in boxes, crates, or other containers. Because powered industrial truck movement is controlled by the operator and is not restricted by the frame of the machine or other impediments, virtually unrestricted movement of the vehicle about the workplace is possible.

The hazards commonly associated with powered industrial trucks vary for different vehicle types, makes, and models. Each type of truck presents different operating hazards. For example, a sit-down, counterbalanced high lift rider truck is more likely than a motorized hand truck to be involved in a falling load accident, because the sit-down rider trucks can lift a load much higher than can a hand truck.

The method or means to prevent an accident and to protect employees from injury varies for different types of trucks. For example, operators of sit-down rider trucks are often injured in tipover accidents when they attempt to jump clear of the vehicle as it tips over. Because the operator's natural tendency is to jump downward, he or she lands on the floor or ground and is then crushed by the vehicle's overhead guard. Therefore, operators of sit-down trucks need to be trained to remain in the operator's position in a tipover accident and to lean away from the direction of fall to minimize the potential for injury.

On the other hand, when a stand-up rider truck tips over, the truck operator can exit the vehicle by simply stepping backward, perpendicular to the direction of the vehicle's fall, to avoid being crushed. In this situation, the operator usually should attempt to jump clear of the vehicle, and should be trained accordingly.

Driving a powered industrial truck at excessive speed can result in loss of control, causing the vehicle to skid, tip over, or fall off a loading dock or other elevated walking or working surface. This condition can be made more dangerous because the load being carried sometimes partially obscures the operator's vision. A vehicle that is out of control or being operated by a driver whose view in the direction of travel is restricted can strike an employee, run into a column or other part of the building, or strike stored material, causing the material to topple and injure employees in the area. Effective driver training teaches operators to act properly to minimize these hazards to themselves and other employees.

Other characteristics of a powered industrial truck that affect safe truck operation are: the truck's tendency to become unstable; its ability to carry loads high off the ground; and its characteristic mode of steering, i.e., with the rear wheels while being powered by the front wheels. Moving loads upward, downward, forward, and backward causes a shift of the center of gravity and can adversely affect the vehicle's stability. When a load is raised or moved away from the vehicle, the vehicle's longitudinal stability is decreased.[3] When the load is lowered or moved closer to the vehicle, its longitudinal stability is increased. Training also is needed to avoid accidents that can be caused by these characteristics.

To reduce the instability hazard caused by the shifting of the material being handled, the ANSI B56.1–1969 standard had seven provisions that addressed proper operation of a powered industrial truck. Knowledge of these principles, as well as the requirements of the OSHA standard, are essential for safe vehicle operation:

604 Q. While negotiating turns, speed shall be reduced to a safe level by means of turning the hand steering wheel in a smooth, sweeping motion. Except when maneuvering at a very low speed, the hand steering wheel shall be turned at a moderate, even rate.

605 A. Only stable or safely arranged loads shall be handled. Caution shall be exercised when handling off-center loads which cannot be centered.

605 B. Only loads within the rated capacity of the truck shall be handled.

605 C. The long or high (including multiple-tiered) loads which may affect capacity shall be adjusted.

605 D. Trucks equipped with attachments shall be operated as partially loaded trucks when not handling a load.

605 E. A load engaging means shall be placed under the load as far as possible; the mast shall be carefully tilted backward to stabilize the load.

605 F. Extreme care shall be used when tilting the load forward or backward, particularly when high tiering. Tilting forward with load engaging means elevated shall be

[3] This assumes that the load is moved forward of the vehicle. When a load is on a side loader vehicle, moving the load away from the vehicle will reduce the longitudinal and lateral stability of the vehicle.

prohibited except to pick up a load. An elevated load shall not be tilted forward except when the load is in a deposit position over a rack or stack. When stacking or tiering, only enough backward tilt to stabilize the load shall be used.

Note: The corresponding provisions appear at §§ 1910.178(n)(15) and (o)(1) through (o)(6) of the general industry standard and are also incorporated by reference in part 1926.

The hazards addressed in this final rule are those associated with industrial trucks in general, as well as those posed by specific makes or models of truck. Each powered industrial truck has distinct characteristics that make its operation different from the operation of other trucks. Therefore, operators must know how these differences affect safe truck operation.

The workplaces where these trucks are being used also present a variety of different hazards. The safety of industrial truck operations can be decreased by workplace conditions such as rough, uneven, or sloped surfaces; unusual loads; hazardous areas; narrow aisles, blind spots, or intersections; and pedestrian traffic or employees working close to the path of travel. Finally, there are hazardous work practices that relate to all trucks, including driving at excessive speed, poor loading, and carrying unauthorized passengers. In addition, poor truck maintenance can contribute to accidents.

The record contains evidence of many accidents that have occurred because of unsafe truck operation, as discussed below. For example, employees have fallen from trucks while using them to change light bulbs on overhead fixtures or riding on the forks to manually retrieve items from high racks. Many accidents have occurred when an operator has attempted to drive with an obstructed view in the direction of travel and has run into another employee. Improper truck maintenance has caused death from over exposure to carbon monoxide, loss of brakes, or rupture of hydraulic lines.

As the above discussion indicates, it is not possible to identify all the hazards that are encountered in all industrial truck operations. Accordingly one cannot develop a single ''generic'' training program that covers in detail all hazards for all powered industrial trucks and all workplaces.

Four major areas of concern need to be addressed in an effective powered industrial truck training program: (1) the general hazards that apply to the operation of all or most powered industrial trucks; (2) the hazards associated with the operation of particular types of trucks; (3) the hazards of workplaces generally; and (4) the hazards of the particular workplace where the vehicle operates. The requirements that OSHA is promulgating are performance-oriented to permit employers to tailor a training program to the characteristics of their workplaces and the particular types of powered industrial trucks operated.

IV. Studies of Accident and Injury Data and Training Effectiveness

This section of the preamble discusses the reports, studies, and other sources of data and information that were analyzed to determine the magnitude and extent of the problems that powered industrial truck operator training can mitigate. It also contains a discussion of the studies that demonstrate how better training can improve safety.

A. Accident and Injury Data

1. The Census of Fatal Occupational Injuries

The Bureau of Labor Statistics (BLS) maintains a database entitled *Census of Fatal Occupational Injuries (CFOI).* The CFOI is a compilation of information on fatal work injuries that occurred in the 50 States and the District of Columbia. BLS gathers pertinent information from death certificates, workers' compensation reports, and other Federal and State records. Information is verified by using at least two source documents.

The census contains a collection of information on the workers and the circumstances surrounding each fatality. The data are compiled annually.

In April, 1994, BLS published a booklet entitled *Fatal Workplace Injuries in 1992:* A Collection of Data and Analysis (Ex. 3–4). This booklet contains an article written by Gary A. Helmer entitled *Fatalities Involving Forklifts and Other Powered Industrial Carriers, 1991–1992.* This report contains information from the CFOI on 170 fatal powered industrial truck accidents. Table 1 lists the reported causes of these accidents.

TABLE 1.—CLASSIFICATION OF FORKLIFT FATALITIES, CFOI, 1991–1992

How the accident occurred	Number	Percent
Forklift overturned	41	24
Forklift struck something or ran off dock	13	8
Worker pinned between objects	19	11
Worker struck by material	29	17
Worker struck by forklift	24	14
Worker fell from forklift	24	14
Worker died during forklift repair	10	6
Other accident	10	6
Total	170	100

Source: Bureau of Labor Statistics, *Fatal Workplace Injuries in 1992, A Collection of Data and Analysis,* Report 870, April 1994.

2. Characteristics of Work-Related Injuries Involving Forklift Trucks

In 1987, Nancy Stout-Wiegand of the National Institute for Occupational Safety and Health (NIOSH) published an article in the *Journal of Safety Research* (Winter 1987, Vol. 18, No. 4, pp. 179–190) entitled *Characteristics of Work-Related Injuries Involving Forklift Trucks* (Ex. 8–6). This article contained an analysis of powered industrial truck injuries reported in two occupational injury databases—the National Electronic Injury Surveillance System (NEISS) and the Bureau of Labor Statistics' Supplementary Data System (SDS).

The NEISS database is composed of records from a national sample of 200 hospital emergency rooms and burn centers handling all types of injuries. The NEISS database was originally established by the Consumer Product Safety Commission, and its original intent was to gather data about accidents involving consumer products rather than industrial injuries. The hospital emergency rooms included in the sample were not necessarily those

located in industrial areas, predominantly treating industrial injuries and illnesses. The data from this sample are weighted to represent the nation in numbers and characteristics of traumatic injuries treated in emergency rooms and burn centers.

A subset of this database—the work-related injuries— is maintained by NIOSH. Because the NEISS database records only injuries treated in emergency rooms and burn centers, traumatic work injuries treated by private practitioners or by industry or private clinics are not included. Moreover, chronic injuries, such as those caused by overexertion, are not as likely to be treated in emergency rooms as are acute traumatic injuries and, therefore, are probably under-represented in the NEISS database. Other probable sources of error in calculating accident rates include misclassification of the sources of injury or the agent of injury. For example, if an employee fell from the elevated forks of a powered industrial truck, the accident could be misclassified as a fall from elevation rather than a fall from a forklift. Similarly, if an employee were struck in the head by part of a load that fell from a powered industrial truck, the accident could be classified as an ''employee struck by falling object'' accident. In either case, the accident would have involved a powered industrial truck, but in neither case would it be classified as a powered industrial truck accident.

The Supplementary Data System (SDS) database is composed of workers' compensation claims for injuries involving lost workdays. Thirty states provide information to the SDS system. The SDS system reports the occupations of injured workers and states where the claims are filed. The SDS includes only compensable injuries. The definition of a compensable injury varies from state to state. In some states, injuries are compensable, for example, if they result in one day or more away from work. In other states, the time away from work may be up to 7 days before the injury becomes compensable.

The SDS and NEISS data do not necessarily include the same injuries because injuries treated in emergency rooms do not always result in lost workdays. At the same time, compensable injuries included in the SDS may not have been treated in emergency rooms and thus would not be represented in NEISS. However, both of these databases represent the more serious injuries involving powered industrial trucks, that is, those requiring treatment in emergency rooms and those that result in compensable injuries.

In 1983, the SDS system identified 13,417 workers' compensation claims for lost-workday injuries involving powered industrial trucks. Assuming that the 30 states in the SDS system are representative of and proportional in population to the whole country (50 states), approximately 22,400 compensation claims (5/3 x 13,417) are filed nationally for lost-workday injuries involving powered industrial trucks. This number is comparable to the estimated 24,000 forklift-related injuries that were treated in U.S. emergency rooms in 1983 as reported by NIOSH from information gathered by the NEISS system. In 1985, the NEISS system reported a total of approximately 34,000 powered industrial truck-related accidents that were treated in emergency rooms. This reflects an increase in the number of such accidents reported by NEISS studies of about 39% over the three-year period from 1983 to 1985.

The SDS report also contained a tabulation of the occupations of the injured workers. The breakdown of the occupations of those employees and the corresponding percentage of accidents are listed in Table 2.

TABLE 2.—PERCENTAGE DISTRIBUTION OF POWERED INDUSTRIAL TRUCK INJURIES BY OCCUPATION OF INJURED EMPLOYEE

Occupation	Percentage
Professional, technical, and kindred workers	0.3
Managers and administrators (except farm)	2.0
Sales workers	0.8
Clerical and kindred workers	5.0
Craftsmen and kindred workers	(15.5)
Mechanics	6.5
Foremen	3.0
Other craftsmen and kindred workers	6.0
Operatives (except transportation)	(17.5)
Assemblers	1.4
Packers/wrappers	1.1
Welders	0.9
Miscellaneous/unspecified operatives	9.2
Other operatives	4.9
Transportation equipment operatives	(20.8)
Powered industrial truck operators	12.3
Truck drivers	5.5
Motor men	1.7
Deliverymen	1.2
Other transportation equipment operators	0.1
Laborers (except farm)	(33.9)
Warehousemen	10.4
Freight and material handlers	7.3
Stock handlers	4.4
Construction laborers	2.2
Miscellaneous/unspecified laborers	8.0
Other laborers	1.6
Farmers (managers and laborers)	1.5
Service workers	1.8
Occupation Unspecified	1.1

Source: Characteristics of Work-Related Injuries Involving Forklift Trucks, Journal of Safety Research, Vol. 18, No. 4, Winter 1987, pp. 179–190.

3. Industrial Forklift Truck Fatalities—A Summary

OSHA's Office of Data Analysis (ODA) examined 53 investigative case files involving powered industrial truck fatalities that occurred between 1980 and 1986 (Ex. 3–7). The results of ODA's analysis are summarized in Table 3, below. Note: the columns do not always add to 100 percent in various tables because of rounding.

TABLE 3. OFFICE OF DATA ANALYSIS—TYPE ACCIDENTS, 53 POWERED INDUSTRIAL TRUCK FATALITIES

Type Accident	Number	Percent
Crushed by tipping vehicle	22	42
Crushed between vehicle and surface	13	25
Crushed between two vehicles	6	11
Struck or run over by vehicle	5	10
Struck by falling material	4	8
Fall from platform on forks	2	4
Accidental activation of controls	1	2

Source: *Industrial Forklift Truck Fatalities—A Summary,* Report from Office of Data Analysis, Office of Statistics, OSHA, Dated June 1990.

The single largest cause of accidents was vehicle tipovers (percentages attributed to specific causes may not track those in Table 3 because a single specific cause—tipover—may be classified under more than one accident type in that table). These tipovers were attributed to the following: (1) The vehicle was out of control (speeding, elevated loads, mechanical problems, etc.; 7 instances—13 percent); (2) the vehicle was run off/over the edge of the surface (4 instances—8 percent); (3) the operator attempted to make too sharp a turn (excessive speed, unbalanced load, etc.; 4 instances—8 percent); (4) an employee jumped from an overturning vehicle being pulled by another vehicle (2 instances—4 percent); (5) the vehicle skidded or slipped on a slippery surface (2 instances—4 percent); (6) the wheels on one side of the vehicle ran over a raised surface or object (2 instances—4 percent); and (7) the vehicle tipped over when struck by another vehicle (1 instance—2 percent).

The second highest number of fatalities reported in the ODA study resulted from accidents when employees were crushed between a vehicle and a surface. These accidents were attributed to the following: (1) The operator got off the vehicle while it was running (7 instances—13 percent); (2) a worker on a platform was crushed between the platform and an overhead surface (2 instances—4 percent); (3) an employee's leg was caught when a vehicle sideswiped a metal surface (1 instance—2 percent); (4) an employee attempted to prevent a vehicle tipover by holding up the overhead guard (1 instance—2 percent); (5) an employee changed a tire and the vehicle fell from the jack (1 instance—2 percent); and (6) an empty 55 gallon drum used to support the vehicle during maintenance collapsed (1 instance—2 percent).

Four of the six accidents where employees were crushed between two vehicles were caused by contact between two moving powered industrial trucks, and the other two involved contact between a powered industrial truck and a stationary vehicle.

Of the five accidents that were identified as being caused by an employee being struck or run over by a vehicle, four were accidents where employees other than the vehicle operator were struck by the vehicle. The remaining one involved an operator trying unsuccessfully to board a free rolling vehicle.

4. Selected Occupational Fatalities Related to Marine Cargo Handling as Found in Reports of OSHA Fatality/Catastrophe Investigations

In 1992, the OSHA Office of Data Analysis (ODA) published a study of fatalities and catastrophes that had occurred in the marine terminal industry (SIC 4491, Marine Cargo Handling) between the years 1975 and 1984. This report is entitled *Selected Occupational Fatalities Related to Marine Cargo Handling as Found in Reports of OSHA Fatalities/Catastrophe Investigations* (Ex. 27). This report contains an analysis of the causes of and other information about 141 accidents that resulted in 165 fatalities that occurred during the period of the report. Of those accidents, 19 (11.5 percent) were attributed to the unsafe use of powered industrial trucks.

5. The OSHA Fatality/Catastrophe Reports

OSHA records a summary of investigation results of accidents resulting in fatalities, catastrophes, amputations, and hospitalizations of two or more days, and those accidents that have received significant publicity or involved extensive property damage. These summaries are recorded on an OSHA Form 170 and include an abstract describing the activities taking place at the time of each accident and the causes of the accident. These reports are stored in a computerized database system, and cover inspection data from 1984 to 1991. There were 4268 reports of accidents in the system that resulted in 3038 fatalities, 3244 serious injuries, and 1413 ''non-serious'' injuries (many of the accidents resulted in multiple fatalities and/or injuries).

OSHA queried the database for all reports that contained the keyword ''industrial truck.'' This produced a printout of 208 accidents (Ex. 8–8). These 208 accidents resulted in 147 fatalities, 115 serious injuries, and 34 ''non-serious'' injuries.

By adding the number of fatalities, serious injuries, and ''non-serious'' injuries and dividing that sum by the number of accidents, OSHA determined that 1.4 injuries of some nature occurred per serious accident reported. OSHA also determined that 4.8 percent of the fatalities, 3.5 percent of the serious injuries, and 2.4 percent of the ''non-serious'' injuries were attributable to an accident that involved a powered industrial truck.

These percentages are derived by dividing truck-related fatalities, serious injuries, and other injuries by the corresponding total number of reported fatalities, serious injuries, and other injuries. For example, the 147 forklift fatalities were divided by the 3038 total fatalities to arrive at the 4.8 percent figure.

OSHA examined the OSHA Form 170s to determine the causes of the accidents that were attributable to the use of powered industrial trucks. Table 4 is a compilation of the causes of these accidents.

TABLE 4.—CAUSES OF ACCIDENTS [1]: OSHA INVESTIGATION SUMMARIES (OSHA 170S)

Cause	Number of reports
No training [2]	19
Improper equipment	10
Overturn	53
Unstable load	45
Overload, improper use	15
Obstructed view	10
Carrying excess passenger	8
Operator inattention	59
Falling from platform or curb	9
Falling from trailer	6
Elevated employees	26
Operator struck by load	37
Other employee struck by load	8
Accident during maintenance	14
Vehicle left in gear	6
Speeding	5
Not powered industrial truck accident	9

[1] The causes of the accidents were determined by the narrative in the accident report. In most cases, the narrative emphasized the cause of the accident; however, in a few cases, reasonable and appropriate assumptions were made. In some cases, multiple accident causes were described in the narrative portion of the report, or were assumed to have caused the accident. (See Ex. 8–8.) Note that some of the accidents that were originally attributed to powered industrial truck operations were, on review, determined not to be caused by truck operations and are reflected in the final row of the table.

[2] Of the 19 instances when the report contained an indication that a lack of training was one of the causal factors of the accident, citations were issued for 6 serious violations, and 2 non-serious violations. In 11 instances, no violation was issued.

Source: Office of Electrical/Electronic and Mechanical Engineering Safety Standards, Directorate of Safety Standards Programs, OSHA.

It should be noted that many of the accidents could have been caused by improper training. For example, when a vehicle tipped over, an employee might have been transporting an unbalanced load because that employee had not been trained about load balance.

Using the OSHA Form 170 data, OSHA also compiled a listing of the industries in which these accidents occurred. Table 5 provides list of industries, and the number of accidents that occurred in those industries. (For a complete listing of the individual industries, see Ex. 3–9.)

TABLE 5—INDUSTRIES WHERE ACCIDENTS OCCURRED, OSHA INVESTIGATIVE SUMMARY REPORTS (OSHA FORM 170)

SIC division	Industry description	Times cited
B	Oil and Gas Extraction	4

TABLE 5—INDUSTRIES WHERE ACCIDENTS OCCURRED, OSHA INVESTIGATIVE SUMMARY REPORTS (OSHA FORM 170)—Continued

SIC division	Industry description	Times cited
C	Construction	25
D	Manufacturing	95
E	Transportation, Communication, and Utilities.	22
F	Wholesale Trades	25
G	Retail Trades	18
I	Services	7
J	Public Administration	4

Note: The breakdown of accidents does not include agricultural accidents because establishments of 10 or fewer employees in that industry are exempt from OSHA jurisdiction.

Source: Office of Electrical/Electronic and Mechanical Engineering Safety Standards, Directorate of Safety Standards Programs, OSHA.

6. OSHA Emergency Communications System Reports

OSHA has another internal system for collecting information about serious accidents. This system requires that serious and/or significant accidents be reported to the National Office over the telephone.

This telephone system is part of the OSHA emergency communications system. Regional Administrators are required to file a first report of fatalities, catastrophes, and other important events (such as those that receive significant publicity) with the National Office. The information contained in these reports is disseminated to responsible officials in OSHA. The National Office receives approximately 1200 reports yearly. (See Ex. 8–10.)

None of the reports is screened before the OSHA National Office receives them. Although these reports are not considered statistically significant for the purpose of calculating the total number of serious workplace accidents, OSHA believes that they represent a reasonable sampling of the most serious type of accidents and that the causes of the accidents closely parallel the distribution of the causes of all accidents.

OSHA has examined the First Report of Serious Injury reports for the years 1980–1991 and has identified 247 that involved powered industrial trucks. Table 6 lists the number of reports received each year, the number of those accidents that involved powered industrial trucks (PITs), and the corresponding percentages.

TABLE 6.—YEARLY SUMMARY OF FIRST REPORTS OF SERIOUS ACCIDENTS

Year	Total reports	PIT accidents	Percentage
1980	200	2	1
1981	125	2	1.6
1982	113	0	0
1983	115	3	2.6
1984	181	1	.6
1985	456	15	3.3
1986	1,147	44	3.8
1987	1,236	38	3.1
1988	1,330	47	3.5
1989	1,150	44	3.8
1990	1,105	41	3.7
1991	[1] 215	10	4.7
Totals [2]	6,424	247	3.6

[1] These are the number of reports received between the first of the year and March 31.

[2] The total number of reports, the number of accidents involving powered industrial trucks and the percentage were calculated using the figures from 1985 to 1990. The number of accidents reported during the period 1980 through 1984 and those reported during 1991 were too few to be representative.

Source: Office of Electrical/Electronic and Mechanical Engineering Safety Standards, Directorate of Safety Standards Programs, OSHA.

Each of the reports involving powered industrial trucks was examined to determine the causes of the accidents. In some instances, multiple causes were identified. Table 7 lists the number of the accidents that were attributable in whole or in part to each cause.

TABLE 7.—CAUSES OF ACCIDENTS (POWERED INDUSTRIAL TRUCKS) FIRST REPORTS OF SERIOUS ACCIDENT

Cause of the accident	Number of accidents
Tipover	58
Struck by powered industrial truck	43
Struck by falling load	33
Elevated employee on truck	28
Ran off loading dock or other surface	16
Improper maintenance procedures	14
Lost control of truck	10
Truck struck material	10
Employee overcome by carbon monoxide or propane fuel	10
Faulty powered industrial truck	7
Unloading unchocked trailer	7
Employee fell from vehicle	7
Improper use of vehicle	6
Electrocutions	2

Source: Office of Electrical/Electronic and Mechanical Engineering Safety Standards, Directorate of Safety Standards Programs, OSHA.

7. OSHA General Duty Clause Citation Analysis

OSHA's Office of Mechanical Engineering Safety Standards analyzed the citations that were issued between 1979 and 1984 for violations of the general duty clause [section 5(a)(1) of the OSH Act]. During that period, there were 3637 inspections that resulted in the issuance of at least one such citation. (See Ex. 8–11.)

Sixty-five general duty clause citations involved powered industrial truck operation. These citations were issued under the general duty clause because the dangerous condition did not appear to be covered by a specific requirement in Section 1910.178. Each was examined to determine the nature of the violation. Table 8 lists the type and number of violations that were cited.

TABLE 8.—SUMMARY OF GENERAL DUTY CLAUSE CITATIONS

Violation	Number of instances
Employee elevated on forks of vehicle	44
Improper operation of vehicle	13
Improper maintenance of vehicle	5
No vehicle operator training	2
Order picker without fall protection	1

Source: Office of Electrical/Electronic and Mechanical Engineering Safety Standards, Directorate of Safety Standards Programs, OSHA.

B. Studies Measuring the Effectiveness of Powered Industrial Truck Safety Training Programs

In 1984, H. Harvey Cohen and Roger C. Jensen, working under contract with the National Institute for Occupational Safety and Health (NIOSH), published an article in the Journal of Safety Research (Fall 1984, Vol. 15, No. 3, pp. 125–135) entitled *Measuring the Effectiveness of an Industrial Lift Truck Safety Training Program* (Ex. 3–5). The authors analyzed two studies undertaken to measure objectively the effects of safety training on powered industrial truck operators' driving performance and safety practices.

This article detailed the results of an experiment that was conducted to evaluate powered industrial truck operator training using a work sampling procedure to obtain objective data about work practices that correlate with injury risk. Two separate studies were conducted in this experiment, one at each of two similar warehouses. These studies were conducted to assess the value of training and the influence of post-training actions on workers' safety performance. These studies demonstrate that training powered industrial truck operators reduced the operators' error rates (number of unsuccessful operations divided by the total number of operations) and that training combined with feedback further reduced error rates.

The studies were conducted at different warehouses using similar training techniques. The training emphasized those operator driving behaviors that were measurable, frequently observed, capable of being reliably observed, related to frequent accident occurrence, and amenable to corrective action through training. Fourteen driving behaviors were evaluated in these studies. Positive reinforcement during the training (use of praise rather than criticism) was used with some trainees to measure its effectiveness. The experiment was conducted in four phases:

(1) The pre-training phase, during which none of the operators had been trained;

(2) The post-training 1 phase, during which the control group remained untrained, the training group (called the treatment group in the study) had been trained, and the training-plus-feedback group had been trained and had also received performance feedback;

(3) The post-training 2 phase, during which all three groups had been trained but only the training-plus-feedback group had received performance feedback; and

(4) The retention phase, which started three months after the end of the post-training 2 phase (and the end of the feedback program).

TABLE 9.—SUMMARY OF MEAN ERROR RATES[1]

[Warehouse 1]

Group	Pre-training	Post-training 1	Post-training 2	Retention
Control	.34	.32	.23	.....
Training	.33	.27	.26	.....
Training + Feedback	.35	.27	.25	.....
All Operators After Training	.34	.27	.25	.19

[1] The mean error rate is defined in the study as the number of incorrect behaviors observed divided by the total number of behaviors observed.

Note: The mean error rate for all operators began at .34, that is, for 34 percent of the observed behaviors, the tasks observed and evaluated were performed improperly.

Source: Measuring the Effectiveness of Industrial Lift Truck Safety Training Program, Journal of Safety Research, Vol. 15, No. 3, Fall 1984, pp. 125–135.

Following the initial training (post-training 1), all three groups showed a decrease in their mean error rates, with the training-plus-feedback group showing the largest decrease (from .35 to .27, a 23 percent decrease), followed by the training-only group (from .33 to .27, an 18 percent decrease), and the control group (from .34 to .32, a 6 percent decrease). The control group's reduction in error rate from the pre-training to the post-training 1 phase of the study was attributed to the influence of peer modeling, i.e., the untrained control group operators were copying the behavior of their trained counterparts. Toward the end of the post-training 1 phase, the error rates of the three groups converged, suggesting that the effects of the training program had begun to wear off. Observers also noted that some behaviors were being compromised when employees with different knowledge levels were required to interact, particularly in conflict-avoidance situations such as signaling and yielding at blind intersections.

During the post-training 2 phase of the study, all groups' performance improved. The control group's performance improved by 28 percent (from a mean error rate of .32 to .23), while the training group experienced a four percent improvement (from a mean error rate of .27 to .26) and the training-

plus-feedback group had a seven percent improvement (from .27 to .25). There was further evidence of a peer modeling effect because all three groups' performance continued to improve although no additional instruction was given.

The retention phase was conducted three months after the completion of the post-training 2 phase of the study to determine the longer term effects of the training. During this phase of the study, mean error rates were checked, as they were during the other phases of the study. The results of this phase of the study indicate a further improvement in the operators' performance, with the mean error rate decreasing from .25 to .19, a 24 percent improvement in performance. The total performance gain achieved during this study was a 44 percent improvement from the pre-training (baseline) phase through the retention phase (from a mean error rate of .34 to a final error rate of .19). These data indicate that there were significantly fewer errors at each successive phase of the study.

The second study was conducted to verify and extend the findings of the first study. A modified experimental design was used to eliminate the mitigating influence of the untrained control group. In the second study, all operators were trained at the same time and all received performance feedback. Comparisons were made only before and after training. The study was divided into three phases: pre-training; post-training; and retention. The retention phase of the study was again conducted three months after the conclusion of the prior phase.

TABLE 10.—SUMMARY OF MEAN ERROR RATES—WAREHOUSE 2

Pre-training	Post-training	Retention
.23	.09	.07

Source: Measuring the Effectiveness of Industrial Lift Truck Safety Training Program, Journal of Safety Research, Vol. 15, No. 3, Fall 1984, pp. 125–135.

After the vehicle operators were trained, they experienced a 61 percent improvement in performance scores (from an error rate of .23 to .09). During the retention phase of the study, there was a further reduction of 22 percent in mean error rates (from .09 to .07 mean error rate). The overall improvement in mean error rates between the pre-training error rate (.23) and that achieved during the retention phase (.07) was a reduction of 70 percent.

Not all errors cause accidents; however, most accidents are caused by one or more errors. The final rule is intended to minimize operator errors. The studies show that better training reduces operator errors. OSHA, the authors of the studies described in the preamble, and other experts believe that accidents will be reduced by about the same percentage as the reduction in the error rate. The studies that OSHA has used are among the best available for cause and effect.

V. Basis for Agency Action

OSHA concludes that, as the above discussion indicates, there are sufficient data and information on which to base a revision of the existing standard for powered industrial truck operator training. The data indicate that a substantial number of fatalities and injuries result from industrial truck accidents in all industries. Studies indicate that better training would substantially reduce the number of accidents that result in fatalities and serious injuries.

OSHA concludes that adherence to these new powered industrial truck operator training requirements will prevent 11 fatalities and 9422 injuries annually that result from accidents involving powered industrial trucks. (See also the analysis of benefits in the Final Economic Analysis section and the analysis of substantial reduction of significant risk in the Statutory Considerations section, below.)

OSHA further concludes that this improved operator training standard is needed to reduce powered industrial truck injuries and fatalities in maritime (including shipyards, marine terminals, and longshoring), construction, and general industry. As noted above, OSHA's Office of Data Analysis found that about 11.5 percent of the fatalities that occurred in marine terminals between 1975 and 1984 were attributable to the use of powered industrial trucks. Additionally, an OSHA-sponsored contractor study found that 28.1 percent of the fatalities that occurred in the marine cargo handling industries were forklift-related. This is much higher than the percentage of such fatalities occurring in general industry. Clearly, these numbers indicate the need to ensure better powered industrial truck operator training in the marine cargo handling industries covered by this final standard. OSHA has not specifically analyzed truck-related fatalities in the shipyard industry, but believes that the accident experience in shipyards is likely to be similar to that in manufacturing.

In the study of the OSHA Fatality/Catastrophe reports that was previously discussed, 25 of the 208 accidents (about 12 percent) that were reported on the OSHA Form 170 occurred in the construction industry. OSHA has determined that there are approximately 46,456 powered industrial trucks in use in construction. This is less than 5 percent of the total 998,671 powered industrial trucks in use. Although the number of powered industrial trucks in use in the construction industry is less than 5 percent of the total number of such vehicles, accidents involving them account for about 12 percent of the total number of construction accidents reported on the OSHA Form 170.

In addition, OSHA's Final Economic Analysis estimates that there were, on average, 16 powered industrial truck related fatalities and 2,380 injuries per year in the construction industry. This also indicates that fatality and injury rates are higher per truck user in the construction industry than in general industry. Accordingly, OSHA concludes that these high accident rates justify covering the construction industry with a better training standard. (See also the discussion of scope, below.)

Many actions taken by other organizations also point to the need to address the hazards posed by unsafe operation of powered industrial trucks: the voluntary consensus standard on this subject has been updated several times since OSHA adopted 29 CFR 1910.178 in 1971; OSHA has been petitioned to improve the requirements for industrial truck training; the Advisory Committee on Construction Safety and Health has recommended improving the standard; and resolutions have been introduced in the Senate and House urging OSHA to revise its outdated powered industrial truck operator training standards.

VI. Training

Training provides a person with the necessary specialized instruction and practice to become proficient at a particular task. Training is the means by which an employer ensures that employees have the knowledge and skills they need to do their jobs correctly and safely. The alternative to formal training is learning by trial and error, an approach that results in an inadequate knowledge base and relies on mistakes (which often involve accidents, injuries, and near-miss incidents) for learning to occur. Reliance on this approach would create a greater chance of injuries and fatalities.

After employees have received initial training, acquired the basic knowledge, and perfected their operating skills, the employer may rely on refresher training to reinforce or improve the employee's

knowledge of the basic training material; to impart new information; to teach material in a new manner; or simply to maintain an acceptable level of awareness of workplace conditions, operating hazards, and truck-related characteristics.

There are several approaches to assembling the necessary materials and methods for an effective training program. One approach is to make use of existing literature and model programs already developed. Another approach is to look at problems that occur during ongoing operations and identify what an operator must know to avoid or otherwise minimize the potential for an accident due to those problems.

A third approach to developing a training program is to analyze the accidents that have occurred and develop a training program that will minimize the potential for a recurrence of the conditions that caused the accident. A problem with this third method of program development is that it is reactive rather than proactive, i.e., tends to emphasize the problems that have caused an accident (the training is in reaction to an accident). By contrast, proactive training teaches employees to prevent accidents rather than waiting for accidents to occur before recognizing the need for the training and determining what the scope and content of the training should be.

According to one hearing participant, a professional trainer (Tr. p. 129):

> In principle we are in support of the proposed training rule. The key issue as we see it is that any prescribed training has to be both effective and efficient. Our viewpoint is that the need for prevention of accidents among lift truck operators is not arguable but we also believe that the current rule is ineffective. Additionally, our view is that the final rule must use what is at this time, common knowledge among the professional training community in the United States regarding effective and efficient training strategies. For the purpose of clarifying our testimony, we're defining operator training as instructional or other influence strategies used to help operators learn to change their on-truck behavior. We believe that effective training of operators is that which results in fewer injuries and fatalities. In that regard, the most important issue for the training rule to address in our viewpoint, is not to just require traditionally accepted training strategies but to require operator training strategies that actually transfer to the operating environment.

Another benefit of proactive training is that the person observing the worksite and the work being conducted to develop a training program for powered industrial truck operators may identify other problems in the workplace and offer solutions to those problems. Identifying and resolving these other problems can reduce the total number and/or severity of accidents in the workplace, not only those related to powered industrial truck use but also those associated with other workplace activities. According to another hearing participant (Tr. p. 425):

> Our processes include an evaluation of the facility and recommendations for improvement. We do not pass a problem within a company without trying to correct that problem before the training is implemented.

The training requirements in the final rule reflect all three approaches discussed above. They require training in specific topics unless a particular topic is not relevant to the types of vehicles or the employer's workplace. They require the training to address topics specific to the employer's workplace and to cover information learned from accidents or near-misses that have occurred in the employer's workplace. As discussed below, OSHA believes that this approach will result in operator training that is most effective in reducing truck-related deaths and injuries.

The topics OSHA requires to be covered in the training mandated by this standard can also be used to evaluate the effectiveness of a powered industrial truck operator's training. For example, an employer can use the list of required topics to determine what should be taught and then compare that with what is being taught. In this manner, employers can ensure that the training is appropriate for the types of trucks being used and the conditions in the workplace that affect the safe operation of those trucks.

Training comes in many forms. It may be as simple and informal as a supervisor discussing the correct way to operate a vehicle, correcting an error in the way an employee is doing a job, or showing an employee how to perform a particular task properly. Alternatively, training may consist of detailed, structured instruction using formal training methods (e.g., lectures, formal demonstrations, practical exercises, examinations, etc.). Formal training is usually used to provide trainees with a large amount of information. OSHA believes, and the record confirms, that a combination of training methods is most effective in training powered industrial truck operators.

For the most part, employees do not start out with the knowledge and skills they need to operate a powered industrial truck safely. Although many employees selected or assigned to operate powered industrial trucks are licensed to drive automobiles, there are enough differences between these two types of vehicles and their operation to require additional knowledge and skills to operate a powered industrial truck safely. For example, industrial trucks, compared with cars, have limited forward visibility when carrying a large load, have rear wheel steering and front wheel drive, have different centers of gravity and balance, have different control configurations, and can carry heavy loads with the weight concentrated at one end of the vehicle. Employees need formal training and practice to gain the knowledge and to master the skills they need to safely operate powered industrial trucks with these characteristics.

Effective employee training and supervision also can lessen the frequency with which employees perform unsafe acts such as speeding, failing to look in the direction of travel, and failing to slow down or stop and sound the vehicle's horn at blind intersections and other areas where pedestrian traffic may not be observable. This, in turn, reduces the frequency and severity of accidents.

Another case where training can prevent accidents or lessen their severity is when powered industrial trucks travel with an elevated load. Effective operator training must emphasize that the operator moves the vehicle only when the load is at its lowest practical point. In addition, even if a sit-down rider truck operator fails to follow this practice and the vehicle tips over, both the chance and severity of injury are reduced if the operator is trained to stay with the vehicle and lean away from the direction of fall. When a sit-down rider truck tips over and the operator attempts to jump off the vehicle while it is tipping over, the operator is often crushed when struck by the overhead guard. In these cases, since the normal tendency is for a person to jump downward, the operator lands on the floor or ground in the path of the overhead guard, and receives a crushing injury to the head, neck, or back. Training an employee to stay with this type of vehicle and lean away from the direction of fall will reduce the severity of or eliminate these injuries.

On the other hand, when a stand-up rider truck tips over laterally, the operator must be trained to step off the vehicle toward the rear of the vehicle. The operator can safely do this because he/she is not moving in the direction in which the truck is falling, but rather is moving perpendicular to the direction of the vehicle's fall.

The studies conducted by Cohen and Jensen, discussed under *Studies of Accident and Injury Data and of Training Effectiveness* earlier in this preamble, found that training reduced operator error rates by as much as 70 percent. Although a 70 percent error rate reduction does not necessarily correspond with an equivalent reduction in the number of accidents that a given group of operators will experience, improper or unsafe operation of powered industrial trucks is clearly the major cause of accidents and their resultant fatalities and injuries. Therefore, reducing the number of unsafe acts that are committed when operating these trucks will reduce the number of accidents, fatalities, and injuries.

Proper employee training must take into account different operating conditions (including the type and size of the load, the type and condition of the surface on which the vehicle is being operated, and other factors that can adversely affect vehicle operation). Operator training must emphasize two points regarding potential accidents: (1) the employee must not engage in activities that will increase the potential for an accident to occur; and (2) the employee must take appropriate action to minimize the potential for injury to himself/herself or to other employees if an accident occurs.

OSHA's current powered industrial truck training standard (codified at 1910.178(l)), has a very general training requirement. It states:

> Only trained and authorized operators shall be permitted to operate a powered industrial truck. Methods shall be devised to train operators in the safe operation of powered industrial trucks.

As discussed above, this provision has not been adequate to reduce the large number of fatalities, accidents, and injuries caused by untrained or poorly trained operators. Consequently, OSHA proposed more extensive training requirements to improve operator training (60 FR 13782, March 14, 1995, and 61 FR 3094, January 30, 1996).

There were 64 commenters who discussed the need for training powered industrial truck operators (Exs. 7–1, 7–5, 7–8, 7–10, 7–19, 7–22, 7–28, 7–29, 7–31, 7–32, 7–34, 7–36, 7–38, 7–39, 7–40, 7–43, 7–45, 7–46, 7–47, 7–48, 7–49, 7–50, 7–51, 7–59, 7–66, 7–67, 7–69, 7–71, 11–1, 11–2, 11–6, 11–12, 11–13, 11–15, 11–17, 11–18, 11–19, 11–22, 11–25, 11–27, 11–29, 11–31, 11–35, 11–36, 11–40, 11–41, 11–44, and 11–46; Tr. Pp. 22–24, 27–29, 35 and 44, 49, 62, 75, 94, 129 and 143, 172, 196, 306, 331, 340, 383, 398, 416, 443). The great majority of these commenters agreed on the need to train powered industrial truck operators.

For example, one commenter (Ex. 7–66) stated:

> The WGMA [West Gulf Maritime Association] supports operator skill and safety training for powered industrial truck operations. We have for years had operator training and certification requirements for certain equipment. These requirements are part of our collective bargaining agreement between management and labor.

A second commenter (Ex. 11–2) stated:

> AGC [Associated General Contractors] believes that worker training is the key to worker protection and AGC commends OSHA for its recent emphasis on powered industrial truck operator training.

A third commenter (Ex. 7–34) said:

> In general, Dow agrees with OSHA that there are risks associated with the operation of powered industrial trucks and that those persons operating them must be knowledgeable and skilled prior to being authorized to operate the vehicle. Dow believes that the training its people receive on these vehicles has been adequate. As a result, comments will focus on retaining the performance language in this training so that we can continue the success we have had thus far.

One commenter (Ex. 7–48), however, expressly disagreed that there is a need for OSHA to issue a standard for training powered industrial truck operators. It stated:

> Overall, UPS [United Parcel Service] questions the need for a standard regulating the training of powered industrial truck operators. UPS has never experienced a noteworthy amount of workplace accidents involving powered industrial trucks. We do not expect that implementation of this type of standard will reduce the already low number of accidents in this category. This proposed standard would substantially increase costs to employers without a corresponding reduction in injuries, providing little justification for its implementation. As such, UPS cannot support the promulgation of this standard.

Many commenters generally supported OSHA's proposal to make the training requirements more explicit. For example, one commenter (Ex. 7–29) stated:

> UTC [United Technologies Corporation] agrees with OSHA's stated purpose ''to amend the current powered industrial truck operator training requirements for general industry and to adopt the same requirements for the maritime industries'', which will eliminate redundant standards for separate industries. In addition, UTC approves of OSHA's approach in mandating ''the development of a training program that would base the amount, type, degree and sufficiency of training on the knowledge and the skills and abilities that are necessary to safely operate the truck'' rather than mandating specific universal training requirements that would not take into consideration the variety of truck, necessary operator knowledge and training levels, and operating situations.
>
> Overall, OSHA's proposed changes to the original 1971 powered industrial truck standard are reasonable and provide a sound basis for enhancing the safe operation of powered industrial trucks in the workplace while allowing a maximum of flexibility in the methods employers may select for implementation.

A second commenter (Ex. 7–31) stated:

> As an association, we [American Warehouse Association] have urged our members to adopt training programs. One member reports that although one-third of the accidents in the warehouse were lift truck-related, one-half of the costs associated with accidents were lift truck related. Although this example is just a snapshot of the industry, this anecdotal information confirms that proper training is in the best interests of our industry.
>
> It is appropriate to consider revising the existing OSHA regulations. A more defined standard will be of benefit to both employers and employees. However, as our comments will suggest, the revised standard need not be overwhelming or unnecessarily complex to achieve the desired result.

A third commenter (Ex. 7–36) stated:

> API [American Petroleum Institute] generally supports the standard proposed by OSHA, with minor revisions, to replace the existing requirements under 29 CFR 1910.178(l) and to be added as new requirements under 29 CFR 1915.120, 1917.43, and 1918.77, provided the proposed standard remains performance oriented. Powered industrial trucks vary greatly in configuration and application, making operator training requirements very site specific. Accordingly, API supports OSHA's development of a flexible, performance based standard that will allow each facility to best address the specific training needs of operators at that location.

Finally, one commenter (Ex. 7–28) said:

> NAWGA/IFDA appreciates the concerns that have led OSHA to propose this rule, and believes that benefits can flow to companies and their workers through the dissemination of guidance on appropriate training for employees who operate powered industrial trucks. While we have comments and suggestions regarding certain aspects of the proposal's requirements, our organization believes that many of the training elements noted in the rule are appropriate topics to be covered in the instruction provided to powered industrial truck operators.

Some commenters opposed changing OSHA's existing training requirement (Exs. 7–1, 7–5, 7–6, 7–8, 7–19, 7–20, 7–22, 7–27, 7–28, 7–33, 7–34, 7–38, 7–40, 7–69, 11–7, 11–15, 11–16, 11–20, 11–23, 11–35, 11–42, Tr. pp. 121, 151, 246).

One reason given for not changing the existing requirement is that it is written in general language and therefore allows employers complete freedom to tailor their powered industrial truck operator training program. These commenters generally stated that they already conduct the appropriate operator training. For example, one commenter (Ex. 7–8) stated:

The proposed training requirements that would mandate the development of a training program that would base the amount, type, degree and sufficiency of training on the knowledge of the trainee and the ability of the vehicle operator to acquire, retain and use the knowledge and skills and abilities that are necessary to safely operate the truck would require quite a bit of additional time and categories of paperwork and would be, in many instances very subjective and difficult to document. The basic requirements that presently exist are quite sufficient and any safety professional worth their salt is going to look at the things you are proposing anyway.

Some of these commenters also suggested that the proposed standard, if adopted, would create too structured a program and would be overly burdensome to the employer. For example, one commenter (Ex. 7–19) stated:

Current regulations, 29 CFR 1910.178, have provided Mobil and other companies like Mobil sufficient direction and discretion to develop and implement effective training processes for its powered industrial truck operators. Mobil is concerned that the more detailed nature of these proposed regulations will require costly changes to currently effective training processes.

Other commenters stated that OSHA's proposed training requirements were appropriate and not overly burdensome. For example, one commenter (Tr. p. 418) stated:

I * * * commend your efforts and give you my profound support. Your proposed rules were well researched and, if passed into law, will assist industry leaders by providing the needed guidelines to develop, implement and follow up their operator training programs * * *

From our company's conception in 1987, it was apparent that our present occupational safety at 1910.178 Code of Regulations for material handling and storage did, in fact, supply some foundation for training materials content, but did not supply enough direction to allow the meeting of the minds within a single company.

Although there was a starting point, technical advances have caused tremendous pressures on our industries, manufacturers, as well as the end user.

New problems were identified as a result of these advances that never had to be addressed in the past. Professionally, I believe that the proposed rules are on target and will prove to be a sufficient step forward in providing guidelines and benchmarks for industries.

Another commenter (Ex. 7–17) stated:

I also believe that inadequate operator training and supervision are the cause of the great majority of industrial truck accidents. Your proposed rule change therefore not only has the potential to substantially reduce the number of fatalities and serious accidents that occur each year; it also has the potential to reduce the large number of unreported accidents and near-misses that occur every day. It is a step in the right direction that should be applauded.

Several representatives of the longshoring and marine terminals industries, however, opposed the proposed rule (Exs. 7–43, 7–46, 7–63, 11–7, 11–20, 11–42, Tr. p. 246). These commenters contended that they already have regulations that cover powered industrial truck operator training (§§ 1917.27(a) and 1918.98(a) respectively) and that those regulations have served their industry well. Indeed, one commenter claimed that there were few powered industrial truck injuries or fatalities in the industry. (See Tr. p. 248.) According to this commenter:

Again, there is no proof of a significant risk to injury to employees to warrant this additional training regulation in our industry. We've heard some raw data quoted yesterday. This is all dependent on the number of truck hours and the amount of exposure the employees have, personal injury and property damage. Our people are exposed to this every day and our record is not that bad.

Another commenter from this industry stated (Tr. p. 248):

The PMA [Pacific Maritime Association] conducts forklift training based on ASME B56.1 to provide skilled operators for employers to meet the requirements of § 1917.27(a) and § 1917.97(a)). This program has served the industry well. Also, on-the-job training is a tradition on the waterfront and qualification by experience and training have proved to be effective.

On the other hand, several witnesses at the hearing testified about powered industrial truck accidents that resulted in deaths and serious injuries in the marine cargo-handling industry. They supported OSHA's proposal to improve training for operators in this sector.

For example, one commenter (Tr. p. 437) stated:

One of the port authorities in the U.S. contracted [with] me to conduct training for the stevedoring and the ILA on the east coast.

We conducted a three-day training program and we had a 54 percent failure factor on basic knowledge.

Another hearing participant (Tr. p. 393) reported:

In fact, last year I investigated a death on a stevedoring area where a supervisor was driving a lift truck with no training that ran over an employee on a shipping dock.

It is clear to OSHA that powered industrial truck accidents are a major cause of injuries and deaths in the marine cargo handling industry. An OSHA contractor that studied fatality reports for the period 1991–1993 collected by the National Institute for Occupational Safety and Health for the Census of Fatal Occupational Injuries Program determined the number of fatal and serious injury accidents reported during the period of study (Ex. 38). According to this study the longshoring and marine terminal industries experienced a percentage of powered industrial truck accidents that was 10 times greater then the second highest industry (28.1 percent of all fatal accidents in the maritime industries compared with 2.8 percent in the second-ranked industry). An OSHA study of fatalities in the marine cargo handling industry indicated that 19 of 165 fatalities that occurred between 1975 and 1984 were attributable to the improper operation of powered industrial trucks. (See section IV. A. 4 above.)

Based on this information and other evidence discussed elsewhere in this preamble, OSHA concludes that powered industrial truck accidents are a major cause of serious injuries and deaths in the marine cargo handling industry. OSHA further concludes that the Agency's current training requirements do not sufficiently protect employees in that industry from death and serious injury from powered industrial truck accidents, and that it is necessary to issue these training requirements to protect those employees from a significant risk of injury and death.

There are a number of additional responses to those commenters in all industries who recommended that OSHA retain the present, very general, training requirements. First, the statistics demonstrate a high level of accidents, injuries, and deaths resulting from improper powered industrial truck operation in all industries. (See the discussion at part IV.A. above.) The Agency's existing training requirements have not worked well enough to reduce those injury rates.

However, without the existing requirements, rates would likely have been much higher. The studies demonstrate that trained operators make fewer errors. The FEA points out that a percentage of current operators are trained. Therefore, it is reasonable to conclude that the existing general training requirement has resulted in the

training of a percentage of the operators and without this existing training there would be more errors and, therefore, more accidents. The new standard will increase the number of trained operators and the quality of the training, further reducing accidents.

Second, the existing requirement is so general that employers may believe that they have fulfilled their obligation by providing very little effective training. Third, the existing provisions provide very little guidance on what training is necessary and effective. Fourth, as discussed above, studies are available that show that effective training will reduce accidents (Ex. 38). Finally, many commenters told OSHA that their experience demonstrates that better training will reduce fatalities and injuries, and some provided examples of how their training programs (similar to the program required by the final rule) had reduced accidents.

The revised training provisions require the employer to develop a training program based on the general principles of safe truck operation, on the type of vehicle(s) being used in the workplace, the hazards of the workplace created by the use of the vehicle(s), and the general safety requirements of the OSHA standard. OSHA is not specifying the time that must be spent on the training or the exact methods that must be used to train operators. OSHA is, however, requiring that trained operators know how to do the job properly and do it safely, as demonstrated by workplace evaluations at the time of initial and refresher training and at periodic intervals (at least once every three years). This approach gives employers the flexibility to develop training programs appropriate to their workplace and avoids unnecessary specification. Thus, this final standard will be both performance-oriented and effective.

VII. The Issues

In the January 30, 1996, **Federal Register** notices, 61 FR 3092 and 3094, OSHA asked for comment on four specific issues as well as any other relevant issues. These four issues were developed by OSHA after input from the Advisory Committee on Construction Safety and Health (ACCSH). The following is a restatement of each issue, a summary of the comments and hearing testimony received, and the Agency's decision on each issue.

1. Should an employer be allowed to accept the certification of training by a third party such as a union, training institute, manufacturer, consultant, or other private or public organization? Since OSHA does not accredit certifiers, what criteria should be used to establish their credibility?

OSHA specified in the proposals that all training must be conducted by a designated person. In those proposals, OSHA defined a designated person as one who has the requisite knowledge, training, and experience to train powered industrial truck operators and judge their competency. (See proposed § 1910.178(l)(2)(iii) and the corresponding provisions of the other proposed standards.)[4] OSHA did not, however, specify that the training must be conducted by the employer, a supervisor, or any other particular person, but only that the training be conducted by a person who is qualified to do so.

There were 50 commenters who addressed this issue. (See Exs. 7–11, 7–15, 7–29, 7–38, 7–39, 7–48, 7–50, 7–51, 7-56, 7–64, 7–65, 7–70, 11–1, 11–3, 11–5, 11–6, 11–8, 11–9, 11–10, 11–15, 11–16, 11–18, 11–19, 11–24, 11–25, 11–28, 11-29, 11–31, 11–33, 11–34, 11–36, 11–37, 11–39, 11–40, 11–43, 11–46, Tr. pp. 20, 25–27, 52, 83, 92, 94, 104, 137, 153, 324, 333, 340–341, 384–386, 422.) These participants all agreed that trainers must have basic knowledge of training methods and/or powered industrial truck operations that enables them to conduct the training of these vehicle operators. There was, however, one comment (Ex. 7–11) that suggested specific requirements for a qualified trainer. This commenter stated:

> * * * A competency standard for the ''designated person'' [should] be incorporated in the proposed rule change. Such a competency standard * * * could include, but would not be limited to:
>
> 1. Experienced and skilled in the safe and efficient operation of a powered industrial truck(s).
>
> 2. Is familiar with, comprehends, understands and employs applicable OSHA codes and all consensus standards as they apply to worker safety and economic impact on the employer.
>
> 3. Is skilled and practiced in the training of adults or has the ability, knowledge and desire to attain such skills.

Some commenters recommended that trainers be accredited by OSHA or have some other professional certification (see Exs. 7–29, 7–56, 7–64, 7–73, 11–5, 11–40, Tr. p. 326). One of these commenters (Ex. 11–5) stated:

> The ASSE believes it is appropriate for OSHA and the ACCSH to create general qualification guidelines when establishing the criteria for lift truck trainers. However, we strongly recommend that OSHA not get into the business of ''certifying'' these trainers. The society believes that OSHA does not have the resources to undertake such an endeavor, and the private sector professional safety and health organizations have been certifying qualified safety and health professionals for decades. To have OSHA take on this responsibility would be equivalent to a ''reinventing the wheel''. Certified Safety Professionals (CSPs), as an example, could be recognized as a level of expertise appropriate to develop/implement this type of training.

OSHA has decided not to include trainer accreditation requirements in the final rule for several reasons. First, OSHA believes that the training criteria are sufficiently detailed so that employers and professional trainers who follow the criteria will provide adequate training. Second, a large number of trainers and individual employers (potentially in the tens of thousands) would need to be accredited, which would overwhelm OSHA's resources. Finally, many small businesses choose to conduct their own training, and requiring them to become accredited to do so would be unnecessarily burdensome.

Since the proposal, OSHA has changed the language of the final rule to clarify that the employer does not need to administer the training but may have it provided by an outside training provider. The employer may need to provide additional training on site-specific or truck-specific matters. OSHA believes that this clarification of the language of the final rule responds to the suggestions of ACCSH and the needs of the construction industry. In addition, as a style change the term ''designated'' has been omitted. Instead ''person'' is used followed by the same qualifications that had been required of ''designated person.''

2. What type of testing should be conducted during initial training to judge the trainee's competency (performance testing and oral and/or written tests)?

A. If tests are administered, what subjects should be tested, and what methods, if any, should be used to judge that the tests are reliable and address the subject matter adequately?

B. What, if any, should be the acceptable pass/fail requirement for the tests?

OSHA proposed that operators must successfully complete their training and be evaluated. OSHA believes that evaluation is an essential element of any training program. Evaluation provides a measure not only of the effectiveness of the training but also the trainees' ability to understand the need for and the

[4] Throughout this preamble, OSHA uses the reference to the general industry standard, § 1910.178, when discussing this final rule. Because the provisions of the final rule also apply to construction, shipyards, marine terminals, and longshoring, the discussion applies equally to these other sections.

important elements of the training. Evaluation also allows the trainer to reemphasize the most important points of the training.

Most of the 32 participants who commented on this issue agreed that some evaluation is necessary when training is conducted. (See Exs. 11–1, 11–3, 11–5, 11–8, 11–10, 11–18, 11–19, 11–24, 11–25, 11–28, 11–30, 11–33, 11–34, 11–36, 11–37, 11–39, 11–40, 11–41, 11–46, Tr. pp. 21, 35, 53, 77, 99, 130, 202, 254, 309, 326, 342, 385, 400.) There was general agreement on the need to conduct written as well as practical testing during the training.

One commenter (Ex. 11–10), in response to the question about written and performance testing, stated:

> API [American Petroleum Institute] feels that the current proposed language in paragraph (5)(i) of the general industry standard adequately addresses any concerns of testing during initial training. Specific requirements for how to test operators would take away the flexibility allowed by the currently proposed language, convert the rule to a specification standard, and greatly increase the information collection burden without necessarily improving the safety performance of operators.

The Advisory Committee on Construction Safety and Health (ACCSH) recommended that OSHA establish a pass/fail requirement for written tests. Some commenters stated that OSHA should specify a passing percentage (such as 70 to 85 percent correct answers)(see Exs. 7–52, 11–19). On the other hand, six commenters generally supported the need for the trainee to perform all the necessary procedures correctly during practical tests. (See Exs. 11–8 and 11–19, Tr. pp. 78, 132, 427, 434.) Their concerns were that if the trainee cannot operate the vehicle safely when that trainee knows that an evaluation is being conducted, there is no guarantee that the trainee will perform the operation correctly under less controlled circumstances. Other commenters stated that OSHA should leave the evaluation of the trainees' grasp of the classroom instruction to the trainer (Exs. 11–34, 11–36).

OSHA has concluded, as proposed, that the evaluation of the classroom part of the training should be left to the trainer. There are many ways to evaluate whether material has been learned, and this evaluation can be accomplished in a number of ways.

Consequently, OSHA has retained a performance-oriented approach that allows the employer to determine that the employee has successfully completed the training, including the classroom and practical training/demonstration elements. The employer may demonstrate this for the classroom element based on evidence that the employee has successfully completed a written or oral test, or by other appropriate means, such as an evaluation by the instructor. OSHA agrees with these comments that successful completion of the practical training requires the trainee to perform all required operations safely.

OSHA concurs with those commenters who recognize the need for both more formal and practical testing and evaluation. If training is conducted without the means to evaluate its effectiveness, there is no way to ensure that the material was adequately presented, that the trainee understood the material, and that the trainee will use the training when operating the vehicle.

OSHA does not believe, however, that it is possible, given the variety of powered industrial trucks, workplace conditions, employee backgrounds, and types of effective training, to specify standardized tests or methods, or to specify passing grades. Although ACCSH did recommend that OSHA specify passing grades, OSHA believes that, by listing topics and requiring demonstrations of proficiency and triennial evaluations, the rule will achieve the goal envisioned by ACCSH for effective training.

3. Are some of the training areas listed not needed?

In developing this final rule, OSHA took its lead from the national consensus standard, ASME B56.1–1993, which contains a listing of those subject areas that the consensus committee felt were important for the trainee to know to successfully operate a powered industrial truck. These subjects were written in general terms so that the training program could be tailored to fit the employer's particular circumstances. The OSHA rule relies on ASME B56.1 and covers essentially the same subject areas.

There were 43 comments (Exs. 7–14, 7–16, 7–21, 7–22, 7-25, 7–28, 7–34, 7–39, 7–40, 7–47, 7–51, 7–53, 7–63, 7–64, 11–3, 11–5, 11–10, 11–11, 11–13, 11–15, 11–19, 11–25, 11–28, 11–29, 11–32, 11–33, 11–34, 11–36, 11–37, 11–38, 11–39, 11–43, 11–45, 11–46, 28, 29, 31, Tr. pp. 27, 40, 43, 79, 198, 255, 400) on the various subjects that were proposed and some additional subjects recommended by some commenters. These commenters, for the most part, supported the topics contained in OSHA's proposal.

For example, one commenter (Ex. 7–28) stated:

> NAWGA/IFDA appreciates the concerns that have led OSHA to propose this rule, and believes that benefits can flow to companies and their workers through the dissemination of guidance on appropriate training for employees who operate powered industrial trucks. While we have comments and suggestions regarding certain aspects of the proposal's requirements, our organization believes that many of the training elements noted in the rule are appropriate topics to be covered in the instruction provided to powered industrial truck operators.

There were several suggestions for improving the language of the listed items. ACCSH suggested that most of the topics OSHA included were appropriate but urged OSHA to improve the wording that addresses the similarities to and differences from the automobile. In the final rule, OSHA has done so. (See discussion below.) OSHA has reviewed each comment and suggested change and has used those changes to improve the final rule, as discussed below.

4. Should an employee receive refresher or remedial training only if operating a vehicle unsafely or if involved in an accident? Is a one-year interval too frequent for retraining or recertification?

In the proposals that OSHA published in the **Federal Register** on March 14, 1995 and January 30, 1996, the Agency proposed that the employer conduct an evaluation of each powered industrial truck operator's performance at least annually to ensure the operator's continued safe operation of the vehicle(s) in the workplace. However, OSHA did not specify a fixed period for refresher training and evaluation but instead proposed that refresher training be provided when there is reason to believe that there has been unsafe operation, when an accident or near miss occurs, when an evaluation indicates that the operator is not capable of performing the assigned duties, or when a new type of truck has been introduced into the workplace.

Some commenters opposed the requirement for refresher training and evaluation unless there was documented evidence of employee misconduct or the training/evaluation was provided at a set interval. (See Exs. 7–13, 7–16, 7–20, 7–45, and 7–58.) Other commenters suggested that OSHA require refresher training on a regular basis, for example at three year intervals. For example, one commenter (Ex. 7–16) stated:

> Refresher training should have an established time frame to ensure operators will be given up-to-date information on safe powered industrial truck operation. This supports the goal of OSHA to prevent the first accident and not serve as the source of

consolation for the first victim. Refresher training should be required at least every three years, and sooner if there is just cause, as set forth by the proposed revision.

ACCSH commented that yearly retraining and evaluation are not as useful in the construction industry as other industries because relatively few employees remain with the same employer for an entire year. This also is the case for the longshoring industry.

OSHA has structured the final rule to address these commenters' concerns. First, the rule stipulates no fixed period for refresher training and evaluation; instead, such training is triggered when the triennial evaluation or an incident or workplace change indicates that it is necessary. OSHA concludes that this performance approach will ensure that the necessary refresher training occurs but does so in a way that is not overly burdensome.

Second, by requiring formal evaluations of operators' proficiency only at three year intervals, OSHA is addressing ACCSH's concerns and the concerns of employers in other industries with high turnover rates. If an employee stays less than three years with the same employer, no periodic evaluation is required (although the evaluation associated with initial training and any refresher training would be required). In addition, when an employee changes jobs, the final rule allows the employer to evaluate the employee's previous training adequacy and appropriateness to determine that the employee can do the job safely. As discussed below, duplicative training would not be required in this situation.

VIII. Summary and Explanation of the Final Standard

A. General

In this final rule, OSHA requires that operators of powered industrial trucks be trained in the operation of such vehicles before they are allowed to operate them independently. The training must consist of instruction (both classroom-type and practical training) in proper vehicle operation, the hazards of operating the vehicle in the workplace, and the requirements of the OSHA standard for powered industrial trucks. Operators who have completed training must then be evaluated while they operate the vehicle in the workplace. Operators must also be periodically evaluated (at least once every three years) to ensure that their skills remain at a high level and must receive refresher training whenever there is a demonstrated need for it. The new standard replaces very general training provisions that have had only a modest impact in reducing truck-related accidents, injuries, and fatalities.

To accomplish the goal of improved powered industrial truck operator training, OSHA is revising its existing general industry standard at § 1910.178(l), and is adding for shipyards a new § 1915.120 with a cross reference to § 1910.178 (l). For construction, a new § 1926.602(d), with a cross reference to 1910.178(l), has been added. The new § 1926.602(d) supplements the current cross-reference to the 1969 ANSI standard, to the extent that the ANSI standard specifies that only trained operators be permitted to operate powered industrial trucks (the same language as was contained at § 1910.178(l)). The standards in parts 1917 and 1918 provide safety and health coverage for longshoring and marine terminal employment. The specific standards in these parts are supplemented by a limited number of general industry standards to provide a comprehensive package of standards for each industry. These general industry standards are listed in §§ 1910.16, 1917.1, and 1918.1. To assure that new paragraph (1) of § 1910.178 covers longshoring and marine terminal employees, OSHA is adding it to the list of applicable general industry standards.

In developing this final standard, OSHA has relied on the training requirements in the latest national consensus standard for powered industrial trucks, ASME B56.1–1993, as well as the training requirements from other standards (both industry and government). In this final rule, the language of these standards has been modified, as appropriate, where the consensus standard uses non-enforceable language (such as in paragraphs 4.19.1 and 4.19.2 of the ASME standard), or for other reasons, as discussed below.

B. Scope

The scope of OSHA's existing training provisions for operators of powered industrial trucks for general industry, construction and shipyards is set forth at 29 CFR 1910.178(a)(1). That paragraph states:

> This section contains safety requirements relating to fire protection, design, maintenance, and use of fork trucks, tractors, platform lift trucks, motorized hand trucks, and other specialized industrial trucks powered by electric motor or internal combustion engines. This section does not apply to compressed air or nonflammable compressed gas-operated industrial trucks, nor to farm vehicles, nor to vehicles intended primarily for earth moving or over-the-road hauling.

Because § 1910.178 adopted the ANSI B56.1–1969 provisions under section 6(a) of the Act, the scope of that standard covering both general industry and shipyards employment is the same as the scope of the ANSI B56.1–1969 standard. The construction standard for powered industrial trucks incorporates ANSI B56.1–1969 by reference and, therefore, also has the same scope as the ANSI standard. The requirement for powered industrial truck use in the marine terminal industry is at § 1917.43. Paragraph (a) states:

> This section applies to every type of powered industrial truck used for material or equipment handling within a marine terminal. It does not apply to over-the-road vehicles.

The standard that applies to powered industrial truck training in the longshoring industry is codified at § 1918.97. That standard does not use the term ''powered industrial truck'' but provides that any employee driving ''any power operated vehicle'' shall be competent by reason of training and experience.

In the preamble of the powered industrial truck operator training proposal published on March 14, 1995, OSHA did not propose to revise the scope of the existing rules. However, OSHA solicited comment on whether the scope of the training requirements should be expanded to cover operators of a broader classification of vehicles than is covered by 29 CFR 1910.178(a).

There were eight commenters who generally discussed the scope of these final rules. (See Exs. 7–43, 11–7, 11–9, 11–17, 11–20, 11–31, 11–42, 11–44, Tr. pp. 99, 240.) Most of these commenters suggested limiting the scope to those vehicles covered by the ASME B56.1–1993 standard, which has a narrower scope than the ANSI B56.1–1969 standard because it does not cover certain types of vehicles that have their own specialized ASME volumes. These commenters believed that operators of specialized types of vehicles needed more specialized training.

Additionally, commenters from the marine terminals and longshoring industries pointed out that they have specialized equipment and/or use different names for some of the types of vehicles that are used in other industries. Some vehicles that are unique to the marine cargo handling industry, or are differently named, are: container top handlers; container reach stackers; straddle carriers; semi-tractors/utility vehicles; sidehandlers; combination vacuum lifts; and yard tractors.

OSHA has considered the comments received on the issue of scope and has decided not to change the scope provisions of § 1910.178(a). This means that the final rule's training requirements in paragraph (l) will apply to any truck covered by the specific industry standard. Thus, these training requirements would apply, e.g., to container top handlers in longshoring and marine terminals.

OSHA concludes that the new standard will improve operator training and reduce fatalities and injuries among those vehicle operators covered by § 1910.178(a)(1). The accident statistics discussed above indicate that there is a high incidence of job-related deaths and injury for operators of all vehicle types. Therefore, narrowing the scope of the final rule would decrease employee protections and increase the risk confronting operators, and would thus be contrary to the goals of the OSH Act. In response to the commenters who recommended a narrower scope, OSHA notes that the new standard is flexible enough to allow training to be tailored to the special characteristics of the workplace and the vehicles used.

Accordingly, the scope of the final standard is broader than that of the ASME B56.1–1993 standard, which covers only some types of powered industrial trucks. The final OSHA standard covers all the types of powered industrial trucks specified at § 1910.178(a)(1), which is equivalent to the broader scope of the ANSI B56.1–1969 standard. Therefore, this final rule applies to the vehicles covered by the following volumes of the consensus standard: Low Lift and High Lift Trucks, ASME B56.1; Guided Industrial Vehicles, ASME B56.5; Rough Terrain Forklift Trucks, ASME B56.6; Industrial Crane Trucks, ASME B56.7; as well as other vehicles that fall within the definition of a powered industrial truck in § 1910.178(a).

As discussed above, OSHA's existing operator training requirements for the marine terminal and longshoring industries essentially cover all powered industrial trucks used in those sectors no matter what specialized name they are given. OSHA concludes that it is important to retain this coverage in these sectors, for the same reasons stated above. There are high accident rates for operators of powered industrial trucks in these sectors, and the new training provisions are flexible enough to tailor the training to address the needs of the operators of specialized vehicles.

Therefore, the final rule applies to all powered industrial trucks defined as such in ASME B56.1–1969, as well as to other specialized equipment found in marine cargo handling operations, including but not limited to straddle carriers, hustlers, toploaders, container reach stackers, and other vehicles that carry, push, pull, lift, or tier loads. Training requirements for other material handling equipment, such as container gantry cranes or derricks, will continue to be covered by §§ 1917.27 and 1918.98.

The final rule does not, however, apply to earth moving equipment or vehicles used for over-the-road hauling. Three commenters suggested that OSHA clarify the scope of these training requirements (Exs. 7–25, 7–37, and 11–2). These commenters stated that the discussion of the scope issue in the proposal's preamble could mislead employers into thinking that earth moving equipment and over-the-road vehicles were included in the scope because these vehicles can lift and move material. OSHA agrees that these vehicles are not powered industrial trucks for the purposes of this rule. Therefore, equipment that was designed to move earth but has been modified to accept forks is not covered by this final rule.

C. Paragraph (l)(1)—Safe Operation

At paragraph (l)(1), OSHA requires the employer to ensure that each powered industrial truck operator is competent to operate such trucks safely, as demonstrated by the completion of the training and evaluation required by the final rule. The language of this paragraph has been changed from that proposed to emphasize the desired result, i.e., the operator's ability to operate a truck safely.

Twenty one commenters (Exs. 7–3, 7–12, 7–14, 7–25, 7–26, 7–29, 7–34, 7–39, 7–47, 7–58, 7–59, 7–64, 7–65, 7–69, 11–4, 11–9, 11–15, 11–32, 11–35, 11–38, Tr. p. 153) discussed this proposed requirement. Their principal concern was that, although all employees can be considered ''potential'' truck operators, this paragraph should apply only to those employees who actually are, or are being trained to be, powered industrial truck operators. For example, one commenter (Ex. 7–25) stated:

> Section 1910.178(1)(i)—We recommend the statements * * * ''ensure that each potential operator'' * * * be changed to * * * ''ensure that each candidate for operator qualification'' * * * This will avoid any confusion about who needs to be evaluated. Every employee can be considered a potential operator, but only select employees will be candidates for certification as qualified and authorized operators by the employer.

OSHA agrees with these commenters and has revised the language of the final rule to make clear that only powered industrial truck operators and trainees, and not all ''potential'' operators, as proposed, are covered. However, an employee who has other duties, but sometimes operates a powered industrial truck, is covered by this paragraph.

Paragraph (l)(1)(ii) requires the employer to ensure that before an employee is permitted to operate a powered industrial truck, except for training purposes, the employee has successfully completed the required training, including an evaluation of the efficacy of that training, except as permitted by paragraph (l)(5) of this section. The language of this paragraph has been changed from that of the corresponding proposed paragraph. The requirement that the operator ''successfully complete'' the training and evaluation required by the new standard has been retained, and the paragraph has been simplified for clarity.

Proposed paragraph (l)(1)(ii) had three elements; however, the final rule focuses only on one major point because the other two are addressed elsewhere in the final rule. In the proposal, the employer was required to have each operator trained, evaluated by a designated person, and determined by that person to be ''performing the required duties safely.'' As now written, the employer must ensure that each operator has successfully completed the required training and evaluation except as permitted by paragraph (l)(5). There are a number of ways the employer can do this. Outside qualified training organizations can provide evidence that the employee has successfully completed the relevant training topics, both classroom and practical. The employer may also have an employee perform the training, which would allow the employer to certify that the employee has successfully completed the training. In the final rule, paragraph (l)(1)(ii) does not stipulate that a designated person conduct the training and evaluation of each operator and make a determination that the operator is performing safely. This is because paragraph (l)(2)(iii) specifically sets out the capabilities of persons performing the training, and paragraph (l)(2)(ii) stipulates that the training is to include both a demonstration and evaluation component (''Training shall consist of a combination of formal instruction * * *, practical training (demonstrations * * * by the trainee), and evaluation of the operator's performance in the workplace.''). There

is no reason to identify a person with the required capabilities as a ''designated'' person, as proposed.

During this rulemaking, there was some comment about training resources available to the employer. (See Exs. 7–15, 7–16, 7–27, 7–51, 7–60, 11–1, 11–8, 11–41, 11–46, 28, Tr. pp. 37, 49, 76, 94.) For example, one commenter (Ex. 11–1) stated:

> As North America's largest Powered Industrial Truck training organization (established in 1981), we welcome the opportunity to provide input into these long overdue regulations. To date, our organization's mobile equipment training programs have trained over 125,000 operators and 3500 trainers.

It is clear to OSHA from the comments and testimony of training organizations that there are adequate resources if employers choose to hire outside training providers. Additionally, truck manufacturers and dealers can provide information and assistance in developing a training program.

OSHA concludes that an evaluation component must be an integral part of the training process if accidents, injuries, and deaths resulting from unsafe powered industrial truck operation are to be reduced. As discussed above (see especially the discussion of the Jensen and Cohen studies in section IV of this preamble), the training and reinforcement that will be done in part through the formal training, demonstration, and evaluation process is a highly effective way of reducing unsafe practices. The practical exercises, demonstrations, and evaluations required as part of each operator's training also will determine whether the employee can competently perform an operator's duties safely.

Finally, paragraph (l)(1)(ii) does not permit an employee to operate a powered industrial truck without supervision until the required training has been completed (see the exception discussed below in connection with paragraph (l)(2)(i)). This requirement is included in the final rule to minimize driving by untrained operators.

D. Training Program Implementation—Paragraph (l)(2)

Paragraph (l)(2) permits trainees to receive practical training in truck operation only in areas where it is safe to do so, sets forth the types of training that are to be given to all powered industrial truck operators, and establishes the qualifications of trainers and evaluators. This paragraph has been revised slightly from the corresponding provisions in the proposal.

Paragraph (l)(2)(i) allows trainees to operate powered industrial trucks provided that the operation is under the direct supervision of a person with the requisite knowledge, training, or experience and the training is conducted in areas where there is minimum danger to the trainee and other employees. This is a change from the proposal, which included the further restriction that no other employee be present while practical training is being conducted. OSHA has revised this requirement based on comments that stated that the proposed restriction might not be possible at some businesses. For example, one commenter (Ex. 7–34) stated:

> Paragraph (l)(2)(i) requires that trainees, under the supervision of the designated person, be allowed to operate a powered industrial truck ''provided the operation of the vehicle is conducted in an area where other employees are not near and the operation of the truck is under controlled conditions.'' Dow believes that this provision needs to be modified. The requirement that other employees may not be near the training area implies that a segregated area must be established. Not only would this add a significant cost to training (especially for low frequency training and space-limited work areas), but also ignores the fact that without great expense to recreate the work environment, the training then would not reflect real work scenarios. The trainee must learn how to maneuver appropriately around the facility including around obstacles such as other employees, etc. It is more appropriate that those working in or around the training area be made aware of the training activities. Instead of segregating the area, the area should be controlled. The presence of the ''designated person'' conducting the training can assist in this regard. As a result, Dow recommends that this provision be modified to read,
>
> Trainees under the direct supervision of the designated person may be allowed to operate a vehicle in a controlled area. Employees in the surrounding area should be alerted to the training activities which are occurring in their area.
>
> The above language allows the employer the flexibility to determine how best to comply with this requirement. It allows those employers who have the resources and the inclination to create a segregated area to do so while preserving the flexibility of other employers to select another adequate method.

Another commenter (Ex. 7–71) stated:

> While the flexibility provided by allowing trainees to operate a powered industrial truck under direct supervision is appropriate and necessary, the restriction that operation be conducted *''in an area where other employees are not near and the operation of the truck is under controlled conditions''* [1910.178(l)(2)(i)(sic)] is vague and [potentially] impractical or unreasonable. Because of space limitations and training program requirements, training may need to be conducted in work areas. Since it is stipulated that training be under the direct supervision of a qualified trainer, we believe that additional restriction is unnecessary and perhaps redundant.

OSHA agrees with these commenters, and is making the final provision more flexible than the proposed requirement. The final rule allows practical (hands-on) training in truck operation even if other employees are present, providing that the training is done in a safe manner.

Proposed paragraph (l)(2)(i) included provisions that were duplicative of other proposed provisions. OSHA has removed the duplicative provisions from the final rule. The proposed language stating that employers must ''implement training'' has been dropped, to eliminate the implication that the employer could not contract out the training to an outside trainer or training organization. However, the employer's responsibility for training remains clearly stated at paragraph (l)(1)(ii) to ensure that employees successfully complete the required training and evaluation, no matter who provides it.

OSHA requires at paragraph (l)(2)(ii) that the training consist of a combination of classroom type instruction, demonstrations by the trainer, practical training, and evaluation of the operator's ability to apply the training in the workplace. The Agency believes that only a combination of training methods will ensure effective employee training. Classroom type training is necessary to teach some of the principles of vehicle operation and provide the basis for practical training. Hands-on (practical) training provides the trainee with the necessary physical skills and enhances the employee's ability to operate a powered industrial truck safely. Demonstrations by the trainer will impart important information to the trainee. In addition, evaluation of the trainee's ability to operate the truck safely in the workplace will ensure that the trainee has successfully transferred the skills learned to the work environment.

No commenters opposed the need for practical training. There was some comment about the need for classroom training, however.

One commenter (Tr. p. 212), in response to a question about whether classroom or practical training was preferable, responded:

> We think both are necessary. Number one, we need the reinforcement of the hands-on plus the classroom training, however.
>
> The other issue, there are several issues that need to be covered in a classrooom for them to be understood when they're on the truck. Let me give you one example.

Lift trucks, as you know, are three point suspension. You can have an operator sitting on a lift truck and you try to explain that. But unless he's seen it, he or she has seen it and unless it has been explained to them and illustrated to them, it's very difficult for them to grasp the concept of three point suspension on a four wheel truck. That can be explained in a classroom and then, hopefully, it won't have to be demonstrated because demonstrated would mean a tipped over truck.

But there are certain things that cannot be demonstrated as adequately as they can be shown in graphs, slides and explained and tested in the book and there are certain things that cannot be covered in the operation. But those things that can, it simply reinforced them.

I think most of us, in our education, understand that any reinforcement we can get all the way from demonstration to illustration, in print and in slides or videos is just reinforcement and helps the learning process to take effect much more deeply.

Another commenter (Ex. 7–31) stated:

The proposal requires that training consist of a combination of classroom instruction and practical training. In small workplaces with few employees classroom instruction, per se, may not be practicable. Training needs to include a combination of methods and be flexible enough to work in different work environments and applications. Classroom instruction is but one way that preliminary instruction can be provided as a prelude to practical training exercises. The method of providing face-to-face instruction should be at the instructor's discretion.

We suggest that subparagraph (ii) be modified to read: Training shall consist of a combination of instruction (classroom, lecture, audiovisual aids, and/or conference) and practical training (demonstrations and practical exercises by the trainee).

Several commenters (Exs. 7–31, 7–35, 7–36, 7–47, 7–49, 11–15, Tr. pp. 24, 153) suggested that classroom training was impractical, particularly when a small business employer has one trainee being trained by a supervisor. Both the proposed and final standard make clear that the ''classroom'' part of the training need not take place in a classroom, but can consist of other methods such as discussions, review of printed material, or viewing of video tapes. Discussions can consist of the trainer talking to the trainee and explaining the training material, either in the workplace or in another location. The Agency's intent was not to limit the flexibility of the employer by requiring that any phase of the training be conducted in a classroom. Rather, the rule requires that the training include an explanatory element as well as a practical element. To make this clearer, the word ''classroom'' has been changed to the word ''formal,'' and examples of different kinds of formal training have been listed in parentheses.

Some of the topics that OSHA lists at paragraph (l)(3) lend themselves to being taught in a formal way. For example, teaching a trainee about vehicle stability by having the trainee tip over a powered industrial truck does not make sense and is not an effective way to learn about that principle. Stability is best learned initially by having the trainer explain the concept of stability, the causes of instability, and the ways to avoid instability. Practical training then may reinforce how to avoid creating an unsafe condition. On the other hand, telling someone what it is like to drive a powered industrial truck with front wheel drive and rear wheel steering is not sufficient to teach the trainee how to operate the vehicle safely, and considerable practical training is also necessary to teach the necessary skills.

The training also includes an evaluation of the operator's performance in the workplace. This is necessary to determine that the operator can effectively utilize all the training to drive safely in the workplace. This is similar to the requirement that was part of paragraph (l)(2)(ii) of the proposal. There was no opposition to the requirement.

OSHA concludes that powered industrial truck operators need to be trained using a combination of classroom type and practical training. Some elements are better taught using one or the other type of training, and often both methods of training are needed. As one hearing participant (Tr. p. 35) stated:

The first point that I would like to comment on is I believe that initial certification training should include both classroom and operational training. This belief is based on the fact that in many cases what I have seen is without giving the correct instruction prior to individuals getting onto equipment, is they tend to develop some very bad habits quickly. I believe giving them the appropriate information initially and then reinforcing that while on the truck is the most effective way to train that. I also believe that with the initial certification, both evaluation of the classroom and the operational performance should be required. Again, this is to identify that they do have the correct knowledge of the equipment and that they have the skills to operate the equipment effectively.

At paragraph (l)(2)(iii), OSHA requires that all training and evaluation required by this standard be conducted by persons with the requisite knowledge, training, or experience to train operators. As discussed elsewhere in this preamble, the employer may have the necessary prerequisites to qualify as a trainer and evaluator, or he or she may assign the responsibility for training and evaluation to one or more employees or an outside trainer and evaluator having those prerequisites. There were several comments on this provision.

One commenter (Ex. 7–34) stated:

Paragraph (l)(2)(iii) provides that training and evaluations must be conducted by a ''designated person.'' Dow is concerned as to what OSHA means by the term ''designated person.'' Hopefully, OSHA does not envision that one person must be hired to specifically conduct the training and evaluations. Dow recommends that the term ''designated person'' be broadly defined to include employees who have been through the training (or possibly an instructor from the training course) and have demonstrated sufficient knowledge and skill to fulfill this role.

Moreover, Dow believes paragraph (l)(2)(iii) must be modified to reflect that training may be handled by a variety of instructors, not merely one ''designated person.'' For large facilities with multiple departments it may be more appropriate that there be multiple trainers with each focusing on specific elements of the training program. For example, one person would discuss the technical characteristics of the vehicle while another person would discuss the specific loading types for their particular department. Therefore, Dow recommends OSHA modify this section to allow facilities the flexibility to have multiple ''designated persons.''

OSHA has concluded that the final rule should adopt a performance-oriented approach to the qualifications of trainers and evaluators. As discussed above under issue 1, OSHA does not have the resources to evaluate and certify trainers and does not consider it necessary to do so. Trainers and evaluators with different backgrounds can achieve the level of ability necessary to teach and evaluate trainees. To meet these commenters' concerns, OSHA has eliminated the term ''designated person'' from the final rule and has instead described the knowledge, skills, or experience any trainer or evaluator must have under the standard.

The Agency finds that this approach will eliminate problems, especially in the construction industry, where terms such as ''designated person,'' ''authorized person,'' ''competent person,'' ''qualified person,'' and others, have distinct meanings and definitions. As written in the final rule, an employee with the requisite knowledge, training, and experience could himself or herself conduct the required training (both initial and refresher) and evaluations. An employer could also employ one or more such persons, or could contract with an outside training organization to conduct the required training and evaluation activities.

This change responds to comments (see, e.g., Exs. 11–10A, 11–29, 11–5, 11–

6A) submitted to the record. For example, a comment submitted by Constangy, Brooks & Smith, LLC, on behalf of a client, the Miller Brewing Company, explains that, in today's environment, which is characterized by ''declining levels of supervision and increasing employee participation and empowerment,'' the person conducting the training and evaluation would in all likelihood be an employee (Ex. 11–29). Another comment from the American Society of Safety Engineers (ASSE) urged OSHA to use language in the final rule that would clearly recognize training given by ''qualified third parties when a company does not have a qualified staff instructor'' (Ex. 11–5). The Mobil Oil Company (Ex. 11–6A) expressed the view that a designated person was not needed succinctly: ''the requirement for operator certification by a ''designated person'' is not practical and would hinder the quality and timeliness of operator training.''

E. Training Program Content—Paragraph (l)(3)

To ensure that the training provided to powered industrial truck operators contains the appropriate information for the operator, the final rule includes a list of subjects that must be mastered in order to operate a truck safely. Paragraph (l)(3) states that all of the topics must be covered in operator training unless the employer can demonstrate that one or more of these topics is not necessary for safe operation in a particular workplace. It is the employer's responsibility to ensure that operators successfully complete all needed training and that the appropriate subjects are taught, including those that are pertinent to the type(s) of truck the operator will be allowed to operate and the work environment in which the vehicle(s) will be operated. Paragraph (l)(3) permits the employer to exclude those topics that are not relevant to safe operation at the employee's work location. However, the employer has the responsibility of demonstrating that these topics are not needed.

For example, if the operator will be operating an order picker, that employee must be trained in, e.g., the location and function of the controls; the location and operation of the engine or motor; steering and maneuvering; visibility; inspection and maintenance that the operator will be expected to perform; and the other general operating functions of the vehicle listed in paragraphs (l)(3)(i)(A) through (M) as well as the workplace-related topics covered in paragraph (l)(3)(ii)(A) through (I). The employee also must be taught and understand, for example, that he or she must be restrained from falling when the platform of the truck is in an elevated position and that he/she must never drive the truck when the platform is elevated (except as specified in the operator's manual). Under paragraph (l)(3), it is the employer's responsibility to ensure that the necessary elements of the training for the type(s) of vehicle to be used and the workplace in which that vehicle(s) will be operated are included in the training.

Some of the elements may be omitted if the employer can demonstrate that they are not relevant to safe powered industrial truck operation in the employer's workplace. In such cases, the employer must be able to demonstrate that a particular topic on the list is not relevant to the training program because that element does not apply to the type of vehicle(s) in use, or because the workplace condition addressed by the element does not exist. For example, if a powered industrial truck is not used in a hazardous environment (gases, vapors, combustibles—see paragraph 1910.178(c)), no training in this element is needed. Similarly, if the truck will be operated on smooth concrete floors, no training needs to be given on operating on rough terrain.

There were several comments (Exs. 7–7, 7–12, 7–13, 7–14, 7–16, 7–34, 7–36, 7–39, 7–65, 7–67, 7–69, 7–70, 11–5, 11–10, 11–11, 11–12, 11–14, 11–15, 11–18, 11–24, 11–29, 11–30, 11–31, 11–32, 11–37, 11–44, 11–45, 29, Tr. pp. 49, 54, 71, 336) that discussed one or more of the topics included in the training program. Some commenters and ACCSH (Exs. 11–5, 7–13, 11–18) suggested that describing the similarities of powered industrial trucks and automobiles could lead a trainee to believe that being able to drive a car automatically means being able to safely operate a powered industrial truck. On the other hand, according to these commenters, emphasizing the differences between driving a car and operating a powered industrial truck would help to clarify important differences, e.g., in steering, stability, and other characteristics.

For example one commenter (Ex. 7–13) stated:

> In section (3)(i)(B), delete * * * ''Similarities to and differences from the automobile * * *'' What does this have to do with operating industrial trucks and why does it have to be included in training? It should be noted that experience with automobiles on the country's highways is far worse than the experience of industry with the use of industrial trucks. Section (3)(iii) should be deleted or reworded. As stated, an employer could be cited for violations if they have not covered the OSHA Standard as a mandatory part of training. However, it is not agreed that this would significantly improve the overall safety of industrial truck operations.

Another commenter (Ex. 11–5) disagreed:

> ASSE believes it is appropriate to differentiate between operating a powered industrial truck and a car. The different steering techniques and the hazards unique to industrial truck operations, we believe, makes such training necessary.

The language of paragraph (l)(3) has been changed slightly in the final rule to emphasize the need to explain the differences between industrial trucks and automobiles.

There also was comment about whether operators must learn all about servicing and maintaining a powered industrial truck if they will not have to perform that servicing and maintenance. For example, one commenter (Ex. 7–39) stated:

> Subparagraph (i)(D) should be deleted in its entirety. The phrase ''and maintenance'' should be deleted from subparagraph (i)(J).
>
> These topics have no bearing on the operator's ability to operate a forklift in a safe manner. The operator does not require knowledge in how an internal combustion power plant or an electrical battery works or is maintained in order to safely operate a forklift. Unless the operator is going to perform this specialized work, there is no need to train the operator in such topics.

OSHA agrees with these commenters' contentions and has changed the final rule accordingly. Paragraph (l)(3)(i)(J) is now written to clarify that if an operator has no servicing responsibilities, that operator need not be trained in how to conduct that servicing activity. On the other hand, if the operator is required to perform any servicing or maintenance on a vehicle, that operator should know how to perform that servicing or maintenance.

The training topics included in this final rule were developed from those contained in the ASME B56.1–1993 standard. Much professional expertise has gone into their development. Many commenters (see, e.g., Exs. 11–10A, 11-18, 11–19, 11–25) generally supported the topics listed. For example, one hearing participant (Tr. p. 54) stated:

> In my opinion, there are a vast number of industries, many largely diversified within themselves, using a multitude of various classifications of lift trucks. Within these classifications there may be multiple attachment applications. Thus, I support the position of OSHA giving the employer the option to eliminate a topic from the list of required subjects provided the employer can demonstrate that the topic is unrelated to the work environment. There are certain topics which are necessary for operators to thoroughly understand and appreciate.

Another commenter (Ex. 11–18) stated:

> The International Brotherhood of Teamsters feels that the current list of topics is comprehensive and should not be substantially altered.

OSHA concludes that the topics proposed, as modified in the final rule based on public input, are appropriate as the basis of effective powered industrial truck operator training programs.

In developing training programs for different types of vehicles, there are certain elements that are common to each program. When training operators of different types of vehicles, employers can take advantage of these similarities by only training employees once on these common subjects. This principle reflects the Agency's desire to allow employers to conduct the training as efficiently and inexpensively as possible while ensuring that the training is adequate.

F. Refresher Training and Evaluation—Paragraph (l)(4)

Paragraph (l)(4)(i) requires employers to provide refresher training as required by paragraph (l)(4)(ii) to ensure that the operator continues to have the knowledge and skills to operate the powered industrial truck safely. Refresher training, which is triggered by the occurrence of the events listed in paragraph (l)(4)(ii), complements the initial training required by paragraph (l)(3) and serves to reinforce that initial training. The refresher training also includes an informal evaluation component that might involve, for example, observing the operator to ensure that he or she has mastered the skills necessary to address any performance deficiency or has developed the skills to operate a new type of truck safely.

An instance of unsafe operation, or an accident, or a near-miss incident, triggers refresher training as specified in paragraph (l)(4)(ii). Such refresher training also is needed if evaluation reveals that an operator is not operating the truck safely, or if an operator is assigned to drive another type of powered industrial truck or to work in substantially different or changed conditions. The type and amount of training needed in the refresher training depend on several factors, including: the different characteristics of the new type of truck or terrain; the practice or practices that the evaluation indicated needed improvement; the nature of the unsafe act; and the potential for an accident to occur. OSHA's decision not to specify the frequency of refresher training but to require it to be provided on an as-needed basis is discussed elsewhere in this preamble. The final rule provides a performance-oriented and cost-effective approach to refresher training. It also requires, at paragraph (l)(4)(i), evaluation of the effectiveness of the refresher training, to ensure that safe practices have been reinforced. This evaluation can be brief and informal. Many comments addressed this provision (Exs. 7–13, 7–16, 7–20, 7–21, 7–23, 7–25, 7–26, 7–28, 7–29, 7–31, 7–34, 7–35, 7–38, 7–39, 7–43, 7–44, 7–45, 7–46, 7–47, 7–48, 7–49, 7–52, 7–56, 7–58, 7–59, 7–61, 7–65, 7–67, 7–69, 7–70, 113, 11–4, 11–5, 11–10, 11–12, 11–15, 11–19, 11–20, 11–27, 11–29, 11–31, 11–32, 11–36, 11–38, 11–44, 28, 29, Tr. pp. 27, 36–39, 55, 63–65, 78, 82, 101, 179, 210, 319, 345, 395, 421–422). Some commenters supported the proposed rule's approach of relying on certain events, operator practices or workplace conditions to trigger refresher training. For example, one commenter (Ex. 11–3) stated:

> Bell Atlantic believes unsafe operation, accidents or near-misses are important criteria for determining if refresher/remedial training is required; however, it is also appropriate for employers to evaluate employees to ensure the employee retains and uses the skills, knowledge, and ability needed to operate the powered industrial truck safely. This evaluation can be accomplished by the employer conducting periodic work observations of the employee's operation of the vehicle to identify areas where remedial training may be needed. The timing of these evaluations should be left to the discretion of the employer.

Another commenter (Ex. 7–46) stated:

> The NAM agrees that employees should be retrained when they are shown to have operated equipment in an unsafe manner * * *

The final rule, at paragraph (l)(4)(ii), contains the triggers for refresher training that were proposed, but adds two others: when a different type of truck or different conditions are introduced or occur in the workplace. This could include a different type of paving, reconfiguration of storage racks, new construction leading to narrower aisles or restricted visibility, etc. These triggers have been added to the final rule because they are specified in the current ASME standard (B56.1–1993, section 4.19.5) and because some commenters (see e.g., Ex. 11–5) recommended that OSHA ''follow the requirements of * * * [that standard] as a guide for refresher/remedial training.''

Some commenters (see, e.g., Exs. 11–3, 11–4, 11–5, 11–10, 11–14, 11–15, 11–25, 11–27, 11–32, 7–13, 7–25, 7–36, 7–45, 7–58) recommended that periodic evaluations be conducted at less frequent intervals, rather than annually, as proposed. These commenters suggested that more frequent evaluations were unnecessary, would interrupt the production process, and would be burdensome for employers.

OSHA believes that the triennial evaluations required by the final rule need not take excessive time, be unduly burdensome, or interrupt the production process. In most cases, the person conducting the evaluation would do two things: first, observe the powered industrial truck operator during normal operations to determine if the operator is performing safely, and second, ask pertinent questions to ensure that the operator has the knowledge or experience needed to operate a truck safely. In some cases, because of the danger or complexity of the operation, the extent of the change in conditions, or the operator's need for additional skills, the evaluation will need to be lengthier and more detailed.

The proposed rule would have required employers to evaluate the driving performance of powered industrial truck operators on an annual basis. Commenters from general industry, construction, and the maritime industries (shipyards, marine terminals, and longshoring operations) objected to the frequency of the proposed evaluations (see e.g., Exs. 7–13, 7–25, 7–28, 7–34, 7–36, 7–45, 7–58, 7–59, 7–69, 7–70, 11–5, 11–10, 11–14, 11–15, 11–25, 11–27, 11–29, 11–32, 11–36, 11–46). For example, the American Petroleum Institute (API)(Ex. 11–10) stated:

> API * * * emphasizes our position that * * * it would be unnecessary to evaluate operators annually. Rather, API suggests that operators be evaluated every three years. This would substantially reduce the information collection burden, while still attending to those operators who may require additional training or who are operating in an unsafe manner.

Arguing along similar lines, the National Association of Home Builders (NAHB) (Ex. 11–14), stated:

> NAHB finds it an unreasonable burden on small employers for OSHA to require an annual evaluation of each operator * * * This will just be an unnecessary requirement and expense to small employers with no clear benefit.

The West Gulf Maritime Association (Ex. 7–66) held the same view, stating:

> Refresher and/or evaluation training shall be provided [only] when determined necessary by performance.

The Office of Advocacy of the U.S. Small Business Administration (SBA) also questioned the need for annual

evaluations. Jere W. Glover, Chief Counsel for Advocacy, stated (Ex. 7–41):

> * * * I question whether * * * it is necessary to perform official evaluations annually. Particularly in a small workplace, evaluations—albeit informal—may be ongoing. Furthermore, coupled with the need for written certification and the requirement for maintaining records, I am concerned about the paper trail that this provision would generate as well.

A few commenters (Exs. 7–29, 7–52) favored a biennial evaluation period rather than the proposed annual interval, but did not present data to support biennial, rather than triennial, evaluation.

In response to these concerns, the final rule requires that periodic evaluations of operator performance be conducted only once every three years. OSHA has revised this provision of the proposal because the Agency concludes that the final rule's comprehensive training requirements—initial training and evaluation for all powered industrial truck operators needing such training; refresher training and evaluation for any operator observed to be operating unsafely, involved in an accident or near-miss, determined by evaluation to need retraining, or called upon to operate a different kind of truck or to operate under changed workplace conditions; and triennial evaluation to ensure that the necessary knowledge and skills have been retained—provide a complete and systematic approach to powered industrial truck operator training. Given this three-tiered approach to training—initial training and evaluation, refresher training and evaluation as needed, and periodic evaluations—annual evaluations are unnecessary. The final rule, at paragraph (l)(4), reflects this finding.

Paragraph (l)(4)(iii) requires employers to conduct an evaluation of each powered industrial truck operator's performance once every three years to ensure that the employee has retained and continues to use the knowledge and skills necessary for safe operation of the vehicle. The required evaluation does not have to be a formal, structured exercise. For example, an evaluation could be as simple as having a person with the requisite skills, knowledge, and experience observe the operator performing several typical operations to ensure that the powered industrial truck is being operated safely and asking the operator a few questions related to the safe operation of the vehicle.

G. Avoidance of Duplicative Training—Paragraph (l)(5)

In paragraph (l)(5), the final rule allows employers to forego those portions of the required training that operators have previously received. OSHA proposed two similar provisions, one pertaining to new hires and one to current operators. The final rule combines these two provisions into one paragraph. The provision at paragraph (l)(5) is intended to prevent unnecessary or duplicative training both for newly hired operators and those already on the payroll. For example, if an operator is already trained in certain aspects of powered industrial truck operation, knows the necessary information, has been evaluated, and has proven to be competent to perform the duties of an operator, there is no reason to require an employer to repeat that operator's training.

There was a general consensus of opinion supporting the utility of this provision. (See Exs. 7–25, 7–31, 7–34, 7–39, 7–67, 7–68, 7–69, 11–12, 11–15, 11–17, 11–18, 11–20, 11–27, 11–28, 11–29, 11–30, 11–37, 11–42, Tr. pp. 283.) These commenters pointed out that unnecessary and repetitive training does not use the employer's or the operator's time productively. If an operator already knows how to operate a powered industrial truck safely and can demonstrate that ability, there is no need to further train that operator. OSHA agrees with these commenters, and the final rule reflects this conclusion.

Paragraph (l)(5) of the final rule provides that an employer need not provide further training to any operator (whether currently on the payroll or a new hire) in any training topic in which the operator has previously received training, if the operator, after evaluation, is found to be competent to perform the operator's duties safely. The operator would need additional training in any element(s) for which the evaluation indicates the need for further training, and for any new type of equipment or changes in workplace conditions.

In evaluating the applicability and adequacy of an operator's prior training, the employer may wish to consider these factors: the type of equipment the operator has operated; how much experience the operator has had on that equipment; how recently this experience was gained; and the type of environment in which the operator worked. The employer may, but is not required to, use written documentation of the earlier training to determine whether an operator has been properly trained. The operator's competency may also simply be evaluated by the employer or another person with the requisite knowledge, skills, and experience to perform evaluations. The employer can determine from this information whether the experience is recent and thorough enough, and whether the operator has demonstrated sufficient competence in operating the powered industrial truck to forego any or some of the initial training. Some training on the site–specific factors of the new operator's workplace is likely always to be necessary.

H. Certification—Paragraph (l)(6)

OSHA proposed to require that employers certify that the required training and evaluation had been conducted and that the operator was competent to perform the duties of an operator safely by keeping a record with the name of the trainee, the dates of the training, and the signature of the person performing the training or evaluation. OSHA also proposed that the employer retain the training materials and course outline and, if the training was conducted by an outside trainer, the name and address of the trainer.

OSHA has, in this final standard, switched the order of the paragraphs on Certification and Avoidance of Duplicative Training. It is more logical to complete all elements of the training program before reaching the requirement to certify that training has been provided. Accordingly, the Certification paragraph in the final rule is in paragraph (l)(6) and the Avoidance of Duplicative Training is at paragraph (l)(5).

There was considerable comment on the proposed certification requirements. (See Exs. 7–13, 7–14, 7–16, 7–19, 7–21, 7–25, 7–26, 7–27, 7–34, 7–39, 7–40, 7–44, 7–47, 7–57, 7–58, 7–59, 7–62, 7–67, 7–69, 7–71, 11–3, 11–5, 11–6, 11–10, 11–12, 11–14, 11–15, 11–18, 11–24, 11–27, 11–28, 11–29, 11–30, 11–31, 11–32, 11–36, 11–37, 11–44, 28, 29, Tr. pp. 25, 51, 56, 102, 122, 155, 178, 203, 308, 321, 335, 341–344, 385, 408, 423.)

Some commenters pointed out that maintaining written certification records, particularly of training, provides a good means of measuring compliance with a standard. They pointed out that many conscientious employers already maintain records of employee training. For example, one commenter (Ex. 7–39) stated:

> Subparagraph (l)(5) requires employers to certify that each operator has been trained or evaluated. Since training for training's sake should never be the focus of a training standard, and since keeping such documentation will not make some a safer driver, CMA believes that OSHA should require the employer to document the verification of the knowledge and skill of the forklift operator. Consistent with the above, CMA recommends that the documentation include: (1) the authorized operator's name and personal identifier; (2) the date of

verification; (3) a reference to the verification method; and (4) the name of the verifier and personal identifier. The verifier should not be required to be signed because this prevents the use of electronic filing.

A second commenter (Ex. 11–3) stated:

In addition, OSHA requested specific comments on the collection of information requirement proposed in 1910.178(l)(5) which requires employers to prepare and maintain a record to certify that employees have been trained and evaluated as required by the proposed standard. Bell Atlantic provides a four (4) hour training program to approximately 300 employees who operate powered industrial trucks, at a cost of $224 per trainee, total training costs = $67,200. This training is documented on the employee's training record and maintained in their personnel file. Bell Atlantic fully supports the use of electronic collection and submission of information wherever possible.

One hearing participant (Tr. p. 423) stated:

Training records are an important tool for industries. It has been proven time and time again that analyzing prior training records before conducting refresher training will enable companies to identify employee conceptions of existing safety rules and standard operating procedures.

Some commenters agreed with the need to maintain records, but suggested that the requirement for a signature be deleted so it would be easier to computerize the records. (See Exs. 7–13, 7–21, 7–26, 7–27, 7–39, 7–40, 7–47, 7–59, 7–69.) OSHA agrees with these commenters and, accordingly, has changed the wording of this provision of the final rule to indicate that the identity of the person performing the training and evaluation is sufficient; a signature is not required. In addition, the final rule has substantially streamlined the proposed certification requirements, reducing the number of items needing to be certified, and eliminating the requirement to maintain training materials, course outlines, and other information when outside trainers are relied on.

Some commenters questioned the need for the employer to retain written records of the training on the grounds that the purpose of training is to prepare the trainee to operate a powered industrial truck in a safe manner and that observing that the operator is driving safely should be sufficient. For example, one commenter (Ex. 11–14) said:

These requirements will be a tremendous burden to builders, especially small builders, who are already overwhelmed by onerous existing recordkeeping requirements. This new request for information from the employer seems inappropriate considering the recent inquiries by OSHA about ways to reduce the paperwork burden on employers. Why mandate these requests for information now when they will most likely be identified at a later date as a source of unnecessary paperwork?

OSHA has been responsive to this comment. The Agency believes that the final rule's certification requirements will provide the assurance necessary that the operator has been trained and evaluated, as required by the standard. However, in response to those who felt that some of the recordkeeping was unnecessary, OSHA has eliminated the requirement for employers to maintain training materials and information from outside trainers. OSHA believes that the certification required by the final rule is sufficient written evidence that the training and evaluation required by the standard has occurred.

I. Dates—Paragraph (l)(7)

The proposal did not include start-up dates. There are approximately 1.5 million powered industrial truck operators, and there is substantial turnover among these operators. Consequently, employers will need a reasonable period of time to implement the training and evaluation required by this final rule. There were a few comments on start-up dates ranging from immediately to three years. The period OSHA has chosen is based on its experience in implementing other safety standards.

The table in the final rule sets out the operator's employment status, and when the initial training and evaluation of operators must be completed. OSHA finds that the use of a table, rather than several written requirements, increases clarity and avoids confusion.

J. Appendix

OSHA has included a non-mandatory appendix in the final rule. Appendix A provides guidance to employers and employees on understanding the basic principles of truck stability. The information contained in this appendix is not intended to provide an exhaustive explanation; rather, it is intended to introduce basic concepts that the employer may use in developing and implementing a training program. The material in the appendix does not add to or reduce any of the mandatory requirements of these standards.

OSHA proposed a non-mandatory Appendix A that contained lists of training topics and other guidance and was primarily based on the current consensus standard, ASME B56.1–1993. Because most of the information in proposed Appendix A is included in the final rule itself at paragraph (l)(3), OSHA has not included proposed Appendix A in the final rule.

The appendix proposed as Appendix B is retained, and has been designated Appendix A in the final rule.

K. Statement of Reasons for Publishing This Standard in Lieu of the National Consensus Standard

In accordance with section 6(b)(8) of the OSH Act, the National Technology Transfer and Advancement (NTTAA) and OMB circular A–119, which implements the NTTAA, OSHA has reviewed the voluntary consensus standard, Safety Standard for Low Lift and High Lift Trucks (ASME B56.1–1993), and has made extensive use of it in developing its final rule. Where there are differences between OSHA's standard and the consensus standard, they are based on several considerations. First, the Agency bases its standards on the rulemaking record. Second, voluntary consensus standards are not always written with enforcement in mind. Third, the consensus standard contains more detail than is necessary in an OSHA standard. OSHA has developed a final rule that is flexible and protective, as well as performance-based. For these reasons, the Agency finds that the final rule better effectuates the purposes of the Act than the consensus standard.

IX. Statutory Considerations

Section 2(b)(3) of the Occupational Safety and Health (OSH) Act authorizes ''the Secretary of Labor to set mandatory *occupational safety and health standards* applicable to businesses affecting interstate commerce,'' and section 5(a)(2) provides that ''each employer shall comply with *occupational safety and health standards* promulgated under this Act'' (emphasis added). Section 3(8) of the OSH Act (29 U.S.C. 652(8)) provides that ''the term 'occupational safety and health standard' means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.''

OSHA considers a standard to be ''reasonably necessary or appropriate'' within the meaning of section 3(8) if it meets the following criteria: (1) The standard will substantially reduce a significant risk of material harm; (2) compliance is technologically feasible in the sense that the protective measures being required already exist, can be brought into existence with available technology, or can be created with

technology that can reasonably be developed; (3) compliance is economically feasible in the sense that industry can absorb or pass on the costs without major dislocation or threat of instability; and (4) the standard is cost effective in that it employs the least expensive of equally protective measures capable of reducing or eliminating significant risk.

Additionally, safety standards that differ from national consensus standards must better effectuate the Act's protective purpose than the corresponding national consensus standards, must be compatible with prior agency action, must be responsive to significant comment in the record, and, to the extent allowed by statute, must be consistent with applicable Executive Orders. OSHA believes that applying these criteria results in standards that provide a high degree of worker protection without imposing an undue burden on employers. (See the discussion of 60 FR 13796–13799, March 14, 1995, for a detailed analysis of the case law.)

As discussed in various places in this preamble, OSHA has determined that the operation of powered industrial trucks by untrained or inadequately trained operators poses significant risks to employees. There have been, on average, 101 fatalities and 94,570 injuries annually due to unsafe powered industrial truck operation. OSHA estimates that compliance with these revised training requirements for powered industrial truck operators will prevent approximately 11 fatalities and 9,422 injuries annually. This constitutes a substantial reduction in the significant risk of material harm currently posed to these employees.

There are no technological obstacles to compliance with the final rule. There are currently training requirements for powered industrial truck operators in general industry (§ 1910.178(1)), in construction (§ 1926.602(c)(1)(vi))(adopted by reference), and in the marine cargo handling industries (§§ 1917.27(a) and 1918.98(a) (requirements for all vehicle operators)). Shipyard employment is covered by the general industry standard. The final rule merely specifies in more detail what is to be taught to powered industrial truck operators and requires the employer to retrain operators when workplace conditions, other changes, or accidents or near-misses indicate that such retraining is necessary, and to institute effective evaluation measures to ensure continued safe vehicle operation. In many companies, the vehicle operator's training and periodic evaluations required by the standard have already been implemented.

OSHA also concludes that compliance is economically feasible because, as documented in the Final Economic Analysis, all regulated sectors can readily absorb or pass on compliance costs. OSHA estimates total annualized costs of $16.9 million, a cost that imposes only a negligible impact of 0.0002 percent of sales and less than 0.01 percent of pretax profits on firms in the regulated industries.

No industry segment or subsegment will experience substantial economic impact. The largest impact for any two-digit SIC is 0.0014 percent of sales or 0.021 percent of pretax profits and for the small business component of affected SICs, the largest impact is 0.001 percent of sales or 0.024 percent of pretax profits. Because of the large amount of data supplied by the Industrial Truck Association, OSHA has been able to prepare an analysis at the three-digit SIC level. No significant impacts were found at any level. Consequently, the new standard is determined to be economically feasible for firms in affected industries.

The standard's costs and compliance requirements are reasonable, amounting to approximately $16.9 million per year. An estimated 11 fatalities and 9422 injuries will be averted per year by compliance with the standard.

As discussed above, many of the provisions of the final standard are based on the training provisions of the current ASME consensus standard (ASME B56.1–1993). Pursuant to section 6(b)(8) of the OSH Act, OSHA has explained why the provisions of the final rule that differ from the ASME standard better effectuate the purpose of the Act.

Conclusion

This final powered industrial truck standard, like other safety standards, is subject to the constraints of section 3(8) of the OSH Act, and must be ''reasonably necessary or appropriate to provide safe or healthful employment and places of employment.''

The Agency concludes that allowing an untrained or poorly trained employee to use a powered industrial truck poses significant risks, both to the operator and to other workers in the vicinity of the truck. To protect employees from those risks, it is necessary to require that only properly trained employees operate these vehicles. OSHA has determined that compliance with this operator training standard is technologically feasible because many companies currently offer the type of training that this standard requires. OSHA also concludes that compliance is economically feasible, because, as documented by the Final Economic Analysis (Ex. 38), all regulated sectors can readily absorb or pass on initial compliance costs while realizing substantial benefits. In addition to reducing fatalities and injuries, the Agency believes that compliance with the powered industrial truck training requirements will result in substantial cost savings and productivity gains at facilities that use powered industrial trucks, as discussed below.

As detailed in OSHA's March 14, 1995 notice (60 FR 13799), in the January 30, 1996 notice (61 FR 3092 and 3094), in this preamble, and in the Final Economic Analysis, the standard's costs, benefits, and compliance requirements are consistent with those of other OSHA safety standards.

X. Summary of the Final Economic Analysis, including the Regulatory Flexibility Analysis

Introduction

The OSH Act requires OSHA to demonstrate the technical and economic feasibility of its rules. Executive Order 12866 and the Regulatory Flexibility Act require Federal agencies to analyze the costs, benefits, and other consequences and impacts, including small business impacts, of their rules. Consistent with these requirements, OSHA has prepared a Final Economic Analysis (FEA) to accompany the final standard being published today. The final powered industrial truck operator training requirements will supplement and expand on the minimal training requirements previously found in OSHA's general industry standard (29 CFR 1910.178(l)) and will also apply to powered industrial truck operators in the marine cargo handling and construction industries.

It has been determined that this is an economically significant regulatory action under E.O. 12866, and a major rule under the Congressional Review provisions of the Small Business Regulatory Enforcement Fairness Act. Accordingly, OSHA has provided OIRA with an assessment of the costs, benefits and alternatives, as required by section 6(a)(3)(C) of E.O. 12866, which is summarized below.

This economic analysis includes a description of the industries affected by the standard, an assessment of the benefits attributable to adoption of the final standard, a determination of the technological feasibility of the standard's provisions, an estimate of the costs of compliance, a determination of the economic feasibility of compliance

with the final provisions, and an analysis of the economic and other impacts of the final rule on establishments, including small establishments, in the affected industries. For a full discussion of the data, analysis, and results presented in this summary, see the Final Economic Analysis in this rulemaking docket [Ex. 38].

Affected Industries

Using powered industrial truck sales data provided by the Industrial Truck Association (ITA), OSHA estimates that there are 998,671 industrial trucks in use in industries covered by the final standard. These industries include the agricultural services segment (SIC 07) of the agricultural industry, the oil and gas extraction segment of the mining industry (which are covered by OSHA's general industry standards), the construction sector (SICs 15–17), manufacturing (SICs 20–39), the transportation and utilities sectors (SICs 41–49), the wholesale and retail sectors (SICs 50–59), the finance, insurance, and real estate sectors (SICs 60–67), and the services sectors (SICs 70–89). Industries with the largest number of powered industrial trucks include wholesale trade-non-durable goods (SIC 51), with an estimated 127,259 powered industrial trucks, and food and kindred products (SIC 20), with an estimated 82,144 such trucks. The construction and marine cargo handling (SIC 4491) sectors are estimated to have about 46,456 and 3,243 powered industrial trucks, respectively.

This final OSHA standard covers workers who operate powered industrial trucks. This includes operators using these vehicles in the general industry, construction, and maritime sectors (including shipyards, marine terminals, and longshoring operations). The population-at-risk in powered industrial truck accidents consists primarily of the operators of these trucks. Operators of powered industrial trucks include workers employed as designated truck operators as well as those who might operate powered industrial trucks as part of another job. These alternate users of powered industrial trucks include shipping and receiving clerks, order pickers, maintenance personnel, and general temporary workers. Non-driving workers such as warehouse personnel, material handlers, laborers, and pedestrians who work on or are present in the vicinity of powered industrial trucks are also injured and killed in powered industrial truck accidents.

OSHA estimates that approximately 1.5 million workers are employed as industrial truck operators in the industries covered by this rule. Industries with the largest number of operators include wholesale trade (SIC 51), with 190,889 operators, and food and kindred products (SIC 20), with 123,215 operators. OSHA estimates that there are 69,684 and 12,973 powered industrial truck operators in the construction and marine cargo handling sectors, respectively.

Technological Feasibility

OSHA could not identify any requirement in the final standard that raises technological feasibility problems for establishments that use industrial trucks. On the contrary, there is substantial evidence that establishments can achieve compliance with all of the final rule's requirements using existing methods and equipment. In addition, the standard introduces no technological requirements of any type. Therefore, OSHA has concluded that the standard is technologically feasible for firms in all affected sectors.

Costs of Compliance

This final industrial truck operator training standard expands the training of truck operators already required by OSHA's existing standards (29 CFR 1910.178(l), 1917.27(a), 1918.98(a), and 1926.602(c)) to include information on operating trucks safely and on warnings appropriate to the type of truck used, the specific hazards found in the workplace where the truck will be operated, and the requirements of this standard. Additionally, the final standard requires employers to monitor the performance of industrial truck operators through a triennial evaluation and to provide refresher training when this evaluation, or other events, suggest that such training is needed.

OSHA estimates the annual cost of compliance with the final standard to be about $16.9 million for all affected establishments in all covered industries. Table 11 outlines the annual costs by each sector affected by the final standard. Industry sectors with the highest estimated annualized compliance costs are manufacturing, with annual costs of $8.3 million, and wholesale and retail trade, with annual costs of $4.5 million. The annual costs of compliance for the construction and marine cargo handling sectors are estimated to be $1.0 and $0.2 million, respectively. Existing industry practice was taken into consideration when calculating costs, i.e., where employers have already voluntarily implemented practices that would be required by the final standard, no cost for these practices is attributed to the standard.

These estimates of the costs of compliance are lower than was the case for the proposed standard. The lower costs principally result from a change to the final rule that permits evaluations of operators to be performed once every three years rather than once every year, as proposed. Other minor changes to the standard also will result in lower costs and improved compliance, such as simplified certification, and these are discussed above in this Preamble as well as in the full FEA.

TABLE 11.—ESTIMATED ANNUALIZED COMPLIANCE COSTS FOR THE FINAL INDUSTRIAL TRUCK OPERATOR TRAINING STANDARD, BY PROVISION AND INDUSTRY

Industry sector	Initial training	Triennial evaluation	Refresher training	Total annual cost
Agriculture	$13,023	$3,788	$940	$17,751
Mining—Oil and Gas Extraction (SIC 13)	21,667	6,302	1,564	29,533
Construction	706,888	205,607	51,031	963,527
Manufacturing	6,061,548	1,763,078	437,594	8,262,220
Transportation and Utilities except SIC 4491	1,454,997	423,204	105,039	1,983,241
Longshoring and Marine Terminals (SIC 4491)	157,261	58,810	11,353	227,424
Wholesale and Retail Trade	3,282,343	954,711	236,958	4,474,012
Finance, Insurance, & Real Estate	47,594	13,843	3,436	64,873
Services	626,186	182,134	45,205	853,525
Total	12,371,506	3,611,478	893,121	16,876,105

Source: US Department of Labor, OSHA, Office of Regulatory Analysis, 1997.
Costs are annualized over 10 years at a 7 percent discount rate (annualization factor 0.1424).

Note: totals may not add due to rounding.

Many commenters (see, e.g., Exs. 11–3, 11–21, 7–60) to the record stated that the Agency had underestimated the costs of the standard. In most cases, these commenters failed to note that about 75 percent of affected establishments currently provide training that is equivalent, or nearly equivalent, to that required by the final standard. The Agency's estimate of 5.5 hours for initial training was within ranges provided by several commenters (4 hours, Bell Atlantic, Ex. 11–3; 8 hours, Tennessee Valley Authority, Ex. 11–21 and Monaco Group, Inc., Ex. 7–60).

Many commenters also questioned the utility of the annual evaluations proposed by OSHA, and several suggested that triennial evaluations of operator competence would be sufficient (see, e.g., American Society of Safety Engineers, Ex. 11–5; U.S. Small Business Administration, Ex. 7–41; and International Brotherhood of Teamsters, Ex. 11–18). The Agency has required triennial evaluations in the final standard. Similarly, many commenters stated that the proposed certification requirements were unduly burdensome (see, e.g., National Association for Home Builders, Ex. 11–14; Storax, Ex. 7–9; and Air Transport Association, Ex. 7–40). Several commenters objected to the requirement for a signature on the certification, noting that requiring a signature would mean that the form could not be handled electronically (Union Electric, Ex. 11–18; Edison Electric Institute, Ex. 7–44, for example). In response to these comments, the final standard does not require a signature for training certification and contains a much simpler certification than the one proposed, including only the operator's name, date of evaluation or training, and name of trainer.

Benefits

An estimated 101 fatalities and 94,570 injuries are caused annually by industrial truck-related accidents. As presented in Table 12, OSHA estimates that compliance with the final standard by establishments in all covered industries will avert 11 of these fatalities and 9,422 injuries per year. These fatalities and injuries are in addition to the lives saved and injuries prevented by OSHA's existing powered industrial truck operator training requirements, i.e., they represent only the incremental benefits of the new requirements. Estimates of benefits from the Final Economic Analysis are based on both general industry (including shipyards) and construction data, which were analyzed separately in the respective published proposals. In addition, the data sources for the Final Economic Analysis were expanded to include far more data than were available for the preliminary regulatory analysis published with the proposed standard. For example, estimates of the injuries potentially avoided as a result of the final rule are based on a national source (Bureau of Labor Statistics' ''Survey of Occupational Injuries and Illnesses'') rather than on data from only one state (California).

TABLE 12.—NUMBER OF FATALITIES AND INJURIES JUDGED TO BE POTENTIALLY AVERTED ANNUALLY BY COMPLIANCE WITH THE FINAL POWERED INDUSTRIAL TRUCK TRAINING STANDARD

Sector	Total number of powered industrial truck fatalities	Estimated number of fatalities potentially averted by compliance with the final standard	Total number of powered industrial truck injuries	Estimated number of injuries potentially averted by compliance with the final standard
Agriculture—Agricultural Services	0	0	47	5
Mining—Oil and Gas Extraction	1	0	0	0
Construction	16	2	2,380	237
Manufacturing	35	4	44,976	4,481
Transportation, Communications, and Utilities except Longshoring and Marine Terminals	16	2	10,698	1,066
Longshoring and Marine Terminals	3	0	275	27
Wholesale and Retail Trade	23	2	31,649	3,153
Finance, Insurance, and Real Estate	0	0	79	8
Services	7	1	4,466	445
All Covered Industries	101	11	94,570	9,422

Source: U.S. Department of Labor, OSHA, Office of Regulatory Analysis, 1997.

OSHA has also adopted a more conservative methodology for estimating the number of fatalities and injuries that could be prevented by the final standard. This approach explains why the estimates of lives saved and injuries averted are lower than those projected in the Preliminary Regulatory Impact Analysis. Based on published reports, the Agency had estimated in the proposal that 44 to 77 percent of accidents could be avoided by compliance with the Agency's proposed rule. OSHA has since decided that a more conservative estimate of 25 percent of accidents more accurately reflects the percentage of accidents that will be averted by compliance with the final standard. This 25 percent reduction in fatalities applies to the Agency's estimated 42 fatalities each year that are potentially preventable, which results in an estimated 11 fatalities avoided each year under the final standard.

The Agency has also included estimates of the direct cost savings, or economic benefits, that occur when accidents are avoided. These economic benefits include the savings in medical costs, value of lost output, savings in administrative costs of workers' compensation claims, and indirect costs to employers associated with injuries to employees. OSHA estimates that the value of the direct cost savings associated with these final rules is $83 million per year. This estimate of cost savings considers only those powered industrial truck-related injuries that involve lost workdays, and thus is a substantial underestimate of the standard's true benefits.

The final standard will also reduce accident-related property damage and litigation costs. OSHA finds that the improved training required by the final standard will reduce property damage by an estimated $52 million annually.

No economic benefits or savings are calculated either for avoiding loss of life or for the pain and suffering of injured workers. This means that the benefits presented here substantially underestimate the benefits of this rule.

Economic Impacts and Regulatory Flexibility Analysis

OSHA has assessed the potential economic impacts of compliance with the final standard and has determined that the standard is economically feasible for firms in all covered industry groups. On average, the annualized compliance costs of the standard amount only to 0.0001 percent of the sales and less than 0.01 percent of estimated pre-tax income for affected firms (Table 13).

BILLING CODE 4510–26–P

Table 13
Economic Impact of the Final Powered Industrial Truck Operator Training Standard

SIC	Industry	Value of Industry Shipments, Receipts or Sales a ($millions)	Annualized Compliance Costs	Compliance Costs as a Percent of Sales	Pre-tax Profit ($millions)	Compliance Costs as a Percent of Pre-tax Profit
7	Agricultural Services	NA	$17,751	-	-	-
13	Oil and gas extraction	$70,832	$29,533	negligible	-	-
15	General Building Contractors	$216,936	$180,646	0.0001%	-	-
16	Heavy Construction - other than building	$79,373	$430,300	0.0005%	-	-
17	Construction - specialty trades	$203,096	$352,581	0.0002%	-	-
20	Food and kindred products	$430,994	$1,397,532	0.0003%	$36,817	0.004%
21	Tobacco products	$30,021	$35,018	0.0001%	[1]	[1]
22	Textile mill products	$78,267	$306,318	0.0004%	$1,609	0.019%
23	Apparel and other textile products	$76,898	$87,368	0.0001%	$2,932	0.003%
24	Lumber and wood products	$103,643	$396,048	0.0004%	$3,063	0.013%
25	Furniture and fixtures	$50,039	$154,574	0.0003%	$2,274	0.007%
26	Paper and allied products	$143,761	$604,501	0.0004%	$17,659	0.003%
27	Printing, publishing, and allied industries	$176,381	$347,349	0.0002%	$14,188	0.002%
28	Chemicals and allied products	$333,259	$740,328	0.0002%	$49,776	0.001%
29	Petroleum refining and related industries	$143,150	$72,865	0.0001%	$16,656	0.000%
30	Rubber and miscellaneous plastics products	$134,533	$415,970	0.0003%	$5,779	0.007%
31	Leather and leather products	$9,545	$37,494	0.0004%	[2]	[2]
32	Stone, clay, glass, and concrete products	$71,227	$314,807	0.0004%	$4,156	0.008%
33	Primary metal industries	$160,771	$452,049	0.0003%	$11,052	0.004%
34	Fabricated metal products	$190,172	$568,422	0.0003%	$8,290	0.007%
35	Industrial & commercial machinery & computer equip.	$314,423	$1,104,183	0.0004%	$22,957	0.005%
36	Electric and electronic equipment	$257,800	$392,625	0.0002%	$35,497	0.001%
37	Transportation equipment	$452,363	$548,260	0.0001%	$28,339	0.002%
38	Instruments and related equipment	$138,798	$112,482	0.0001%	$15,558	0.001%
39	Miscellaneous manufacturing industries	$44,156	$174,028	0.0004%	$2,049	0.008%
41	Local, suburban, and interurban passenger transit	$10,441	$39,876	0.0004%	-	-
42	Trucking and warehousing	$103,723	$1,399,336	0.0013%	-	-
44	Water transportation	$19,956	$246,141	0.0012%	-	-
45	Transportation by air	$96,263	$146,892	0.0002%	-	-
46	Pipelines, except natural gas	$2,008	$3,255	0.0002%	-	-
47	Transportation services	$64,356	$120,850	0.0002%	-	-
48	Communications	$280,098	$47,201	negligible	-	-
49	Electric, gas, and sanitary services	$345,852	$207,113	0.0001%	-	-
50	Durable goods	$1,088,903	$1,061,474	0.0001%	$8,364	0.013%
51	Nondurable goods	$980,445	$1,760,781	0.0002%	$8,801	0.020%
52	Building materials and garden supplies	$122,533	$341,167	0.0003%	-	-
53	General merchandise stores	$286,447	$327,935	0.0001%	$10,641	0.003%
54	Food stores	$397,800	$552,887	0.0001%	$5,261	0.011%
55	Automotive dealers and service stations	$668,512	$53,505	negligible	-	-
56	Apparel and accessory stores	$109,603	$31,643	negligible	-	-
57	Furniture and home furnishings stores	$119,626	$109,312	0.0001%	-	-
58	Eating and drinking places	$228,351	$22,438	negligible	-	-
59	Miscellaneous retail [d]	$266,358	$212,870	0.0001%	-	-
60	Banking	$503,386	$12,693	negligible	-	-
61	Credit agencies other than banks	$198,163	$5,289	negligible	-	-
62	Security and commodity brokers and services	$76,066	$4,231	negligible	-	-
63	Insurance carriers	$837,166	$22,917	negligible	-	-
64	Insurance agents, brokers, and services	$39,333	$2,468	negligible	-	-
65	Real estate	$116,629	$11,282	negligible	-	-
67	Holding and other investment offices	$129,685	$5,994	negligible	-	-
70	Hotels and other lodging places	$66,964	$10,748	negligible	-	-
72	Personal services	$60,348	$10,748	negligible	-	-
73	Business services	$335,807	$452,271	0.0001%	-	-
75	Auto repair, services, and parking	$85,494	$120,506	0.0001%	-	-
76	Miscellaneous repair services	$36,306	$33,546	0.0001%	-	-
78	Motion pictures	$48,130	$13,679	negligible	-	-
79	Amusement and recreation services	$59,382	$19,867	negligible	-	-
80	Health services	$304,135	$57,973	negligible	-	-
81	Legal services	$101,104	$3,583	negligible	-	-
82	Educational services	$4,764	$51,460	0.0011%	-	-
83	Social services	$16,502	$17,587	0.0001%	-	-
84	Museums, art galleries, botanical & zoological gardens	$101,104	$977	negligible	-	-
86	Membership oganizations	NA	$6,188	-	-	-
87	Engineering, accounting, research & management svcs.	$223,700	$41,689	negligible	-	-
89	Miscellaneous services, n.e.c.	NA	$12,702	-	-	-
		$12,445,881	$16,876,105	0.0001%		<0.01%

Source: US Department of Labor, OSHA, Office of Regulatory Analysis, 1997.

NEC: Not elsewhere classified

Negligible denotes less than 0.0001 percent.

[1] included in SIC 20.

[2] included in SIC 23

BILLING CODE 4510–26–C

These figures suggest that even under the worst-case assumption of no cost pass-through, prices would be little affected by the standard. The two-digit industry sectors with the highest costs of compliance, trucking and warehousing (SIC 42) and water transportation (SIC 44), have costs of compliance that are 0.0013 and 0.0012 percent of revenues respectively. The industry with the greatest reduction in profits, nondurable goods (SIC 51), has a reduction in profits of 0.02 percent. Clearly, such potential small increases in prices and reductions in profits are economically feasible, and the Agency therefore concludes that the final standard is economically feasible for all affected industries.

These potential economic impacts overestimate the likely economic impact of the standard because they do not include any consideration of the economic benefits of the standard that may accrue to employers, such as reduced worker compensation costs and reduced property damage. OSHA estimates that reduced property damage alone would be sufficient to more than offset the total costs of the standard. In the Preliminary Regulatory Impact Analysis developed in support of OSHA's 1995 proposal [Ex. 2], the Agency examined the impact of the proposed standard on different sizes of establishments. Based on that analysis, the Agency certified that the proposed standard would not have a significant economic impact on a substantial number of small entities. Upon review of comments and other data submitted to the record of this rulemaking, the Agency has analyzed the final rule's impact on small entities, as defined by the Small Business Administration (SBA) and in accordance with the Regulatory Flexibility Act. In addition, in order to ensure that the smallest entities are not significantly impacted, the Agency also performed an analysis of impacts on the smallest establishments, i.e., those with fewer than 20 employees.

The impacts of the standard on sales and profits did not exceed 1 percent for small firms in any covered industry, whether the analysis used the SBA's definitions or the fewer-than-20-employee size class definition. In fact, the largest reduction in profit in any sector was 0.024% for small businesses in trucking and warehouses (SIC 42). Because the incremental costs of the final rule are primarily related to the number of powered industrial truck operators per establishment, the standard does not have a differential impact on small entities. If the costs of compliance were influenced by economies of scale, such effects would have been demonstrated by OSHA's analysis of the smallest firms, i.e., those with fewer than 20 employees. However, no such effects were seen, even among firms in this smallest size-class. Therefore, the Agency has no reason to conclude that establishments or firms in intermediate size groupings, i.e., those in the range between 20 employees and the employment size cutoff for the applicable SIC-specific SBA definition, would experience larger impacts.

Based on this finding, the Agency certifies that the final Powered Industrial Truck Operator Training standard will not have a significant adverse economic impact on a substantial number of small entities. The results of OSHA's analysis of small business impacts on firms within the SBA's size classifications are shown in Table 14.

Unfunded Mandates

The final Powered Industrial Truck Operator Training standard has been reviewed in accordance with the Unfunded Mandates Reform Act of 1995 (UMRA) (U.S.C. 1501 et seq.) and Executive Order 12875. For purposes of the UMRA as well as the Executive Order, the Agency certifies that the final standard does not include any Federal mandate that may result in increased expenditures by State, local, or tribal governments, or increased expenditures by the private sector of more than $100 million in any year.

BILLING CODE 4510–26–P

Table 14
Annual Cost of the Final Standards for Powered Industrial Truck Operator Training as a Percent of Sales and Profit for Small Firms as Defined by the Small Business Administration

SIC Industry	Affected Firm Size Class	Number of Affected Firms	Value of Industry Shipments or Sales ($millions)	Pre-Tax Profit ($millions)	Annual Compliance Costs	Compliance Costs as a Percent of	
						Sales	Pre-tax Profits
078 Agricultural services	$5 million*	41,072	$9,538	NA	$7,906	0.0001%	NA
08 Forestry	$5 million*	1,602	$951	$37	$2,753	0.0003%	0.007%
09 Fishing, hunting, and trapping	$3 million*	1,315	$425	$14	$1,349	0.0003%	0.010%
13 Oil and gas extraction	500 employees	14,366	$31,887	$1,682	$12,699	0.0000%	0.001%
15 General contractors and operative builders	$17 million*	144,497	$164,776	$6,653	$130,607	0.0001%	0.002%
16 Heavy construction, except building	$17 million*	28,080	$51,202	$2,467	$208,265	0.0004%	0.008%
17 Special trade contractors	$7 million*	317,306	$180,459	$9,152	$290,174	0.0002%	0.003%
20 Food and kindred products	500 employees	14,190	$110,387	$5,205	$394,104	0.0004%	0.008%
21 Tobacco products	500 employees	57	$861	$83	$2,206	0.0003%	0.003%
22 Textile mill products	500 employees	4,804	$21,281	$1,184	$90,670	0.0004%	0.008%
23 Apparel and other textile products	500 employees	19,069	$37,597	$1,619	$49,800	0.0001%	0.003%
24 Lumber and wood products	500 employees	30,646	$52,306	$2,778	$264,164	0.0005%	0.010%
25 Furniture and fixtures	500 employees	9,596	$21,528	$1,019	$77,287	0.0004%	0.008%
26 Paper and allied products	500 employees	3,845	$29,526	$1,890	$162,006	0.0005%	0.009%
27 Printing and publishing	500 employees	54,808	$79,992	$4,860	$180,622	0.0002%	0.004%
28 Chemicals and allied products	500 employees	7,457	$62,139	$3,919	$139,922	0.0002%	0.004%
29 Petroleum and coal products	500 employees	985	$12,392	$547	$12,241	0.0001%	0.002%
30 Rubber and miscellaneous plastics products	500 employees	11,699	$51,865	$3,747	$194,674	0.0004%	0.005%
31 Leather and leather products	500 employees	1,624	$4,071	$139	$16,310	0.0004%	0.012%
32 Stone, clay, and glass products	500 employees	11,051	$27,843	$1,746	$146,700	0.0005%	0.008%
33 Primary metal industries	500 employees	4,716	$32,264	$2,012	$135,163	0.0004%	0.007%
34 Fabricated metal products	500 employees	30,097	$89,152	$6,157	$321,158	0.0004%	0.005%
35 Industrial machinery and equipment	500 employees	46,961	$100,346	$7,637	$526,695	0.0005%	0.007%
36 Electronic and other electronic equipment	500 employees	12,886	$53,944	$3,712	$114,254	0.0002%	0.003%
37 Transportation equipment	500 employees	8,674	$31,584	$1,737	$77,305	0.0002%	0.004%
38 Instruments and related products	500 employees	9,010	$31,106	$2,196	$29,695	0.0001%	0.001%
39 Miscellaneous manufacturing industries	500 employees	14,791	$25,232	$1,450	$117,295	0.0005%	0.008%
41 Local and interurban passenger transit	$5 million*	13,455	$6,450	$212	$18,343	0.0003%	0.009%
42 Trucking and warehousing	$18.5 million*	83,667	$64,742	$2,575	$590,520	0.0009%	0.023%
44 Water transportation	500 employees	5,875	$12,523	$603	$114,948	0.0009%	0.019%
45 Transportation by air	1500 employee	4,582	$10,599	$441	$14,542	0.0001%	0.003%
46 Pipelines, except natural gas	1500 employee	39	$693	$227	$290	0.0000%	0.000%
47 Transportation services	$5 million*	33,266	$13,914	$576	$69,489	0.0005%	0.012%
48 Communication	1500 employee	12,509	$30,662	$4,674	$9,204	0.0000%	0.000%
49 Electric, gas, and sanitary services	$5 million*	7,354	$6,926	$523	$7,456	0.0001%	0.001%
50 Wholesale trade - durable goods	100 employees	219,565	$897,053	$46,824	$596,548	0.0001%	0.001%
51 Wholesale trade - nondurable goods	100 employees	127,029	$773,401	$30,654	$820,524	0.0001%	0.003%
52 Building materials and garden supplies	$5 million*	50,330	$35,838	$1,391	$118,044	0.0003%	0.008%
53 General merchandise stores	$5 million*	9,641	$3,845	$140	$5,247	0.0001%	0.004%
54 Food stores	$5 million*	128,388	$97,965	$2,420	$165,866	0.0002%	0.007%
55 Automotive dealers and service stations	$5 million*	120,653	$135,133	$3,498	$15,302	0.0000%	0.000%
56 Apparel and accessory stores	$5 million*	58,287	$22,281	$1,337	$5,632	0.0000%	0.000%
57 Furniture and homefurnishings stores	$5 million*	77,200	$42,755	$2,062	$43,725	0.0001%	0.002%
58 Eating and drinking places	$5 million*	285,736	$112,289	$4,756	$11,802	0.0000%	0.000%
59 Miscellaneous retail	$5 million*	220,388	$99,082	$5,012	$82,168	0.0001%	0.002%
60 Depository institutions	$5 million*	15,139	$16,124	NA	$597	0.0000%	NA
61 Nondepository institutions	$5 million*	13,094	$10,932	$854	$603	0.0000%	0.000%
62 Security and commodity brokers	$5 million*	14,639	$10,790	$641	$482	0.0000%	0.000%
63 Insurance carriers	$5 million*	5,275	$4,412	NA	$252	0.0000%	NA
64 Insurance agents, brokers, and service	$5 million*	101,772	$36,821	NA	$1,723	0.0000%	NA
65 Real estate	$5 million*	183,938	$109,143	$15,272	$7,774	0.0000%	0.000%
67 Holding and other investment offices	$5 million*	16,665	$16,609	$1,608	$1,271	0.0000%	0.000%
70 Hotels and other lodging places	$5 million*	35,505	$18,992	$1,618	$2,751	0.0000%	0.000%
72 Personal services	$5 million*	150,783	$31,608	$2,096	$7,352	0.0000%	0.000%
73 Business services	$5 million*	223,314	$124,891	$7,686	$143,822	0.0001%	0.002%
75 Auto repair, services, and parking	$5 million*	134,281	$50,584	$2,866	$89,657	0.0002%	0.003%
76 Miscellaneous repair services	$5 million*	59,611	$22,430	$1,433	$23,113	0.0001%	0.002%
78 Motion pictures	$5 million*	24,072	$8,836	$654	$2,968	0.0000%	0.000%
79 Amusement and recreation services	$5 million*	62,496	$35,211	$1,382	$10,808	0.0000%	0.001%
80 Health services	$5 million*	383,120	$210,585	$10,804	$14,899	0.0000%	0.000%
81 Legal services	$5 million*	131,500	$44,099	$6,091	$1,662	0.0000%	0.000%
82 Educational services	$5 million*	31,060	$22,279	$902	$12,968	0.0001%	0.001%
83 Social services	$5 million*	93,940	$36,264	$1,565	$9,022	0.0000%	0.001%
84 Museums, botanical, zoological gardens	$5 million*	2,838	$1,535	$99	$428	0.0000%	0.000%
86 Membership organizations	$5 million*	220,674	$68,120	$3,082	$4,771	0.0000%	0.000%
87 Engineering and management services	$5 million*	192,434	$100,639	$6,220	$19,635	0.0000%	0.000%
89 Services, n.e.c.	$5 million*	10,585	$5,317	$354	$8,498	0.0002%	0.002%

Source: US Department of Labor, Occupational Safety and Health Administration, Office of Regulatory Analysis, 1997.
* Annual Receipts.
[a] As per 61 FR 3289, January 31, 1996.

BILLING CODE 4510–26–C

OSHA standards do not apply to State and local governments, except in States that have voluntarily elected to adopt an OSHA State Plan. Consequently, the Powered Industrial Truck Operators Training rule does not meet the definition of a ''Federal intergovernmental mandate'' (Section 421(5) of the UMRA (2 U.S.C. 658(5)). In addition, the Agency has concluded, based on review of the rulemaking record, that few, if any, of the affected employers are State, local, and tribal governments.

XI. Environmental Impact

The final rule has been reviewed in accordance with the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321, *et seq.*), the regulations of the Council on Environmental Quality (40 CFR Part 1500 through 1517), and the Department of Labor's NEPA procedures (29 CFR part 11). As a result of this review, OSHA has determined that the final standard will have no significant environmental impact.

XII. OMB Review Under the Paperwork Reduction Act

This final rule contains collection of information requirements. Under paragraph (l)(6), employers are required to prepare a certification record whenever an operator has received training or has been evaluated. The certification record includes the name of the operator, the date of the training or evaluation, and the identity of the person(s) who performed the training or evaluation. Paragraph (l)(3) requires initial training and evaluation; paragraph (l)(4) establishes conditions requiring refresher training and evaluation and periodic evaluations (once every three years); and paragraph (l)(5) requires the employer to evaluate the adequacy of previous training. A certification record must be prepared whenever one of these activities occurs.

OMB submitted comments on the proposed collections of information (paperwork) (Exs. L–39, L–40) for powered industrial truck operator training. OMB's concerns focused on the burden associated with some elements of operator training, the need for annual evaluations, and the need for comprehensive certification requirements contained in the proposed rules. The final rule addresses OMB's concerns and greatly reduces information collection burdens, as discussed below.

OSHA received 109 written comments on the proposed rule, along with testimony from 22 participants at the public hearings. There was significant opposition to the paperwork burdens associated with the proposed standard. Some indicated that the proposed requirements were too extensive. Others believed that they were a necessary tool to make the training program effective. Based on its review of this information, OSHA has made several changes that substantially reduce both the amount and the frequency of information collection, but retain the minimum necessary for an effective training program. First, OSHA has determined that the proposed annual evaluation of operators should be changed to triennial evaluation. Second, the Agency has eliminated the initial evaluation of employees to determine their training needs, and added an evaluation of the employee's performance after receiving training. Third, OSHA has removed the proposed requirement for employers to sign training and evaluation records. Finally, OSHA has eliminated the proposed requirement for the employer to retain training materials. Section VIII of this Preamble discusses at length the record evidence on these provisions and other issues relating to information collection.

In summary, OSHA estimates that there are 1,540,315 operators of powered industrial trucks in the industries covered by this final rule. A total of 759,571 hours will be needed for employers to comply with the information collection requirements for training and evaluation of these employees in the first year, and 543,860 hours in each subsequent year. These estimates are based on information in OSHA's Final Economic Analysis for the final rule.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), OSHA requested OMB approval of the collection of information requirement described above. On November 18, 1998, the Office of Management and Budget granted approval of the information requirements under Office of Management and Budget Control Number 1218–0242.

XIII. State Plan Standards

The 25 States with their own OSHA-approved occupational safety and health plans must adopt comparable standards within six months of the publication date of this final standard. These States are: Alaska, Arizona, California, Connecticut (for State and local government employees only), Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, New York (for State and local government employees only), North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming. Until such time as a State standard is promulgated, Federal OSHA will provide interim enforcement assistance, as appropriate, in those States.

XIV. Federalism and Children's Executive Order

These regulations have been reviewed in accordance with Executive Order 12875 (52 FR 58093, Oct. 28, 1993) regarding Federalism. The orders require that agencies, to the extent possible, refrain from limiting state policy options, consult with states prior to taking any actions which would restrict state policy options, and take such actions only when there is clear constitutional authority and the presence of a problem of national scope. The Order provides for preemption of state law only if there is a clear Congressional intent for the Agency to do so. Any such preemption is to be limited to the extent possible.

In accordance with Executive Order 13045, OSHA has evaluated the environmental safety and health effects of the rule on children. The Agency has determined that the final rule will have no effect on children.

Section 18 of the Occupational Safety and Health Act (OSH Act) expresses Congress' intent to preempt State laws relating to issues on which Federal OSHA has promulgated occupational safety and health standards. Under the OSH Act, a State can avoid preemption on issues covered by Federal standards only if it submits, and obtains Federal approval of, a plan for the development of such standards and their enforcement. Occupational safety and health standards developed by such Plan States must, among other things, be at least as effective in providing safe and healthful employment and places of employment as the Federal standards. When such standards are applicable to products distributed or used in interstate commerce, they may not unduly burden commerce and must be justified by compelling local conditions.

The Federal standard on powered industrial truck operator training addresses hazards that are not unique to any one State or region of the country. Nonetheless, States with occupational safety and health plans approved under section 18 of the OSH Act will be able to develop their own State standards to deal with any special problems that might be encountered in a particular State. Moreover, because this standard is written in general, performance-oriented terms, there is considerable flexibility for State Plans to require, and

for affected employers to use, methods of compliance that are appropriate to the working conditions covered by these standards.

In brief, these rules address a clear national problem related to occupational safety and health in general industry, construction, shipyard, and the marine cargo-handling industries. Those states that have elected to participate under section 18 of the OSH Act are not preempted by these standards, and will be able to address any special conditions within the framework of the Federal Act while ensuring that the State standards are at least as effective as the Federal standard.

XV. List of Subjects

29 CFR part 1910

Motor vehicle safety, Occupational safety and health, Transportation.

29 CFR part 1915

Shipyards industry, Motor vehicle safety, Occupational safety and health, Transportation.

29 CFR part 1917

Marine terminals, Motor vehicle safety, Occupational safety and health, Vessels.

29 CFR part 1918

Longshoring, Motor vehicle safety, Occupational safety and health, Vessels.

29 CFR part 1926

Construction industry, Motor vehicle safety, Occupational safety and health, Transportation.

XVI. Authority

This document was prepared under the direction of Charles N. Jeffress, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

Accordingly, pursuant to sections 4, 6(b), 8(c), and 8(g) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), section 107 of the Construction Work Hours and Safety Act (Construction Safety Act) (40 U.S.C. 333), section 41 of the Longshore and Harbor Workers Compensation Act (33 U.S.C. 941), Secretary of Labor's Order 6–96 (62 FR 111), and 29 CFR part 1911, 29 CFR parts 1910, 1915, 1917, 1918, and 1926 are amended as set forth below.

Signed at Washington, DC, this 17th day of November, 1998.

Charles N. Jeffress,

Assistant Secretary of Labor.

PART 1910—OCCUPATIONAL SAFETY AND HEALTH STANDARDS [AMENDED]

1. The authority citation for subpart B of part 1910 continues to read as follows:

Authority: Secs. 4, 6, and 8 of the Occupational Safety and Health Act, 29 U.S.C. 653, 655, 657; Walsh-Healey Act, 41 U.S.C. 35 et seq.; Service Contract Act of 1965, 41 U.S.C. 351 et seq.; Sec. 107, Contract Work Hours and Safety Standards Act (Construction Safety Act), 40 U.S.C. 333; Sec. 41, Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 941; National Foundation of Arts and Humanities Act, 20 U.S.C. 951 et seq.; Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), or 6–96 (62 FR 111), as applicable; and 29 CFR Part 1911.

2. Section 1910.16 is amended by adding new paragraphs (a)(2)(x) and (b)(2)(xiv), by removing the word ''and'' from the end of paragraph (b)(2)(xii) and by removing the period at the end of paragraph (b)(2)(xiii)(D) and adding in its place a semicolon and the word ''and'' as follows:

§ 1910.16 Longshoring and marine terminals.

(a) * * *

(2) * * *

(x) Powered industrial truck operator training, Subpart N, § 1910.178(l).

(b) * * *

(2) * * *

(xiv) Powered industrial truck operator training, Subpart N, § 1910.178(l).

* * * * *

3. The authority citation for subpart N of part 1910 is revised to read as follows:

Authority: Secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033) or 6–96 (62 FR 111), as applicable.

Sections 1910.176, 1910.177, 1910.178, 1910.179, 1910.180, 1910.181, and 1910.184 also issued under 29 CFR part 1911.

4. Section 1910.178 is amended by revising paragraph (l) and by adding Appendix A at the end of the section to read as follows:

§ 1910.178 Powered industrial trucks.

* * * * *

(l) Operator training.

(1) *Safe operation.* (i) The employer shall ensure that each powered industrial truck operator is competent to operate a powered industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in this paragraph (l).

(ii) Prior to permitting an employee to operate a powered industrial truck (except for training purposes), the employer shall ensure that each operator has successfully completed the training required by this paragraph (l), except as permitted by paragraph (l)(5).

(2) *Training program implementation.* (i) Trainees may operate a powered industrial truck only:

(A) Under the direct supervision of persons who have the knowledge, training, and experience to train operators and evaluate their competence; and

(B) Where such operation does not endanger the trainee or other employees.

(ii) Training shall consist of a combination of formal instruction (e.g., lecture, discussion, interactive computer learning, video tape, written material), practical training (demonstrations performed by the trainer and practical exercises performed by the trainee), and evaluation of the operator's performance in the workplace.

(iii) All operator training and evaluation shall be conducted by persons who have the knowledge, training, and experience to train powered industrial truck operators and evaluate their competence.

(3) *Training program content.* Powered industrial truck operators shall receive initial training in the following topics, except in topics which the employer can demonstrate are not applicable to safe operation of the truck in the employer's workplace.

(i) Truck-related topics:

(A) Operating instructions, warnings, and precautions for the types of truck the operator will be authorized to operate;

(B) Differences between the truck and the automobile;

(C) Truck controls and instrumentation: where they are located, what they do, and how they work;

(D) Engine or motor operation;

(E) Steering and maneuvering;

(F) Visibility (including restrictions due to loading);

(G) Fork and attachment adaptation, operation, and use limitations;

(H) Vehicle capacity;

(I) Vehicle stability;

(J) Any vehicle inspection and maintenance that the operator will be required to perform;

(K) Refueling and/or charging and recharging of batteries;

(L) Operating limitations;

(M) Any other operating instructions, warnings, or precautions listed in the operator's manual for the types of vehicle that the employee is being trained to operate.

(ii) Workplace-related topics:

(A) Surface conditions where the vehicle will be operated;

(B) Composition of loads to be carried and load stability;

(C) Load manipulation, stacking, and unstacking;

(D) Pedestrian traffic in areas where the vehicle will be operated;

(E) Narrow aisles and other restricted places where the vehicle will be operated;

(F) Hazardous (classified) locations where the vehicle will be operated;

(G) Ramps and other sloped surfaces that could affect the vehicle's stability;

(H) Closed environments and other areas where insufficient ventilation or poor vehicle maintenance could cause a buildup of carbon monoxide or diesel exhaust;

(I) Other unique or potentially hazardous environmental conditions in the workplace that could affect safe operation.

(iii) The requirements of this section.

(4) *Refresher training and evaluation.* (i) Refresher training, including an evaluation of the effectiveness of that training, shall be conducted as required by paragraph (l)(4)(ii) to ensure that the operator has the knowledge and skills needed to operate the powered industrial truck safely.

(ii) Refresher training in relevant topics shall be provided to the operator when:

(A) The operator has been observed to operate the vehicle in an unsafe manner;

(B) The operator has been involved in an accident or near-miss incident;

(C) The operator has received an evaluation that reveals that the operator is not operating the truck safely;

(D) The operator is assigned to drive a different type of truck; or

(E) A condition in the workplace changes in a manner that could affect safe operation of the truck.

(iii) An evaluation of each powered industrial truck operator's performance shall be conducted at least once every three years.

(5) *Avoidance of duplicative training.* If an operator has previously received training in a topic specified in paragraph (l)(3) of this section, and such training is appropriate to the truck and working conditions encountered, additional training in that topic is not required if the operator has been evaluated and found competent to operate the truck safely.

(6) *Certification.* The employer shall certify that each operator has been trained and evaluated as required by this paragraph (l). The certification shall include the name of the operator, the date of the training, the date of the evaluation, and the identity of the person(s) performing the training or evaluation.

(7) *Dates.* The employer shall ensure that operators of powered industrial trucks are trained, as appropriate, by the dates shown in the following table.

If the employee was hired:	The initial training and evaluation of that employee must be completed:
Before December 1, 1999	By December 1, 1999.
After December 1, 1999	Before the employee is assigned to operate a powered industrial truck.

(8) Appendix A to this section provides non-mandatory guidance to assist employers in implementing this paragraph (l). This appendix does not add to, alter, or reduce the requirements of this section.

* * * * *

Appendix A—Stability of Powered Industrial Trucks (Non-mandatory Appendix to Paragraph (l) of This Section)

A–1. Definitions.

The following definitions help to explain the principle of stability:

Center of gravity is the point on an object at which all of the object's weight is concentrated. For symmetrical loads, the center of gravity is at the middle of the load.

Counterweight is the weight that is built into the truck's basic structure and is used to offset the load's weight and to maximize the vehicle's resistance to tipping over.

Fulcrum is the truck's axis of rotation when it tips over.

Grade is the slope of a surface, which is usually measured as the number of feet of rise or fall over a hundred foot horizontal distance (the slope is expressed as a percent).

Lateral stability is a truck's resistance to overturning sideways.

Line of action is an imaginary vertical line through an object's center of gravity.

Load center is the horizontal distance from the load's edge (or the fork's or other attachment's vertical face) to the line of action through the load's center of gravity.

Longitudinal stability is the truck's resistance to overturning forward or rearward.

Moment is the product of the object's weight times the distance from a fixed point (usually the fulcrum). In the case of a powered industrial truck, the distance is measured from the point at which the truck will tip over to the object's line of action. The distance is always measured perpendicular to the line of action.

Track is the distance between the wheels on the same axle of the truck.

Wheelbase is the distance between the centerline of the vehicle's front and rear wheels.

A–2. *General.*

A–2.1. Determining the stability of a powered industrial truck is simple once a few basic principles are understood. There are many factors that contribute to a vehicle's stability: the vehicle's wheelbase, track, and height; the load's weight distribution; and the vehicle's counterweight location (if the vehicle is so equipped).

A–2.2. The ''stability triangle,'' used in most stability discussions, demonstrates stability simply.

A–3. *Basic Principles.*

A–3.1. Whether an object is stable depends on the object's moment at one end of a system being greater than, equal to, or smaller than the object's moment at the system's other end. This principle can be seen in the way a see-saw or teeter-totter works: that is, if the product of the load and distance from the fulcrum (moment) is equal to the moment at the device's other end, the device is balanced and it will not move. However, if there is a greater moment at one end of the device, the device will try to move downward at the end with the greater moment.

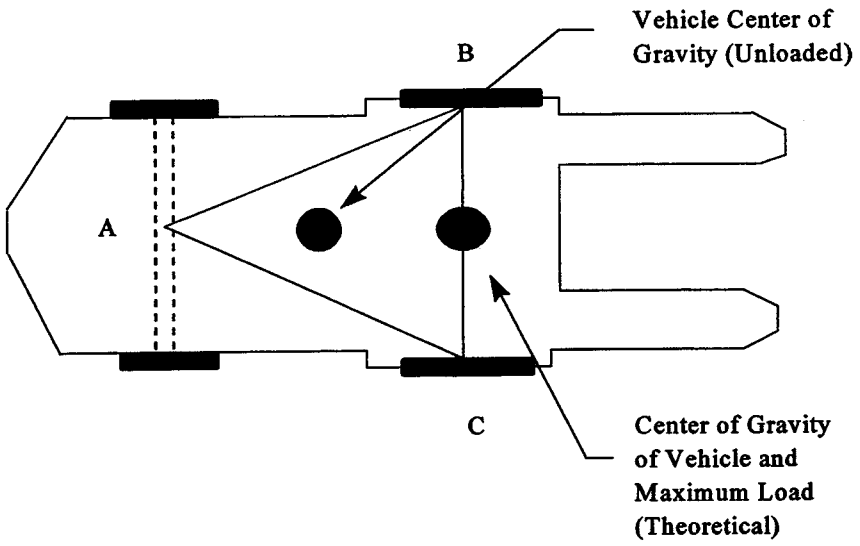
A–3.2. The longitudinal stability of a counterbalanced powered industrial truck depends on the vehicle's moment and the load's moment. In other words, if the mathematic product of the load moment (the distance from the front wheels, the approximate point at which the vehicle would tip forward) to the load's center of gravity times the load's weight is less than the vehicle's moment, the system is balanced and will not tip forward. However, if the load's moment is greater than the vehicle's moment, the greater load-moment will force the truck to tip forward.

A–4. *The Stability Triangle.*

A–4.1. Almost all counterbalanced powered industrial trucks have a three-point suspension system, that is, the vehicle is supported at three points. This is true even if the vehicle has four wheels. The truck's steer axle is attached to the truck by a pivot pin in the axle's center. When the points are connected with imaginary lines, this three-point support forms a triangle called the stability triangle. Figure 1 depicts the stability triangle.

BILLING CODE 4510–26–P

Figure 1.

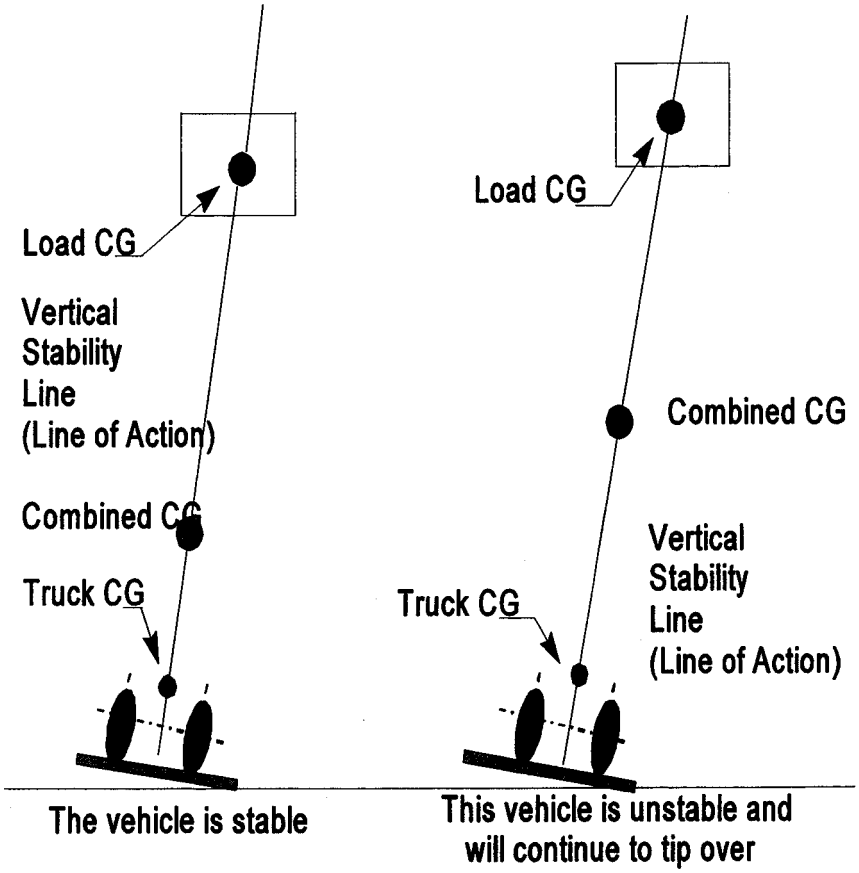


Notes:

1. **When the vehicle is loaded, the combined center of gravity (CG) shifts toward line B-C. Theoretically the maximum load will result in the CG at the line B-C. In actual practice, the combined CG should never be at line B-C.**
2. **The addition of additional counterweight will cause the truck CG to shift toward point A and result in a truck that is less stable laterally.**

A–4.2. When the vehicle's line of action, or load center, falls within the stability triangle, the vehicle is stable and will not tip over. However, when the vehicle's line of action or the vehicle/load combination falls outside the stability triangle, the vehicle is unstable and may tip over. (See Figure 2.)

Figure 2.



BILLING CODE 4510–26–C

A–5. *Longitudinal Stability.*

A–5.1. The axis of rotation when a truck tips forward is the front wheels' points of contact with the pavement. When a powered industrial truck tips forward, the truck will rotate about this line. When a truck is stable, the vehicle-moment must exceed the load-moment. As long as the vehicle-moment is equal to or exceeds the load-moment, the vehicle will not tip over. On the other hand, if the load moment slightly exceeds the vehicle-moment, the truck will begin to tip forward, thereby causing the rear to lose contact with the floor or ground and resulting in loss of steering control. If the load-moment greatly exceeds the vehicle moment, the truck will tip forward.

A–5.2. To determine the maximum safe load-moment, the truck manufacturer normally rates the truck at a maximum load at a given distance from the front face of the forks. The specified distance from the front face of the forks to the line of action of the load is commonly called the load center. Because larger trucks normally handle loads that are physically larger, these vehicles have greater load centers. Trucks with a capacity of 30,000 pounds or less are normally rated at a given load weight at a 24-inch load center. Trucks with a capacity greater than 30,000 pounds are normally rated at a given load weight at a 36- or 48-inch load center. To safely operate the vehicle, the operator should always check the data plate to determine the maximum allowable weight at the rated load center.

A–5.3. Although the true load-moment distance is measured from the front wheels, this distance is greater than the distance from the front face of the forks. Calculating the maximum allowable load-moment using the load-center distance always provides a lower load-moment than the truck was designed to handle. When handling unusual loads, such as those that are larger than 48 inches long (the center of gravity is greater than 24 inches) or that have an offset center of gravity, etc., a maximum allowable load-moment should be calculated and used to determine whether a load can be safely handled. For example, if an operator is operating a 3000 pound capacity truck (with a 24-inch load center), the maximum allowable load-moment is 72,000 inch-pounds (3,000 times 24). If a load is 60 inches long (30-inch load center), then the maximum that this load can weigh is 2,400 pounds (72,000 divided by 30).

A–6. *Lateral Stability.*

A–6.1. The vehicle's lateral stability is determined by the line of action's position (a vertical line that passes through the combined vehicle's and load's center of gravity) relative to the stability triangle. When the vehicle is not loaded, the truck's center of gravity location is the only factor to be considered in determining the truck's stability. As long as the line of action of the combined vehicle's and load's center of gravity falls within the stability triangle, the truck is stable and will not tip over. However, if the line of action falls outside the stability triangle, the truck is not stable and may tip over. Refer to Figure 2.

A–6.2. Factors that affect the vehicle's lateral stability include the load's placement on the truck, the height of the load above the surface on which the vehicle is operating, and the vehicle's degree of lean.

A–7. *Dynamic Stability.*

A–7.1. Up to this point, the stability of a powered industrial truck has been discussed without considering the dynamic forces that result when the vehicle and load are put into motion. The weight's transfer and the resultant shift in the center of gravity due to the dynamic forces created when the machine is moving, braking, cornering, lifting, tilting, and lowering loads, etc., are important stability considerations.

A–7.2. When determining whether a load can be safely handled, the operator should exercise extra caution when handling loads that cause the vehicle to approach its maximum design characteristics. For example, if an operator must handle a maximum load, the load should be carried at the lowest position possible, the truck should be accelerated slowly and evenly, and the forks should be tilted forward cautiously. However, no precise rules can be formulated to cover all of these eventualities.

PART 1915—OCCUPATIONAL SAFETY AND HEALTH STANDARDS FOR SHIPYARD EMPLOYMENT [AMENDED]

1. The authority citation for part 1915 is revised to read as follows:

Authority: Section 41, Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941); secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), or 6–96 (62 FR 111), as applicable.

Sections 1915.120 and 1915.152 also issued under 29 CFR 1911.

2. A new § 1915.120 is added to subpart G to read as follows:

§ 1915.120 Powered Industrial Truck Operator Training

Note: The requirements applicable to shipyard employment under this section are identical to those set forth at § 1910.178(l) of this chapter.

PART 1917—MARINE TERMINALS [AMENDED]

1. The authority citation for part 1917 continues to read as follows:

Authority: Section 41, Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941); Secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), or 6–96 (62 FR 111), as applicable; and 29 CFR Part 1911.

Section 1917.28 also issued under 5 USC 553.

Subpart A—Scope and Definitions

2. Section 1917.1 is amended by adding a new paragraph (a)(2)(xiv), by removing the word ''and'' from the end of paragraph (a)(2)(xii) and by removing the period at the end of paragraph (a)(2)(xiii)(D), and adding in its place a semicolon and the word ''and'' as follows:

§ 1917.1 Scope and applicability.

(a) * * *

(2) * * *

(xiv) Powered industrial truck operator training, Subpart N, § 1910.178(l).

* * * * *

PART 1918—SAFETY AND HEALTH REGULATIONS FOR LONGSHORING [AMENDED]

1. The authority citation for part 1918 is revised to read as follows:

Authority: Section 4, 6, and 8 of the Occupational Safety and Health Act of 1970, 29 U.S.C. 653, 655, 657; Walsh-Healey Act, 41 U.S.C. 35 et seq.; Service Contract Act of 1965, 41 U.S.C. 351 et seq.; Sec. 107, Contract Work Hours and Safety Standards Act (Construction Safety Act), 40 U.S.C. 333; Sec. 41 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 941; National Foundation of Arts and Humanities Act, 20 U.S.C. 951 et seq.; Secretary of Labor's Order No. 6–96 (62 FR 111); and 29 CFR part 1911.

Subpart A—Scope and Definitions

2. Section 1918.1 is amended by adding a new paragraph (b)(10), by removing the word ''and'' from the end of paragraph (b)(8) and by removing the period from the end of paragraph (b)(9)(iv) and adding in its place a semicolon and the word ''and'' as follows:

§ 1918.1 Scope and application

* * * * *

(b) * * *

(10) Powered industrial truck operator training, Subpart N, § 1910.178(l).

PART 1926—OCCUPATIONAL SAFETY AND HEALTH STANDARDS FOR CONSTRUCTION [AMENDED]

1. The authority citation for subpart O of part 1926 is revised to read as follows:

Authority: Section 107, Construction Work Hours and Safety Standards Act (Construction Safety Act) (40 U.S.C. 333); Secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), or 6–96 (62 FR 111), as applicable. Section 1926.602 also issued under 29 CFR part 1911.

2. Section 1926.602 is amended by adding a new paragraph (d) to read as follows:

§ 1926.602 Material Handling Equipment [Amended]

* * * * *

(d) *Powered industrial truck operator training.*

Note: The requirements applicable to construction work under this paragraph are identical to those set forth at § 1910.178(l) of this chapter.

* * * * *

[FR Doc. 98–31283 Filed 11–30–98; 8:45 am]

BILLING CODE 4510–26–P

federal register

Tuesday
December 1, 1998

Part III

Federal Deposit Insurance Corporation

12 CFR Parts 303, 337, and 362

Activities of Insured State Banks and Insured Savings Associations; Proposed and Final Rules

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 303, 337 and 362

RIN 3064–AC12

Activities of Insured State Banks and Insured Savings Associations

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: As part of the FDIC's systematic review of its regulations and written policies under section 303(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (CDRI), the FDIC has revised and consolidated its rules and regulations governing activities and investments of insured state banks and insured savings associations. The rule implements sections 24, 28, and 18(m) of the Federal Deposit Insurance Act, and also establishes certain safety and soundness standards pursuant to the FDIC's authority under section 8. The FDIC's final rule establishes a number of new exceptions and allows institutions to conduct certain activities after providing the FDIC with notice rather than filing an application. Subject to appropriate separations and limitations, the activities that may be conducted through a majority-owned subsidiary under these expedited notice processing criteria are real estate investment and securities underwriting. The FDIC combined its regulations governing the activities and investments of insured state banks with those governing insured savings associations. In addition, the FDIC's final rule updates its regulations governing the safety and soundness of securities activities of subsidiaries and affiliates of insured state nonmember banks. The FDIC's final rule modernizes this group of regulations and harmonizes the provisions governing activities that are not permissible for national banks with those governing the securities underwriting and distribution activities of subsidiaries of state nonmember banks. The FDIC's final rule makes a number of substantive changes and amends the regulations by deleting obsolete provisions, rewriting the regulatory text to make it more readable, conforming the treatment of state banks and savings associations to the extent possible given the underlying statutory and regulatory scheme governing the different charters. The FDIC's final rule also conforms most of the disclosures required under the current regulation to the Interagency Statement on the Retail Sale of Nondeposit Investment Products.

EFFECTIVE DATE: January 1, 1999.

FOR FURTHER INFORMATION CONTACT: Curtis Vaughn, Examination Specialist, (202/898–6759), Division of Supervision; Linda L. Stamp, Counsel, (202/898–7310) or Jamey Basham, Counsel, (202/898–7265), Legal Division, FDIC, 550 17th Street, N.W., Washington, D.C. 20429.

SUPPLEMENTARY INFORMATION:

I. Background

Section 303 of the Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA) required that the FDIC review its regulations for the purpose of streamlining those regulations, reducing any unnecessary costs and eliminating unwarranted constraints on credit availability while faithfully implementing statutory requirements. Pursuant to that statutory direction, the FDIC reviewed part 362 ''Activities and Investments of Insured State Banks,'' subpart G of Part 303, effective October 1, 1998, (formerly § 303.13) ''Filings by Savings Associations'', and § 337.4 ''Securities Activities of Subsidiaries of Insured State Banks: Bank Transactions with Affiliated Securities Companies'', and proposed making a number of changes to those regulations. That proposal is found in the September 12, 1997, issue of the **Federal Register** at 62 FR 47969.

The FDIC's final rule restructures existing part 362, placing the substance of the text of the current regulation into new subpart A. Subpart A addresses the Activities of Insured State Banks implementing section 24 of the Federal Deposit Insurance Act (FDI Act). 12 U.S.C. 1831a. Section 24 restricts and prohibits insured state banks and their subsidiaries from engaging in activities and investments of a type that are not permissible for national banks and their subsidiaries. Through this new final rule, the FDIC introduces a new streamlined notice processing concept for insured state nonmember banks that want to engage in certain activities that are impermissible for national banks and their subsidiaries.

Due to the experience that the FDIC has gained in reviewing applications from insured state nonmember banks since the enactment of section 24, the FDIC has standardized the eligibility criteria and conditions for two activities. This mechanism gives insured state nonmember banks a level of certainty that has been lacking for banks that want to diversify their earnings and maintain their competitiveness by investing in subsidiaries that engage in activities not permissible for national banks. This framework sets forth the eligibility criteria and conditions for majority-owned subsidiaries of insured state nonmember banks to engage in real estate investment and securities underwriting. This framework allows insured state nonmember banks to proceed with their business plans in these areas with relative certainty that the FDIC will consent to the execution of their plans and with assurance that consent will be forthcoming on a predictable schedule. This framework allows the insured state nonmember banks to be creative and innovative in their business plan within the structure appropriate to the activities being undertaken. The FDIC hopes that this rule will assist the insured state nonmember banks as they progress into the competitive financial environment of the 21st century in which they operate their business.

The FDIC's final rule moves the part of the FDIC's regulations governing securities underwriting not permissible for national banks (currently at 12 CFR 337.4) into subpart A of part 362. Although the proposal contemplated that the entire regulation, Securities Activities of Insured State Nonmember Banks, found in § 337.4 of this chapter would be removed and reserved, we have postponed that action while redeveloping some of the safety and soundness criteria that govern insured state bank subsidiaries that engage in the public sale, distribution or underwriting of securities and other activities that are not permissible for a national bank but that are permissible for national bank subsidiaries. The redeveloped regulatory language that will amend subpart B of this regulation is published as a proposed rule elsewhere in this issue of the **Federal Register** for further public comment. During the period that § 337.4 still exists, where activities are covered by both § 337.4 and this final rule, we have provided relief from the requirements of § 337.4 in this rulemaking.

For those activities that were covered under § 337.4 and are now covered under this part 362, we have attempted to modernize the regulations governing those activities by updating the requirements, revising the regulations by deleting obsolete provisions, rewriting the regulatory text to make it more readable, removing a number of the obsolete current restrictions on those activities, and removing the disclosures required under the current regulation.

Safety and Soundness Rules Governing Insured State Nonmember Banks is found in the new subpart B. Subpart B establishes modern standards for insured state nonmember banks to conduct real estate investment activities through a subsidiary, and for those insured state nonmember banks that are not affiliated with a bank holding company (nonbank banks), to conduct securities activities in an affiliated organization. The existing restrictions on these securities activities are found in § 337.4 of this chapter.

Subpart G of part 303, effective October 1, 1998, (formerly § 303.13) of this chapter which relates to activities and filings by savings associations is revised in a number of ways. First, the substantive portions applicable to state savings associations of subpart G are placed in new subpart C of part 362. The substantive requirements applicable to all savings associations when Acquiring, Establishing, or Conducting New Activities through a Subsidiary are moved to new subpart D.

In the proposal, subpart E contained the revised application and notice procedures as well as delegations of authority for insured state banks, and subpart F contained the revised application and notice procedures as well as delegations of authority for insured savings associations. On a parallel track, the FDIC has completed its revision of part 303 of the FDIC's rules and regulations. Part 303 contains substantially all of the FDIC's applications procedures and delegations of authority. Subparts G and H of part 303 were designated as the place where the text of subparts E and F of our proposed rule would be located. As a part of the part 303 review process and for ease of reference, the FDIC is removing the applications procedures relating to activities and investments of insured state banks from part 362 and placing them in subpart G of part 303. The procedures applicable to insured savings associations are consolidated in subpart H of part 303. These subparts are published as an amendment to part 303 as a part of this final regulation.

Part 362 of the FDIC's regulations implements the provisions of section 24 of the FDI Act. Section 24 was added to the FDI Act by the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA). With certain exceptions, section 24 limits the direct equity investments of state chartered insured banks to equity investments of a type permissible for national banks. Section 24 prohibits an insured state bank from directly, or indirectly through a subsidiary, engaging as principal in any activity that is not permissible for a national bank unless the bank meets its capital requirements and the FDIC determines that the activity will not pose a significant risk to the appropriate deposit insurance fund. In addition, section 24 prohibits the subsidiary of an insured state bank from directly or indirectly engaging as principal in any activity that is not permissible for a national bank subsidiary unless the bank meets its capital requirements and the FDIC determines that the activity will not pose a significant risk to the appropriate deposit insurance fund. The FDIC may make such determinations by regulation or order. The statute requires institutions that held equity investments not conforming to the new requirements to divest no later than December 19, 1996. The statute also requires that banks file certain notices with the FDIC concerning grandfathered investments.

Part 362 was adopted in two stages. The provisions of the current regulation concerning equity investments appeared in the **Federal Register** on November 9, 1992, at 57 FR 53234. The provisions of the current regulation concerning activities of insured state banks and their majority-owned subsidiaries appeared in the **Federal Register** on December 8, 1993, at 58 FR 64455.

Subpart G of Part 303, effective October 1, 1998, (formerly § 303.13) of the FDIC's regulations (12 CFR 303.140) implements FDI Act sections 28 (12 U.S.C. 1831e) and 18(m) (12 U.S.C. 1828(m)). Both sections were added to the FDI Act by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). While section 28 of the FDI Act and section 24 of the FDI Act are similar, there are a number of fundamental differences between the two provisions which caused the implementing regulations to differ in some respects.

Section 18(m) of the FDI Act requires state and federal savings associations to provide the FDIC with notice 30 days before establishing or acquiring a subsidiary or engaging in any new activity through a subsidiary. Section 28 governs the activities and equity investments of state savings associations and provides that no state savings association may engage as principal in any activity of a type or in an amount that is impermissible for a federal savings association unless the FDIC determines that the activity will not pose a significant risk to the affected deposit insurance fund and the savings association is in compliance with the fully phased-in capital requirements prescribed under section 5(t) of the Home Owners' Loan Act (12 U.S.C. 1464(t)) (HOLA). Except for its investment in service corporations, a state savings association is prohibited from acquiring or retaining any equity investment that is not permissible for a federal savings association. A state savings association may acquire or retain an investment in a service corporation of a type or in an amount not permissible for a federal savings association if the FDIC determines that neither the amount invested in the service corporation nor the activities of the service corporation pose a significant risk to the affected deposit insurance fund and the savings association continues to meet the fully phased-in capital requirements. A savings association was required to divest itself of prohibited equity investments no later than July 1, 1994. Section 28 also prohibits state and federal savings associations from acquiring any corporate debt security that is not of investment grade (commonly known as ''junk bonds'').

Section 303.13 of the FDIC's regulations was adopted as an interim final rule on December 29, 1989 (54 FR 53548). The FDIC revised the rule after reviewing the comments and the regulation as adopted appeared in the **Federal Register** on September 17, 1990 (55 FR 38042). The regulation established application and notice procedures governing requests by a state savings association to directly, or through a service corporation, engage in activities that are not permissible for a federal savings association; the intent of a state savings association to engage in permissible activities in an amount exceeding that permissible for a federal savings association; or the intent of a state savings association to divest corporate debt securities not of investment grade. The regulation also established procedures to give prior notice for the establishment or acquisition of a subsidiary or the conduct of new activities through a subsidiary. Section 303.13 was recently moved with stylistic, but not substantive changes, to subpart G of part 303, effective October 1, 1998 of the FDIC's regulations.

Section 337.4 of the FDIC's regulations (12 CFR 337.4) governs securities activities of subsidiaries of insured state nonmember banks as well as transactions between insured state nonmember banks and their securities subsidiaries and affiliates. The regulation was adopted in 1984 (49 FR 46723) and is designed to promote the safety and soundness of insured state nonmember banks that have subsidiaries which engage in securities activities, including activities that are impermissible for banks directly under section 16 of the Banking Act of 1933

(12 U.S.C. section 24 (seventh)), commonly known as the Glass-Steagall Act. For those subsidiaries that engage in underwriting activities that are prohibited for a bank, the regulation requires that these subsidiaries qualify as bona fide subsidiaries, establishes transaction restrictions between a bank and its subsidiaries or other affiliates that engage in such securities activities, requires that an insured state nonmember bank give prior notice to the FDIC before establishing or acquiring any securities subsidiary, requires that disclosures be provided to securities customers in certain instances, and requires that a bank's investment in such a securities subsidiary be deducted from the bank's capital.

On August 23, 1996, the FDIC published a notice of proposed rulemaking (61 FR 43486, August 23, 1996) (August 1996 proposed rule) to amend part 362. Under that proposed rule, a notice procedure would have replaced the application currently required in the case of real estate, life insurance, and annuity investment activities provided certain conditions and restrictions were met. The proposed rule set forth notice processing procedures for real estate, life insurance policies, and annuity contract investments for well-capitalized, well-managed insured state banks. While the August 1996 proposed rule would have amended existing part 362, this new final rule replaces existing part 362.

After considering the comments to the August 1996 proposed rule and reconsidering the issues underlying the current regulation, the FDIC withdrew that proposed rule in favor of the more comprehensive approach presently adopted. One major change was the elimination of a life insurance policy and annuity contract investment notice due to intervening guidance provided by the Office of the Comptroller of the Currency (OCC) that appears to eliminate the necessity for an application with respect to virtually all of the life insurance and annuity investments received by the FDIC in the past. While section 24 and the part 362 application process would continue to apply to those life insurance and annuity investments which are impermissible for national banks, the FDIC has decided that there is no need to adopt a notice process that specifically addresses what we expect to be an extremely small number of situations.

II. Description of the Final Rule

The FDIC divided part 362 into four subparts and changed some of the structure of the rule. Generally, we moved substantive aspects of the regulation that were formerly found in the definitions of terms like ''bona fide subsidiary'' to the applicable regulation text. This reorganization should assist the reader in understanding and applying the regulation. Next we deleted most of the provisions relating to divesture because we found them to be unnecessary due to the passage of time. Third, we combined the rules covering the equity investments of banks and savings associations into part 362 to regulate these investments as consistently as possible given the limitations imposed by the different statutes that govern each kind of insured institution. Finally, although the FDIC agrees with the principles applicable to transactions between insured depository institutions and its affiliates contained in sections 23A and 23B of the Federal Reserve Act (12 U.S.C. 371c and 371c–1), our experience over the last five years in applying section 24 has led us to conclude that extending 23A and 23B by reference to bank subsidiaries is inadvisable. For that reason, the final regulation does not incorporate sections 23A and 23B of the Federal Reserve Act by cross-reference; rather, the regulation adapts similar principles to those set forth in sections 23A and 23B to the bank/subsidiary relationship as appropriate. In drafting the final rule, we have considered each of the requirements contained in sections 23A and 23B in the context of transactions between an insured institution and its subsidiary and refined the restrictions appropriately. We are comfortable that this approach strikes a better balance between caution and commercial reality by harmonizing the capital deductions and the principles of 23A and 23B.

Subpart A of the final rule deals with the activities and investments of insured state banks. Except for those sections pertaining to the applications, notices and related delegations of authority (procedural provisions), existing part 362 essentially becomes subpart A under the current proposal. The procedural provisions of existing part 362 have been transferred to subpart G of part 303. Subpart A addresses the activities of insured state banks in § 362.3. The activities carried on in subsidiaries of insured state banks are addressed separately in § 362.4.

Under a safety and soundness standard, subpart B of the final regulation requires subsidiaries of insured state *nonmember* banks engaged in certain activities to meet the standards established by the FDIC, even if the OCC determines that those activities are permissible for a national bank subsidiary. The FDIC has determined that real estate investment activities may pose significant risks to the deposit insurance funds. For that reason, the FDIC established standards that an insured state nonmember bank must meet before engaging in real estate investment activities that are not permissible for a national bank, even if they are permissible for the subsidiary of a national bank.

Subpart B also establishes modern standards for insured state nonmember banks to govern transactions between those insured state nonmember banks that are not affiliated with a bank holding company (nonbank banks) and affiliated organizations conducting securities activities. The existing restrictions on these securities activities are found in § 337.4 of this chapter. The new rule only covers those entities not covered by orders issued by the Board of Governors of the Federal Reserve System (FRB) governing the securities activities of those banks that are affiliated with a bank holding company or a member bank.

In addition, subpart B prohibits an insured state nonmember bank not affiliated with a company that is treated as a bank holding company (see section 4(f) of the Bank Holding Company Act, 12 U.S.C. 1843(f)), from becoming affiliated with a company that directly engages in the underwriting of securities not permissible for a bank itself unless the standards established under the proposed regulation are met.

Subpart C of the final rule concerns the activities and investments of insured state savings associations. The substantive provisions applicable to activities of savings associations currently appearing in subpart G of part 303, effective October 1, 1998, (formerly § 303.13) would be revised in a number of ways and placed in new subpart C. To the extent possible, activities and investments of insured state savings associations are treated consistently with the treatment accorded insured state banks. Thus, we revised a number of definitions currently contained in subpart G of part 303 to track the definitions used in subpart A of part 362.

Subpart D of the final rule requires that an insured savings association provide a 30-day notice to the FDIC whenever the institution establishes or acquires a subsidiary or conducts a new activity through a subsidiary. This provision does not alter the notice required by statute and current subpart G of part 303. We moved this requirement to a new subpart to accommodate Federally chartered savings associations by limiting the

amount of regulation text they would have to read to learn how to comply with this statutory notice.

III. Comment Summary

The FDIC received 129 comments in response to the proposed regulation. The overall comments generally favored the FDIC's approach to streamlining the consent process for banks and savings associations to engage in activities using standardized criteria with seven comments specifically supporting the FDIC's efforts to streamline these rules. Comments were received from 102 financial institutions, 2 one bank holding companies, 3 state banking departments, 14 trade associations, 2 investment companies, 4 Congressmen, 1 federal banking regulator and 1 individual.

The overwhelming majority of the comments (107), primarily from Massachusetts, were focused on concerns over proposed changes to the standards governing holding equity securities in subsidiaries by banks having grandfathered authority to hold the securities at the bank level. We have responded to these comments by reinstating the exception for a grandfathered bank to hold equity securities in a subsidiary. A complete discussion of this issue is found in the section by section analysis.

With regard to the structure of the rule and the consolidation of the banking and savings activities into a single rule, five comments expressly supported the FDIC's efforts to accomplish these goals. However, one comment suggested using a table like the Office of Thrift Supervision (OTS) has used to aid understanding this complex and difficult regulation. Three comments support cross-referencing the Interagency Statement rather than restating disclosure requirements. A readability analysis was submitted by one individual and, based upon the results, the individual questioned whether the FDIC was successful in achieving the stated objective of using plain English. This individual offered his services to the FDIC as a writing consultant. Other general comments observed that diversifying into new activities increases safety and soundness and were pleased that the FDIC supports state institutions' exercising of new powers. Two comments indicated that in the preamble, the FDIC had overstated the authority of the FRB to impose more stringent standards on any activity conducted by a state member bank. This statement is derived from section 24(i); however, we intended to refer to those activities not permissible for national banks. At least one bank and the state banking departments advocate further streamlining of the regulations to make it easier for banks to use their capital through subsidiaries. The bank suggested that banks must have more flexibility to keep their capital in the banking system, rather than paying out more dividends to shareholders. Although we favor diversifying the banks' income stream and making bankers' compliance burden as light as possible, we also are charged with maintaining safety and soundness and meeting the requirements of section 24 of the FDI Act. Thus, we strive to balance these interests in crafting more flexible regulations.

Most of the remaining comments addressed the substance of the regulation and provided constructive feedback on the regulation text. Two comments focusing on the Purpose and Scope Section suggested a definition of what is meant by ''acting as principal,'' although we already had a definition of ''as principal.'' Two comments objected to the FDIC accepting the time period imposed by the National Bank Act on real estate that is acquired for debts previously contracted as a limitation that carries over to state banks. We believe that the authority of a national bank to own real estate is governed by the statute and that this limitation is inherent in that authority. Thus, we believe that a state bank is constrained by this same limitation unless relief can be granted by the FDIC. Relief may be granted by the FDIC only if the state bank transfers the property to a majority-owned subsidiary with appropriate capital and complies with whatever other constraints the FDIC deems adequate to protect the deposit insurance fund from significant risk.

In the definitions section, eight comments requested that we expand the definition of majority-owned subsidiary to include limited liability companies and limited partnership interests. One comment suggested that the qualified housing exception also include limited liability companies. Four comments expressed concern over the change to the definition of ''change of control.'' Four comments expressed concern about the change to the definition of ''significant risk to the deposit insurance fund.'' One comment suggested a definition of ''investment in subsidiary'' and further clarification of the items to be included in debt and equity.

With regard to the activities of insured state banks, two comments supported the FDIC's new interpretation of when the ''in an amount'' limitation is applicable. Six comments addressed insurance activities, including three addressing the appropriate disclosures. Five comments addressed the change in the measurement of the applicable capital limit for adjustable rate and money market preferred stock. Six comments addressed the 4(c)(8) list (closely related to banking) activities, including specific alternatives on real estate leasing. One comment supported the change in the qualified housing projects exception to conform the meaning of lower income to that used in the community reinvestment regulations in defining low and moderate income.

With regard to the activities of subsidiaries of insured state banks, one comment thought the control concept was unnecessary for lower tier subsidiaries. Over one hundred ten comment letters addressed the various issues involving the holding of equity securities through a majority-owned subsidiary, with the overwhelming majority of the comments coming from Massachusetts banking interests to advocate not changing the constraints governing banks in that state owning grandfathered equity securities in a subsidiary. Several of these comment letters identified more than one issue. Twenty comments addressed the issues involved with engaging in real estate investment activity through a majority-owned subsidiary. Nine comments addressed the issues identified in securities underwriting activity through a majority-owned subsidiary. Eleven comments addressed the eligible depository institution criteria. Twelve comments addressed the eligible subsidiary criteria and generally expressed the view that the eligible subsidiary was an improvement over the bona fide subsidiary concept found in the old rule. Seventeen comments addressed the investment and transaction limits criteria. Eight comments were directed to the way the capital requirements operate. One comment said that banks should have the option of complying with original conditions or the new rule.

With regard to the real estate activities covered by subpart B, five comments addressed this issue and generally thought that the FDIC should not impose additional regulations on state nonmember banks.

With regard to subpart C governing savings associations, one comment expressed the view that thrifts do not know what is permissible for national banks and needed greater specificity in the regulation. There were no comments on subpart D; however, no substantive change was made to this statutory filing requirement.

With regard to subparts E and F governing the notice and application processing and content, two comments were received in favor of firmer processing deadlines.

IV. Section by Section Analysis

A. Subpart A—Activities of Insured State Banks

Section 362.1 Purpose and Scope

As described in the preamble accompanying the proposal, included within the proposed changes to the regulation was the inclusion of a purpose and scope paragraph describing the statutory background, intent, and nature of items covered by this subpart. Several commenters acknowledged the FDIC's efforts to restructure the regulation and agreed that the proposed reorganization simplifies what continues to be complex material. These commenters stated that the use of purpose and scope paragraphs helps clarify the coverage of each subpart.

The intent of § 362.1 is to clarify that the purpose and scope of subpart A is to ensure that activities and investments undertaken by insured state banks and their subsidiaries do not present a significant risk to the deposit insurance funds, are not unsafe and are not unsound, are consistent with the purposes of federal deposit insurance, and are otherwise consistent with law. Subpart A implements the provisions of section 24 of the FDI Act that restrict and prohibit insured state banks and their subsidiaries from engaging in activities and investments of a type that are not permissible for national banks and their subsidiaries. The phrase ''activity permissible for a national bank'' means any activity authorized for national banks under any statute including the National Bank Act (12 U.S.C. 21 *et. seq.*), as well as activities recognized as permissible for a national bank in regulations, official circulars, bulletins, orders or written interpretations issued by the OCC.

This subpart governs activities conducted ''as principal'' and therefore does not govern activities conducted as agent for a customer, conducted in a brokerage, custodial, advisory, or administrative capacity, conducted as trustee, or conducted in any substantially similar capacity. As explained in the preamble accompanying the proposal, we moved this language from § 362.2(c) of the former version of part 362 where the term ''as principal'' was defined to mean acting other than as agent for a customer, acting as trustee, or conducting an activity in a brokerage, custodial or advisory capacity. The FDIC previously described this definition as not covering, for example, acting as agent for the sale of insurance, acting as agent for the sale of securities, acting as agent for the sale of real estate, or acting as agent in arranging for travel services. Likewise, providing safekeeping services, providing personal financial planning services, and acting as trustee were described as not being ''as principal'' activities within the meaning of this definition. In contrast, real estate development, insurance underwriting, issuing annuities, and securities underwriting would constitute ''as principal'' activities.

Further, for example, travel agency activities have not been brought within the scope of part 362 and would not require prior consent from the FDIC even though a national bank is not permitted to act as travel agent. Agency activities are not covered by the regulations because the state bank would not be acting ''as principal'' in providing those services. Thus, the fact that a national bank may not engage in travel agency activities is of no consequence. Of course, state banks would have to be authorized to engage in travel agency activities under state law. We intend to continue to interpret section 24 and part 362 as excluding any coverage of activities being conducted as agent. To highlight this issue, provide clarity, and alert the reader of this rule that activities being conducted as agent are not within the scope of section 24 and part 362, this language was moved to the purpose and scope paragraph in the proposal.

Comments addressing the proposed treatment of ''as principal'' were submitted by two industry trade groups. One group agreed that moving the applicable language to the purpose and scope paragraph helps clarify that section 24 does not apply to activities conducted in an agency or similar capacity. However, both commenters recommended that the FDIC define ''as principal'' by specifying what is meant by acting as principal rather than providing a list of capacities exempt from that definition. In other words, the commenters desired a definition consisting of an inclusive list rather than a list of exemptions. Additionally, one commenter expressed concern that the current list of exempt capacities may omit certain agency-like roles. As such, the commenter recommended that the FDIC include ''substantially similar capacities'' in the list of capacities that are not considered to be conducted ''as principal''.

The FDIC continues to believe that including the ''as principal'' language in the purpose and scope paragraph provides clarity regarding activities coming within the scope of section 24. As such, the FDIC elects not to separately define ''as principal'', and has deleted as redundant an overlapping definition of ''as principal'' contained in § 362.2(c) of the proposal. Additionally, the FDIC cannot reasonably list all capacities that will be considered to be ''as principal''. Therefore, the FDIC is not persuaded that changing the nature of the definition to an inclusive list of capacities that are considered ''as principal'' would alleviate confusion. Instead, ''as principal'' activities will continue to be described as being all capacities other than the listed exceptions. The FDIC nonetheless agrees that the current list may exclude certain agency-like roles and is therefore adding the phrase ''or in any substantially similar capacity'' to the regulatory language of § 362.1(b)(1). Also, the FDIC has added a list of examples of activities that are not ''as principal'' to provide the public with additional guidance.

The preamble of the proposal also explains that equity investments acquired in connection with debts previously contracted (DPC) are not within the scope of this subpart when held within the shorter of the time limits prescribed by state or federal law. The exclusion of equity investments acquired in connection with DPC was moved from the definition of ''equity investment'' in the former regulation to the purpose and scope paragraph to highlight this issue, provide clarity, and alert the reader of this rule that these investments are not within the scope of section 24 and part 362. Interests taken as DPC are excluded from the scope of this regulation provided that the interests are not held for investment purposes and are not held longer than the shorter of any time limit on holding such interests (1) set by applicable state law or regulation or (2) the maximum time limit on holding such interests set by applicable statute for a national bank. The result of the modification would be to make it clear, for example, that real estate taken DPC may not be held for longer than 10 years (see 12 U.S.C. 29) or any shorter period of time set by the state. In the case of equity securities taken DPC, the bank must divest the equity securities ''within a reasonable time'' (i.e, as soon as possible consistent with obtaining a reasonable return) (see OCC Interpretive Letter No. 395, August 24, 1987, (1988–89 Transfer Binder) Fed Banking L. Rep. (CCH) p. 85619, which interprets and applies the National Bank Act) or no later than the time permitted under state law if that time period is

shorter. Of course, a state bank permitted to hold such interests under state law may apply to the FDIC for consent to continue to hold the real property through a majority-owned subsidiary. In the final rule, the FDIC has added some general information about the manner in which a national bank may hold DPC.

Two commenters objected to the FDIC imposing the national bank holding period limits on insured state banks if those limits are shorter than otherwise permitted under state law. One commenter suggested applying a ''reasonable time period'' divestiture standard similar to that concerning equity securities acquired DPC. The holding periods governing a national bank's ability to own real estate acquired DPC are contained within section 29 of the National Bank Act (12. U.S.C. 29). Because a national bank can hold real estate acquired DPC in limited circumstances, section 24 only allows a state bank to hold such interests under the same constraints, *i.e.*, for a maximum of 10 years. Conversely, section 29 does not contain divestiture periods for equity securities acquired DPC and the FDIC has therefore elected to defer to a ''reasonable time'' standard. However, due to the statutory limitation in section 29, no changes are made to the exception for real estate acquired DPC and the regulation will continue to apply the holding periods in the manner proposed.

As discussed in the proposal's preamble, the intent of the insured state bank in holding equity investments acquired in connection with DPC is also relevant to the analysis of whether the equity investment is permitted. Any interest taken DPC may not be held for investment purposes. For example, a bank may be able to expend monies in connection with DPC property and/or take other actions with regard to that property. However, if those expenditures and actions are not permissible for a national bank, the property will not fall within the DPC exception. For an additional example, if the bank's actions are speculative in nature or go beyond what is necessary and prudent in order for the bank to recover on the loan, a national bank would not be permitted to take these actions. The FDIC expects bank management to document that DPC property is being actively marketed; current appraisals or other means of establishing fair market value may be used to support management's decision not to dispose of property if offers to purchase the property have been received and rejected by management.

Similarly, the proposal also moved to the purpose and scope paragraph language governing any interest in real estate in which the real property is (1) used or intended in good faith to be used within a reasonable time by an insured state bank or its subsidiaries as offices or related facilities for the conduct of its business or future expansion of its business or (2) used as public welfare investments of a type permissible for national banks. Again, this language was moved from the definition of ''equity investment'' in the former regulation to highlight this issue, provide clarity, and alert the reader of this rule that such investments are not within the scope of this subpart. In the case of real property held for use at some time in the future as premises, the holding of the property must reflect a bona fide intent on the part of the bank to use the property in the future as premises. We are not aware of any statutory time frame that applies in the case of a national bank which limits the holding of such property to a specific time period. Therefore, the issue of the precise time frame under which future premises may be held without implicating part 362 must be decided on a case-by-case basis. If the holding period allowed under state law is longer than what the FDIC determines to be reasonable and consistent with a bona fide intent to use the property for future premises, the bank will be so informed and will be required to convert the property to use, divest the property, or apply for consent to hold the property through a majority-owned subsidiary of the bank. We note that the OCC's regulations indicate that real property held for future premises should normally be converted to use within five years after which time it will be considered other real estate owned and must be actively marketed and divested within no more than ten years (12 CFR part 34). We understand that the time periods set forth in the OCC's regulations reflect safety and soundness determinations by that agency. As such, and in keeping with what has been to date the FDIC's posture with regard to safety and soundness determinations of the OCC, the FDIC will make its own judgment to determine when a reasonable time has elapsed for holding property for future premises.

The purpose and scope paragraph also explains that a subsidiary of an insured state bank may not engage in activities that are not permissible for a subsidiary of a national bank unless the bank is in compliance with applicable capital standards and the FDIC has determined that the activity poses no significant risk to the deposit insurance fund. Subpart A provides standards for certain activities that are not permissible for a subsidiary of a national bank. Additionally, because of safety and soundness concerns relating to real estate investment activities, subpart B reflects special rules for subsidiaries of insured state nonmember banks that engage in real estate investment activities of a type that are not permissible for a national bank, but that may be otherwise permissible for a subsidiary of a national bank.

The FDIC intends to allow insured state banks and their subsidiaries to undertake safe and sound activities and investments that do not present a significant risk to the deposit insurance funds and that are consistent with the purposes of federal deposit insurance and other applicable law. This subpart does not authorize any insured state bank to make investments or to conduct activities that are not authorized or that are prohibited by either state or federal law.

Section 362.2 Definitions

Revised subpart A § 362.2 contains the definitions applicable to this subpart. Most definitions are unchanged from those used in the current regulation. Nonetheless, the proposal contains edits to enhance clarity and readability, define additional terms, and delete certain definitions as unnecessary.

To standardize as many definitions as possible, we incorporated the following definitions from section 3 of the FDI Act (12 U.S.C. 1813): ''depository institution'', ''insured state bank'', ''bank'', ''state bank'', ''savings association'', ''state savings association'', ''insured depository institution'', ''federal savings association'', and ''insured state nonmember bank''. This standardization required that we delete the definitions of the first two terms, ''depository institution'' and ''insured state bank'', currently found in part 362. No substantive change was intended by this modification. The remaining terms were added by reference to provide clarity throughout the proposed part 362 because we incorporate many of the definitions from subpart A into the other part 362 subparts. The FDIC received no comments concerning these changes and is therefore adopting the referenced definitions as proposed.

Several definitions were carried forward in the proposal from the current regulation either unchanged or containing only minor edits to enhance clarity or readability without changing the meaning. The following definitions

were carried forward without any substantive meaning changes: ''control'', ''extension of credit'', ''executive officer'', ''director'', ''principal shareholder'', ''related interest'', ''national securities exchange'', ''residents of state'', ''subsidiary'', and ''tier one capital''. Again, the FDIC received no comments on the referenced definitions which are adopted as proposed.

The name of one definition was simplified without substantively changing its meaning. The subject definition was formerly found in § 362.2(g) and was described as follows ''an insured state bank will be considered to convert its charter''. This definition is now provided by § 362.2(f) and is named ''convert its charter''. No commenters addressed this simplified title which is adopted as proposed.

The definitions of ''activity permissible for a national bank'', ''an activity is considered to be conducted as principal'', and ''equity investment permissible for a national bank'' were deleted in the proposed and final rule because the substance of the information contained in those definitions was incorporated into the scope paragraph in § 362.1. When developing the proposal, the FDIC concluded that moving the information contained in these definitions to the scope paragraph made the coverage of the rule clearer. Additionally, placing this information at the beginning of the subpart is consistent with the purpose of a scope paragraph. Some readers may save time by realizing sooner that the regulation may be inapplicable to conduct contemplated by a particular bank. It also may be more logical for the reader to consider the scope paragraph to determine the rule's applicability, rather than having to rely on the definition section. Moreover, we concluded that it would be unnecessary to duplicate this same information in the definition section. The FDIC received no specific comments on the proposed treatment, but respondents commenting on the overall structure of the proposal generally favored the use of the purpose and scope paragraphs. The final regulation incorporates the changes as proposed. The proposed definition of ''as principal'' at § 362.2(c) duplicates material set out in the scope section at § 362.1(b)(1), and has therefore been eliminated in the final rule. Appropriate definitional language has been added to § 362.1(b)(1).

The proposal also deleted the definition of ''equity interest in real estate'' and moved the recitation of the permissibility of owning real estate for bank premises and future premises, owning real estate for public welfare investments, and owning real estate from DPC to the scope paragraph for the reasons stated in the preceding paragraph. These activities are permissible for national banks and we concluded that it was unnecessary to continue to restate this information in the definition section of the regulation. No substantive change is intended by the simplification of this language. Further, we determined that the remainder of the definition of ''equity interest in real estate'' did little to enhance clarity or understanding; therefore, we are relying on the language defining ''equity investment'' to cover real estate investments.

Conforming changes were made to the definition of ''equity investment'' by removing the reference to the deleted definition of ''equity interest in real estate''. Additionally, the remaining part of the ''equity investment'' definition was shortened and edited to enhance readability. This definition is intended to encompass an investment in an equity security, partnership interest, or real estate as it did in the former regulation. No substantive changes were intended by the changes described in this or the preceding paragraph. The FDIC received no comments on these changes which are adopted as proposed.

With regard to the definition of ''equity security'', we modified the definition by deleting references to circumstances where holding equity securities is permissible for national banks, such as when equity securities are held as a result of a foreclosure or other arrangements concerning debts previously contracted. Language discussing the exclusion of DPC and other investments that are permissible for national banks was relocated to the scope paragraph for the reasons previously stated. Like the exceptions concerning equity investments in real estate, no substantive change is intended by the relocation of the subject exceptions to the purpose and scope paragraph. No comments were received on this proposed treatment which is adopted as proposed.

The definitions of ''investment in a department'' and ''department'' were deleted because they are no longer needed in the revised regulation text. The core standards applicable to a department of a bank are detailed in § 362.3(c) and defining the term ''department'' is therefore unnecessary. If a calculation of an ''investment in a department'' needs to be made, the FDIC intends to defer to governing state law. As a result, a definition of ''investment in a department'' is unnecessary and was deleted. There were no comments addressing the removal of these definitions.

Similarly, we deleted the definition of ''investment in a subsidiary'' because the definition is no longer needed in the revised regulation text. Amounts subject to the investment limits of § 362.4(d) are listed clearly in that subsection. The FDIC opted to list amounts subject to investment limits in § 362.4(d) to separate those debt-type investments from the equity-type investments subject to the capital treatment of § 362.4(e). The regulation also contains other investment limits applicable to both debt and equity investments. Because of these different types of investment limits, the FDIC did not find a single ''investment in a subsidiary'' definition helpful. Therefore, the FDIC has elected not to incorporate such a definition despite a request by one commenter. However, as the same commenter suggested, the FDIC has attempted to clearly delineate amounts subject to the various investment limits, transaction restrictions, and capital requirements when applicable through both the regulation text and the corresponding preamble language.

We deleted the definition of ''bona fide subsidiary'' and chose to make similar characteristics part of the ''eligible subsidiary'' criteria in § 362.4(c)(2). Including these criteria as a part of the substantive regulation text in the referenced subsection, rather than as a definition, makes reading the rule easier and the meaning clearer. No commenters addressed this treatment. Comments concerning the various elements of the eligible subsidiary criteria are discussed elsewhere in this preamble under the appropriate section.

The regulation substitutes the current definition of ''lower income'' with a cross reference in § 362.3(a)(2)(ii) to the definition of ''low income'' and ''moderate income'' used for purposes of part 345 of the FDIC's regulations (12 CFR 345) which implements the Community Reinvestment Act (CRA). 12 U.S.C. 2901, et. seq. Under part 345, ''low income'' means an individual income that is less than 50 percent of the area median income or a median family income that is less than 50 percent in the case of a census tract or a block numbering area delineated by the United States Census in the most recent decennial census. ''Moderate income'' means an individual income that is at least 50 percent but less than 80 percent of the area median or a median family income that is at least 50 but less than 80 percent in the case of a census tract or block numbering area.

The ''lower income'' definition is relevant for purposes of applying the

exception in the regulation which allows an insured state bank to be a partner in a limited partnership whose sole purpose is direct or indirect investment in the acquisition, rehabilitation, or new construction of qualified housing projects (housing for lower income persons). As we anticipate that insured state banks will seek to use such investments in meeting their community reinvestment obligations, the FDIC is of the opinion that conforming the definition of lower income to that used for CRA purposes will benefit banks. This change has the effect of expanding the housing projects that qualify for the exception. The FDIC received one comment addressing the altered definition with the respondent favorably noting and supporting the resultant effect. The final regulation adopts this change as proposed.

The regulation includes an altered definition of the term ''activity''. As modified, the definition includes both activities and investments. Where equity investments are intended to be excluded from a particular section of the regulation, we expressly exclude those investments in the regulatory text. Previously, the term ''activity'' was defined differently depending upon whether it was used in connection with the direct conduct of business by an insured state bank or in connection with the conduct of business by a subsidiary of the bank. This change was made both to simplify the regulation and to reflect the section 24 definition of ''activity''. No comments were received on this proposed change.

It is noted that no comments were received regarding the proposed suggestion also to modify the ''activity'' definition to incorporate a recent interpretation by the agency that determined that the act of making a political campaign contribution does not constitute an ''activity'' for purposes of part 362. The referenced interpretation uses a three prong analysis to help determine whether particular conduct should be considered an activity and therefore subject to review under part 362 if the conduct is not permissible for a national bank.

First, any conduct that is an integral part of the business of banking as well as any conduct which is closely related or incidental to banking should be considered an activity. In applying this factor, it is important to focus on what banks do that makes them different from other types of businesses. For example, lending money is clearly an ''activity'' for purposes of part 362. The second factor asks whether the conduct is merely a corporate function as opposed to a banking function. For example, paying dividends to shareholders is primarily a general corporate function and not one associated with banking because of some unique characteristic of banking as a business. Generally, activities that are not general corporate functions will involve interaction between the bank and its customers rather than its employees or shareholders. The third factor asks whether the conduct involves an attempt by the bank to generate a profit. For example, banks make loans and accept deposits in an effort to make money. However, contracting with another company to generate monthly customer statements should not be considered to be an activity in and of itself as it simply is entered into in support of the ''activity'' of taking deposits. If at least two of the factors yield a conclusion that the conduct is part of the authorized conduct of business by the bank, the better conclusion is that the conduct is an activity. Because of the lack of interest received on expanding the definition to reflect this interpretation, no change is made to the definition proposed. The FDIC intends to continue to apply the above analysis when determining whether particular conduct should be considered an activity.

The definition of ''real estate investment activity'' was shortened to mean any interest in real estate held directly or indirectly that is not permissible for a national bank. This term is used in § 362.4(b)(5) of subpart A. Additionally, it is used in § 362.8 of subpart B which contains safety and soundness restrictions on real estate activities of subsidiaries of insured state nonmember banks that may be deemed to be permissible for operating subsidiaries of national banks but that would not be permissible for a national bank itself. The proposed definition contained a parenthetical excluding real estate leasing from the definition of real estate investment activities. By excluding leasing from the proposed ''real estate investment activity'' definition, the FDIC was attempting to clearly separate leasing activity from other real estate investment activities.

Under the current regulation, banks and their majority-owned subsidiaries are allowed to engage in real estate leasing under the regulatory exceptions enabling them to engage in activities closely related to banking.[1] These regulatory exceptions were carried forward in the proposal. However, the FDIC is concerned about certain activities encompassed within this section. For example, the 4(c)(8) list includes real estate leasing. When an individual or entity engages in leasing activity as the lessor of a particular parcel, the landlord has an ownership interest in the underlying real estate. Under section 24 of the FDI Act, insured state banks are limited in their ability to own real estate. We are concerned that an insured state bank could consider this regulation and its certain conditions as the FDIC having permitted the bank or its majority-owned subsidiaries to own real estate interests that would not be permissible for a national bank or a subsidiary of a national bank. To prevent insured state banks from attempting to use this consent to leasing activity as a way to avoid the corporate separations, transaction limitations and restrictions, and capital treatment applicable to other real estate investment activities, the proposed definition expressly excluded leasing. Additionally, the FDIC was attempting to ensure that banks using the notice procedure to engage in real estate investment activities were not, in effect, operating a commercial business by virtue of the terms of the leasing activity.

The FDIC recognizes, however, that the proposed definition would have effectively prevented an insured state bank's majority-owned subsidiary that was proceeding under the notice procedure from leasing property that it is otherwise permitted to own or develop.[2] As a result, the insured state bank would have been required to submit an application to seek further consent from the FDIC to lease real property it was allowed to own. To correct this anomaly, the FDIC has deleted the parenthetical from the definition and deals with the activities of real estate leasing and other real estate investment activities separately as discussed elsewhere in this preamble. The subject definition is otherwise unchanged from the proposal.

The final rule includes a modified definition of ''company'' to which we added limited liability companies to the list of entities considered to be a company. This change was made to recognize the creation of limited liability companies and their growing prevalence in the market place. Four

[1] These regulatory exceptions were provided by § 362.4(c)(3)(ii)(A) and (B) depending upon whether conducted by the bank or through a majority-owned subsidiary, respectively. The exceptions provided that insured state banks or their majority-owned subsidiaries could engage in principal in activities that the FRB by regulation or order has found to be closely related to banking for the purposes of section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)).

[2] Provided it meets the conditions imposed by § 362.4(b)(5).

commenters suggested explicitly adding limited liability partnerships to the list of business structures included in the ''company'' definition. The FDIC believes the suggested change is unnecessary because limited liability partnerships are already included in the definition through the term ''partnership''.

As proposed, the FDIC adopted the modified definition of ''significant risk to the fund'' with the second sentence that clarifies that this definition includes the risk that may be present either when an activity or an equity investment contributes or may contribute to the decline in condition of a particular state-chartered depository institution or when a type of activity or equity investment is found by the FDIC to contribute or potentially contribute to the deterioration of the overall condition of the banking system. Our interpretation of the definition remains unchanged. Significant risk to the deposit insurance fund is understood to be present whenever there is a high probability that any insurance fund administered by the FDIC may suffer a loss. The preamble accompanying the adoption of this definition in 1992 (57 FR 53220, November 9, 1992) indicated that the FDIC recognizes that no investment or activity may be said to be without risk under all circumstances and that such a fact alone will not cause the agency to determine that a particular activity or investment poses a significant risk of loss to the fund. The definition emphasizes that there is a high degree of likelihood under all of the relevant circumstances that an investment or activity by a particular bank, or by banks in general or in a given market or region, may ultimately produce a loss to either of the funds. The relative or absolute size of the loss that is projected in comparison to the fund is not determinative of the issue. The preamble indicated that the definition is consistent with and derived from the legislative history of section 24 of the FDI Act. Previously, the FDIC rejected the suggestion that a risk to the fund be found only if a particular activity or investment is expected to result in the imminent failure of a bank. The suggestion was rejected in 1992 as the FDIC determined that it was inappropriate to approach the issue this narrowly in light of the legislative intent.

Four commenters addressed the proposed change to the wording of this definition. One industry trade association complimented the change. However, two other groups expressed concern that the added sentence results in a definition that is overly broad, and a state bank stated that the change makes the definition incoherent. The latter three commenters expressed concern that the added sentence contains no qualifications or limitations. These commenters state that numerous activities may negatively impact the condition of an institution or may contribute to deterioration in the overall banking system without causing loss to the insurance fund. The commenters suggest that section 24 requires the FDIC to consider the extent of the impact before determining that an activity presents a significant risk to the fund. The FDIC agrees with the commenters that consideration must be given to the extent that a negative event may harm an institution or the overall banking industry. However, the FDIC believes that both sentences contained in the definition must be read together. The second sentence clarifies that significant risk is present whenever there is a high probability that an activity or an equity investment will or could result in a loss to an insurance fund administered by the FDIC, regardless of whether the loss results from one or multiple institutions. After consideration of the comments and the wording, the FDIC adopts the expanded definition as proposed.

The proposal re-defined the term ''well-capitalized'' to incorporate the same meaning set forth in part 325 of this chapter for an insured state nonmember bank. For other state-chartered depository institutions, the term ''well-capitalized'' has the same meaning as set forth in the capital regulations adopted by the state. Importing the capital definitions used by the various state-chartered depository institutions should simplify the calculations when they deal with their appropriate federal banking agency. The other terms defined under § 362.2(x) of the current regulation were deleted as unnecessary due to the other changes in the regulation text.

The proposal added definitions of the following terms: ''change in control'', ''institution'', ''majority-owned subsidiary'', ''security'' and ''state-chartered depository institution.''

After reconsideration of the proposed definition of ''change in control'', the FDIC decided to adopt certain changes to bring the definition back into substantive consistency with the broader reach of the term as is provided by the current regulation. The change in control definition comes into play primarily in connection with section 24's grandfather with respect to common or preferred stock listed on a national securities exchange and shares of registered investment companies. Section 24 states that the grandfather ceases to apply if the bank converts its charter or undergoes a change in control.

The definition proposed at § 362.2(c) covered any instance in which the bank undergoes a transaction which requires a notice to be filed under section 7(j) of the FDI Act (12 U.S.C. 1817(j)) except a transaction which is presumed to be a change in control for the purposes of that section under FDIC's or FRB's regulations implementing section 7(j), or in which the bank is acquired by or merged into a bank that is not eligible for the grandfather. This proposed definition eliminated two other instances which the current regulation, at § 362.3(b)(4)(ii), treats as a change in control: any transaction subject to section 3 of the Bank Holding Company Act (12 U.S.C. 1842) other than a one bank holding company formation (section 3 transactions), and a transaction in which control of the bank's parent company changes (parent control changes).

In the preamble to the proposal, the FDIC indicated that elimination of the section 3 transactions and the parent control changes would bring the definition more in line with what constituted a true change in control. For example, the section 3 transaction language in the current rule would encompass all mergers between the holding company of a grandfathered bank and another bank holding company, regardless of which holding company was the survivor. However, upon further reflection, the FDIC has decided that total elimination of the section 3 transactions would create anomalous results. If a controlling interest in a grandfathered bank was acquired by an unrelated holding company (which requires approval under section 3), it is difficult to argue how this is materially less of a change in control than if control of the bank was acquired by an individual in a section 7(j) transaction. Still, there are cases in which a rigid application of the section 3 transactions would reach too far. In contrast to the example in which a bank holding company acquires control of a grandfathered bank, the FRB's approval under section 3 is required if a bank holding company acquires anything more than five percent of any outstanding class of a bank's voting shares. The revised definition at § 362.2(c) contained in the final rule therefore includes transactions subject to section 3 approval only when a bank holding company acquires control of a grandfathered bank through the section 3 transaction. The current exclusion for one bank holding

company formations also is maintained in the final rule.

Also, the elimination of the parent control changes in the proposed rule created potentially confusing ambiguities, particularly when coupled with the elimination of the section 3 transactions. For example, if the holding company of a bank eligible for the grandfather is acquired and merged into an unrelated bank holding company (again, which requires approval under section 3), it is difficult to argue how this is materially less of a change in control than if the bank itself was merged with an unrelated bank. But the merger and acquisition language in the proposed definition referred only to the bank itself. The final rule expands the merger language to holding companies, accordingly. As another example, it is difficult to argue that a transaction requiring the holding company of a grandfathered bank to submit a change in control notice under section 7(j) is materially less of a change in control than a transaction requiring the grandfathered bank itself to file such a notice, and the 7(j) language in the proposed rule did not expressly refer to holding company transactions. In the final rule, the FDIC has therefore revised the 7(j) language to clarify its applicability to both scenarios.

The FDIC received three similar comments expressing concern about the proposed changes to the ''change in control'' definition. The commenters acknowledge that deleting certain instances from the current definition reduces the instances in which a bank would lose its grandfathered rights. Nonetheless, the commenters feel that it is unclear whether the proposed changes may have also inadvertently broadened the reach of the remaining transactions causing the grandfathered right to be terminated. This ambiguity appears to result from an incomplete understanding of whether the definition continues to exclude transactions presumed to be a change in control under the FDIC's and FRB's regulations implementing section 7(j) of the FDI Act. The FDIC wants to assure commenters that the regulatory language of the final definition, like that of the proposal, continues to exclude such presumed changes in control from the events that result in a loss of the subject grandfathered rights.

One additional commenter took exception to the FDIC's position concerning the ability to look to the substance of a transaction in determining whether grandfather rights terminate. The commenter objected to the FDIC's statement in the preamble to the proposed rule that state banks should be aware that, depending upon the circumstances, the grandfather could be considered terminated after a merger transaction in which an eligible bank is the survivor. For example, if a state bank that is not eligible for the grandfather is merged into a much smaller state bank that is eligible for the grandfather, the FDIC may determine that in substance the eligible bank has been acquired by a bank that is not eligible for the grandfather. The commenter argues that the FDIC's interpretation is inconsistent with the FDIC's current regulations, and claims that if the FDIC subjects such transactions to subjective criteria such as relative asset size, institutions considering mergers or acquisitions will be disadvantaged because of the uncertainty regarding the potential loss of grandfathered status. The commenter also asserts that the FDIC's interpretation is inconsistent with congressional intent because section 24 did not define change in control; Congress clearly intended the use of ''change in control'' language in section 24(f)(5) to reference the meaning of the phrase ''change in control'' established by the Change in Bank Control Act (CBCA) (12 U.S.C. 1817(j)). In the commenter's view, since the CBCA predates section 24 by nine years, Congress intended to use ''change in control'' as a term of art.

The interpretation set out in the preamble to the proposal is consistent with the FDIC's current regulation and is in fact set out in the preamble accompanying the FDIC's original adoption of the change in control provisions under part 362 in 1992. 57 FR 53227 (Nov. 9, 1992). The commenter's argument takes too narrow a view of section 24(f)(5), as the FDIC pointed out in proposing the change of control provisions of current part 362. In light of the broader congressional action under section 24 to generally prohibit equity investments by state banks which are not permissible for a national bank, and the limited nature of the grandfather exception, it is appropriate to define the universe of events constituting a change in control so as to encompass transactions constituting a true acquisition. 57 FR 30444 (July 9, 1992). In modifying the change in control provisions of part 362, the FDIC has narrowed the definition somewhat, as discussed above, to approximate more closely when a true change in control of the bank has taken place. If, as the commenter argues, change in control only includes transactions subject to the CBCA, the exclusion under the CBCA for all transactions reviewable under the Bank Merger Act (12 U.S.C. 1828(c)) or the Bank Holding Company Act would be brought to bear. Therefore, the FDIC rejects the arguments provided by the commenter as being an overly narrow interpretation of the statute.

We defined ''state-chartered depository institution'' and ''institution'' to mean any state bank or state savings association insured by the FDIC. These definitions should enhance readability and eliminate ambiguity concerning the subject terms. Defining ''institution'' enables us to shorten the drafting of the rule. No comments were received regarding these definitions which are adopted as proposed.

Additionally, the proposal added a definition of ''majority-owned subsidiary'' which was defined to mean any corporation in which the parent insured state bank owns a majority of the outstanding voting stock. This definition was added to clarify our intention that expedited notice procedures only be available when an insured state bank interposes an entity providing limited liability to the parent institution. We interpret Congress's intention in imposing the majority-owned subsidiary requirement in section 24 of the FDI Act to generally require that such a subsidiary provide limited liability to the insured state bank. Thus, except in unusual circumstances, we have and will require majority-owned subsidiaries to adopt a form of business that provides limited liability to the parent bank. In assessing our experience with applications, we have determined that the notice procedure will be available only to banks that engage in activities through a majority-owned subsidiary that takes the corporate form of business. We welcome applications that may take a different form of business such as a limited partnership or limited liability company, but would like to develop more experience with appropriate separations to protect the bank from liability under these other forms of business enterprise through the application process before including such entities in a notice procedure.

Eight commenters objected to the FDIC's decision to construct the definition around the corporate form of business. The commenters were unanimous in suggesting that the FDIC expand the definition to include limited liability companies (LLCs), limited liability partnerships (LLPs), and limited partnerships. Several of the commenters note that these forms of business have been in existence in many states for a number of years, and they project that the presence of such

structures will continue to increase given the tax benefits, limited liability, and flexible structure provided by these business forms. The respondents contend that these business forms sufficiently insulate the members and partners from liability. One commenter noted that they are aware of no significant judicial challenge to the liability insulation provided by these business forms. As such, the commenter asserts that the proposed definition contravenes congressional intent because it does not recognize a business form that would provide limited liability to the insured state bank. Finally, the commenters note that both the FRB and the OCC have recently permitted the limited liability organizational form for operating subsidiaries.

Limited liability partnerships and companies are both relatively new business forms. There is little definitive legal guidance concerning the liability protection offered by these organizational structures. Among the unresolved issues is the question of how to structure the management of LLCs and LPs to afford the same level of separateness provided by the corporate form under the eligible subsidiary criteria. Because of the limited existing case law regarding piercing the veil of LLCs and LLPs, the FDIC is unable to determine the appropriate objective separation criteria that will provide the parent bank with substantially the same liability protection offered by an independent corporate structure. Thus, we have not expanded the definition to include LLCs and LLPs at this time. The FDIC views this decision to preclude LLCs and LLPs as consistent with the agency's interpretation of the congressional intent to limiting liability for subsidiaries' activities from accruing to the insured state bank.

The effect of the FDIC's decision is that the notice process is limited to banks with subsidiaries organized using the corporate form. We encourage banks to submit applications when they want to use an alternative business form. Then, the banks can propose appropriate objective separations that fit the particular activity and the FDIC can evaluate these separations on a case-by-case basis. At some future date, more standardized criteria may emerge. Then, the FDIC may consider re-visiting this issue. The FDIC does not intend any exclusion of these forms by omitting them from the notice processing criteria. They simply do not allow for the more limited review involved in an expedited notice processing system.

Although the FDIC requires the first level majority-owned subsidiary to be a corporation, it is noted that the final regulation contains a provision, at § 362.4(b)(3), allowing lower level subsidiaries to assume other business forms including LLCs and LLPs. Please refer to the applicable discussion of this section elsewhere in this preamble.

The final rule also incorporates the definition of ''security'' from part 344 of this chapter to eliminate any ambiguity over the coverage of this rule when securities activities and investments are contemplated.

Section 362.3 Activities of Insured State Banks

Equity Investment Prohibition. Section 362.3(a) restates the statutory prohibition on insured state banks making or retaining any equity investment of a type that is not permissible for a national bank. The prohibition does not apply if one of the statutory exceptions contained in section 24 of the FDI Act (as restated in the current regulation and carried forward in the final regulation) applies. As discussed in the preamble accompanying the proposal, the final regulation eliminates the reference to ''amount'' that is contained in the current version of § 362.3(a). The FDIC reconsidered our interpretation of the language of section 24 in which paragraph (c) prohibits an insured state bank from acquiring or retaining any equity investment of a type that is impermissible for a national bank and paragraph (f) prohibits an insured state bank from acquiring or retaining any equity investment of a type or in an amount that is impermissible for a national bank. We previously interpreted the language of paragraph (f) as controlling and read that language into the entire statute. We reconsidered this approach and decided that it was not the most reasonable construction of this statute and determined that the language of the earlier paragraph (c) is controlling without the necessity to import the language of (f). We believe that the second mention as contained in paragraph (f) should be limited to those items discussed under paragraph (f). Thus, the language of paragraph (c) controls when any other equity investment is being considered. Therefore, we deleted the amount language from the prohibition stated in the regulation. The FDIC received comments from two parties expressly approving this revised interpretation.

Exception for subsidiaries of which the bank is majority owner. The final regulation retains the exception allowing investments in subsidiaries of which the bank is majority owner as currently in effect without any substantive change. However, the FDIC has modified the language of this section to remove negative inferences and make the text clearer. Rather than stating that the bank may do what is not prohibited, the FDIC affirmatively states that an insured state chartered bank may acquire or retain investments in these subsidiaries. If an insured state bank holds less than a majority interest in the subsidiary, and that equity investment is of a type that would be prohibited to a national bank, the exception does not apply and the investment is subject to divestiture.

Majority ownership for the exception is understood to mean ownership of greater than 50 percent of the outstanding voting stock of the subsidiary. National banks may own a minority interest in certain types of subsidiaries. (*See* 12 CFR 5.34 (1998)). Therefore, an insured state bank may hold a minority interest in a subsidiary if a national bank could do so. Thus, section 24 does not necessarily require a state bank to hold at least a majority of the stock of a company in order for the equity investment in the company to be permissible.

For purposes of the notice procedure, the regulation defines the business form of a majority-owned subsidiary to be a corporation. As is discussed above in connection with the definition of a ''Majority-owned subsidiary'', there may be other forms of business organization that are suitable for the purposes of this exception such as partnerships or limited liability companies, but the FDIC prefers to review such alternate forms of organization on a case-by-case basis through the application process to assure that appropriate separation between the insured depository institution and the subsidiary is in place.

To qualify for the exception, the majority-owned subsidiary may engage only in the activities described in § 362.4(b). The allowable activities include exceptions to the general statutory prohibition, some of which have a statutory basis and others of which are derived through the FDIC's power to create regulatory exceptions.

Investments in qualified housing projects. Section 362.3(a)(2)(ii) of the final regulation provides an exception for qualified housing projects. The final regulation combines the language found in two paragraphs of the current regulation with the resulting paragraph retaining substantially the same language. Changes were made to clarify some technical aspects of the manner in which the qualified housing rules work and are not intended to be substantive. In addition, the FDIC modified the

language of the text to remove negative inferences and make the text clearer.

Under this exception, an insured state bank is allowed to invest as a limited partner in a partnership, the sole purpose of which is direct or indirect investment in the acquisition, rehabilitation, or new construction of a residential housing project intended to primarily benefit lower income persons throughout the period of the bank's investment. The bank's investments, when aggregated with any existing investment in such a partnership or partnerships, may not exceed 2 percent of the bank's total assets. The FDIC expects a bank to use the figure reported on the bank's most recent consolidated report of condition (Call Report) prior to making the investment as the measure of its total assets. If an investment in a qualified housing project does not exceed the limit at the time the investment is made, the investment shall be considered to be a legal investment even if the bank's total assets subsequently decline.

The current exception is limited to instances in which the bank invests as a limited partner in a partnership. In the proposal, comment was invited on (1) whether the FDIC should expand the exception to include limited liability companies and (2) whether doing so is permissible under the statute. (Section 24(c)(3) of the FDI Act provides that a state bank may invest ''as a limited partner in a partnership''.). No comments were received on the legal issue. One comment applauded our suggestion to expand this statutory exception by regulation. In the final rule, we have expanded § 362.3(a)(2)(ii) to permit insured state banks to invest in qualified housing projects as a limited partner or through a limited liability company.

Although the statutory language in the paragraph allowing an investment in qualified housing projects explicitly allows only a limited partnership investment, it does not prohibit other forms of ownership. For the purpose of this investment and consistent with the underlying public policy purposes of this statute, we consider limited liability companies to be substantially equivalent to limited partnership interests. It is consistent with the FDIC's authority under the statute to extend the qualified housing projects exception by regulation to cover the limited liability company form of business enterprise in this circumstance. Limited partnership interests and limited liability companies provide similar forms of business enterprise. Although we have been unwilling to expand the regulatory exceptions to allow limited liability companies to substitute for corporate forms of business enterprise where uniform separation standards were required to protect the bank from the liability of its subsidiaries that conduct activities not permissible for national bank subsidiaries, we believe that no similar impediments exist here. We also acknowledge that we have been reluctant to extend this exception to limited liability companies in the past when informal interpretations were requested.[3] However, we believe, and no commenter raised any contrary argument, that it is appropriate to extend the statutory exception to cover these substantially similar organizational structures through this regulation. Thus, subject to the other limitations in the rule, we are allowing by regulation insured state banks to invest in limited liability companies that invest in the acquisition, rehabilitation or construction of a qualified housing project.

Grandfathered investments in listed common or preferred stock and shares of registered investment companies. Available only to certain grandfathered state banks, § 326.3(a)(2)(iii) of the final regulation carries forward the statutory exception for investments in common or preferred stock listed on a national securities exchange and for shares of investment companies registered under the Investment Company Act of 1940. Although there is no substantive change, the FDIC has modified the language of this section to remove negative inferences and make the text clearer.

To use the grandfathered authority, section 24 requires, among other things, that a state bank file a notice with the FDIC before relying on the exception and that the FDIC approve the notice. The notice requirement, content of notice, presumptions with respect to the notice, and the maximum permissible investment under the grandfather also are set out in the current regulation. The references contained in the current regulation describing the notice content and procedures were deleted because we believe that most, if not all, of banks eligible for the grandfather already have filed notices with the FDIC. Thus, we eliminated language governing the specific content and processing of notices and cross-referencing the notice procedures under subpart G of part 303. Any bank that has filed a notice need not file again.

Paragraph (B) of this section of the final regulation provides that the exception for listed stock and registered shares ceases to apply in the event that the bank converts its charter or the bank or its parent holding company undergoes a change in control. This language restates the statutory language governing when grandfather rights terminate. As is discussed in the preamble above in connection with the definition of ''change in control'', the FDIC has revised both the current and proposed scope of transactions encompassed in the notion of a change in control.

The regulation continues to provide that in the event an eligible bank undergoes any transaction that results in the loss of the exception, the bank is not prohibited from retaining its existing investments unless the FDIC determines that retaining the investments will adversely affect the bank and the FDIC orders the bank to divest the stock and/or shares. This provision has been retained in the final rule without any change except for the deletion of the citation to specific authorities the FDIC may rely on concerning divestiture. Rather than containing specific citations, the final regulation merely references the FDIC's ability to order divestiture under any applicable authority. State banks should continue to be aware that any inaction by the FDIC would not preclude a bank's appropriate banking agency (when that agency is an agency other than the FDIC) from taking steps to require divestiture of the stock and/or shares if, in that agency's judgment, divestiture is warranted.

The FDIC has moved, simplified, and shortened the limit on the maximum permissible investment in listed stock and registered shares. The final regulation limits the bank's investment in grandfathered listed stock and registered shares, when made, to a maximum of 100 percent of tier one capital as measured on the bank's most recent Call Report prior to the investment. The final rule modifies the proposed regulatory language somewhat, to clarify how the maximum investment limit is to be determined. The final rule uses the lower of the bank's cost or the market value of the stock and shares as the measure of compliance with this limit. The proposal referred to book value. At the time the FDIC adopted the current version of the rule, call report instructions and generally accepted accounting principles (GAAP) provided that equity securities were generally to be carried at the lower of cost or market value. The FDIC adopted the book value

[3] *See* 2 FDIC Law, Regulations, Related Acts (FDIC) 4903; 1994 WL 763183 (F.D.I.C.) and FDIC 94–50, 1994 FDIC Interp. Ltr. LEXIS 89, October 12, 1994.

approach at that time, in response to industry comments that a market value approach would exhaust a bank's grandfather authority as the value of its stock and shares appreciated. Now that call report instructions and GAAP require stock and shares covered by the rule to be reported at market value in many cases, the book value approach no longer serves the desired purpose. The FDIC is expressly referring to the lower of cost or market approach in the final rule, in order to maintain consistency with the current rule. The lower of cost or market approach is also consistent with the federal banking agencies' rules for determining tier one capital, which require exclusion of net unrealized holding losses on available-for-sale equity securities with readily determinable fair values.

Language indicating that investments by well-capitalized banks in amounts up to 100 percent of tier one capital will be presumed not to present a significant risk to the fund was deleted, as was language indicating that it will be presumed to present a significant risk to the fund for an undercapitalized bank to invest in amounts that high. In addition, the proposed rule deleted the language stating the presumption that, absent some mitigating factor, it will not be presumed to present a significant risk for an adequately capitalized bank to invest up to 100 percent of tier one capital. The FDIC received one comment asking that we retain regulatory language describing these presumptions for well- and adequately-capitalized banks. The commenter believes that removal of the presumptions will create uncertainty and may cause banks to hesitate to take full advantage of these investment opportunities. The FDIC nonetheless believes at this time that it is not necessary to expressly state these presumptions in the regulation. However, this action does not alter the FDIC's position regarding the presumptions.

Language in the current regulation concerning the divestiture of stock and/or shares in excess of that permitted by the FDIC (as well as such investments in excess of 100 percent of the bank's tier one capital) has been deleted under the proposal as no longer necessary due to the passage of time. In both instances, the time allowed for such divestiture has passed.

We note that the statute does not impose any conditions or restrictions on a bank that enjoys the grandfather in terms of per issuer limits. The proposal invited comment on whether the FDIC should impose restrictions under the regulation that would, for example, limit a bank to investing in less than a controlling interest in any given issuer. Additionally, we asked whether the regulation should incorporate other limits or restrictions to ensure the grandfathered investments do not pose a risk. Although no comments specifically addressed these questions, several commenters referred to the fact that most institutions to which the grandfather is applicable have already filed notices with the FDIC regarding those investments. These institutions have since complied with any imposed conditions, or subsequently applied to have the conditions altered or removed. The commenters do not feel that banks should now be subject to requirements the FDIC did not originally impose. Moreover, the commenters point out that the FDIC and state banking authorities routinely review investment portfolios as part of the supervisory process and can address any deficiencies on a case-by-case basis. Upon further reflection, the FDIC is persuaded not to impose any new regulatory requirements on these grandfathered institutions for directly held investments. However, the FDIC wants to emphasize that it expects banks using this grandfathered investment authority to establish prudent limits and controls governing these investments. Equity securities and registered shares that are held by the bank must be consistent with the institution's overall investment goals and will be reviewed by examiners in that context. The FDIC will not take exception to listed stock and registered shares that are well regarded by knowledgeable investors, marketable, held in moderate proportions, and meet the institution's overall investment goals.

Stock investment in insured depository institutions owned exclusively by other banks and savings associations (banker's banks). Section 362.3(b)(2)(iv) of the final regulation continues to reflect the statutory exception that an insured state bank is not prohibited from acquiring or retaining the shares of depository institutions that engage only in activities permissible for national banks, are subject to examination and are regulated by a state bank supervisor, and are owned by 20 or more depository institutions not one of which owns more than 15 percent of the voting shares. In addition, the voting shares must be held only by depository institutions (other than directors' qualifying shares or shares held under or acquired through a plan established for the benefit of the officers and employees). Note that the proposal modified this exception to no longer limit the bank's investment in such depository institutions to ''voting'' stock. This change was made to allow banks to hold non-voting interests in these entities because section 24(f)(3)(B) of the FDIC Act does not limit the exception to voting stock. However, the final regulation retains the reference to ''voting'' stock in determining the various ownership and control thresholds. The FDIC received no comments on this provision which is adopted as proposed.

Stock investments in insurance companies. Section 362.3(a)(2)(v) of the final regulation incorporates statutory exceptions permitting state banks to hold equity investments in insurance companies. The exceptions are provided by statute and are implemented in the current version of part 362. For the most part, the exceptions are carried forward into the final regulation with no substantive editing. The exceptions are discussed separately below.

Directors and officers liability insurance corporations. The first exception permits insured state banks to own stock in corporations that solely underwrite or reinsure financial institution directors' and officers' liability insurance or blanket bond group insurance. A bank's investment in any one corporation is limited to 10 percent of the outstanding stock. Consistent with the proposal, we eliminated the present limitation of 10 percent of the ''voting'' stock and changed the present reference from ''company'' to ''corporation'' conforming the language to the statutory exception.

While the statute and regulation provide a limit on a bank's investment in the stock of any one insurance company under this provision, there is no statutory or regulatory ''aggregate'' investment limit in all insurance companies, nor does the statute combine these investments with any other exception under which a state bank may invest in equity securities. In the past, the FDIC has addressed investment concentration and diversification issues on a case-by-case basis. Nonetheless, the FDIC invited comment on whether it should incorporate aggregate limits on grandfathered bank investments in insurance companies. Responses addressing this issue were submitted by two trade associations and one bank consortium. While one trade association suggested that it would be prudent for the FDIC to incorporate some form of investment limit, the other two parties strongly opposed the imposition of any regulatory limit on what are statutory

exceptions. The FDIC has elected not to impose aggregate investment limits on equity investments specifically permitted by statute, nor will it combine the bank's investments in insurance companies with other equity investments made pursuant to any regulatory exception. Instead, the FDIC will continue to address investment concentration and diversification issues on a case-by-case basis.

Stock of savings bank life insurance company. The second exception for equity investments in insurance companies permits any insured state bank located in New York, Massachusetts, or Connecticut to own stock in savings bank life insurance companies provided that certain consumer disclosures are made. Again, this regulatory provision mirrors the specific statutory exception found in section 24. The savings bank life insurance investment exception is broader than the director and officer liability insurance company exception discussed above. There are no individual or aggregate investment limitations for investments in savings bank life insurance companies.

Consistent with the proposal, the provision implementing this exception in the current regulation was carried forward into the final regulation with some modifications. The language describing this exception was revised to affirmatively permit banks located in New York, Massachusetts, or Connecticut to own stock in a savings bank life insurance company provided the company provides the required disclosures. Additionally, the final regulation alters the required disclosure from that provided by the current regulation. Rather than continue the disclosure language currently contained in § 362.3(b)(3), the FDIC has decided to require disclosures of the type provided for in the Interagency Statement. As a result, these companies are required to provide their retail customers with written and oral disclosures consistent with the Interagency Statement when selling savings bank life insurance policies, other insurance products, and annuities. The required disclosures in the Interagency Statement include a statement that the products are not insured by the FDIC, are not a deposit or other obligation of, or guaranteed by, the bank, and are subject to investment risks, including the possible loss of the principal amount invested. While the existing regulatory language is similar to the Interagency Statement in what it requires to be disclosed, it is not identical. The last disclosure—that such products may involve risk of loss—is not required under the current regulation.

Although commenters generally supported referencing the Interagency Statement rather than incorporating a different disclosure standard, a savings bank life insurance company and a United States Congressman objected to the ''risk of loss'' disclosure. The savings bank life insurance company claims that a disclosure of that nature is a falsehood unsupported by factual data. Both commenters are concerned that the ''risk of loss'' disclosure places savings bank life insurance companies at a competitive disadvantage relative to other entities selling life insurance products. The Congressman suggested replacing the required disclosure concerning ''may involve risk of loss'' with ''may involve market risk, if applicable''.

It is the FDIC's view that FDIC-insured deposits differ from savings bank life insurance products and annuities because investors in such products are exposed to a possible loss of the principal amount invested. The Interagency Statement does not distinguish between the relative loss exposure presented by various nondeposit investment products. The distinction is simply between insured deposits and other investment products. Savings bank life insurance, other insurance products, and annuities contain an investment risk component exposing the investor to a loss of principal despite the assertion offered by one commenter. Further, investors in nondeposit products are exposed to more than market risks. The FDIC is therefore unwilling to change the nature of the required disclosure.

Nevertheless, the FDIC recognizes that the language proposed in § 362.3(a)(2)(v)(B) may be interpreted to mean the subject disclosure must contain the phrase ''may involve risk of loss''. The FDIC intends for the disclosures to be consistent with the Interagency Statement and was simply paraphrasing the respective disclosure content in the event the Interagency Statement is succeeded by another statement or regulation. Included in the required disclosures is a statement specifying that the nondeposit product is ''subject to investment risks, including possible loss of the principal amount invested''. The actual Interagency Statement language may convey a less threatening tone concerning the possibility of loss. To avoid confusion and reflect the FDIC's actual intent, the phrase ''may involve risk of loss'' was replaced with ''are subject to investment risks, including possible loss of the principal amount invested'' in the final rule.

The FDIC is aware that insurance companies, including savings bank life insurance companies, typically offer annuity products and that many states regulate annuities through their insurance departments. The FDIC agrees with the OCC that annuities are investment products that are subject to the requirements found in the Interagency Statement when sold to retail customers on bank premises as well as in other instances specified in the Interagency Statement.

Other activities prohibition. Section 362.3(b) of the final regulation restates the statutory limit prohibiting insured state banks from directly or indirectly engaging as principal in any activity that is not permissible for a national bank. Activity is defined in the rule as the conduct of business by a state-chartered depository institution and includes acquiring or retaining any investment. Because acquiring or retaining an investment is an activity by definition, the proposal added language to make clear that this prohibition does not supersede the equity investment exceptions of § 362.3(a)(2). The prohibition does not apply if one of the statutory exceptions contained in section 24 of the FDI Act (restated in the current regulation and carried forward in the final regulation) applies. The FDIC has also provided a regulatory exception to the prohibition on other activities concerning the acquisition of certain debt-like instruments. Insured state banks desiring to engage in other activities must submit an application to the FDIC pursuant to § 362.3(b)(2)(i).

Consent through Application. The limit on activities contained in section 24 states that an insured state bank may not engage as principal in any type of activity that is not permissible for a national bank unless the FDIC has determined that the activity would pose no significant risk to the appropriate deposit insurance fund, and the bank is and continues to be in compliance with applicable capital standards prescribed by the appropriate federal banking agency. Section 362.3(b)(2)(i) establishes an application process for the FDIC to make the determination concerning risk to the funds. The substance of this process is unchanged from the current regulation.

Insurance underwriting. This exception tracks the statutory exception in section 24 which grandfathers: (1) Certain insured state banks engaged in the underwriting of savings bank life insurance through a department of the bank; (2) any insured state bank that engaged in underwriting of insurance on

or before September 30, 1991, which was reinsured in whole or in part by the Federal Crop Insurance Corporation; and (3) certain well-capitalized banks engaged in insurance underwriting through a department of a bank. The exception is carried forward from the current regulation with a number of modifications.

The savings bank life insurance exception applies to insured state banks located in Massachusetts, New York, or Connecticut. To use this exception, banks must engage in the activity through a department of the bank meeting the core standards discussed below. The standards for conducting this activity are taken from the current regulation with the exception of the disclosure standards which are discussed below. We moved the requirements for a department from the definitions section to the substantive portion of the regulation text.

The exception for underwriting federal crop insurance is unchanged from the current regulation, and there are no regulatory limitations on the conduct of the activity.

An insured state bank that wishes to use the remaining grandfathered insurance underwriting exception may do so only if the insured state bank was lawfully providing insurance, as principal, as of November 21, 1991. Further, the insured state bank must be well-capitalized if it is to engage in insurance underwriting and the bank must conduct the insurance underwriting in a department that meets the core standards described below. Banks taking advantage of this grandfather provision may underwrite only the same type of insurance that was underwritten as of November 21, 1991, and may operate and have customers only in the same states in which it was underwriting policies on November 21, 1991. The grandfather authority for this activity does not terminate upon a change in control of the bank or its parent holding company.

Both savings bank life insurance activities and grandfathered insurance underwriting must take place in a department of the bank which meets certain core operating and separation standards. Consistent with the disclosure requirements of the current regulation, the core operating standards require the department to inform its customers that only the assets of the department may be used to satisfy the obligations of the department. Note that this language does not require the bank to say that the bank is not responsible for the obligations of the department. The bank and the department constitute one corporate entity. In the event of insolvency, the insurance underwriting department's assets and liabilities would be segregated from the bank's assets and liabilities due to the requirements of state law. The regulatory language of the final rule has been changed to clarify that a bank seeking to operate its department under separation standards different than the core standards in the rule may submit an application to the FDIC.

The final regulation eliminates the proposed operating standard requirement that the department provide customers with written disclosures consistent with those in the Interagency Statement. The FDIC proposed replacing the disclosure statement currently imposed by § 362.4(g)(1)(iii) with that required in the Interagency Statement to increase consistency and reduce the regulatory burden of differing requirements. Upon further reflection, the FDIC has decided that while it is prudent to eliminate the disclosure currently required by part 362, the proposal to impose the Interagency Statement in connection with this activity in this regulation is unnecessary. Unlike the statutory exception permitting banks to engage in savings bank life insurance activities, the authorizing statute does not require a customer disclosure as a condition of engaging in other grandfathered insurance activities. Nevertheless, banks engaged in grandfathered insurance underwriting continue to be subject to the Interagency Statement in connection with sales to bank customers, including the disclosure provisions of that statement. Comments support this change and recognize that any retail sale of nondeposit investment products to bank customers is subject to the Interagency Statement if made on bank premises, by a bank employee, or pursuant to a compensated referral.

The FDIC cannot, however, eliminate the regulatory requirement that insured state banks engaged in savings bank life insurance activities make disclosures to all consumers. Section 24(e) of the FDI Act authorizes this activity only if the bank meets the consumer disclosure requirements. Thus, under the statute, the FDIC must promulgate consumer disclosures for savings bank life insurance. Section 362.4(c)(1) of the current regulation addresses banks engaging in savings bank life insurance underwriting activities. The referenced section requires the bank to make certain disclosures to purchasers of life insurance policies, other insurance products, and annuities. As discussed previously in this preamble, these disclosures are similar to those set out in the Interagency Statement but they are not identical. Currently, banks engaging in savings bank life insurance underwriting are covered by the Interagency Statement and part 362. As a result, banks have been required to comply with both of these similar but somewhat different requirements. The final regulation replaces the current disclosure requirement with a cross reference to the Interagency Statement to make compliance easier. Banks engaging in savings bank life insurance activities should note, however, that consistent with the proposal and the current regulation, the final rule carries forward the requirement that the department also inform purchasers that only the assets of the insurance department may be used to satisfy the obligations of the department. Comments and the FDIC's response are described elsewhere in this preamble.

The core separation standards in the final rule restate the requirements currently found in the definition of department. These standards require the department to: (1) Be physically distinct from the remainder of the bank; (2) maintain separate accounting and other records; (3) have assets, liabilities, obligations, and expenses that are separate and distinct from those of the remainder of the bank; and (4) be subject to state statutes that permitting the obligations, liabilities, and expenses to be satisfied only with the assets of the department. The standards are unchanged from those in the current regulation, but they have been moved from the definitions section to ensure that the requirements are shown in connection with the appropriate regulatory exception.

Acquiring and retaining adjustable rate and money market preferred stock. The proposal provides an exception that allows a state bank to invest in up to 15 percent of the bank's tier one capital in adjustable rate preferred stock and money market (auction rate) preferred stock without filing an application with the FDIC. The exception was adopted when the 1992 version of the regulation was adopted in final form. After reviewing comments at that time, the FDIC found that adjustable rate preferred stock and money market (auction rate) preferred stock were essentially substitutes for money market investments such as commercial paper and that these investments possess characteristics closer to debt than to equity securities. Therefore, money market preferred stock and adjustable rate preferred stock were excluded from the definition of equity security. As a result, these investments are not subject to the equity investment prohibitions of the statute or the regulation and they are

considered to be an ''other activity'' for the purposes of this regulation.

This exception focuses on two categories of preferred stock. This first category, adjustable rate preferred stock, refers to shares where dividends are established by contract through the use of a formula based on Treasury rates or some other readily available interest rate levels. Money market preferred stock refers to those issues where dividends are established through a periodic auction process that establishes yields in relation to short-term rates paid on commercial paper issued by the same or a similar company. The credit quality of the issuer determines the value of the security. Money market preferred shares are sold at auction.

Consistent with other parts of the proposal, the FDIC has modified the exception by limiting the 15 percent measurement to tier one capital, rather than total capital. Throughout the final regulation, all capital-based limitations are measured against tier one capital to increase uniformity within the regulation. The FDIC recognizes that this change may lower the permitted amount of these investments held by institutions already engaged in the activity. An insured state bank that has investments exceeding the proposed limit, but within the total capital limit, may continue holding those investments until they are redeemed or repurchased by the issuer. The 15 percent of tier one capital limitation should be used in determining the allowable amount of new purchases of money market preferred and adjustable rate preferred stock. Of course, institutions wanting to increase their holdings of these securities may submit an application to the FDIC.

The FDIC received five comments regarding this proposed change. Although the commenters applaud the desire for consistency, they contend that the results of such a change are unjustified when done principally for the sake of uniformity. Thus, the commenters suggest that the FDIC either leave the measurement base unchanged or increase the limit to offset the impact of the change. While the FDIC acknowledges the concerns expressed by commenters, it is not persuaded that changing the capital base from total to tier one capital creates a significant hardship. Therefore, the final regulation uses the tier one capital base to measure the applicable limit. The FDIC will handle applications to exceed the governing threshold in an expeditious manner according to procedures detailed in subpart G of part 303.

The final regulation incorporates a provision allowing insured state banks to acquire and retain other instruments of a type determined by the FDIC to have the character of debt securities provided the instruments do not represent a significant risk to the deposit insurance funds. In response to investor and client needs, the financial markets continually develop new financial products. A recent example of such an instrument is trust preferred stock. Trust preferred stock is a hybrid instrument possessing characteristics typically associated with debt obligations. Trust preferred securities are issued by an issuer trust that uses the proceeds to purchase subordinated deferrable interest debentures in a corporation. The corporation guarantees the obligations of the issuer trust and agrees to indemnify third parties for other expenses and liabilities incurred by the issuer trust. Taken together, the debentures, guarantee, and expense indemnity agreement constitute a full, irrevocable, and unconditional guarantee of the obligations of the issuer trust by the issuer corporation. With the exception of credit risk, investors in trust preferred stock are protected from changes in the value of the instruments. Like investors in debt securities, trust preferred stock investors do not share any appreciation in the value of the issuer trust and have no voting rights in the management or ordinary course of business of the issuer trust. Additionally, trust preferred stock is not perpetual and distributions on the stock resemble the periodic interest payments on debt. In essence, such investments are functionally equivalent to investments in the underlying debentures. In the future, as such new instruments come to the FDIC's attention, the FDIC will provide public notice of its determinations under the rule by issuing Financial Institution Letters describing its decisions. Any investments in such instruments would be aggregated with investments in adjustable rate and money market preferred stock for purposes of applying the 15 percent of tier one capital limit.

Activities that are closely related to banking. The language in the proposal providing a regulatory exception allowing insured state banks to engage in activities closely related to banking has been eliminated. The proposed regulation continued language found in the current regulation entitled ''Activities that are closely related to banking''. Section 362.3(b)(2)(iv) of the proposal permitted an insured state bank to engage as principal in any activity that is not permissible for a national bank provided that the FRB by regulation or order has found the activity to be closely related to banking for the purposes of section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)). However, the proposed exception was subject to the statutory restrictions prohibiting the bank from directly holding equity investments that a national bank may not hold or which are not otherwise permissible investments for insured state banks pursuant to § 362.3(b). Additionally, the proposal imposed limits on certain of the activities authorized by the 4(c)(8) reference. Included in the limits was a provision requiring the bank, when acting as a real property lessor, to either re-lease the real estate or dispose of the same within two years after the lease expires.

The FDIC received six comments on this provision, four of them objecting to the two-year disposition period at the conclusion of a real estate lease. Another opined that the bank's survival depends on its ability to diversify by engaging in real estate leasing through a subsidiary. An industry trade association supports continued reliance on activities authorized by the FRB pursuant to 4(c)(8) of the Bank Holding Company Act.

Upon further analysis, the FDIC has deleted the reference to the 4(c)(8) list because the activities included on that list generally are of a type permissible for national banks. The one exception that clearly is not generally permissible for a national bank involves real estate leasing. It is noted that national banks are permitted to engage in certain real estate leasing activities. As with other activities permissible for national banks, insured state banks can engage in the same real estate leasing activities subject to any limitations imposed by the applicable state law. However, since section 24 of the FDI Act does not permit the FDIC to allow insured state banks, at the bank level, to hold equity investments that are not permissible for national banks, any FDIC authorization for real estate leasing raises a question whether, under a particular leasing arrangement, the bank as lessor holds an interest in real estate tantamount to an equity investment. Given the variety of potential lease structures, it is not practicable for the FDIC to deal with this issue categorically, under a regulatory exception, at this time. If authorized under state law, state banks are permitted to engage in leasing activities through majority-owned subsidiaries. This exception is discussed in the description of § 362.4(b) in this preamble.

Guarantee activities. The current regulation contains a provision that

permits a state bank with a foreign branch to directly guarantee the obligations of its customers as set out in what was formerly § 347.3(c)(1) of the FDIC's regulations without filing any application under part 362. A technical amendment to part 362 was recently made to update this reference to § 347.103(a)(1) as published in the **Federal Register** on April 8, 1998 (63 FR 17090). The current regulation also permits a state bank to offer customer-sponsored credit card programs in which the bank guarantees the obligations of its retail banking deposit customers. This provision has been deleted as unnecessary since these activities are permissible for a national bank. In its current rule, the FDIC used this provision to clarify that part 362 does not prohibit these activities. To shorten the regulation, such clarifying language has been deleted since the activity is permissible for a national bank. The FDIC received no comments addressing this provision and it is dropped as proposed.

Section 362.4 Subsidiaries of Insured State Banks

General prohibition. The regulatory language implementing the statutory prohibition on an insured state bank engaging in ''as principal'' activities that are not permissible for a national bank is separated from the prohibition on an insured state bank subsidiary engaging in activities which are not permissible for a subsidiary of a national bank. For ease of reference we separated bank and subsidiary activities. Section 362.4 deals exclusively with activities that may be conducted in a subsidiary of an insured state bank. Five commenters supported this restructuring of the regulation. The FDIC believes that separating the activities that may be conducted at the bank level from the activities that must be or may be conducted by a subsidiary makes it easier for the reader to focus on the analysis of the regulation. Therefore, the general prohibition in the final regulation is adopted as proposed.

Exceptions. First, the regulation provides that activities not permissible for a national bank subsidiary may not be conducted by the subsidiary of an insured state bank unless one of the exceptions in the regulation applies. This language is similar to the current part 362 and we received no comments on the provision. The final regulation contains no changes to the proposed language.

Consent obtained through application. The revised regulation allows approval by individual application provided that the insured state bank meets and continues to meet the applicable capital standards and the FDIC finds there is no significant risk to the fund. Language from the current regulation is deleted that expressly provides that approval is necessary for each subsidiary even if the bank received approval to engage in the same activity through another subsidiary. Deleting this language does not automatically permit a state bank to establish a second subsidiary to conduct the same activity that was approved for another subsidiary of the same bank; however, the issue will be handled on a case-by-case basis by the FDIC pursuant to order. For example, if the FDIC approves an application by a state bank to establish a majority-owned subsidiary to engage in real estate investment activities, the order may (in the FDIC's discretion) be written to allow more than one subsidiary to conduct the activity or to require that any additional real estate subsidiaries must be individually approved.

Application procedures may be used by a bank to request the FDIC's consent to engage in an activity that is limited but not specifically prohibited by this part. For instance, the notice procedures require that the subsidiary take the corporate organizational form. Several comments expressed concern about the restriction on the form of business enterprise. Any subsidiary that is organized as a limited liability company would be required to use the application procedures. The FDIC does not intend to prohibit insured state banks from organizing subsidiaries in a form other than a corporation, or to make it more difficult to establish these other forms of business enterprise. However, the FDIC would like to review other forms of organizations, on a case-by-case basis, to satisfy itself that adequate separations are placed between the bank and its subsidiary. At this time, we have not found a way to craft standardized separation criteria for these other forms of business enterprise. No commenters suggested any criteria. Other requests that do not meet the notice criteria or that desire relief from a limit or restriction included in the notice criteria also are encouraged. Application instructions have been moved to subpart G of part 303.

Consistent with the proposal, the final rule eliminates language that prohibited an insured state bank from engaging in insurance underwriting through a subsidiary except to the extent that such activities are permissible for a national bank. Eliminating this language does not result in any substantive change as section 24 of the FDI Act clearly provides that the FDIC may not approve an application for a state bank to directly or indirectly conduct insurance underwriting activities that are not permissible for a national bank. The FDIC received no comment on this change. Therefore, the language is unnecessary and has been eliminated as proposed.

The current part 362 allows state banks that do not meet their minimum capital requirements to gradually phase out otherwise impermissible activities that were being conducted as of December 19, 1992. These provisions are eliminated due to the passage of time. The relevant outside dates to complete the phase out of those activities have passed (December 19, 1996, for real estate activities and December 8, 1994, for all other activities).

Grandfathered Insurance Underwriting. The regulation provides for three statutory exceptions that allow subsidiaries to engage in insurance underwriting, covering ''grandfathered'' insurance activities, title insurance, and crop insurance.

Subsidiaries may engage in the same grandfathered insurance underwriting as the bank if the bank or subsidiary was lawfully providing insurance as principal on November 21, 1991. The limitations under which this subsidiary may operate have been changed.

The current standard that the bank must be well-capitalized has been changed. Consistent with the proposal, the final rule requires the bank to be well-capitalized after deducting its investment in the insurance subsidiary. One comment on this change argues that the risk involved in insurance underwriting depends upon the type of insurance and that not all insurance underwriting is inherently risky enough to justify an automatic capital deduction. The FDIC believes that this capital treatment is an important element to separate the operations of the bank and the subsidiary. This treatment clearly delineates and identifies the capital that is available to support the bank and the capital that is available to support the subsidiary. Capital standards for insurance companies are based on different criteria from bank capital requirements. Most states have minimum capital requirements for insurance companies. The FDIC believes that a bank's investment in an insurance underwriting subsidiary is not actually ''available'' to the bank in the event the bank experiences losses and needs additional capital. As a result, the bank's investment in the insurance subsidiary should not be considered when determining whether the bank has sufficient capital.

Another commenter objects to the introduction of the ''capital deduction'' arguing that providing insurance as principal under the ''grandfather'' provision is not an activity for which a state bank must obtain a risk to the fund determination. The comment asserts that the provision is self-operative in the absence of any determination or regulations of the FDIC, since Congress evaluated the risk to the insurance funds created by the activity and found that risk to be acceptable. The FDIC agrees that, other than the requirement that the bank must be well-capitalized, section 24 itself imposes no additional conditions or restrictions on the activity. Nevertheless, ever since the FDIC originally promulgated its part 362 rules regarding the conduct of this activity, the FDIC has noted that the activity can involve material risks, and it is therefore prudent to separate those risks from the insured state bank. *See* 58 FR 64482 (Dec. 8, 1993). The FDIC has always imposed conditions on this activity, over and above those addressed in section 24 itself, to protect bank safety and soundness and protect the deposit insurance funds. *See* 58 FR 6465 (January 29, 1993). As noted at the time, the FDIC is not precluded from imposing such restrictions, as section 24(i) itself clearly indicates.

Commenters disagreed on the need for an aggregate investment limit for equity investments in grandfathered insurance activities. One comment argues that it is important to limit the maximum exposure to the depository institution. Another comment states that such a limit is not suggested by the statute, and the FDIC should retain the flexibility to act on a case-by-case basis. After further consideration of this issue, the FDIC is not convinced that the risks from the different types of insurance subject to grandfather provisions are similar. Therefore, an aggregate limit would not necessarily enhance the safety and soundness of the banks involved in this activity. After considering the comments received and for the reasons stated above, the language in the final regulation is unchanged from the proposal.

The revisions to the regulation require a subsidiary engaging in grandfathered insurance underwriting to meet the standards for an ''eligible subsidiary'' discussed below. This standard replaces the ''bona fide'' subsidiary standard in the current regulation. The ''eligible subsidiary'' standard generally contains the same requirements for corporate separateness as the ''bona fide'' subsidiary definition but adds the following provisions: (1) The subsidiary has only one business purpose; (2) the subsidiary has a current written business plan that is appropriate to its type and scope of business; (3) the subsidiary has adequate management for the type of activity contemplated, including appropriate licenses and memberships, and complies with industry standards; and (4) the subsidiary establishes policies and procedures to ensure adequate computer, audit and accounting systems, internal risk management controls, and the subsidiary has the necessary operational and managerial infrastructure to implement the business plan. No comment was received relating to the effect of these additional requirements on banks engaged in insurance underwriting. We believe that the standards for adequate separation between an insured state bank and any subsidiary engaged in insurance underwriting should be similar to those that separate other subsidiaries that engage in activities not permitted to the bank. Therefore, no changes have been made to the proposed separation standards.

In lieu of the prescribed disclosures contained in the current regulation and in a departure from the proposal, the revision does not prescribe disclosures. Instead, the FDIC is relying on the terms of the Interagency Statement as applicable guidance when the subsidiary's products are sold on bank premises, are sold by bank employees, or are sold when the bank receives remuneration for a referral. The FDIC has made the change primarily because it recognizes that there is a reduced likelihood of customer confusion when sales of insurance products by a subsidiary of an insured state bank are not made on bank premises, are not made by bank employees, and are not a result of a referral from the bank.

However, there is an increased risk of customer confusion where the insured state bank and the subsidiary selling the product have similar names. Those cases are addressed in part by a separation standard which is discussed below. The separation standard requires that the subsidiary conduct its business pursuant to independent policies and procedures designed to inform customers and prospective customers of the subsidiary that the subsidiary is a separate organization from the state-chartered depository institution and that the state-chartered depository institution is not responsible for and does not guarantee the obligations of the subsidiary. The institution and its subsidiary should take any steps necessary to avoid customer confusion on behalf of non-bank customers, or bank customers in transactions not covered by the Interagency Statement.

Under § 362.5(b)(2), banks with subsidiaries engaged in grandfathered insurance underwriting activities are expected to meet the new requirements, and have 90 days from the effective date to achieve compliance or apply to the FDIC for approval to operate otherwise. The FDIC will consider any such applications on a case-by-case basis.

The regulation provides that a subsidiary may continue to underwrite title insurance based on the specific statutory authority from section 24. This provision is currently in part 362 and is carried forward with no substantive change. The insured state bank is permitted only to retain the investment if the insured state bank was required, before June 1, 1991, to provide title insurance as a condition of the bank's initial chartering under state law. The authority to retain the investment terminates if a change in control of the grandfathered bank or its holding company occurs after June 1, 1991. There are no statutory or regulatory investment limits on banks holding these types of grandfathered investments.

The exception for subsidiaries engaged in underwriting crop insurance is continued. Under section 24, insured state banks and their subsidiaries are permitted to continue underwriting crop insurance under two conditions: (1) They were engaged in the business on or before September 30, 1991; and (2) the crop insurance was reinsured in whole or in part by the Federal Crop Insurance Corporation. While this grandfathered insurance underwriting authority requires that the bank or its subsidiary had to be engaged in the activity as of a certain date, the authority does not terminate upon a change in control of the bank or its parent holding company.

Majority-owned subsidiaries ownership of equity investments that represent a control interest in a company. In proposed § 362.4(b)(3), the FDIC would have allowed majority-owned subsidiaries of insured state banks to hold controlling interests in lower-level subsidiaries engaged in certain activities which the FDIC authorized to be conducted at the bank level in proposed § 362.3(b)(2). These activities were holding adjustable rate and money market preferred stock; and engaging in activities found by the FRB to be closely related to the business of banking under section 4(c)(8) of the Bank Holding Company Act (subject to certain restrictions). Proposed § 362.4(b)(3) differed from current § 362.4(c)(3)(iv)(C), which effectively

authorizes the majority-owned subsidiary to own stock of a corporation engaged in 4(c)(8) activities by authorizing the ownership of stock of a corporation that engages in activities permissible for a bank service corporation but imposes no control requirement. Proposed § 362.4(b)(3) also contained no counterpart to current § 362.4(c)(3)(iv)(D), authorizing a majority-owned subsidiary to invest in 50 percent or less of the stock of a corporation engaging solely in activities which are not ''as principal'.

In the final version, at § 362.4(b)(3), the FDIC has broadened the proposed language, so that the overall effect of the section is to authorize insured state banks to have lower-level subsidiaries engaged in many of the same types of activities which the FDIC previously found do not pose a significant risk when conducted at the bank level or through a majority-owned subsidiary. The FDIC has received questions concerning the types of activities and the restrictions on these activities if conducted by lower-level subsidiaries. This addition to the final regulation is intended to clarify that generally, the same limitations are imposed on the lower-level subsidiary as are imposed on the majority-owned subsidiary conducting the same type of activity. As discussed below, the FDIC has retained the control requirement (subject to one modification), because the overall design of the section is to authorize lower-level subsidiaries to engage in approved activities. Of course, banks also may apply to the FDIC for permission to make additional investments in excess of or which differ from those where general consent is granted under the rule.

As is also discussed below, the activities covered by the final version of § 362.4(b)(3) still differs from current § 362.4(c)(3)(iv)(C) and current § 362.4(c)(3)(iv)(D), but changes made from the proposed language narrow the gap.

First, the FDIC has found that it is not a significant risk to the deposit insurance funds if a majority-owned subsidiary holds a controlling interest in a company engaged in real estate or securities activities authorized under the real estate investment activities and securities activities sections of this regulation at § 362.4(b)(5), discussed below. The bank must file notice with the FDIC, and may proceed if the FDIC does not object. The bank must meet the same core eligibility criteria in § 362.4(c)(1) that would apply if the bank were conducting the activity directly through a majority-owned subsidiary. The bank's investments in and transactions with the lower tier company are subject to the same limits under § 362.4(d) as would apply if the bank were conducting the activity directly through a majority-owned subsidiary. The majority-owned subsidiary must also comply with the investment and transaction limits, to ensure that the majority-owned subsidiary is not used as a conduit to the lower tier company in derogation of the § 362.4(d) limits on the lower tier company. The bank must also deduct its equity investment in the majority-owned subsidiary and the lower tier company from its capital in accordance with § 362.4(e), as would be the case if the bank were conducting the activity directly through a majority-owned subsidiary. If the lower tier company is engaged in securities activities of the type contemplated by § 362.4(b)(5)(ii), the bank and the lower tier company must observe the additional requirements set out in that section. Finally, either the majority-owned subsidiary must observe the core eligibility criteria in § 362.4(c)(2), or the lower tier company must observe them. However, absent an application to the FDIC, the latter option is available only if the lower tier company takes corporate form. The FDIC's rationale for each of these limits on the activities authorized by § 362.4(b)(5) is discussed in detail below.

Second, the FDIC also has found that it is not a significant risk to the deposit insurance funds if a majority-owned subsidiary holds a controlling interest in a company which engages in: (1) Any activity permissible for a national bank including such permissible activities that may require the company to register as a securities broker; (2) acting as an insurance agency; (3) acquiring or retaining adjustable rate and money market preferred stock or other instruments of a similar character to the same extent allowed for the bank itself under § 362.3(b)(2)(iii) and combined with the 15 percent limit therein; or (4) engaging in real estate leasing activities to the same extent permissible for the majority-owned subsidiary under § 362.4(b)(6), discussed below.

One comment, on the use of the control test for defining activities for lower level subsidiaries, indicated concern over the change from the current regulation. Specifically, concern was expressed relating to a group of insured depository institutions that collectively own through majority-owned subsidiaries a company engaged in securities brokerage and insurance underwriting. None of the banks involved own a control interest. The structure of the ownership was set up in reliance upon the exception in current § 362.4(c)(3)(iv)(D). The FDIC recognizes that many community banks rely on formation of a consortium of banks to provide permissible financial services for its customers that one bank could not efficiently provide. We believe it would be imprudent to penalize institutions that have invested in these activities through a majority-owned subsidiary. Therefore, the proposed regulatory language has been changed, creating an exception to the control requirement where the company in question is controlled by insured depository institutions.

The scope of the activities authorized under final § 362.4(b)(3) differ from current § 362.4(c)(3)(iv)(C) and current § 362.4(c)(3)(iv)(D). The FDIC eliminated proposed § 362.3(b)(2)(iv), which would have authorized 4(c)(8) activities at the bank level. In a parallel fashion, we eliminated current § 362.4(c)(3)(iv)(C), which effectively authorizes the majority-owned subsidiary to own stock of a corporation engaged in 4(c)(8) activities. As is discussed above in connection with that change, the activities included on the 4(c)(8) list are generally of a type permissible for national banks, and the authorization in § 362.4(b)(3)(ii)(A) of the final rule authorizes the lower-level subsidiary to engage in activities permissible for national banks. As is also discussed above, the 4(c)(8) list's inclusion of real estate leasing is the one significant exception that was not otherwise dealt with in this regulation. To address the elimination of real estate leasing under the 4(c)(8) list, the FDIC has created § 362.4(b)(6) to govern real estate leasing by a majority-owned subsidiary. Such activity also is authorized for a lower-level subsidiary under § 362.4(b)(3)(ii)(D) of the final rule.

With regard to current § 362.4(c)(3)(iv)(D), authorizing a majority-owned subsidiary to invest in 50 percent or less of the stock of a corporation engaging solely in activities which are not ''as principal'', the final version of § 362.4(b)(3) has the effect of authorizing non-principal activities which are financially-related. Section 362.4(b)(3)(ii)(B) of the final rule authorizes insurance agency activities by the lower-level subsidiary; and 362.4(b)(3)(ii)(A), authorizing the lower-level subsidiary to engage in activities permissible for national banks, encompasses certain non-principal activities, such as securities brokerage and investment advisory services.

We have previously required applications to hold savings association stock, although a savings association

could be owned, controlled or operated if the savings association engages only in deposit-taking and other activities that are permissible for a bank holding company.[4]

If a bank was relying on a previous regulatory exception that has now been eliminated, § 362.5(b)(3) of the final rule provides the activity may continue as previously conducted for 90 days after the effective date of this regulation. If the activity of the lower-level subsidiary is not authorized by the new rule, or the control standard is not met in that time frame, the insured state bank must apply to the FDIC for permission to continue the activity.

Equity securities held by a majority-owned subsidiary. The FDIC sought comment on whether the final regulation should contain an exception that would allow an insured state bank to hold equity securities at the subsidiary level. In light of comments received on this issue, Staff is further analyzing the proposal. Thus, the final rule does not contain the provision that would have permitted a majority-owned subsidiary of a state bank and savings association to engage in equity securities investment activities. At this time, we are proceeding with the remainder of the final regulation so as to avoid further delay in the streamlining benefits that state banks and savings associations will enjoy from the revisions. As a part of this regulation, we are inserting provisions from the current regulation that allow: (1) An insured state bank through a majority-owned subsidiary to invest in up to ten percent of the stock of another insured bank; and (2) an insured state bank that has received approval to invest in equity securities pursuant to the statutory grandfather to conduct these activities through a majority-owned subsidiary without any additional approval from the FDIC. The provisions have been continued to allow previously approved activities to continue while staff is analyzing equity securities investment activities further.

The FDIC proposed to eliminate the notice for these activities, the specific reference to grandfathered activity, and to allow similar activity for all insured state banks. However, the exception provided that the bank's investment in the majority-owned subsidiary be deducted from capital and that the activity be subject to certain eligibility requirements and transaction limitations. Comment was frequent and strong that this proposal was unacceptable to the banks that held stocks under the current regulation.

Numerous commenters argued that the statutory grandfather for banks holding common and preferred stock investments and registered shares extends to the bank and its subsidiaries. Section 24(f) is the governing statute in this matter. The exception contained in this provision extends only to the insured state bank. The statute makes no mention of the bank's subsidiary. Section 24(c) of the FDI Act does allow the bank to hold common or preferred stock or shares of registered investment companies through a majority-owned subsidiary. Activities conducted in a majority-owned subsidiary are subject to the bank's compliance with applicable capital standards and the FDIC's finding under section 24(d) that the activity poses no significant risk to the funds.

Most of the comments received came from interested parties in the Commonwealth of Massachusetts and referred to a type of subsidiary authorized in Massachusetts to hold all types of securities, whether permissible or impermissible for a national bank. These subsidiaries were established to take advantage of specialized tax treatment under Massachusetts law. The FDIC understands the tax-favored treatment of these subsidiaries; however, that tax treatment is a matter of state tax law and is not a factor in the FDIC's risk to the fund determination under this statute. However, the FDIC is not unsympathetic to the plight of insured state banks that have acted lawfully in structuring their business to achieve tax-favored treatment. The FDIC is unwilling to upset such good faith arrangements without considering other alternatives.

Reflecting a sentiment that is contained in many comment letters, one commenter stated, ''as a practical matter, we are unaware of any circumstance where banks have been harmed by conducting these activities through a subsidiary, and thus we believe that conducting the grandfathered activities in that manner poses no risk to the deposit insurance funds''. The FDIC recognizes that for the past 15 years there has been an unprecedented rise in the value of common and preferred stock and registered shares, and these markets have experienced no sustained, appreciable downturn in value in over 10 years. The FDIC does not base its risk to the fund determination on the recent history of markets for listed common and preferred stock and registered shares. The FDIC's policy regarding holding individual stocks is to not take exception to holding corporate equities which are well regarded by knowledgeable investors, marketable and held in moderate proportions. In reviewing equities held on an aggregate basis, the bank's portfolio of common and preferred stock and registered shares is reviewed in context of its overall investment portfolio. The holding of common and preferred stock and registered shares must be in the context of the bank's overall goals of investment quality, maturity pattern, diversification of risks, marketability of the portfolio, and income production. The bank's overall investment strategies are then judged in relationship to the: (1) General character of the institution's business; (2) analysis of funding sources; (3) available capital funds; and (4) economic and monetary factors.

The FDIC proposed that the bank's investment in a subsidiary investing in equity securities be deducted from the bank's capital before determining the adequacy of the bank's capital. This treatment would separate the capital that is available to support the bank from the capital that is available to support the activities of the subsidiary. In that scenario, because the risks of holding equity securities is borne by the capital of the subsidiary, the portfolio of equity securities and registered shares does not have to be analyzed in context of the bank's overall investment strategies. If the capital separations are not present, then the risks of holding equity securities through a fully consolidated subsidiary must be considered in context of the bank's overall investment strategies. In addition, if a bank chooses to hold investments that are permissible for a national bank in a subsidiary that also may hold investments that are not permissible for a national bank, the FDIC will treat the entire subsidiary as engaged in an activity that is not permissible for a national bank.

Many comments say that the FDIC's proposal for deducting a bank's investment in its securities subsidiary from the bank's capital before determining capital adequacy is inconsistent with the capital treatment for recognition of 45% of net unrealized gains in the equities portfolio under the FDIC's capital regulations (12 CFR part 325).[5] The argument that has been made by these comments is persuasive to the FDIC. The two approaches to treatment of gains on securities do seem inconsistent, and the capital regulation is consistent with the other federal financial institution regulators' approach to capital treatment of common and preferred stock and shares of registered investment companies.

[4] 12 U.S.C. 1843(c) and 12 CFR 225.28(b)(4)(ii).

[5] 63 FR 46518 (Sept. 1, 1998).

State law in Massachusetts permits a state bank to establish a subsidiary to hold the equity security and investment company share of investments that the bank is permitted to make under state law. Those investments if made directly by the bank are eligible for the ''grandfather'' provided for by section 24(f) of the FDI Act and § 362.3(a)(2)(iii). According to the comments, such subsidiaries should be given the same treatment accorded to the bank, i.e., if the bank is permitted by the FDIC to exercise its direct investment authority, the bank should be permitted to invest in those securities and investment company shares through a subsidiary under the same terms as exist under the current rule without a capital deduction.

After considering the comments, the FDIC has decided to retain the current provision allowing grandfathered banks to hold their investments in common or preferred stock and shares of investment companies through a majority-owned subsidiary until the staff analysis of equity securities investments is completed. Section 362.4(b)(4)(i) of the final regulation provides that any insured state bank that has received approval to invest in common or preferred stock or shares of an investment company pursuant to § 362.3(a)(2)(iii) may conduct the approved investment activities through a majority-owned subsidiary provided that any conditions or restrictions imposed with regard to the approval granted under § 362.3(a)(2)(iii) are met. Section 362.3(a)(2)(iii) provides that no insured state bank may take advantage of the ''grandfather'' provided for investments in common or preferred stock listed on a national securities exchange and shares of an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1, *et seq.*) unless the bank files a notice with the FDIC of the bank's intent to make such investments and the FDIC determines that such investments will not pose a significant risk to the deposit insurance funds. In no event may the bank's investments in such securities and/or investment company shares exceed 100% of the bank's tier one capital. The FDIC may condition its finding of no risk upon whatever conditions or restrictions it finds appropriate. The ''grandfather'' will be lost if certain events occur (see § 362.3(a)(2)(iii)).

The maximum permissible investment by the consolidated bank and majority-owned subsidiary engaged in this activity is 100 percent of the bank's consolidated tier one capital. If the bank also holds listed common or preferred stock or shares of registered investment companies at the bank level pursuant to the grandfather, such securities will count toward the limit. For a particular bank, the FDIC may impose a limit on a case-by-case basis at its discretion of less than the maximum permissible investment of 100 percent of tier 1 capital. The FDIC may require divestiture of some or all of the investments if it is determined that retention of the investments will have an adverse effect on the safety and soundness of the consolidated bank. The limitation of up to 100 percent of tier one capital, the requirement for bank policies, and the reservation of the authority to require divestiture are taken directly from the current regulation of these activities when conducted at the bank level.

Bank stock. Section § 362.4(b)(4)(ii) of the final regulation restores the exception which allows an insured state bank to invest in up to ten percent of the outstanding stock of another insured bank without the FDIC's prior consent provided that the investment is made through a majority-owned subsidiary which was organized for the purpose of holding such shares. This exception is restored to the regulation to provide relief for those state banks which are permitted under state law to invest in the stock of other banks and have done so in reliance on the current regulation. Insured state banks should note, however, that the holding of such shares must of course be permissible under other relevant state and federal law.

The FDIC has become aware that some insured state banks own a sufficient interest in the stock of other insured state banks to cause the bank which is so owned to be considered a majority-owned subsidiary under part 362. It is the FDIC's posture that such an owner bank does not need to file a request under part 362 seeking approval for its majority-owned subsidiary that is an insured state bank to conduct as principal activities that are not permissible for a national bank. As the majority-owned subsidiary is itself an insured state bank, that bank is required under part 362 and section 24 of the FDI Act to request consent on its own behalf for permission to engage in any as principal activity that is not permissible for a national bank.

Again, we are reinstating the provision in the current rule that permits a majority-owned subsidiary of a state bank to invest in up to ten percent of the outstanding stock of another insured bank. No other restrictions on this investment are imposed until the staff analysis of equity securities investment activities is complete.

Majority-owned subsidiaries conducting real estate investment activities and securities underwriting. The FDIC has determined that real estate investment and securities underwriting activities do not represent a significant risk to the deposit insurance funds, provided that the activities are conducted by a majority-owned subsidiary in compliance with the requirements set forth. These activities require the insured state bank to file a notice. Then, as long as the FDIC does not object to the notice, the bank may conduct the activity in compliance with the requirements. The FDIC is not precluded from taking any appropriate action or imposing additional requirements with respect to the activities when the facts and circumstances warrant such action.

Engage in real estate investment activities. Section 24 of the FDI Act and the current version of part 362 generally prohibit an insured state bank from engaging in real estate investment activities not permissible for a national bank, absent FDIC approval. Section 24 does not grant FDIC authority to permit an insured state bank to directly engage in real estate investment activities not permissible for a national bank. The circumstances under which national banks may hold equity investments in real estate are limited. If a particular real estate investment is permissible for a national bank, an insured state bank only needs to document that determination. If a particular real estate investment is not permissible for a national bank and an insured state bank wants to engage in real estate investment activities (or continue to hold the real estate investment in the case of investments acquired before enactment of section 24 of the FDI Act), the insured state bank must file an application with FDIC for consent. The FDIC may approve such applications if the investment is made through a majority-owned subsidiary, the institution meets the stated capital requirements and the FDIC determines that the activity does not pose a significant risk to the affected deposit insurance fund.

The FDIC evaluates a number of factors when acting on requests for consent to engage in real estate investment activities. In evaluating a request to conduct equity real estate investment activity, the FDIC considers the type of proposed real estate investment activity to determine if the activity is suitable for the insured depository institution. Where appropriate, the FDIC fashions

conditions designed to address potential risks that have been identified in the context of a given request. The FDIC also reviews the proposed subsidiary structure and its management policies and practices to determine if the insured state bank is adequately protected and analyzes capital adequacy to ensure that the insured institution has sufficient capital to support its banking activities.

In all of the applications that have been approved to conduct a real estate investment activity to date, the FDIC has imposed a number of conditions in granting the approval. In short, the FDIC has determined on a case-by-case basis that the conduct of certain real estate investment activities by a majority-owned corporate subsidiary of an insured state bank will not present a significant risk to the deposit insurance fund provided certain conditions are observed. In drafting these notice provisions, the FDIC has evaluated the conditions usually imposed when granting approval to insured state banks to conduct real estate activities and incorporated these conditions within the revised regulation where appropriate.

The revised rule allows majority-owned subsidiaries to invest in and/or retain equity interests in real estate not permissible for a national bank under an expedited notice process, provided certain criteria are met. Institutions not meeting the criteria must make application to the FDIC and obtain the FDIC's approval on a case-specific basis. To use the notice process, the insured state bank must qualify as an ''eligible depository institution'', as that term is defined within the revised regulation, and the majority-owned subsidiary must qualify as an ''eligible subsidiary'', which is also defined within the revised rule. These criteria are discussed below. The insured state bank must also abide by the investment and transaction limitations set forth in the revised regulation.

Under the revisions, the insured state bank may not invest more than 20 percent of the bank's tier one capital in all of its majority-owned subsidiaries which are conducting activities subject to the investment limits. This language reflects two changes from the proposal. First, the 10 percent per subsidiary limit has been eliminated. Second, the revisions provide that the 20 percent aggregate investment limit applies to all subsidiaries engaged in activities that are being separated from the insured depository institution. Under the regulation, the activities subject to the investment limit are real estate investment activities and securities underwriting. These investment limits may cover any other activities that the FDIC deems appropriate by regulation or any FDIC order. For the purpose of calculating the dollar amount of the investment limitations, the bank would calculate 20 percent of its tier one capital after deducting all amounts required by the regulation or any FDIC order.

Comments received were generally supportive of the overall investment limit but were critical of a provision in the proposed regulation that the bank could invest no more than 10 percent of its tier one capital in any one subsidiary engaged in real estate activities. The comments questioned the rationale for requiring more than one subsidiary if a bank is investing up to its aggregate limit in real estate investment activities. The FDIC in its proposal attempted to have the restrictions on transactions between an insured state bank and its subsidiaries reflect as closely as possible the same restrictions that are imposed on a bank/affiliate relationship. The 10 percent limitation per subsidiary in the proposal reflected the desire of the FDIC that a bank engaging in real estate investment activities diversify its risks. Upon reflection, the FDIC believes an arbitrary limit on the amount that can be invested in any one subsidiary does not necessarily accomplish the desired diversification. In reviewing notices of intent to engage in this activity, the FDIC will look at the bank's diversification of risks when making a determination of whether to consent to the planned activity. Therefore, the final rule drops the proposed 10 percent limit on investment in each subsidiary. The 20 percent limitation on the investment in real estate investment activities provides an important safeguard against excessive investment in these activities, and is retained in the final regulation. However, that limit now includes all subsidiaries engaged in activities that are being separated from the insured depository institution. This change occurred when the FDIC reassessed the limit and decided to make it more closely parallel the 23A standard governing affiliates. Thus, the 20 percent limit will apply to all activities that are separated from the insured depository institution. Under the final regulation, the activities subject to the investment limit are real estate investment activities and securities underwriting. Of course this limit may be modified by application.

The FDIC recognizes that some real estate investments or activities are more time, management and capital intensive than others. Our experience in reviewing the requests submitted under section 24 has led us to conclude that small equity investments in real estate—held under certain conditions—do not pose a significant risk to the deposit insurance fund. As a result, the final rule provides relief to insured state banks having small investments in a majority-owned subsidiary engaging in real estate investment activities. The FDIC is attempting to strike a reasonable balance between prudential safeguards and regulatory burden in its revisions. As a result, the final rule establishes certain exceptions from the requirements necessary to establish an eligible subsidiary whenever the insured state bank's investment is of a de minimis nature and meets certain other criteria. Under the final rule, whenever the bank's investment in its majority-owned subsidiary conducting real estate activities does not exceed 2 percent of the bank's tier one capital and the bank's investment in the subsidiary does not include extensions of credit from the bank to the subsidiary, a debt instrument purchased from the subsidiary or any other transaction originated from the bank to the benefit of the subsidiary, the subsidiary is relieved of certain of the requirements that must be met to establish an eligible subsidiary under the regulation. For example, the subsidiary need not be physically separate from the insured state bank; the chief executive officer of the subsidiary is not required to be an employee separate from the bank; a majority of the board of directors of the subsidiary need not be separate from the directors or officers of the bank; and the subsidiary need not establish separate policies and procedures as described in the regulation in § 362.4(c)(2)(xi). Commenters did not object to the elimination of these eligible subsidiary standards in these circumstances. Several commenters expressed concern that the de minimis investment level is too low. The comments suggested that 2 percent of tier one capital is an arbitrary limit and should be raised to 5 percent. Another commenter supported the limit stating that it is an appropriate safe harbor limit. The FDIC recognizes that arguments can be made for varying limits in this regard. We have chosen a conservative limit. With further experience that provides evidence that this limit can be safely increased, we can reconsider the appropriate level to be considered de minimis activity in the future.

One commenter suggested that both investment limits should be measured against tier one and tier two capital rather than using only tier one capital. The FDIC believes that certain elements

of tier two capital such as the allowance for loan and lease losses do not provide protection against activities such as real estate investment. Therefore, the FDIC has decided to retain tier one capital as the appropriate capital against which to measure risk in these activities.

Another commenter suggested that extensions of credit should be permitted subject to an aggregate limit. This same comment added that the restriction to a single subsidiary could be eliminated. In creating the de minimis exception, the FDIC wanted this exception to be used primarily for the passive holding of real estate. Multiple subsidiaries and bank lending to fund the investments is indicative of a more active investment.

If the institution or its investment does not meet the criteria established under the revised regulation for using the notice procedure, an application may be filed with the FDIC. A description of the requisite contents of notices and applications, and the FDIC's processing thereof, is contained in subpart G of part 303. The FDIC encourages institutions to file an application if the institution wishes to request relief from any of the requirements necessary to be considered an eligible depository institution or an eligible subsidiary. The FDIC recognizes that not all real estate investment should require a subsidiary to be established exactly as outlined under the eligible subsidiary definition. However, the FDIC is unwilling to eliminate those criteria under the expedited notice process.

Engage in the public sale, distribution or underwriting of securities that are not permissible for a national bank under section 16 of the Banking Act of 1933. The current regulation provides that an insured state nonmember bank may establish a majority-owned subsidiary that engages in the underwriting and distribution of securities without filing an application with the FDIC if the requirements and restrictions of § 337.4 of the FDIC's regulations are met. Section 337.4 governs the manner in which subsidiaries of insured state nonmember banks must operate if the subsidiaries engage in securities activities that would not be permissible for the bank itself under section 16 of the Banking Act of 1933, commonly known as the Glass-Steagall Act. In short, the regulation lists securities underwriting and distribution as an activity that will not pose a significant risk to the deposit insurance funds if conducted through a majority-owned subsidiary that operates in accordance with § 337.4. The proposed revisions made significant changes to that exception. Most of the proposal has been adopted without significant change in the final rule.

Due to the existing cross reference to § 337.4, the FDIC reviewed § 337.4 as a part of its review of part 362 for CDRI. The purpose of the review was to streamline and clarify the regulation, update the regulation as necessary given any changes in the law, regulatory practice, and the marketplace since its adoption, and remove any redundant or unnecessary provisions. As a result of that review, the FDIC is making a number of substantive changes to the rules which govern securities sales, distribution, or underwriting by subsidiaries of insured state nonmember banks. Although the FDIC has chosen to place the exception in the part of the regulation governing activities by insured state banks, by law, only subsidiaries of state nonmember banks may engage in securities underwriting activities that are not permissible for national banks. As we have previously stated, subpart A of this regulation does not grant authority to conduct activities or make investments. Subpart A only gives relief from the prohibitions of section 24 of the FDI Act. Insured state banks must be in compliance with applicable state law when engaging in any activity.

Since the FDIC issued its proposal to amend part 362, the OCC has given its consent to an operating subsidiary of a national bank to conduct municipal revenue bond underwriting. This activity currently is not permissible for the national bank even though the activity has been approved for a subsidiary of a national bank. Concurrent with these revisions, the FDIC is issuing a proposal to address activities that are permissible for a subsidiary of a national bank that are not permissible for the national bank itself. Until that regulation is finalized, § 337.4 will remain operative to govern only activities that are not covered by the final rule in subpart A of part 362.

The FDIC is also issuing a technical amendment to § 337.4, at § 337.4(i), in connection with this rulemaking to make this clear. It provides that any state nonmember bank subsidiary or affiliate conducting securities activities governed by § 362.4(b)(5)(ii) or § 362.8(b) must comply with such rules, and such compliance satisfies their obligations under § 337.4.

Background of section 337.4. On August 23, 1982, the FDIC adopted a policy statement on the applicability of the Glass-Steagall Act to securities activities of insured state nonmember banks (47 FR 38984). That policy statement expressed the opinion of the FDIC that under the Glass-Steagall Act: (1) Insured state nonmember banks may be affiliated with companies that engage in securities activities; and (2) securities activities of subsidiaries of insured state nonmember banks are not subject to section 21 of the Glass-Steagall Act (12 U.S.C. 378) which prohibits deposit taking institutions from engaging in the business of issuing, underwriting, selling, or distributing stocks, bonds, debentures, notes, or other securities.

The policy statement applies solely to insured state nonmember banks. As noted in the policy statement, the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) places certain restrictions on non-banking activities. Insured state nonmember banks that are members of a bank holding company system need to take into consideration sections 4(a) and 4(c)(8) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843 (a) and (c)) and applicable FRB regulations before entering into securities activities through subsidiaries.

The policy statement also expressed the opinion of the Board of Directors of the FDIC that there may be a need to restrict or prohibit certain securities activities of subsidiaries of state nonmember banks. As the policy statement noted, ''the FDIC * * * recognizes its ongoing responsibility to ensure the safe and sound operation of insured state nonmember banks, and depending upon the facts, the potential risks inherent in a bank subsidiary's involvement in certain securities activities''.

In November 1984, after notice and comment proceedings, the FDIC adopted a final rule regulating the securities activities of affiliates and subsidiaries of insured state nonmember banks under the FDI Act. 49 FR 46709 (Nov. 28, 1984), regulations codified at 12 CFR 337.4 (1986).[6] Although the rule

[6] After the regulations were adopted, the representatives of mutual fund companies and investment bankers brought another action challenging the regulations allowing insured banks, which are not members of the Federal Reserve System, to have subsidiary or affiliate relationships with firms engaged in securities work. The United States District Court for the District of Columbia, Gerhard A. Gesell, J., 606 F. Supp. 683, upheld the regulations, and representatives appealed and also petitioned for review. The Court of Appeals held that: (1) representatives had standing to challenge regulations under both the Glass-Steagall Act and the FDI Act, but (2) regulations did not violate either Act. *Investment Company Institute* v. *Federal Deposit Insurance Corporation,* 815 F.2d 1540 (D.C. Cir. 1987).

A trade association representing Federal Deposit Insurance Corporation-insured savings banks also brought suit challenging FDIC regulations respecting proper relationship between FDIC-insured banks and their securities-dealing ''subsidiaries'' or ''affiliates.'' On cross motions for summary judgment, the District Court, Jackson, J.,

does not prohibit such securities activities outright, it does restrict these activities in a number of ways and only permits the activities if authorized under state law.

Section 337.4 is structured to ensure the separateness of the subsidiary and the bank. This separation is necessary as the bank would be prohibited by the Glass-Steagall Act from engaging in many activities the subsidiary might undertake and the separation safeguards the soundness of the parent bank.

Section 337.4 adopted a tiered approach to the activities of the subsidiary and limits the underwriting of securities that would otherwise be prohibited to the bank itself under the Glass-Steagall Act unless the subsidiary and bank meet the separation standards in the regulation and the activities are limited to underwriting of investment quality securities. Section 337.4 permitted a subsidiary to engage in additional underwriting if it meets the separation standards and the subsidiary is a member in good standing with the National Association of Securities Dealers and management has at least five years experience in the industry.

The subsidiaries engaged in activities not permissible for the bank itself also are required to be adequately capitalized, and therefore, these subsidiaries are required to meet the capital standards of the NASD and SEC. As a protection to the deposit insurance fund, a bank's investment in these subsidiaries is not counted toward the bank's capital.

An insured state nonmember bank that has a subsidiary or affiliate engaging in the sale, distribution, or underwriting of stocks, bonds, debentures or notes, or other securities, or acting as an investment advisor to any investment company is prohibited under § 337.4 through a series of restrictions from engaging in transactions which could create a conflict of interest or the appearance of a conflict of interest.

Under § 337.4, the FDIC created an atmosphere in which bank affiliation with entities engaged in securities activities is very controlled. The FDIC has examination authority over bank subsidiaries. Under section 10(b) of the FDI Act (12 U.S.C. 1820(b)), the FDIC has the authority to examine affiliates to determine the effect of that relationship on the insured institution. Nevertheless, the FDIC generally has allowed these entities to be functionally regulated, that is the FDIC usually examines the insured state nonmember bank and primarily relies on the SEC and the NASD oversight of the securities subsidiary or affiliate. The FDIC views its established separations for banks and securities firms as creating an environment in which the FDIC's responsibility to protect the deposit insurance funds has been met without creating too much overlapping regulation for the securities firms. The FDIC maintains an open dialogue with the NASD and the SEC concerning matters of mutual interest. To that end, the FDIC has entered into an agreement in principle with the NASD concerning examination of securities companies affiliated with insured institutions.

The number of banks which have subsidiaries engaging in securities activities that can not be conducted in the bank itself is very small. These subsidiaries engage in the underwriting of debt and equity securities and distribution and management of mutual funds.

The FRB permits a nonbank subsidiary of a bank holding company to underwrite and deal in securities through its orders under the Bank Holding Company Act and section 20 of the Glass-Steagall Act.[7] The FDIC has reviewed its securities underwriting activity regulations in light of the FRB's recently-adopted operating standards that modify the FRB's section 20 orders.[8] The FDIC also reviewed the comments received by the FRB. The FRB conducted a comprehensive review of the prudential limitations established in its section 20 decisions. The FRB sought comment on modifying these limitations to allow section 20 subsidiaries to operate more efficiently and serve their customers more effectively.[9] The FDIC found the analysis of the FRB instructive and has determined that its regulation already incorporates many of the same modifications that the FRB has made.

In the final rule, the FDIC is not adopting all of the standards of the FRB. For instance, the FDIC is not requiring a separate statement of operating standards. The final regulation applies certain standards to insured state banks engaging in securities underwriting activities through majority-owned through the ''eligible subsidiary'' requirements. Separate operating standards are unnecessary because each of these safeguards provides appropriate protections for bank subsidiaries engaged in underwriting activities.

However, the FDIC has retained the proposed requirement that the chief executive officer of the subsidiary may not be an employee of the bank and a majority of the subsidiary's board of directors must not be directors or officers of the bank. This standard is the same as the operating standard on interlocks adopted by the FRB to govern its section 20 orders.

One of the reasons for these safeguards involves the FDIC's continuing concerns that the bank should be protected from liability for the securities underwriting activities of the subsidiary. Under the securities laws, a parent company may have liability as a ''controlling person''.[10] The FDIC views management and board of director separation as enhanced protection from controlling person liability as well as protection from disclosures of material nonpublic information. Protection from disclosures of material nonpublic information also

held that: (1) trade association had standing, and (2) regulations were within authority of FDIC. *National Council of Savings Institutions* v. *Federal Deposit Insurance Corporation,* 664 F.Supp. 572 (D.C. 1987).

[7] The affiliate restrictions under § 337.4 were created prior to the time the FRB had approved securities activities under section 20 of the Glass-Steagall Act as an activity that is closely related to banking. Given the regulatory structure now in place for affiliates of banks engaged in securities activities, the FDIC's affiliate restrictions are no longer necessary except for those holding companies that are not subject to the restrictions of the Bank Holding Company Act. The restrictions on affiliation have been moved to subpart B of this regulation and are focused only on those companies that are not registered bank holding companies.

[8] 62 FR 45295, August 21, 1997.

[9] 61 FR 57679, November 7, 1996, and 62 FR 2622, January 17, 1997.

[10] Liability of ''controlling persons'' for securities law violations by the persons or entities they ''control'' is found in section 15 of the Securities Act of 1933, 15 U.S.C. 77o, and section 20 of the Securities and Exchange Act of 1934, 15 U.S.C. 78t(a). Although the tests of liability under these statutes vary slightly, the FDIC is concerned that under the most stringent of these authorities liability may be imposed on a parent entity. Under the Tenth Circuit's permissive test for controlling person liability, any appearance of an ability to exercise influence, whether directly or indirectly, and even if such influence cannot amount to control, is sufficient to cause a person to be a controlling person within the meaning of sections 15 or 20. Although liability may be avoided by proving no knowledge or good faith, proving no knowledge requires no knowledge of the general operations or actions of the primary violator and good faith requires both good faith and nonparticipation. *See First Interstate Bank of Denver, N.A.* versus *Pring,* 969 F.2d 891 (10th Cir. 1992), rev'd on other grounds, 511 U.S. 164 (1994); *Arena Land & Inv. Co. Inc.* versus *Petty,* 906 F.Supp. 1470 (D. Utah 1994); *San Francisco-Oklahoma Petroleum Exploration Corp.* versus *Carstan Oil Co., Inc.,* 765 F.2d 962 (10th Cir. 1985); *Seattle-First National Bank* versus *Carlstedt,* 678 F.Supp. 1543 (W.D. Okla. 1987). However, to the extent that any securities underwriting liability may have been reduced due to the enactment of The Private Securities Litigation Reform Act of 1995, Pub. L. 104–67, then the FDIC's concerns regarding controlling person liability may be reduced. It is likely that the FDIC will want to await the development of the standards under this new law before taking actions that could risk liability on a parent bank that has an underwriting subsidiary.

may be enhanced by the use of appropriate policies and procedures.[11]

Substantive changes to the subsidiary underwriting activities. Generally, the regulations governing the securities underwriting activity of state nonmember banks have been streamlined to make compliance easier. In addition, state nonmember banks that deem any particular constraint to be burdensome may file an application with the FDIC to have the constraint removed for that bank and its majority-owned subsidiary. The FDIC has eliminated those constraints that were deemed to overlap other requirements or that could be eliminated while maintaining safety and soundness standards. For example, the FDIC has eliminated the notice requirement for all state nonmember bank subsidiaries that engage in securities activities that are permissible for a national bank. Under the final regulation, a notice is required only of state nonmember banks with subsidiaries engaging in securities activities that would be impermissible for a national bank. The FDIC has determined that it can adequately monitor the other securities activities through its regular reporting and examination processes.

As indicated in the following discussion on core eligibility requirements, the final rule permits a state nonmember bank meeting certain criteria to conduct, as principal, securities activities through a subsidiary that are not permissible for a national bank after filing an expedited notice with the FDIC, rather than a full application. The insured state bank must be an ''eligible depository institution'' and the subsidiary must be an ''eligible subsidiary''. Briefly, an ''eligible depository institution'' must be chartered and operating for at least three years, have satisfactory composite and management ratings under the Uniform Financial Institution Rating System (UFIRS) as well as satisfactory compliance and CRA ratings, and not be subject to any formal or informal corrective or supervisory order or agreement. These requirements are uniform with other part 362 notice procedures for insured state banks to engage in activities not permissible for national banks. These requirements are not presently found in § 337.4 but the FDIC believes that only banks that are well-run and well-managed should be given the opportunity to engage in securities activities that are not permissible for a national bank under the streamlined notice procedures. These criteria are imposed as expedited processing criteria rather than substantive criteria. Other banks that want to enter these activities should be subject to the scrutiny of the application process. Although operations not permissible for a national bank are conducted and managed by a separate majority-owned subsidiary, such activities are part of the analysis of the consolidated financial institution. The condition of the institution and the ability of its management are an important component in determining if the risks of the securities activities will have a negative impact on the insured institution. The ''eligible subsidiary'' definition, discussed below, recognizes the level of risk present in securities underwriting activities. Commenters did not object to using these standards for institutions that wish to engage in these securities activities.

One of the other notable differences between the current and final regulations is the substitution of the ''eligible subsidiary'' criteria for that of the ''bona fide subsidiary'' definition contained in § 337.4(a)(2). The definitions are similar, but changes have been made to the existing capital and physical separation requirements. Also, new requirements have been added to ensure that the subsidiary's business is conducted according to independent policies and procedures. With regard to those subsidiaries which engage in the public sale, distribution or underwriting of securities that are not permissible for a national bank, additional conditions also must be met. The conditions are that: (1) The state-chartered depository institution must adopt policies and procedures, including appropriate limits on exposure, to govern the institution's participation in financing transactions underwritten or arranged by an underwriting majority-owned subsidiary; (2) the state-chartered depository institution may not express an opinion on the value or the advisability of the purchase or sale of securities underwritten or dealt in by a majority-owned subsidiary unless the state-chartered depository institution notifies the customer that the majority-owned subsidiary is underwriting, making a market, distributing or dealing in the security; (3) the majority-owned corporate subsidiary is registered and is a member in good standing with the appropriate self-regulatory organization (SRO), and promptly informs the appropriate regional director of the Division of Supervision (DOS) in writing of any material actions taken against the majority-owned subsidiary or any of its employees by the state, the appropriate SROs or the SEC; and (4) the state-chartered depository institution does not knowingly purchase as principal or fiduciary during the existence of any underwriting or selling syndicate any securities underwritten by the majority-owned subsidiary unless the purchase is approved by the state-chartered depository institution's board of directors before the securities are initially offered for sale to the public. These additional requirements are similar to but simplify the requirements currently contained in § 337.4. Commenters did not offer objection to these simplified standards and they have been adopted as proposed.

In addition, the FDIC has eliminated the five-year period limiting the securities activities of a state nonmember bank's underwriting subsidiary's business operations. Rather, with notice and compliance with the safeguards, a state nonmember bank's securities subsidiary may conduct any securities business set forth in its business plan after the notice period has expired without an objection by the FDIC. The reasons the FDIC initially chose the more conservative posture are rooted in the time they were adopted. When the FDIC approved establishment of the initial underwriting subsidiaries, it had no experience supervising investment banking operations in the United States. Because affiliation between banks and securities underwriters and dealers was long considered impractical or illegal, banks had not operated such entities since enactment of the Glass-Steagall Act in 1933. Moreover, pre-Glass-Steagall affiliations were considered to have caused losses to the banking industry and investors, although some modern

[11] *See* ''Anti-manipulation Rules Concerning Securities Offerings'', Regulation M, 17 CFR part 242 (1997) where the SEC grapples with limiting trading advantages that might otherwise accrue to affiliates by limiting trading in prohibited securities by affiliates. The SEC is attempting to prevent trading on material nonpublic information. To reduce the danger of such trading, the SEC has a broad ban on affiliated purchasers. To narrow that exception while continuing to limit access to the nonpublic information that might otherwise occur, the SEC has limited access to material nonpublic information through restraints on common officers. Alternatively, the SEC could prohibit trading by affiliates that shared any common officers or employees. In narrowing this exception to ''those officers or employees that direct, effect or recommend transactions in securities'', the SEC stated that it ''believes that this modification will resolve substantially commenters'' concerns that sharing one or more senior executives with a distribution participant, issuer, or selling security holder would preclude an affiliate from availing itself of the exclusion''. 62 FR 520 at 523, fn. 22 (January 3, 1997). As the SEC also stated, the requirement would not preclude the affiliates from sharing common executives charged with risk management, compliance or general oversight responsibilities.

research questions this view.[12] Thus, the affiliation of banks and investment banks presented unknown risks that were considered substantial in 1983. In addition, although the FDIC recognized that supervision and regulation of broker-dealers by the SEC provided significant protections, the FDIC had little experience with how these protections operated. The FDIC has now gained experience with supervising the securities activities of banks and is better able to assess which safeguards are appropriate to impose on these activities to protect the bank and the deposit insurance funds. For those reasons, the limitations and restrictions contained in § 337.4 on underwriting other than ''investment quality debt securities'' or ''investment quality equity securities'' have been eliminated from the regulation. It should be noted that certain safeguards have been added to the system since § 337.4 was adopted. These safeguards include risk-based capital standards and the Interagency Statement. The FDIC has removed the disclosures currently contained in § 337.4, which are similar to the disclosures required by the Interagency Statement. In lieu of the prescribed disclosures, the FDIC will rely on the Interagency Statement as applicable guidance when the subsidiary's products are sold on bank premises, by bank employees or when the bank receives remuneration for a referral. This change makes compliance easier. Comments support this change and recognize that any retail sale of nondeposit investment products to bank customers is subject to the Interagency Statement when the subsidiary's products are sold on bank premises, by bank employees, or as a result of a compensated referral.

The FDIC has changed its disclosure standards relating to subsidiaries engaged in insurance underwriting to those found in the Interagency Statement for reasons similar to those discussed above. In addition, securities firms are subject to a comprehensive Federal supervisory and regulatory system designed to inform investors of risks inherent in their transactions. However, as was also discussed above in connection with insurance subsidiaries, there is a risk of customer confusion where the insured state bank and the subsidiary selling the product have similar names. Those cases are addressed in this part by a separation standard which is discussed below. The separation standard requires that the subsidiary conduct its business pursuant to independent policies and procedures designed to inform customers and prospective customers of the subsidiary that the subsidiary is a separate organization from the state-chartered depository institution and that the state-chartered depository institution is not responsible for and does not guarantee the obligations of the subsidiary. The institution and its subsidiary should take any steps necessary to avoid customer confusion on behalf of non-bank customers, or bank customers in transactions not covered by the Interagency Statement.

Finally, the FDIC will continue to impose many of the safeguards found in section 23A of the Federal Reserve Act and to impose the types of safeguards found in section 23B of the Federal Reserve Act. Although section 23B did not exist until 1987 and only covers transactions where banks and their subsidiaries are on one side and other affiliates are on the other side, the FDIC had included some similar constraints in the original version of § 337.4. Now, most of the transaction restrictions found in section 23B are adopted by the FDIC in the final rule to promote consistency with the restrictions imposed by other banking agencies on similar activities. These restrictions require that bank/subsidiary transactions be on an arm's length basis and that the subsidiary disclose that the bank is not responsible for the subsidiary's obligations. The bank also is prohibited from purchasing certain products from the subsidiary. While imposing the arm's length restrictions, the FDIC is eliminating any overlapping safeguards. Comments received did not recommend reinstating any of the restrictions from the current § 337.4.

In contrast to the arm's length transaction restrictions, transaction limitations did exist and were incorporated into § 337.4 by reference to section 23A of the Federal Reserve Act. To simplify compliance for transactions between state nonmember banks and their subsidiaries, the FDIC has placed the transactions limits and arm's length requirements in the regulatory text language and only included the restrictions that are relevant to a particular activity. The FDIC hopes that this restatement will clarify the standards being imposed on state nonmember banks and their subsidiaries.

On June 11, 1998, the FRB requested comment on an interpretation of section 23A that would exempt certain transactions between an insured depository institution and its affiliates. These interpretations would be published in part 250 of the FRB's regulations. 63 FR 32766 (June 16, 1998). Specifically, the interpretation would expand the exemption of section 23A(d)(6), which permits a bank to purchase assets of an affiliate when the assets have a ''readily identifiable and publicly available market quotation''. The proposal would, with some caveats, bring within the exemption securities that have a ''ready market'', as defined by the SEC.

The second interpretation would create two exemptions to the provision of section 23A relating to transactions with third parties that benefit the bank (and are therefore treated as ''covered transactions''.) The context for this exemption is an extension of credit by a bank to a third party to purchase securities through the bank's registered broker-dealer affiliate. The first exemption would apply when the affiliate acts solely as broker or riskless principal in a securities transaction. The second exemption would apply when the extension of credit is made pursuant to a preexisting line of credit that was not established for the purpose of buying securities from or through an affiliate.

In light of the FRB's proposals, we have re-evaluated our proposed coverage of similar transactions and have determined that the language we have crafted to govern securities underwriting subsidiaries would already allow the transactions that the FRB proposes to exempt under these interpretations. We believe that these transactions do not raise safety and soundness issues if conducted under the arm's length standards that we proposed and adopt in our final rule. Thus, we will allow a bank to purchase assets (including securities) when those transactions are carried out on terms and conditions that are substantially similar to those prevailing at the time for comparable transactions with unaffiliated parties. In addition, we already allow an extension of credit to buy an asset from the subsidiary when those transactions are carried out on terms and conditions that are substantially similar to those prevailing at the time for comparable transactions with unaffiliated parties. We consider that language to be broad enough to include purchasing securities, including when the subsidiary acts solely as broker or riskless principal in a securities transaction. A preexisting line of credit that was not established for the purpose of buying securities from or through the subsidiary is also allowed, if it otherwise meets the terms of the FDIC's exception.

[12] *See, e.g.,* George J. Benston, The Separation of Commercial and Investment Banking: The Glass-Steagall Act Revisited and Reconsidered 41 (1990).

In addition, the FDIC has sought to eliminate transaction restrictions that would duplicate the restrictions on information flow or transactions imposed by the SROs and/or by the SEC.[13] The FDIC does not seek to eliminate the obligation to protect material nonpublic information nor does it seek to undercut or minimize the importance of the restrictions imposed by the SROs and SEC. Rather, the FDIC seeks to avoid imposing burdensome overlapping restrictions merely because a securities underwriting entity is owned by a bank. Further, the FDIC seeks to avoid restrictions where the risk of loss or manipulation is small or the costs of compliance are disproportionate to the purposes the restrictions serve. In addition, the FDIC defers to the expertise of the SEC which has found that greater flexibility for market activities during public offerings is appropriate due to greater securities market transparency, the surveillance capabilities of the SROs, and the continuing application of the anti-fraud and anti-manipulation provisions of the federal securities laws.[14]

Consistent with the current notice procedure found in § 337.4, an insured state nonmember bank may indirectly through a majority-owned subsidiary engage in the public sale, distribution or underwriting of securities that would be impermissible for a national bank provided that the bank files notice prior to initiating the activities, the FDIC does not object prior to the expiration of the notice period and certain conditions are, and continue to be, met. The FDIC has shortened the notice period from the existing 60 days to 30 days and placed filing procedures in subpart G of part 303. Previously, specific instructions and guidelines on the form and content of any applications or notices required under § 337.4 were found within that section. With regard to those insured state nonmember banks that have been engaging in a securities activity covered by the new § 362.4(b)(5) under a notice filed and in compliance with § 337.4, § 362.5(b) of the regulation allows those activities to continue as long as the bank and its majority-owned subsidiaries meet the core eligibility requirements, the investment and transaction limitations, and capital requirements contained in § 362.4 (c), (d), and (e). The revised regulation requires these securities subsidiaries to meet the additional conditions specified in § 362.4(b)(5)(ii) that require securities subsidiaries to adopt appropriate policies and procedures, register with the SEC and take steps to avoid conflicts of interest. The revisions also require the state nonmember bank to adopt policies concerning the financing of issues underwritten or distributed by the subsidiary. The state nonmember bank and its securities subsidiary will have one year from the effective date of the regulation to meet these restrictions and would be expected to be working toward full compliance over that time period. Failure to meet the restrictions within a year after the adoption of a final rule will necessitate an application for the FDIC's consent to continue those activities.

To qualify for the streamlined notice procedure, a bank must be well-capitalized after deducting from its tier one capital the equity investment in the subsidiary as well as the bank's pro rata share of any retained earnings of the subsidiary. The deduction must be reflected on the bank's consolidated report of income and condition and the resulting capital will be used for assessment risk classification purposes under part 327 and for prompt corrective action purposes under part 325. However, the capital deduction will not be used to determine whether the bank is ''critically undercapitalized'' under part 325. Since the risk-based capital requirements had not been adopted when the current version of § 337.4 was adopted, no similar capital level was required of banks to establish an underwriting subsidiary, although the capital deduction has always been required. This requirement is uniform with the requirements found in the other part 362 notice procedures for insured state banks to engage in activities not permissible for national banks. The well-capitalized standard and the capital deduction recognize the level of risk present in securities underwriting activities by a subsidiary of a state nonmember bank. This risk includes the potential that a bank could reallocate capital from the insured depository institution to the underwriting subsidiary. Thus, it is appropriate for the FDIC to retain the capital deduction even though the FRB eliminated the requirement that a holding company deduct its investment in a section 20 subsidiary on August 21, 1997.

Comment was divided on the issue of whether the FDIC should impose revenue limits similar to those the FRB has established for section 20 affiliates. One comment noted that in order to provide for consistency between regulators and limit exposure to risk, the FDIC should adopt a limitation similar to that adopted by the FRB for section 20 affiliates that a securities subsidiary may earn no more than 25 percent of its income from activities that are ineligible for the bank. Other comments countered that there is not a legal or safety and soundness reason to apply such a revenue limit. We agree that there is no legal reason for a revenue limit. Because of the restrictions on transactions, the capital deduction, and separations required between a bank and a subsidiary, the FDIC does not believe that the revenue limit is necessary to control the risk to the affected deposit insurance fund.

One comment asserts that there are significant benefits of securities underwriting and no material disadvantages. The revisions that have been made are intended to strike a balance between enabling banks to compete in the financial services arena and allowing activities without consideration of risks involved. With appropriate safeguards, any material disadvantages can be mitigated or eliminated.

Notice for change in circumstances. The regulation requires the bank to provide written notice to the appropriate Regional Office of the FDIC within 10 business days of a change in circumstances in its real estate or securities subsidiary. Under the revised regulation, a change in circumstances is described as a material change in a subsidiary's business plan or management. The standard of material change would indicate such events as a change in chief executive officer of the subsidiary or a change in investment strategy or type of business or activity engaged in by the subsidiary. The regional director also may address other changes that come to the attention of the FDIC during the normal supervisory process. The FDIC received two comments concerning the change of circumstance notice. Both comments indicated that the notice is burdensome and unnecessary. The comments argue that a change in the chief executive office or investment strategies are routine. The FDIC is putting significant reliance on the management and the business plan presented when an activity is approved for a majority-owned subsidiary. The FDIC does not consider either change to be routine and believes that it is important that the FDIC be aware of material changes in the operations of the subsidiary. One

[13] *See* ''Anti-manipulation Rules Concerning Securities Offerings,'' 62 FR 520 (January 3, 1997); 15 U.S.C. 78o(f), requiring registered brokers or dealers to maintain and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic information; and ''Broker-Dealer Policies and Procedures Designed to Segment the Flow and Prevent the Misuse of Material Nonpublic Information,'' A Report by the Division of Market Regulation, U.S. SEC, (March 1990).

[14] Id. at 520.

comment requested that the notice period be extended from ten days to 30 days. The FDIC believes that both a change in management and a change in the business plan of the subsidiary should be matters that have received significant prior consideration before these events occur. It is not unreasonable to request notice of these events within ten days of the change. Therefore, after careful consideration of the comments, we have not changed the proposed requirement for a notice of change of circumstances to be submitted within 10 business days after any such change.

In the case of a state member bank, the FDIC will communicate our concerns to the appropriate persons in the Federal Reserve System regarding the continued conduct of an activity after a change in circumstances. The FDIC will work with the identified persons within the Federal Reserve System to develop the appropriate response to the new circumstances.

The FDIC does not intend to require a bank which falls out of compliance with eligibility conditions to immediately cease any activity in which the bank had been engaged. The FDIC will deal with each situation on a case-by-case basis through the supervision and examination process. In short, the FDIC intends to utilize its supervisory and regulatory tools in dealing with a bank's failure to meet the eligibility requirements on a continuing basis. The issue of the bank's ongoing activities will be dealt with in the context of that effort. The FDIC views the case-by-case approach to whether a bank will be permitted to continue an activity as preferable to forcing a bank to, in all instances, immediately cease the activity. Such an inflexible approach could exacerbate an already poor situation.

Real estate leasing. As was discussed above, the FDIC has deleted the current exception allowing a majority-owned subsidiary to engage in activities included on the referenced list of activities determined by the FRB to be closely related to the business of banking under section 4(c)(8) of the Bank Holding Company Act, because the activities included on that list are generally of a type permissible for national banks. The one exception that clearly is not generally permissible for a national bank involves real estate leasing. The FDIC has inserted a real estate leasing provision to allow continuation of activities that are permitted under the current exception but may be lost with the elimination of the reference to the 4(c)(8) list.

For the purposes of part 362, the FDIC studied real estate leasing to make a determination if there is a significant risk to the fund. The FDIC's determination requires that we look at the possibility of loss inherent in the leasing transaction.

In a real estate leasing transaction, the lessor is the owner of the parcel subject to the lease. The FDIC has defined equity investment to include any interest in real estate. A threshold question for the FDIC involves whether an ownership interest as lessor carries all of the risks and rewards of ownership when there is no lease.

By inserting a reference to the 4(c)(8) list, the FDIC consented that real estate leasing could be conducted under the standards set by the FRB. These standards provided that leasing real property or acting as agent, broker, or adviser in leasing such property is allowed if: (1) The lease is on a nonoperating basis which means that the banking holding company may not engage in operating, servicing, maintaining, or repairing leased property during the lease term; (2) the initial term of the lease is at least 90 days; (3) at the inception of the lease, the effect of the transaction will yield a return that will compensate the lessor for not less than the lessor's full investment in the property plus the estimated cost of financing the property over the term of the lease from rental payments, estimated tax benefits, and the estimated residual value of the property and the expiration of the initial lease; and (4) the estimated residual value of the property shall not exceed 25 percent of the acquisition cost of the property to the lessor. In defining the real estate leasing parameters, the FRB's definition focuses on characteristics that make the activity closely related to banking.

In making its risk to the fund determination, the FDIC looked not only at banking standards for leasing transactions but also at GAAP. Under GAAP, a lease is defined as the right to use an asset for a stated period of time. Generally, a transaction is not a lease if the right to use the property is not transferred; the transaction involves the right to explore natural resources; or the transaction represents licensing agreements. Also under GAAP, leases are considered under two broad categories: (1) Capital leases which effectively transfer the benefits and risks of ownership from the lessor to the lessee; and (2) operating leases which is everything that is not a capital lease and represents a series of cash flows. If any one of the following criteria is met, a lease may be considered to be a capital lease:

- Ownership of the property is transferred to the lessee at the end of the lease term; or
- The lease contains a bargain purchase option; or
- The lease term represents at least 75 percent of the estimated economic life of the leased property; or
- The present value of the minimum lease payments at the beginning of the lease term is 90 percent of more of the fair value of the leased property to the lessor at the inception of the lease less any related investment tax credit retained by and expected to be realized by the lessor.

Two other criteria must be present in order for the lessor to determine that a lease is a capital lease: (1) Collection of minimum lease payments is reasonably predictable; and (2) no important uncertainties exist for unreimbursable costs to be borne by the lessor.

The FDIC has decided that a majority-owned subsidiary acting as lessor under a real property lease which meets certain criteria does not represent a significant risk to the deposit insurance fund. To meet these criteria, the lease must qualify as a capital lease under GAAP and the bank and the majority-owned subsidiary may not provide servicing, repair, or maintenance to the property except to the extent needed to protect the value of the property. In addition, the majority-owned subsidiary may not acquire real estate to be leased unless it has entered into a capital lease, or has a binding commitment to enter into such a lease, or has a binding written agreement that indemnifies the subsidiary against loss in connection with its acquisition of the property. Any expenditures by the majority-owned subsidiary to make reasonable repairs, renovations, and necessary improvements shall not exceed 25 percent of the subsidiary's full investment in the property. These standards provide a framework in which the risks and rewards of ownership of the leased property have effectively been transferred from the lessor to the lessee.

A majority-owned subsidiary that acquires property for lease under this provision may not use this exception as a vehicle to acquire an equity investment in real estate. Upon expiration of the initial lease, the majority-owned subsidiary must as soon as practicable, but in any event in less than two years, re-lease the property under a capital lease or divest itself of the property. An application will be required if the subsidiary cannot meet the two-year deadline.

Acquiring and retaining adjustable rate and money market preferred stock. The proposed regulation text has been revised in the final rule to provide that a majority-owned subsidiary may acquire and retain adjustable rate and money market preferred stock and any other instrument that the FDIC has determined to have the character of debt securities to the same extent that these activities may be conducted by the bank itself. Since these subsidiaries are fully consolidated with the bank, the 15 percent of tier one capital limitation will be calculated against the consolidated tier one capital of the bank and subsidiary. If a bank and its majority-owned subsidiary both engage in this activity, the authority to conduct this activity in a majority-owned subsidiary may not be used to exceed the 15 percent limitation on this type of activity without further consent of the FDIC. This exception is provided to allow consistency between the authorized activities of the bank and its majority-owned subsidiary.

Core eligibility requirements. Consistent with the proposal, the revised regulation has been organized much differently from the current regulation where separation standards between an insured state bank and its subsidiary are contained in the regulation's definition of ''bona fide'' subsidiary. The revised regulation introduces the concept of core eligibility requirements. These requirements are defined in two parts. The first part defines the eligible depository institution criteria and the second part defines the eligible subsidiary standards.

Eligible depository institution. An ''eligible depository institution'' is a depository institution that has been chartered and operating for at least three years; received an FDIC-assigned composite UFIRS rating of 1 or 2 at its most recent examination; received a rating of 1 or 2 under the ''management'' component of the UFIRS at its most recent examination; received at least a satisfactory CRA rating from its primary federal regulator at its last examination; received a compliance rating of 1 or 2 from its primary federal regulator at its last examination; and is not subject to any corrective or supervisory order or agreement. The FDIC believes that these criteria are appropriate to ensure that expedited processing under the notice procedures is available only to well-managed institutions that do not present any supervisory, compliance or CRA concerns.

The standards for an ''eligible depository institution'' are being coordinated with similar requirements for other types of notices and applications made to the FDIC. In developing the eligibility standards, several items have been added that previously were not a stated standard for banks wishing to engage in activities not permissible for a national bank.

The requirement that the institution has been chartered and operated for three or more years reflects the experience of the FDIC that newly formed depository institutions need closer scrutiny. Therefore, a request by this type of institution to become involved in activities not permissible for a national bank should receive consideration under the application process rather than being eligible for a notice process. Several comments noted that the provision requiring the bank to be operating for three or more years ignores the presence of an established bank holding company or seasoned management. The FDIC is persuaded by the arguments that an exception is appropriate when there is an established holding company or seasoned management is present. Therefore, the criterion has been changed to require that the bank must have been chartered and operating for 3 or more years unless the appropriate regional director (DOS) finds that the bank is owned by an established, well-capitalized, well-managed holding company or is managed by seasoned management.

The revised regulation provides that the notice procedures should be available only to well-managed, well-capitalized banks. Banks which have composite and management ratings of 1 or 2 have shown that they have the requisite financial and managerial resources to run a financial institution without presenting a significant risk to the deposit insurance fund. While lower-rated financial institutions may have the requisite financial and managerial resources and skills to undertake such activities, the FDIC believes that those institutions should be subject to the formal part 362 application process as opposed to the streamlined notice process. Institutions that do not meet the eligibility criteria have been evaluated and have been determined to have some weaknesses that may require additional attention before allowing them to engage in additional activities. For that reason, the FDIC has concluded that it is more prudent to require institutions rated 3 or below to utilize the application process.

Comments received did not object to the standard of a composite rating of 1 or 2 or a management rating of 1 or 2; however, the regulatory language that the ratings used be assigned by the appropriate federal banking agency was questioned. Some comments contended that this provision fails to consider that the FDIC and FRB recognize and generally adopt the ratings assigned by the state banking departments under an alternate examination program. The language does not ignore ratings assigned by the state banking authorities. All ratings, whether state or Federal, considered by the FDIC for purposes of processing applications must be assigned by the FDIC after reviewing the results of an examination conducted by another banking agency. Although the language differs between this processing criteria and the proposal to amend our applications processing regulation (part 303), there is no intention of establishing a different standard. To reduce confusion, the language in the revised regulation has been changed to reflect that the ratings are the FDIC-assigned rating at the institution's most recent state or Federal examination.

In setting criteria to define which banks are eligible to use the notice process, the FDIC has determined it is appropriate to take into account all areas of managerial and operational expertise. In particular, the revised regulation requires that the institution have a satisfactory or better CRA rating, a 1 or 2 compliance rating, and not be subject to any formal or informal enforcement action before it may use the notice procedures.

The proposal to use the CRA ratings as an eligibility criteria drew negative comments. One commenter even expressed the opinion that the FDIC's use of a CRA rating as an eligibility criterion for expedited processing is a violation of the CRA itself. The FDIC is not proposing some alternative method of CRA enforcement. The CRA criterion is not intended to ''punish'' any bank which the FDIC has previously criticized for substandard CRA performance; nor is it intended to ''reward'' a bank with satisfactory performance. The CRA criterion acts solely as a procedural device for application processing, in connection with the other criteria, to identify applications for further review if they come from banks which have not been meeting all the primary supervisory requirements. If a bank has not complied with all of these primary supervisory expectations, it may be a symptom of financial, management, or operational deficiencies which could be exacerbated by undertaking the proposed additional activities. The consequence of failing to meet all the eligibility criteria is only that the request will be subject to exactly the same kind and level of review to which

it is subject under the current rules which have no expedited processing procedures. Therefore, the FDIC retains the same eligibility criteria in the final regulation as proposed.

Eligible Subsidiary. The eligible subsidiary requirements are also used to determine which institutions qualify for notice processing. Additionally, the requirements are also criteria the FDIC is likely to take into account when reviewing and considering applications. The FDIC's support of the concept of the expansion of bank powers is based in part on establishing a corporate separateness between the insured state bank and the entity conducting activities that are not permissible for the depository institution directly. The revised regulation establishes these separations as well as standards for operations through the concept of ''eligible subsidiary''. An entity is an ''eligible subsidiary'' if it: (1) Meets applicable statutory or regulatory capital requirements and has sufficient operating capital in light of the normal obligations that are reasonably foreseeable for a business of its size and character; (2) is physically separate and distinct in its operations from the operations of the bank, provided that this requirement shall not be construed to prohibit the bank and its subsidiary from sharing the same facility if the area where the subsidiary conducts business with the public is clearly distinct from the area where customers of the bank conduct business with the institution—the extent of the separation will vary according to the type and frequency of customer contact; (3) maintains separate accounting and other business records; (4) observes separate business formalities such as separate board of directors' meetings; (5) has a chief executive officer who is not an employee of the bank; (6) has a majority of its board of directors who are neither directors nor officers of the bank; (7) conducts business pursuant to independent policies and procedures designed to inform customers and prospective customers of the subsidiary that the subsidiary is a separate organization from the bank and that the bank is not responsible for and does not guarantee the obligations of the subsidiary; (8) has only one business purpose; (9) has a current written business plan that is appropriate to the type and scope of business conducted by the subsidiary; (10) has adequate management for the type of activity contemplated, including appropriate licenses and memberships, and complies with industry standards; and (11) establishes policies and procedures to ensure adequate computer, audit and accounting systems, internal risk management controls, and has the necessary operational and managerial infrastructure to implement the business plan.

The separations currently necessary between the bank and subsidiary are outlined in the definitions of ''bona fide'' subsidiary contained in § 337.4 and part 362. The broad principles of separation upon which the ''bona fide'' subsidiary definition and the ''eligible subsidiary'' definition are based include: (1) Adequate capitalization of the subsidiary; (2) separate corporate functions; (3) separation of facilities; (4) separation of personnel; and (5) advertising the bank and the subsidiary as separate entities. In developing the standards for an ''eligible subsidiary'', the FDIC has modified some of the criteria used in the current regulation. The changes are found in the capital requirement, the physical separation requirement, the separate employee standard, and the requirement that the subsidiary's business be conducted pursuant to independent policies and procedures.

The language in the current part 362 allows the subsidiary and the parent bank to share officers so long as a majority of the subsidiary's executive officers were neither officers nor directors of the bank. Section 337.4 contains a requirement that there be no shared officers. The ''eligible subsidiary'' concept adopts a standard that the chief executive officer of the subsidiary should not be an employee of the bank. The eligible subsidiary requirements in this regard are thus less restrictive than those found in both § 337.4 and the current version of part 362, as well as those in many FDIC orders authorizing real estate activities. The eligible subsidiary definition only requires that the chief executive officer not be an employee of the bank. Officers are employees of the bank. This limitation would allow the chief executive officer to be an employee of an affiliated entity or be on the board of directors of the bank. Two comments indicated that the requirement for an independent chief executive officer is too restrictive. One comment suggested that this requirement be dropped for small banks. The FDIC is sympathetic to the concerns of small banks; however, banks that desire relief from this standard may apply to the FDIC for approval. The FDIC recognizes that there may be instances in which this standard may not be needed. The FDIC will consider such requests and waive the standard in appropriate situations.

The current rule's requirement that the subsidiary be adequately capitalized was revised to provide that the subsidiary must meet any applicable statutory or regulatory capital requirements, that the subsidiary have sufficient operating capital in light of the normal obligations that are reasonably foreseeable for a business of its size and character, and that the subsidiary's capital meet any commonly accepted industry standard for a business of its size and character. This definition clarifies that the FDIC expects the subsidiary to meet the capital requirements of its primary regulator, particularly those subsidiaries involved in securities and insurance. No comments objected to this change. This standard is unchanged in the final rule.

The physical separation requirement of the current rule was clarified by the addition of a sentence which indicates that the extent to which the bank and the subsidiary must carry on operations in physically distinct areas will vary according to the type and frequency of public contacts. The FDIC does not intend to require physical separation where such a standard adds little value such as where a subsidiary engaged in developing commercial real estate has little or no customer contact. The possibility of customer confusion should be the determining factor in deciding the physical separation requirements for the subsidiary.

One commenter stated that this clarification is an improvement over the existing regulation; however, the comment encourages the FDIC to clarify that the subsidiary and the bank may conduct activities in the same location if the subsidiary is engaging in activities that are permissible for the bank to engage. The FDIC agrees that this point is important. The requirements of this regulation apply to activities that are not permissible for a national bank. Activities such as the sale of securities are covered by the requirements of the Interagency Statement. We have decided that no change in the regulation language is necessary to further clarify that these standards do not apply to subsidiaries engaging solely in activities permissible for a national bank. We believe it is clear that the coverage of the core eligibility requirements is for institutions to conduct as principal activities through a subsidiary that are not permissible for a subsidiary of a national bank.

We eliminated the provision contained in the current regulation that required employees of the bank and subsidiary to be separately compensated when they have contact with the public. This requirement was imposed to

reduce confusion relating to whether customers were dealing with the bank or the subsidiary. Since the adoption of the current regulation, the Interagency Statement was issued. The Interagency Statement recognizes the concept of employees who work both for a registered broker-dealer and the bank. Because of the disclosures required under the Interagency Statement informing the customer of the nature of the product being sold and the physical separation requirements, the need for separate public contact employees is diminished. No objections to the proposed changes were offered, and the requirement for separate public contact employees is dropped from the revised regulation.

Language was added that the subsidiary must conduct business in a manner that informs customers that the bank is not responsible for and does not guarantee the obligations of the subsidiary. This standard is taken from section 23B of the Federal Reserve Act which prohibits banks from entering into any agreement to guarantee the obligations of their affiliates and prohibits banks as well as their affiliates from advertising that the bank is responsible for the obligations of its affiliates. In the proposal, we made this standard an affirmative duty of disclosure. This type of disclosure is intended to reduce customer confusion concerning who is responsible for the products purchased. Two comments questioned the affirmative nature of the standard. The duty to inform customers would in many cases be unnecessary. For instance, when a transaction is covered by the Interagency Statement disclosures are already required to inform customers that the product is not an obligation of the bank. The commenters believe that the requirement should be analogous to section 23B and only require that the subsidiary not mislead its customers. The FDIC has not been persuaded by the arguments. The affirmative requirement to make disclosures applies to the subsidiary and the Interagency Statement disclosures apply to the bank. One of the most important steps the subsidiary can take to assure a separate corporate existence from the parent bank is to make affirmative disclosures to its customers as prescribed. Therefore, the disclosure requirement remains as proposed.

The regulation contains a standard that a majority of the board of directors of the eligible subsidiary act as neither a director nor an officer of the bank. Commenters suggested that this standard be altered. One comment suggested that the standard be eliminated for small banks. The issue of the need for management separation is not an issue that clearly relates to the size of the bank. We recognize that this requirement for some small banks may present a challenge. The FDIC believes that management separations are an important safeguard. If an institution desires a different structure than that proposed in these standards, they may submit an application for FDIC consideration. Another commenter suggested that the FDIC defer to the OCC standard that permits ⅔ of the subsidiary's board members to be directors of the depository institution. The FDIC believes that the majority of the board standard provides a structure in which decisions relating to the subsidiary are being made by a majority of persons who are not associated with the bank. This standard provides an easily identifiable level of separation. If the standard creates a burden for a bank, the FDIC will consider a request for relief. After considering the comments, the FDIC has decided not to change this standard.

In a previous proposal a question was raised if this standard prohibited directors of a subsidiary from serving as directors and officers of the parent holding company or an affiliated entity. The FDIC is primarily concerned about risk to the deposit insurance funds and is therefore looking to establish separation between the insured bank and its subsidiary. The eligible subsidiary requirement is designed to assure that the subsidiary is in fact a separate and distinct entity from the bank. This requirement should prevent ''piercing of the corporate veil'' and insulate the bank, and the deposit insurance fund, from any liabilities of the subsidiary.

We recognize that a director or officer employed by the bank's parent holding company or a sister affiliate is not as ''independent'' as a totally disinterested third party. The FDIC is, however, attempting to strike a reasonable balance between prudential safeguards and regulatory burden. The requirement that a majority of the board not be directors or officers of the bank will provide certain benefits that the FDIC thinks are very important in the context of subsidiary operations. The FDIC expects these persons to act as a safeguard against conflicts of interest and to be independent voices on the board of directors. While the presence of ''independent'' directors may not, in and of itself, prevent piercing of the corporate veil, it will add incremental protection and in some circumstances may be key to preserving the separation of the bank and its subsidiary in terms of liability. In view of the other standards of separateness that have been established under the eligible subsidiary standard as well as the imposition of investment and transaction limits, we do not believe that a connection between the bank's parent or affiliate will pose undue risk to the insured bank.

In addition to the separation standards, the ''eligible subsidiary'' concept introduces operational standards that are not part of the current regulation. These standards provide guidance concerning the organization of the subsidiary that the FDIC believes important to the independent operation of the subsidiary.

The revised regulation requires that a bank that wishes to file a notice to establish a subsidiary to engage in insurance, real estate or securities have only one business purpose among those categories. Several comments objected to this standard. One comment stated that the subsidiary should be allowed to engage in similar business lines rather than being held to a strict sole purpose standard. Other comments encouraged a broad definition of the term ''one business purpose''. Other comments recommended eliminating the requirement stating the FDIC should rely on the business plan for information needed to address any concerns. Because the FDIC is limiting a bank's transactions with subsidiaries engaged in real estate, or securities activities authorized under subpart A, and the aggregate limits only extend to subsidiaries engaged in the activities subject to the investment limits, the FDIC believes it is important to limit the scope of the subsidiary's activities when using the expedited procedures. The FDIC will use the business plan as a tool to review the lines of business engaged in by the subsidiary. The FDIC will be flexible in its interpretation of the term ''one business purpose.'' For instance, the FDIC would consider a subsidiary engaged in underwriting a financial product and also selling that product to have one business purpose.

The regulation contains a standard that the subsidiary have a current written business plan that is appropriate to its type and scope of business. The FDIC believes that an institution that is contemplating involvement with activities that are not permissible for a national bank or a subsidiary of a national bank should have a carefully conceived plan for how it will operate the business. We recognize that certain activities do not require elaborate business plans; however, every activity should be considered by the board of the bank to determine the scope of the

activity allowed and how profitability is to be attained. We received no comments on this requirement. This standard is adopted without change.

The requirement for adequate management of the subsidiary establishes the FDIC's view that insured depository institutions should consider the importance of management in the success of an operation. The requirement to obtain appropriate licenses and memberships and to comply with industry standards indicates the FDIC's support of securities and insurance industry standards in determining adequacy of subsidiary management. We received no comments, and this standard is adopted without change.

An important factor in controlling the spread of liabilities from the subsidiary to the insured depository institution is that the subsidiary establishes necessary internal controls, accounting systems, and audit standards. The FDIC does not expect to supplement this requirement with specific guidance since the systems must be tailored to specific activities, some of which are otherwise regulated. We received no comments on this standard, and it is unchanged.

Investment and transaction limits. The revised regulation contains investment limits and other requirements that apply to an insured state bank and its subsidiaries that engage in ''as principal'' activities that are not permissible for a national bank if the requirements are imposed by order or expressly imposed by regulation. The provision is not contained in the current regulation; however, § 337.4 imposes by reference the limitations of section 23A of the Federal Reserve Act (§ 337.4 was adopted prior to the adoption of section 23B of the Federal Reserve Act). Both section 23A and section 23B restrictions have been imposed by the FDIC through its orders authorizing insured state banks to engage in activities not permissible for a national bank.

Some of the provisions of sections 23A and 23B are inconsistent when applied in the context of a bank/subsidiary relationship. The FDIC believes that merely incorporating sections 23A and 23B by reference raises significant interpretative issues and only promotes confusion in an already complex area.

For these reasons, the FDIC has adopted a separate subsection which sets forth the specific investment limits and arm's length transaction requirements. In general, the provisions impose an aggregate investment on all subsidiaries that engage in activities covered by the investment limits, require that extensions of credit from a bank to its subsidiaries be fully-collateralized when made, prohibit the bank from taking a low quality asset as collateral on such loans, and require that transactions between the bank and its subsidiaries be on an arm's length basis. The comments received state that the investment and transaction limits which have been proposed are preferable to incorporating sections 23A and 23B by reference. Two comments suggested that this section be eliminated if the FRB adopts its proposal to expand sections 23A and 23B coverage to subsidiaries engaged in activities not permissible for a national bank. The FDIC will not respond to this scenario until the FRB has issued a final regulation. Another comment expressed the opinion that in view of the explicit statutory exception in sections 23A and 23B for transactions between an insured bank and its subsidiaries, the restrictions in these provisions should not be applied in any form by the FDIC. The FDIC agrees that section 23A and 23B should not be applied to a bank/subsidiary relationship that is fully consolidated for capital reporting purposes. For subsidiaries that are engaged in activities for which the FDIC imposes a requirement that capital of the subsidiary be deducted from the bank's capital in determining the bank's capital adequacy, we believe that restrictions on transactions between the bank and the subsidiary are also necessary. Another comment indicated that the investment and transaction limits proposed are unnecessarily complex and would make many activities uneconomic. Specifically, the cost of collateral requirements would diminish if not eliminate the potential profit from the permitted activity. The FDIC is concerned that an insured bank not be allowed to easily and cheaply transfer risks from the uninsured entity to the insured depository institution. Collateral requirements are a method of assuring that any money lent by the bank to its subsidiary will ultimately be repaid. This comment also suggests that Regulation K of the FRB would provide a more appropriate analogue than sections 23A and 23B. In this regulation, appropriate safeguards are provided by focusing on the capital strength of the bank and the extent of its investment in the entity. We believe that capital strength of the bank and the extent of its investment in a subsidiary are important considerations. The revised regulation addresses each of those areas. In addition, restrictions on the flow of funds from an insured bank to a subsidiary engaged in activities not permissible for the bank itself are necessary. We have chosen to keep the investment and transaction limitations in the final regulation.

The revised regulation expands the definition of bank for the purposes of the investment and transaction limitations. A bank includes not only the insured entity but also any subsidiary that is engaged in activities that are not subject to these investment and transaction limits. Sections 23A and 23B of the Federal Reserve Act combine the bank and all of its subsidiaries in imposing investment limitations on all affiliates. The FDIC is using the same concept in separating subsidiaries conducting activities that are subject to investment and transaction limits from the bank and any other subsidiary that engages in activities not subject to the investment and transaction limits. This rule will prohibit a bank from funding a subsidiary that is subject to the investment and transaction limits through a subsidiary that is not subject to the limits. One comment expressed support for this concept but emphasized that there is no need to include ''eligible subsidiaries'' in the restrictions since these entities have already been separated from the insured depository institution. The FDIC did not intend to extend these restrictions to transactions between ''eligible subsidiaries''. Therefore, this language has not been changed.

Investment limit. Under the proposed rule, the FDIC limited bank investments in certain subsidiaries. Those limits are basically the same as would apply between a bank and its affiliates under section 23A. As is the case with covered transactions under section 23A, extensions of credit and other transactions that benefit the bank's subsidiary would be considered part of the bank's investment. The only exception would be for arm's length extensions of credit made by the bank to finance sales of assets by the subsidiary to third parties. These transactions would not need to comply with the collateral requirements and investment limitations of section 23A, provided that they met certain arm's length standards.

In contrast to the bank-affiliate relationship being governed by the statutory limits of sections 23A and 23B, inherent in the idea of a subsidiary is the subsidiary's value to the bank as an asset. That value increases as the subsidiary earns profits and decreases as the subsidiary loses money. The increases are reflected in the subsidiary's retained earnings and the consolidated retained earnings of the bank as a whole. The FDIC wants to

separate the bank's equity investment in the subsidiary from any lending to or covered transactions with the subsidiary. Thus, the FDIC proposed to treat the bank's equity investment as a deduction from capital, while limiting any lending to or covered transactions with the subsidiary in a similar fashion as these transactions are limited in the bank-affiliate relationship. Then, the question arises as to how to properly treat retained earnings at the subsidiary level. If retained earnings at the subsidiary level were treated as subject to the investment limits, the bank could be forced to take the retained earnings out of the subsidiary to stay under the applicable limits. If retained earnings are allowed to accumulate without limit, then the bank could declare dividends to its shareholders based on the retained earnings at the subsidiary. Later, in the event that the subsidiary incurred losses, the bank's capital could become inadequate based on the subsidiary's losses. Thus, the FDIC decided that retained earnings should be deducted from capital in the same way as the equity investment is deducted.

Comments were supportive of the proposed concept of investment limits for loans to and debt of the subsidiary in contrast to the capital deduction for equity investments in and retained earnings of the subsidiary. One commenter expressed reservations about the structure of the investment limits. The proposal to limit transactions between a bank and its eligible subsidiary to 10 percent of capital to any one subsidiary and 20 percent of capital to all eligible subsidiaries conducting the same activity was questioned. By including the 10 percent limitation to any one subsidiary, the FDIC would only create burden to institutions without the benefit of appreciably limiting or diversifying risk. The commenter points out that since the eligible subsidiaries are not subject to transaction limitations between each other, it would be easy to structure the use of the entire 20 percent investment provision between the two subsidiaries but really for the benefit of the same project or business. The comment accepts that the 20 percent aggregate limit is appropriate, and recommends that the regulation be amended to apply only the 20 percent limitation. The FDIC is persuaded by this argument, and the final rule has dropped the 10 percent to any one subsidiary limitation.

The definition of ''investment'' under this provision has four components. The first component is any extension of credit by the bank to the subsidiary. The term ''extension of credit'' is defined in part 362 to have the same meaning as that under section 22(h) of the Federal Reserve Act (12 U.S.C. 375b) and would therefore apply not only to loans but also to commitments of credit. The second component is ''any debt securities of the subsidiary'' held by the bank. This component recognizes that debt securities are very similar to extensions of credit. The third component is the acceptance of securities issued by the subsidiary as collateral for extensions of credit to any person or company. The fourth and final component addresses any extensions or commitments of credit to a third party for investment in the subsidiary, investment in a project in which the subsidiary has an interest, or extensions of credit or commitments of credit which are used for the benefit of, or transferred to, the subsidiary. Commenters did not object to these components of ''investment,'' and the definition is unchanged.

The revised regulation calculates the 20 percent limit based on tier one capital. Also, the revisions limit the aggregate investment to all subsidiaries conducting activities subject to the investment limits. Comments note that the 20 percent limit is calculated against tier one capital instead of capital and surplus as is the standard for section 23A. One comment goes on to state that even though the FDIC has proposed a more restrictive standard, the 20 percent limit applies to an aggregate of the same activity rather than the section 23A standard covering all affiliates. In that respect, the 20 percent limit in the proposal is less restrictive. Although the FDIC does not intend to mimic section 23A in all respects, the FDIC has determined that an aggregate limit on activities that are covered by the investment limits is appropriate. The standard established is intended to reflect an appropriate limitation for subsidiary activities. The FDIC continues to use the more restrictive tier one capital as its measure to create consistency throughout the regulation. The FDIC does not find the burden of this more restrictive capital base to be unreasonable.

Arm's length transaction requirement. For subsidiaries engaged in activities covered by the investment and transactions limitations, the revisions require that any transaction between a bank and its subsidiary must be on terms and conditions that are substantially the same as those prevailing at the time for comparable transactions with unaffiliated parties. This ''arm's length transaction'' requirement is intended to make sure that the business of the subsidiary does not take place to the disadvantage of the bank. The types of transactions covered by the requirement include: (1) Investments in the subsidiary; (2) the purchase from or sale to the subsidiary of any assets, including securities; (3) entering into any contract, lease or other agreement with the subsidiary; and (4) paying compensation to the subsidiary or any person who has an interest in the subsidiary. The revised regulation indicates, however, that the restrictions do not apply to an insured state bank giving immediate credit to a subsidiary for uncollected items received in the ordinary course of business.

The arm's length transaction requirement is meant to protect the bank from abusive practices. To the extent that the subsidiary offers the parent bank a transaction which is at or better than market terms and conditions, the bank may accept such transaction since the bank is receiving a benefit, as opposed to being harmed. It may be the case, however, that a bank will be unable to meet the regulatory standard because there are no known comparable transactions between unaffiliated parties. In these situations, the FDIC will review the transactions and expect the bank to meet a ''good faith'' standard.

This section and the language therein is not a substantive change from the proposal. Comments had mixed messages about this section of the regulation. Commenters agreed that this proposal is preferable to the incorporation by reference to section 23B. One comment stated that if the FRB's proposal to impose section 23B on subsidiaries is finalized, the FDIC should withdraw its regulatory language to avoid confusion. The FDIC is aware of the FRB proposal and will react once the final position of the FRB is known. Another comment stated that in view of the explicit statutory exception in section 23B between an insured depository institution and its subsidiaries, these restrictions in any form should not be applied by the FDIC. When engaging in transactions with a subsidiary, banks and bank counsel should be aware of the FDIC's separate corporate existence concerns. Bank subsidiaries should be organized and operated as separate corporate entities. Subsidiaries should be adequately capitalized for the business they are engaged in and separate corporate formalities should be observed. Frequent transactions between the bank and its subsidiary which are not on an arm's length basis may lead to questions as to whether the subsidiary is actually a separate corporate entity or merely the alter ego of the bank. One of the primary

reasons for the FDIC requiring that certain activities be conducted through an eligible subsidiary is to provide the bank, and the deposit insurance funds, with liability protection. To the extent a bank ignores the separate corporate existence of the subsidiary, this liability protection is jeopardized. We believe setting forth the exact requirements will reduce regulatory burden and confusion as banks and bank counsel will more readily know what requirements are to be followed.

Banks will be prohibited from buying low quality assets from their subsidiaries. We received no comments objecting to this standard. The FDIC has taken the definition of ''low quality asset'' from the proposal without modification.

The revised regulation contains provisions addressing insider transactions and product tying. The arm's length standard addresses transactions between an insured depository institution and its subsidiaries. The FDIC is adding a provision that an arm's length standard applies to transactions between the subsidiary and insiders of the insured depository institution. The revised regulation requires that any transactions with insiders must meet the requirements that transactions be on substantially the same terms and conditions as generally available to unaffiliated parties. Banks engaging in such transactions should retain proper documentation showing that the transactions meet the arm's length requirement. The FDIC will review transactions with insiders in the normal course of the examination process and take such actions as may be necessary and appropriate if problems arise. Questionable transactions will have to be justified under the standards of the regulation.

Comments were not supportive of this standard. One comment stated that the new restriction is unnecessary since such insiders would already be subject to the restrictions set forth in Regulation O. The FDIC has recognized this overlap by excluding transactions covered by § 337.3, which implements many of the restrictions contained in Regulation O for insured state nonmember banks. The comment also contends that if the subsidiary is isolated from the bank as would be required by the revised regulation, there should be no need to regulate transactions between bank insiders and the eligible subsidiary. The FDIC is implementing these provisions in an abundance of caution. The standard is that insider transactions should be on the same terms and conditions as those prevailing at the time for comparable transactions with persons not affiliated with the insured state bank. The standard does not prohibit transactions; it merely sets parameters that does not allow insiders to engage in transactions that are on terms more favorable than those available in the market. Another comment states that, for example, this standard potentially would prohibit an executive officer from participating in an employee benefit program that waives trustee fees for IRA accounts if the assets of such accounts are invested in mutual funds distributed by a securities firm affiliate of the bank. The FDIC is persuaded by this argument and has added an exception that the standard shall not prohibit any transaction made pursuant to a benefit or compensation program that is widely available to employees of the insured state bank and that does not give preference to any insider of the insured state bank over other employees of the insured state bank.

The proposed regulation also contained a requirement that neither the insured state bank nor the majority-owned subsidiary may require a customer to either buy a product or use a service from the other as a condition of entering into a transaction. While the condition may duplicate existing standards under applicable law for banks to some extent, it is not clear that all circumstances addressed by the proposed condition are covered by the existing statutory and regulatory restrictions. Banks are subject to statutory anti-tying restrictions at 12 U.S.C. § 1972. The OCC extends anti-tying provisions to national bank subsidiaries. *See* OCC Bulletin 95–20. The extension of anti-tying restrictions to savings and loan holding companies and their affiliates in transactions involving a savings association is statutory. Consequently, the OTS is not authorized to exempt savings and loan holding companies and their affiliates entirely from all tying restrictions. 62 FR 15819.

The FDIC specifically requested public comment on whether the proposed anti-tying restriction was appropriate. The FDIC received five comments opposed to the proposed anti-tying requirement. One commenter objected to the requirement on general grounds. The other four asserted that statutory tying limits imposed by Congress in 1970 (12 U.S.C. 1972) are sufficient, and that the FDIC should not impose additional restrictions on tying by bank subsidiaries. Of these, two commenters were of the view that statutory tying limits are based on outdated views of banks' market power and constitute a competitive disadvantage for banks which should not be compounded by the addition of the FDIC's proposed tying restriction for real estate investment and securities underwriting subsidiaries. These commenters also made note of recent FRB action (as discussed in the FDIC's preamble to the proposed rule) eliminating the FRB's extension of tying restrictions to bank holding companies and their nonbank affiliates. The FRB based its action on its experience that bank holding companies and their nonbank affiliates do not possess the market power over credit or other unique competitive advantages that Congress assumed that banks enjoyed in 1970, when Congress adopted 12 U.S.C. 1972, and nonstatutory blanket anti-tying restrictions are therefore not justified. 62 FR 9312. The commenters suggest the FDIC take a similar approach.

The FDIC is concerned that opportunities may exist for abusive tying arrangements. It is this concern which has caused the FDIC to include particular tying restrictions of varying types in its approval orders governing real estate investment activities, and in its rules under § 337.4 on securities underwriting. In the real estate orders, the FDIC has typically prohibited the bank from conditioning an extension of credit on the borrower's agreement to also acquire real estate from the real estate development subsidiary. Under § 337.4, a bank could not directly or indirectly condition an extension of credit on the borrower's agreement to contract with the securities subsidiary to underwrite or distribute the borrower's securities, or to purchase any security currently underwritten by the subsidiary. The inclusion of these conditions highlighted the FDIC's concerns with these particular practices. Because of the FDIC's concern about the potential for abusive tying practices, and because the tying restrictions as proposed are only used to further delineate the circumstances in which a notice, rather than an application, is required, the FDIC has decided to adopt the tying restriction as proposed. Any bank wishing to conduct business on a basis different than the general rule set out in the tying restriction may submit an application. Then, the FDIC can evaluate the arrangement in light of its particular facts, including the permissibility of the arrangement under other applicable tying laws, its safety and soundness, and what risk it poses to the fund.

Collateralization requirements. The revised regulation provides that an insured state bank is prohibited from

making an extension of credit to a subsidiary covered by the investment and transaction limits unless such transaction is fully-collateralized at the time the bank makes the loan or extension of credit. This requirement is intended to protect the bank in the event of a loan default. ''Fully collateralized'' under the regulation means extensions of credit secured by collateral with a market value at the time the extension of credit is entered into of at least 100 percent of the extension of credit amount for government securities or a segregated deposit in a bank; 110 percent of the extension of credit amount for municipal securities; 120 percent of the extension of credit amount for other debt securities; and 130 percent of the extension of credit amount for other securities, leases or other real or personal property. One comment objected to the fact that the FDIC proposed to use this schedule as minimum guidance. The comment questions if the FDIC intends to require collateral standards that are more rigid than those in effect under section 23A. As stated, the FDIC intends to look to the collateralization schedule as minimum guidance, but wants to retain flexibility in making the determination if additional collateral is necessary. Maintaining flexibility does not mean that the FDIC intends to impose harsh new standards; however, we intend on a case-by-case basis to reserve the ability to require greater collateral in situations where the risk potential is higher.

Two comments were received on this issue. Both commenters believe the collateral requirements are unnecessary. The comments argue that if collateralization were a normal term of the transaction, it would be required by the arms length transaction requirements. One commenter noted that the cost of the collateral requirements would diminish if not eliminate the potential profit from the permitted activity. The FDIC understands the concerns about the collateral requirement; however, this provision provides a higher level of protection to the insured state bank. If there are instances in which the collateral requirements are uneconomical, the insured state bank may use the application procedures of this regulation to request relief. Therefore, the FDIC has decided to make no change to the collateral requirements of this section.

Capital requirements. Under the revised rule, a bank using the notice process to invest in a subsidiary engaging in certain activities authorized by subpart A would be required to deduct its equity investment in the subsidiary as well as its pro rata share of retained earnings of the subsidiary when reporting its capital position on the bank's consolidated report of income and condition, in assessment risk classification and for prompt corrective action purposes (except for the purposes of determining if an institution is critically undercapitalized). Such a capital deduction may be required as a condition of an order issued by the FDIC, is required to use the notice procedure to request consent for real estate investment activities and securities underwriting and distribution, and is required to engage in grandfathered insurance underwriting. The purpose of the restriction is to ensure that the bank has sufficient capital devoted to its banking operations and that it would not be adversely impacted even if its entire investment in the subsidiary is lost.

This treatment of the bank's investment in subsidiaries engaged in activities not permissible for a national bank creates a regulatory capital standard. Section 37 of the FDI Act (12 U.S.C. 1831n) generally requires that accounting principles applicable to depository institutions for regulatory reporting purposes must be consistent with, or not less stringent than, GAAP. The FDIC believes that this requirement does not extend to the Federal banking agencies' definitions of regulatory capital. It is well established that the calculation of regulatory capital for supervisory purposes may differ from the measurement of equity capital for financial reporting purposes, and section 37 by its terms contemplates the necessity of such differences. For example, statutory restrictions against the recognition of goodwill for regulatory capital purposes may lead to differences between the reported amount of equity capital and the regulatory capital calculation for tier one capital. Other types of intangible assets are also subject to limitations under the agencies' regulatory capital rules. In addition, subordinated debt and the allowance for loan and lease losses are examples of items where the regulatory reporting and the regulatory capital treatments differ.

The capital deduction as contained in the revised regulation is not a new concept for the federal banking regulators. The FDIC has required a capital deduction for investments by state nonmember banks in securities underwriting subsidiaries for years. *See* 12 CFR 325.5(c). In addition, the OCC recently endorsed the idea of deducting from capital a national bank's investments in certain types of operating subsidiaries. *See* 12 CFR 5.34(f)(3)(i), 61 FR 60342, 60377 (Nov. 27, 1996).

The calculation of the amount deducted from capital in this proposal includes the bank's equity investment in the subsidiary as well as the bank's share of retained earnings. The calculation does not require the deduction of any loans from the bank to the subsidiary or the bank's investment in the debt securities of the subsidiary.

Several comments questioned the capital deduction requirement. One commenter suggested that the FDIC should consider the impact of this provision on state laws, standards and policies. For example, state loan-to-one borrower restrictions that are determined by the bank's capital level may be affected. The FDIC is setting a capital standard for regulatory purposes. The effect of this standard on limitations based on capital under state law depend on the construction of state laws and regulations.

One comment was supportive of the capital deduction concept but also encouraged the FDIC to reconsider activities at a future date to determine whether it is appropriate to eliminate this requirement. The FDIC agrees with this suggestion and will consider such requests as experience is gained. Affected institutions also have the option of applying to the FDIC and setting forth their arguments why the capital deduction is unnecessary in their cases.

One other comment suggests that if the FDIC imposes the capital deduction, then it is essential that the deduction be limited to the bank's investment in the subsidiaries and not include retained earnings. The commenter contends that this requirement would result in the bank's capital being adversely affected by the subsidiary's success. The FDIC does not agree with this conclusion. The capital deduction required by this standard is a requirement for calculating regulatory capital. Under GAAP, a majority-owned subsidiary is fully consolidated with the bank and included in the amount reported on Statements of Condition and Income in the Consolidated Reports of Condition and Income. The subsidiary's retained earnings are incorporated into the bank's capital through this consolidation process. The treatment required by § 362.4(e) simply isolates the capital used to support the insured state bank from that supporting the subsidiary for regulatory capital purposes. The referenced requirement accomplishes that goal by subtracting both the bank's stock investment in the

subsidiary and the bank's share of the subsidiary's retained earnings from the parent bank's capital. This requirement is not punitive as the only amounts subtracted are those equity investments already included on the balance sheet (and thereby balance sheet capital) through consolidation.

Other underwriting activities. The regulatory text does not directly address the underwriting of annuities. The FDIC has opined that annuities are not an insurance product and are not subject to section 24(b) and 24(d)(2), prohibiting the FDIC from authorizing insurance underwriting. The FDIC has approved two requests from insured state banks to engage in annuity underwriting activities through a majority-owned subsidiary. The revised regulation does not provide a notice procedure to engage in such activities. No comment was received on this activity. The FDIC has decided to continue handling such requests on a case-by-case basis through the applications procedures established under this regulation.

Section 362.5 Approvals Previously Granted

There are a number of areas in which the final rule differs in approach from the current part 362. Because of these differing approaches, the revised regulation contains a section dealing with approvals previously granted.

Insured state banks that have previously received consent by order or notice from this agency should not need to reapply to continue the activity, including real estate investment activities, provided the bank and subsidiary, as applicable, continue to comply with the conditions of the order of approval. It is not the intent of the FDIC to require insured state banks to request consent to engage in an activity which has already been approved previously by this agency. Section 362.5(a) of the final rule makes this clear.

One comment stated that banks that have previously received approval from the FDIC should have the option of complying with the original order or the new regulation. The FDIC agrees with this approach. Because previously granted approvals may contain conditions that are different from the standards that are established in this proposal, in certain circumstances, the bank may elect to operate under the restrictions of this proposal. Specifically, the bank may comply with the investment and transaction limitations between the bank and its subsidiaries contained in § 362.4(d), the capital requirement limitations detailed in § 362.4(e), and the subsidiary restrictions as outlined in the term ''eligible subsidiary'' and contained in § 362.4(c)(2) in lieu of similar requirements contained in its approval order. Any conditions that are specific to a bank's situation and do not fall within the above limitations will continue to be effective. Language has been added to the final rule to clarify that once a bank elects to follow the regulatory restrictions instead of those in the approval order, the bank may not elect to revert to the applicable conditions of the order.

An insured state bank that has received a previous approval and qualifies for the exception in § 362.4(b)(5)(i) relating to real estate investment activities that do not exceed 2 percent of the bank's tier one capital may take advantage of the exceptions contained in that section without further application or notice to the FDIC. Additional regulatory language clarifying this point has been added to the final rule in § 362.5(a).

The FDIC has also approved certain activities through its current regulations. Specifically, the FDIC has incorporated and modified the restrictions of § 337.4 in this revision. The revised rule will allow an insured state nonmember bank engaging in a securities activity covered by § 362.4(b)(5)(ii), which has engaged in such activity prior to this rule's effective date in accordance with § 337.4, to continue those activities if the bank and its subsidiary meet the restrictions of § 362.4(b)(5)(ii), (c), (d), and (e). For securities activity covered by § 362.4(b)(5)(ii), the FDIC intends that these requirements replace the restrictions contained in § 337.4.

The FDIC recognizes that the requirements of the final rule differ from the requirements of § 337.4. Because the transition from the current § 337.4 requirements to the new regulatory requirements may have unforeseen implementation problems, the bank and its subsidiary will have one year from the effective date to comply with new restrictions and conditions without further application or notice to the FDIC. If the bank and its subsidiary are unable to comply within the one-year time period, the bank must apply in accordance with § 362.4(b)(1) and subpart G of part 303 to continue with the securities underwriting activity. Commenters did not object to this transition language and it is being implemented as proposed.

The restrictions for engaging in grandfathered insurance underwriting through a subsidiary have also been changed from the current regulation. The current regulation prescribes disclosures, requires that the subsidiary be a bona fide subsidiary, and requires that the bank be adequately capitalized after deducting the bank's investment in the grandfathered insurance subsidiary. The revisions rely on disclosures to bank customers when required by the Interagency Statement, require that the subsidiary meet the requirements of an eligible subsidiary, and require that the bank be well-capitalized after deducting its investment in the grandfathered insurance subsidiary. The FDIC recognizes that these standards are not the same as previous requirements, and the capital standard in particular is more stringent. For grandfathered insurance conducted at the bank level, the final rule also makes certain changes from the current rule, including the requirement that the bank disclose the separate nature of the department to insurance customers. Section 362.5(b)(2) of the final rule provides that an insured state bank which is engaged in providing insurance as principal may continue that activity if it complies with the final rule within 90 days of the effective date of the regulation. If the bank is unable to comply with these provisions setting forth the FDIC's guidance for conducting grandfathered insurance activities in a safe and sound manner, the bank should submit a notice to the FDIC concerning the deficiencies.

Insured state banks that have subsidiaries that have been operating under the exceptions relating to owning stock of a company engaged in activities permissible for a bank service corporation or activities that are not ''as principal'' in the current regulation are now subject to new requirements including the requirement that the subsidiary have at least a control interest in the company conducting the activity. The scope of authorized activities has also been changed slightly. Any bank affected by these changes will have 90 days to meet the requirements of the final rule. If the bank or its subsidiary does not meet these requirements, the bank must apply for the FDIC's consent. The FDIC does not intend to use this request for consent as a punitive measure; however, the FDIC would like to review a bank's investment in these equity securities of companies that are engaged in these activities. Comments did not indicate any circumstance in which this request for consent may be necessary.

The FDIC also is requiring that an insured state bank that converts from a savings association charter and engages in activities through a subsidiary, even if such activity was permissible for a subsidiary of a federal savings

association, shall make application or provide notice, whichever applies, to the FDIC to continue the activity unless the activity and manner and amount in which the activity is operated is one that the FDIC has determined by regulation does not pose a significant risk to the deposit insurance fund. Since the statutory and regulatory systems developed for savings associations are different from the bank systems, the FDIC believes that any institution that converts its charter should be subject to the same regulatory requirements as other institutions with the same type of charter.

If, prior to conversion, the savings association had received approval from the FDIC to continue through a subsidiary the activity of a type or in an amount that was not permissible for a federal savings association, the converted insured state bank need not reapply for consent provided the bank and subsidiary continue to comply with the terms of the approval order, meet all the conditions and restrictions for being an eligible subsidiary contained in § 362.4(c)(2), comply with the investment and transactions limits of § 362.4(d), and meet the capital requirement of § 362.4(e). If the converted bank or its subsidiary, as applicable, does not comply with all these requirements, the bank must obtain the FDIC's consent to continue the activity. The FDIC has imposed these conditions to fill a regulatory gap. Savings associations and their service corporations are subject to regulatory standards of separation, the savings association is limited in the amount it may invest in the service corporation, and the savings association must deduct its investment in the service corporation from its capital if the service corporation engages in activities that are not permissible for a national bank. The eligible subsidiary standard, the investment and transaction limits, and the capital requirements replace these standards once the savings association has converted its charter to a bank.

If the bank does not receive the FDIC's consent for its subsidiary to continue an activity, the bank must divest its nonconforming investment in the subsidiary within two years of the date of conversion either by divesting itself of its subsidiary or by the subsidiary divesting itself of the impermissible activity. The FDIC did not receive comment concerning these transition issues for charter conversions. The final rule adopts the language as proposed.

B. Subpart B—Safety and Soundness Rules Governing State Nonmember Banks

Section 362.6 Purpose and Scope

This subpart, along with the notice and application provisions of subpart G of part 303, applies to certain banking practices that may have adverse effects on the safety and soundness of insured state nonmember banks. The FDIC intends to allow insured state nonmember banks and their subsidiaries to undertake only safe and sound activities and investments that would not present a significant risk to the deposit insurance fund and that are consistent with the purposes of federal deposit insurance and other law. The safety and soundness standards of this subpart apply to activities undertaken by insured state nonmember banks through a subsidiary if those activities are permissible for a national bank subsidiary but that are not permissible for the national bank itself. This subpart addresses only real estate investment activities undertaken through a subsidiary; however, the FDIC is issuing concurrently a notice of proposed rulemaking published elsewhere in today's **Federal Register** which addresses securities underwriting and distribution activities conducted by a subsidiary of an insured state nonmember bank if those activities are permissible for a national bank only through a subsidiary. The FDIC has a long history of considering the risks from activities such as real estate investment and securities underwriting and distribution to be unsafe and unsound for a bank to undertake without appropriate safeguards to address that risk. The FDIC also proposes a notice requirement for other activities permissible for a national bank only through a subsidiary.

Additionally, this subpart sets forth the standards that apply when affiliated organizations of insured state nonmember banks that are not affiliated with a bank holding company conduct securities activities. The collective business enterprises of these entities are commonly described as nonbank bank holding company affiliates. The FDIC has a long history of considering the risks from the conduct of securities activities by affiliates of insured state nonmember banks to be unsafe and unsound without appropriate safeguards to address those risks. This rule incorporates many of the standards currently applicable to these entities through § 337.4 of the FDIC's regulations. This rule will replace § 337.4 although that section of the FDIC's rules will not be eliminated until the FDIC finalizes its rule regarding securities activities of subsidiaries. The scope of this regulation is narrower than § 337.4 due to intervening regulations promulgated by other Federal banking agencies that render more comprehensive rules unnecessary. In addition, the FDIC has updated the restrictions and brought them into line with modern views of appropriate securities safeguards between affiliates and insured banks.

Section 362.7 Definitions

The definitions of ''activity'', ''company'', ''control'', ''equity security'', ''insured state nonmember bank'', ''real estate investment activity'', ''security'', and ''subsidiary'' apply as is described above in subpart A. These definitions remain consistent to avoid confusion among the various subparts of this regulation.

This subpart introduces restrictions on activities of entities that are commonly owned with the insured state bank by a holding company that is not considered to be a bank holding company under the Bank Holding Company Act. Therefore, for the purposes of this subpart, ''affiliate'' is defined as any company that directly or indirectly, through one or more intermediaries, controls or is under common control with an insured state nonmember bank. The proposed definition of the term ''affiliate'' was not intended to include a subsidiary of an insured state nonmember bank, and language expressly stating this has been added in the final rule to clarify this point. Subsidiaries of insured state nonmember banks engaged in these activities are already covered by § 362.4(b)(5)(ii).

Section 362.8 Restrictions on Activities of Insured State Nonmember Banks

Real Estate. Since national banks are generally prohibited from owning and developing real estate, insured state banks have been required to apply to the FDIC under section 24 before undertaking or continuing such real estate activities. The FDIC has concluded as a result of its experience in reviewing these applications that while real estate investments generally possess many risks that are not readily comparable to other equity investments, institutions may contain these risks by undertaking real estate investments within certain parameters. The FDIC has considered the manner under which an insured state nonmember bank may undertake real estate investment activities and determined that insured state nonmember banks and their

subsidiaries should generally meet certain standards before engaging in real estate investment activities that are not permissible for national banks. As a result, the final rule establishes standards under which insured state nonmember banks may participate in real estate investment activities. These standards address the FDIC's safety and soundness concerns with real estate investment activities permissible for a national bank subsidiary but not for the national bank itself. Providing this listing of such standards will allow insured state nonmember banks to initiate investment activities with knowledge of what the FDIC considers when evaluating the safety and soundness of the operations of the institution and its subsidiaries. This rule simplifies and clarifies the standards under which insured state nonmember banks may conduct their investment activities while providing comprehensive and flexible regulation of the dealings between a bank and its subsidiaries.

Certain standards under the regulation also pertain to the FDIC's willingness to allow an eligible institution to commence the activity after expedited notice to the FDIC, rather than a full application process. Under the FDIC's regulation, if an institution and its real estate investment operations meet the standards established, the institution need only file notice with the FDIC as outlined in subpart G of part 303. However, if the institution and its operations do not meet the general standards set forth in this rule, or if the institution so chooses, it may file application with the FDIC for the FDIC's consent, in accordance with procedures set out in subpart G of part 303.

One commenter stated that establishing additional regulations on insured state nonmember banks is excessive. Such banks are already regulated by the state in which they are domiciled. The FDIC believes that the risks associated with real estate investment activities are such that it must establish standards for the conduct of that activity. The notice of proposed rulemaking contained an extensive discussion of these risks. In addition to the high degree of market variability, real estate markets are, for the most part, localized; investments are normally not securitized; financial information flow is often poor; and the market is generally not very liquid. A financial institution—like any other investor—faces substantial risks when it takes an equity position in a real estate venture. Market participants face a general trade-off: the riskier the project, the higher the required rate of return. A key aspect of that trade-off is the notion that a riskier project will entail a higher probability of significant losses for the investor. Assessments of the degree of risk will depend on factors affecting future returns such as cyclical economic developments, technological advances, structural market changes, and the project's sensitivity to financial market changes.

The FDIC recognizes its ongoing responsibility to ensure the safe and sound operation of insured state nonmember banks and their subsidiaries. Although this subpart creates new regulation for insured state nonmember banks, the FDIC does not believe that this burden is too great in relation to the risks of real estate investment activities.

Another commenter expressed concern about consistency stating that the unintended consequence of this approach may result in different regulatory treatment applicable to insured state nonmember banks as opposed to national banks and state member banks. Another comment echoes this sentiment stating that it is likely that national banks will be subject to case by case restrictions of the OCC but these restrictions will not carry the weight and force of those set by regulation. The commenter recommends parallel treatment between national and state banks. The FDIC does not believe it is in the best interest of insured state nonmember banks to automatically follow the safety and soundness restrictions of an interpretation, order, circular or official bulletin issued by the OCC regarding real estate investment activities that are permissible for the subsidiary of a national bank but are not permissible for a national bank itself. The process established in this subpart gives insured state nonmember banks the option to apply to the FDIC to engage in real estate investment activities suggesting whatever criteria the applicant believes to be appropriate for the risk involved with the activity. The standards set forth in this regulation allow applicants to use an expedited notice procedure. These standards are not absolute criteria that the FDIC cannot vary. If the FDIC adopted the regulatory and interpretive standards set by the OCC, insured state nonmember banks would have no flexibility to request variance from these standards. The FDIC believes that the risks may be different for different real estate investment activities. Therefore, the flexible approach established in this regulation is important in finding appropriate standards for the risks presented. State nonmember banks are treated consistently with national banks in that each must submit a request to their primary Federal regulator to engage in real estate investment activities through a subsidiary.

Another comment states that the regulatory differences between state and national institutions harm the dual banking system especially during a period of rapid interstate expansion. The FDIC is a strong supporter of the dual banking system. For insured state nonmember banks to compete effectively, the supervisory system should be expeditious in its response to the industry. This regulation establishes procedures in which insured state nonmember banks may use a notice procedure and follow standards established in this regulation or may file an application and request variance from these standards. The FDIC believes that a system that allows an insured state nonmember bank to directly petition its primary federal regulator to conduct real estate investment activities in a subsidiary is more appropriate than a situation in which these activities of insured state nonmember banks are restricted by regulations, orders and interpretations of the OCC.

Section 362.8(a) of the regulation addresses the FDIC's ongoing supervisory concerns regarding real estate investment activities and imposes procedures to address the FDIC's concerns about the safety and soundness of these activities. Depending upon the facts, the potential risks inherent in a bank subsidiary's involvement in real estate investment activities may make restrictions and limitations necessary to protect the bank and ultimately the deposit insurance funds from losses associated with the significant risks inherent in real estate investment activities.

To address its safety and soundness concerns about real estate investment activities not permissible for a national bank, the FDIC has adopted the same standards when insured state banks conduct those real estate investment activities regardless of whether those real estate investment activities are permissible for a national bank subsidiary. This subpart addresses the impact on insured state nonmember banks if the OCC were to approve applications submitted by national banks to conduct real estate investment activities through operating subsidiaries.

Unless the FDIC has previously given its approval for the bank to engage in the particular real estate investment activity that is not permissible for a national bank, an insured state nonmember bank must file a notice or

application with the FDIC in order to directly or indirectly undertake a real estate investment activity, even if the real estate investment activity is permissible for the subsidiary of a national bank. To qualify for the notice provision under this new regulation, the insured state nonmember bank and its subsidiary must meet the standards established in § 362.4(b)(5)(i). After filing a notice as provided for in subpart G of part 303 to which the FDIC does not object, the institution may then proceed with its investment activities. If the insured state nonmember bank and its subsidiary do not meet the standards established under the rule, or if the institution so chooses, an application for the FDIC's consent may be filed under the procedures set out in subpart G of part 303.

Affiliation With Securities Companies. Section 362.8(b) reflects the FDIC's longstanding view that an unrestricted affiliation with a securities company may have adverse effects on the safety and soundness of insured state nonmembers banks. This section reiterates the § 337.4 prohibition against any affiliation by an insured state nonmember bank with any company that directly engages in the underwriting of stocks, bonds, debentures, notes, or other securities which is not permissible for a national bank unless certain conditions are met. The final rule permits the affiliation only if:

(1) The securities business of the affiliate is physically separate and distinct in its operations from the operations of the bank, provided that this requirement shall not be construed to prohibit the bank and its affiliate from sharing the same facility if the area where the affiliate conducts retail sales activity with the public is physically distinct from the routine deposit taking area of the bank;

(2) The affiliate has a chief executive officer who is not an employee of the bank;

(3) A majority of the affiliate's board of directors are not directors, officers, or employees of the bank;

(4) The affiliate conducts business pursuant to independent policies and procedures designed to inform customers and prospective customers of the affiliate that the affiliate is a separate organization from the bank and the state-chartered depository institution is not responsible for and does not guarantee the obligations of the affiliate;

(5) The bank adopts policies and procedures, including appropriate limits on exposure, to govern their participation in financing transactions underwritten by an underwriting affiliate;

(6) The bank does not express an opinion on the value or the advisability of the purchase or sale of securities underwritten or dealt in by an affiliate unless it notifies the customer that the entity underwriting, making a market, distributing or dealing in the securities is an affiliate of the bank;

(7) The bank does not purchase as principal or fiduciary during the existence of any underwriting or selling syndicate any securities underwritten by the affiliate unless the purchase is approved by the bank's board of directors before the securities are initially offered for sale to the public;

(8) The bank did not condition any extension of credit to any company on the requirement that the company contract with, or agree to contract with, the bank's affiliate to underwrite or distribute the company's securities;

(9) The bank did not condition any extension of credit or the offering of any service to any person or company on the requirement that the person or company purchase any security underwritten or distributed by the affiliate; and

(10) The bank complies with the investment and transaction limitations of § 362.4(d). These standards have been adopted as proposed although the language of § 362.8(b)(4) has been changed to be consistent with that proposed in subpart A.

Many of the restrictions and prohibitions listed above are contained currently in § 337.4. Additionally, the conditions that are imposed, under § 362.4(b)(5)(ii), on subsidiaries which engage in the sale, distribution, or underwriting of securities such as adopting independent policies and procedures governing participation in financing transactions underwritten by an affiliate, expressing opinions on the advisability of the purchase or sale of particular securities, and purchasing securities as principal or fiduciary only with prior board approval have been added. As indicated earlier, the prohibition against shared officers has been eased and now only refers to the chief executive officer. Comments did not object to these standards and they are not being adopted as proposed.

As written, the regulation only applies these restrictions to an insured state nonmember bank affiliated with a company not treated as a bank holding company pursuant to section 4(f) of the Bank Holding Company Act (12 U.S.C. 1843(f)), that directly engages in the underwriting of stocks, bonds, debentures, notes, or other securities which are not permissible for a national bank. Other affiliates now covered by the safeguards of § 337.4 would no longer be covered under the FDIC's regulations. Other affiliates are adequately separated from the banks by the restrictions imposed by the FRB. Therefore, the final regulation has been streamlined to eliminate duplicative coverage of these affiliates.

Because of the bank/affiliate relationship covered by this subpart, the term ''investment'' also includes the bank's investment in the equity securities of the affiliate. This treatment is consistent with section 23A. No comment was received on this treatment and the definition of investment for subpart B is adopted as proposed.

Disclosure provisions contained in § 337.4 are not contained in this rule. If securities underwritten, distributed or sold by the affiliate are sold on bank premises, are sold by employees of the bank, or are sold subject to the bank receiving remuneration for the transaction, the sale is covered by the disclosures contained in the Interagency Statement on Retail Sales of Nondeposit Investment Products. Sales occurring outside these parameters are not likely to generate customer confusion; however, the affiliate is responsible for informing its customers that the affiliate is a separate organization from the bank and the bank is not responsible for and does not guarantee the obligations of the affiliate whenever confusion is likely to occur.

C. Subpart C—Activities of Insured State Savings Associations

Section 362.9 Purpose and Scope

The intent of § 362.9 is to clarify that the purpose and scope of subpart C is to ensure that activities and investments undertaken by insured state savings associations and their service corporations do not present a significant risk to the deposit insurance funds, are not unsafe and are not unsound, are consistent with the purposes of federal deposit insurance, and are otherwise consistent with law. This subpart, together with the notice and application procedures of subpart H of part 303, implements the provisions of section 28 of the FDI Act that restrict and prohibit insured state savings associations and their service corporations from engaging in activities and investments of a type that are not permissible for federal savings associations and their service corporations. The phrase ''activity permissible for a federal savings association'' means any activity authorized for federal savings associations under any statute including the Home Owners Loan Act (HOLA), as well as activities recognized as

permissible for a federal savings association in regulations, official thrift bulletins, orders or written interpretations issued by the OTS, or its predecessor, the Federal Home Loan Bank Board.

Regarding insured state savings associations, this subpart governs only activities conducted ''as principal'' and therefore does not govern activities conducted as agent for a customer, conducted in a brokerage, custodial, advisory, or administrative capacity, conducted as trustee, or conducted in any substantially similar capacity. In the final rule, the FDIC has added a list of examples of what types of activities are not ''as principal.'' This change is consistent with the addition of such material to the purpose and scope section of subpart A. However, this subpart covers all activities regardless of whether conducted ''as principal'' or in another capacity at the service corporation level. This subpart does not restrict any interest in real estate in which the real property is (a) used or intended in good faith to be used within a reasonable time by an insured state savings association or its service corporations as offices or related facilities for the conduct of its business or future expansion of its business or (b) used as public welfare investments of a type and in an amount permissible for federal savings associations. Equity investments acquired in connection with debts previously contracted that are held within the shorter of the time limits prescribed by state or federal law are not subject to the limitations of this subpart.

The FDIC intends to allow insured state savings associations and their service corporations to undertake only safe and sound activities and investments that do not present a significant risk to the deposit insurance funds and that are consistent with the purposes of federal deposit insurance and other applicable law. This subpart does not authorize any insured state savings association to make investments or conduct activities that are not authorized or that are prohibited by either federal or state law.

Section 362.10 Definitions

Section 362.10 of the final regulation contains the definitions used in this subpart. Rather than repeating terms defined in subpart A, the definitions contained in § 362.2 are incorporated into subpart C by reference. Included in the definitions are most of the terms currently defined in subpart G of Part 303, effective October 1, 1998, (formerly § 303.13) of the FDIC's regulations. The proposed rule made editing changes primarily to enhance clarity without changing the meaning. However, certain changes were made to alter the meaning of the terms and these changes are identified in this discussion. The final rule adopts the proposed definitions without further change.

The terms ''corporate debt securities not of investment grade'' and ''qualified affiliate'' have been directly imported into subpart C from subpart G (§ 303.141) without substantive change. Substantially the same ''control'' and ''equity security'' definitions are incorporated by reference to subpart A. The last sentence of the current ''equity security'' definition, which excludes equity securities acquired through foreclosure or settlement in lieu of foreclosure, was deleted for the same reason that similar language was deleted from several definitions in subpart A. Language is now included in the purpose and scope paragraph explaining that equity investments acquired through such actions are not subject to the regulation. No substantive change from current rules is intended by this modification.

Consistent with the proposal, modified versions of ''activity'', ''equity investment'', ''significant risk to the fund'', and ''subsidiary'' were also carried forward by reference to subpart A. As proposed, the definition of activity was expanded to encompass all activities including acquiring or retaining equity investments. This change was made to conform the ''activity'' definition used in the regulation to that provided in the governing statutes. Both sections 24 and 28 of the FDI Act define activity to include acquiring or retaining any investment. Sections of this part governing activities other than acquiring or retaining equity investments include statements specifically excluding the activity of acquiring or retaining equity investments.

Consistent with the proposal, the ''equity investment'' definition was modified to better identify its components. The definition includes any ownership interest in any company. This change was made to clarify that ownership interests in limited liability companies, business trusts, associations, joint ventures and other entities separately defined as a ''company'' are considered equity investments. Additionally, as proposed, the definition was expanded to include any membership interest that includes a voting right in any company, and a sentence was added excluding from the definition any of the identified items when taken as security for a loan. The intended effect of these changes is not to broaden the scope of the regulation, but instead to clarify the FDIC's position that such investments are all considered equity investments notwithstanding the form of business organization.

Consistent with the proposal, the definition of ''significant risk'' was effectively retitled ''significant risk to the fund'' by the reference to subpart A. As proposed, a second sentence was added to the definition explaining that a significant risk to the fund may be present either when an activity or an equity investment contributes or may contribute to the decline in condition of a particular state-chartered depository institution or when a type of activity or equity investment is found by the FDIC to contribute or potentially contribute to the deterioration of the overall condition of the banking system. This sentence is intended to elaborate on the FDIC's position that the absolute size of a projected loss in comparison to the deposit insurance funds is not determinative of the issue. Additionally, it clarifies the FDIC's position that risk to the fund may be present even if a particular activity or investment may not result in the imminent failure of an institution. The FDIC received four comments addressing this definition which are detailed in the discussion of the applicable definition in subpart A.

With the exception of substituting the separately defined term ''company'' for the list of entities such as corporations, business trusts, associations, and joint ventures currently in the ''subsidiary'' definition, the final rule makes little change from the current definition. It is noted that limited liability companies are now included in the company definition and, by extension, are included in the subsidiary definition. The only other change from current rules is that in the definition of subsidiary, the exclusion of ''insured depository institutions'' for purposes of § 303.146 (as effective October 1, 1998, formerly § 303.13(f)) has been moved to the purpose and scope section of proposed subpart D. No substantive changes are intended by these modifications. The FDIC received no comments on these definitions which are adopted as proposed.

While proposed subpart C retained substantially the same ''service corporation'' definition as the current rule, the proposal deleted the word ''only'' from the phrase ''available for purchase only by savings associations''. This change was intended to make it clear that a service corporation of an insured state savings association may invest in lower-tier service corporations if allowed by this part or FDIC order, and it is consistent with the recently

amended part 559 of the OTS' regulations (12 CFR part 559). The change was not intended to alter the nature of the requirements governing the savings association's equity investment in the first-tier service corporation. No comments were received on this change and the final rule adopts it as proposed.

As in subpart A and consistent with the proposal, the definition of ''equity interest in real estate'' was deleted in the final regulation. The exceptions detailed in § 303.141(e) (as effective October 1, 1998, formerly § 303.13(a)(5)) of the current definition were moved to the purpose and scope paragraph. As a result, readers are now informed that these excepted real estate investments are not subject to this regulation. The FDIC believes that the remaining content of the current definition fails to provide any meaningful clarity or understanding. Therefore, the FDIC will instead rely on the ''equity investment'' definition to include relevant real estate investments. A related change was made to the ''equity investment'' definition by deleting the reference to ''equity interest in real estate'' and replacing it with language to include any interest in real estate (excluding real estate that is not within the scope of this part). No substantive changes are intended by these modifications.

Consistent with the proposal, a definition for the term ''insured state savings association'' is added to the final rule. Because this term is not explicitly defined in section 3 of the FDI Act, this definition was added to ensure readers clearly understand that an insured state savings association means any state chartered savings association insured by the FDIC.

Other terms that were previously undefined, but that are added by the general incorporation of the definitions in subpart A should not result in any substantive changes to the meanings of those terms as currently used in subpart G of part 303, effective October 1, 1998, (formerly § 303.13) of the FDIC's regulations.

Section 362.11 Activities of Insured State Savings Associations

Equity investment prohibition. Section 362.11(a)(1) of the final regulation replaces the provisions of § 303.144(a) (as effective October 1, 1998, formerly § 303.13(d)) of the FDIC's current regulations and restates the statutory prohibition preventing insured state savings associations from making or retaining any equity investment of a type, or in an amount, not permissible for a federal savings association. The prohibition does not apply if the statutory exception (restated in the current regulation and carried forward in the proposal) contained in section 28 of the FDI Act applies. With the exception of deleting items no longer applicable due to the passage of time, this provision is retained as currently in effect without any substantive changes.

Exception for service corporations. The final regulation retains the exception now in § 303.144(b) (as effective October 1, 1998, formerly § 303.13(d)(2)) which allows investments in service corporations as currently in effect without any substantive change. However, consistent with the proposal, the FDIC has modified the language of this section using a structure paralleling that found in proposed subpart A permitting insured state banks to invest in majority-owned subsidiaries. Similar to the treatment accorded insured state banks, an insured state savings association must meet and continue to be in compliance with the capital requirements prescribed by the appropriate federal banking agency and the FDIC must determine that the activities to be conducted by the service corporation do not present a significant risk to the relevant deposit insurance fund. However, unlike the treatment accorded banks, the FDIC must also determine that the amount of the investment does not present a significant risk to the relevant deposit insurance fund. The criteria identified in the preceding sentences are derived directly from the underlying statutory language. For an insured state savings association to invest in service corporations engaging in activities that are not permissible for a service corporation of a federal savings association, the service corporation must be engaging in activities or acquiring and retaining investments described in § 362.12(b) as regulatory exceptions to the general prohibition.

We moved language currently in § 303.144(b)(2) (as effective October 1, 1998, formerly § 303.13(d)) concerning the filing of applications to acquire an equity investment in a service corporation to § 303.141 of the amended subpart H of part 303.

Activities other than equity investments. Section 362.11(b) of the final regulation replaces the sections now found at §§ 303.142, 303.143 and 303.144 (as effective October 1, 1998, formerly §§ 303.13(b), 303.13(c), and 303.13(e), respectively) of the FDIC's regulations. As proposed, some portions of the existing sections have been eliminated because they are no longer necessary due to the passage of time, and other portions have been edited and reformatted in a manner consistent with the corresponding sections of subpart A. Language currently in the referenced sections of part 303 concerning notices and applications has been edited, reformatted, and moved to the amended subpart H of part 303.

Prohibited activities. Section 362.11(b)(1) of the final regulation restates the statutory prohibition that insured state savings associations may not directly engage as principal in any activity of a type, or in an amount, that is not permissible for a federal savings association unless the activity meets a statutory or regulatory exception. Similar to language found in subpart A for insured state banks, the proposed rule added language to clarify that this prohibition does not supersede the equity investment exception of § 362.11(a)(2). The FDIC added this language because acquiring or retaining any investment is defined as an activity. The language has been adopted in the final rule without change from the proposal.

The statutory prohibition preventing state and federal savings associations from directly, or indirectly through a subsidiary (other than a subsidiary that is a qualified affiliate), acquiring or retaining any corporate debt that is not of investment grade after August 9, 1989, is also carried forward from what is now § 303.145 (as effective October 1, 1998, formerly § 303.13(e)) of the FDIC's regulations. However, consistent with the proposal, the § 303.145 requirement was deleted. The referenced section required savings institutions to file divestiture plans concerning corporate debt that was not of investment grade and that was held in a capacity other than through a qualified affiliate. Divestiture was required by no later than July 1, 1994, rendering that provision unnecessary due to the passage of time.

Exceptions to the other activities prohibition. The statutory exception to the other activities prohibition contained in section 28 of the FDI Act continues to function in a manner similar to the relevant provisions of what is now found in subpart H of part 303. The regulation continues to permit an insured state savings association to retain any asset (including a nonresidential real estate loan) acquired prior to August 9, 1989. However, corporate debt securities that are not of investment grade may only be purchased or held by a qualified affiliate. Whether or not the security is of investment grade is measured only at the time of acquisition.

Additionally, the FDIC has provided regulatory exceptions to the other

activities prohibition. The first exception retains the application process now found at § 303.142 (as effective October 1, 1998, formerly §§ 303.13(b)(1)) and provides insured state savings associations with the option of applying to the FDIC for approval to engage in an activity of a type that is not permissible for a federal savings association. Additionally, the notice process currently found at § 303.143 (as effective October 1, 1998, formerly § 303.13(c)(1)) is carried forward for insured state savings associations that want to engage in activities of a type permissible for a federal savings association, but in an amount exceeding that permissible for federal savings associations. The final regulation adds a regulatory exception enabling insured state savings associations to acquire and retain adjustable rate, money market preferred stock, and instruments determined by the FDIC to have similar characteristics without submitting an application to the FDIC if the acquisition is done within the prescribed limits.

The final regulation deletes a proposed exception that would have allowed an insured state savings association to engage as principal in any activity that is not permissible for a federal savings association provided that the FRB has found the activity to be closely related to banking pursuant to 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)). Upon further analysis, the FDIC determined that this exception would have little utility because most of the activities authorized by the FRB under the referenced authority are already permissible for federal savings associations or are otherwise addressed in this regulation. In the preamble to the proposal, the FDIC requested comment from savings associations on whether the proposed standard was appropriate and beneficial. The FDIC received only one comment, indicating that state savings associations were generally unaware of what is authorized by the 4(c)(8) list and that the FDIC should be more specific. The FDIC has decided to eliminate the reference and specifically address those activities that are allowed. The elimination of this proposed authority is consistent with the FDIC's elimination of the corresponding authority for state banks in subpart A.

Consent obtained through application. Section 28 prohibits insured state savings associations from directly engaging in activities of a type or in an amount not permissible for a federal savings association unless: (1) The association meets and continues to meet the capital standards prescribed by the appropriate federal financial institution regulator; and (2) the FDIC determines that conducting the activity in the additional amount will not present a significant risk to the relevant deposit insurance fund. Section 362.11(b)(2)(i) establishes an application option for savings associations that meet the relevant capital standards and that seek the FDIC's consent to engage in activities that are otherwise prohibited. The substance of this process is unchanged from the relevant sections of part 303 of the FDIC's current regulations. The regulation is being adopted without change from its proposed form.

Nonresidential realty loans permissible for a federal savings association conducted in an amount not permissible. Consistent with the proposal, the final regulation carries forward and modifies the provision now found at § 303.142 (as effective October 1, 1998, formerly § 303.13(b)(1)) of this chapter requiring an insured state savings association that wants to hold nonresidential real estate loans in an amount exceeding the limits described in section 5(c)(2)(B) of HOLA (12 U.S.C. 1464 (c)(2)(B)) to apply for the FDIC's consent. Unlike the current regulation, the final regulation enables the insured state savings association to submit a notice to seek the FDIC's approval instead of an application. This change is nonsubstantive and is made to expedite the process for insured state savings associations wanting to exceed the referenced limits. None of the comments submitted addressed this change.

Acquiring and retaining adjustable rate and money market preferred stock. The final regulation extends to insured state savings associations a revised version of the proposed regulatory exception allowing an insured state bank to invest in up to 15 percent of its tier one capital in adjustable rate preferred stock and money market (auction rate) preferred stock without filing an application with the FDIC. By statute, however, insured savings associations are restricted in their ability to purchase debt that is not of investment grade. This regulatory exception does not override that statutory prohibition and any instruments purchased must comply with that statutory constraint. Additionally, this exception is only extended to savings associations meeting and continuing to meet the applicable capital standards prescribed by the appropriate federal financial institution regulator.

When this regulatory exception was adopted for insured state banks in 1992, the FDIC found that adjustable rate preferred stock and money market (auction rate) preferred stock were essentially substitutes for money market investments such as commercial paper and that their characteristics are closer to debt than to equity securities. Therefore, money market preferred stock and adjustable rate preferred stock were excluded from the definition of equity security. As a result, these investments are not subject to the equity investment prohibitions of the statute and the regulation, and they are considered an ''other activity'' for the purposes of this regulation.

This exception focuses on two categories of preferred stock. This first category, adjustable rate preferred stock refers to shares where dividends are established by contract through the use of a formula based on Treasury rates or some other readily available interest rate levels. Money market preferred stock refers to those issues where dividends are established through a periodic auction process that establishes yields in relation to short term rates paid on commercial paper issued by the same or a similar company. The credit quality of the issuer determines the value of the security, and money market preferred shares are sold at auction.

The FDIC continues to believe that the activity of investing up to 15 percent of an institution's tier one capital in the referenced instruments does not represent a significant risk to the deposit insurance funds. Furthermore, the FDIC believes the same funding option should be available to insured state savings associations and extends a similar exception to savings associations subject to the same revised limits.

Additionally, like a similar provision in subpart A, the final regulation allows the state savings associations to acquire and retain other instruments of a type determined by the FDIC to have the character of debt securities provided the instruments do not represent a significant risk to the deposit insurance funds. A recent example of such an instrument is trust preferred stock. Trust preferred stock is a hybrid instrument possessing characteristics typically associated with debt obligations. Trust preferred securities are issued by an issuer trust that uses the proceeds to purchase subordinated deferrable interest debentures in a corporation. The corporation guarantees the obligations of the issuer trust and agrees to indemnify third parties for other expenses and liabilities incurred by the issuer trust. Taken together, the debentures, guarantee, and expense indemnity agreement constitute a full, irrevocable, and unconditional guarantee of the obligations of the issuer

trust by the issuer corporation. With the exception of credit risk, investors in trust preferred stock are protected from changes in the value of the instruments. Like investors in debt securities, trust preferred stock investors do not share any appreciation in the value of the issuer and have no voting rights in the management or ordinary course of business of the issuer. Additionally, trust preferred stock is not perpetual and distributions on the stock resemble the periodic interest payments on debt. In essence, such investments are functionally equivalent to investments in the underlying debentures. Investments in such instruments are aggregated with investments in adjustable rate and money market preferred stock for purposes of applying the limit of 15 percent of tier one capital.

Guarantee activities. When drafting the proposal, the FDIC considered adding an exception for guarantee activities including credit card guarantee programs and comparable arrangements that would have been similar to that which we proposed to delete from subpart A. These programs typically involve a situation where an institution guarantees the credit obligations of its retail customers. Although the FDIC continues to believe that these activities present no significant risk to the deposit insurance funds, the FDIC proposed deleting this activity from subpart A because it was determined that national banks, and therefore insured state banks, may already engage in the activities. The FDIC determined that federal savings associations, and by extension insured state savings associations, may engage in these activities as well. The FDIC received no comments advocating the addition of an exception for these activities and, as a result, no exception was crafted.

Section 362.12 Service Corporations of Insured State Savings Associations

Section 362.12 of the final regulation governs the activities of service corporations of insured state savings associations and generally replaces what is now found at § 303.144(b) (as effective October 1, 1998, formerly § 303.13(d)(2)) of the FDIC's regulations. The section reorganizes the substance of the current regulation and consolidates all provisions concerning the activities of service corporations into the same section. Language currently in § 303.144(b) (as effective October 1, 1998, formerly § 303.13(d)(2)) concerning applications was revised and moved to §§ 303.141 and 303.142 of subpart H of part 303. Additionally, the FDIC extended several regulatory exceptions closely resembling similar exceptions provided to subsidiaries of insured state banks in subpart A of this final regulation. The FDIC notes that if the service corporation is a new subsidiary or is a subsidiary conducting a new activity, all of the exceptions in § 362.12 remain subject to the notice provisions contained in section 18(m) of the FDI Act which are now being implemented in subpart D of this regulation.

General prohibition. A service corporation of an insured state savings association may not engage in any activity that is not permissible for a service corporation of a federal savings association unless the savings association submits an application and receives the FDIC's consent or the activity qualifies for a regulatory exception. This provision does not represent a substantive change from the current regulation. The regulatory language implementing this prohibition has been separated from the restrictions in § 362.11 prohibiting an insured state savings association from directly engaging in activities which are not permissible for a federal savings association. By separating the savings association's activities and those of a service corporation, § 362.12 deals exclusively with activities that may be conducted by a service corporation of an insured state savings association.

Consent obtained through application. Consistent with the proposal, the final regulation continues to allow insured state savings associations to submit applications seeking the FDIC's consent to engage in activities through a service corporation that are otherwise prohibited. Section 362.12(b)(1) carries forward the substance of the application option in § 303.144(b) (as effective October 1, 1998, formerly § 303.13(d)(2)) of the FDIC's current regulations. Approval will be granted only if: (1) The savings association meets and continues to meet the applicable capital standards prescribed by the appropriate federal banking agency; and (2) the FDIC determines that conducting the activity in the requested amount will not present a significant risk to the relevant deposit insurance fund.

Service corporations conducting unrestricted activities.

The FDIC has found that it is not a significant risk to the deposit insurance fund if a service corporation engages in certain activities as long as the insured state savings association continues to meet the applicable capital standards prescribed by the appropriate federal banking agency. One of these activities, authorized by § 362.12(b)(2)(i) of the final rule, is owning a control interest in a company that engages in securities activities authorized by § 362.12(b)(4), provided the activity is conducted pursuant to the limitations and requirements of § 362.12(b)(4), including the requirement that the insured state savings association files a notice with the FDIC to which the FDIC does not object. The regulation specifies that both the service corporation and the lower tier company must meet the investment and transaction limits, and the capital deduction, that would apply if the service corporation engaged in the securities activities directly under § 362.12(b)(4), to ensure that the service corporation is not used as a conduit to the lower tier company in derogation of these requirements. The savings association must also meet the same core eligibility requirements that would apply if the service corporation engaged in the activity directly, and the savings association and the lower tier company must meet certain additional requirements in § 362.12(b)(4). However, with regard to the core eligibility requirements applicable to a service corporation conducting the activity under § 362.12(b)(4), these may be observed by the service corporation, or in the alternative by the lower tier company if the company takes corporate form.

The FDIC also extended a regulatory exception enabling service corporations to acquire and retain equity securities of a company engaged in the following activities: (1) Activities permissible for a federal savings association; (2) any activity permissible for the savings association itself under § 362.11(b)(2)(iii); or (3) insurance agency activities. The service corporation must either own a controlling interest in a company engaging in these activities, or the company must be controlled by insured depository institutions. The FDIC provided similar exceptions to majority-owned subsidiaries of insured state banks in subpart A. Sections 362.12(b)(2) (i) through (ii) are intended to cover a service corporation's investment in lower level subsidiaries engaged in activities that the FDIC has found to present no significant risk to the deposit insurance fund.

The final version differs from the proposal in that, as is the case in the corresponding provision of subpart A, the FDIC created a limited exception to the control requirement under § 362.12(b)(2)(ii) if the company is controlled by a group of insured depository institutions. This accommodates community associations

wishing to form a consortium of associations to provide financial services for their customers that one association cannot provide on a cost effective basis.

The final version also differs from the proposal in that, as is the case in the corresponding provision of subpart A, the activities authorized for the lower-level company are not identical to the activities proposed.[15] The FDIC made this change to remain consistent with subpart A. The rule as adopted does not eliminate any authorization granted by current rules, and the FDIC received no comments on the proposal, so the change from the proposed activities will have no impact on state savings associations.

Section 28 of the FDI Act requires the FDIC's consent before a service corporation may engage in any activity that is not permissible for a service corporation of a federal savings association. While the language of section 28 governs only activities conducted ''as principal'' by insured state savings associations, the ''as principal'' language was not extended to service corporations in the governing statute. This means that even if the activity is not conducted ''as principal'', the subpart C prohibition applies if the activity is not permissible for a service corporation of a federal savings association.

Because the FDIC believes that activities conducted other than ''as principal'' present no significant risk to the relevant deposit insurance fund, we provided an exception in § 362.12(b)(2)(iii) allowing a service corporation of an insured state savings association to act other than ''as principal,'' if the savings association meets and continues to meet the applicable capital standards prescribed by its appropriate federal banking agency. The FDIC received no comments on this exception. The final regulation also requires a savings association to own a control interest in a service corporation conducting the activities. The control requirement was added to more closely approximate the treatment accorded to insured state banks and their subsidiaries. Insured state bank subsidiaries can act other than ''as principal.'' However, a subsidiary is defined as being a company controlled by a depository institution. Therefore, the control standard imposed in this section equates the ownership interest requirements of insured state savings associations and insured state banks. Additionally, it helps differentiate between an insured state savings association controlling a company and simply investing in the shares of a company.

The FDIC also provided, at § 362.12(b)(2)(iv) of the final rule, an exception allowing service corporations of qualifying savings associations to invest in adjustable rate preferred stock, money market (auction rate) preferred stock, and other instruments of a type determined by the FDIC to have the character of debt securities provided the instruments do not represent a significant risk to the deposit insurance funds. Investments by a service corporation in these instruments are combined with and subject to the same limits applicable to the parent savings association. The FDIC did not receive any comments on extending this exception to insured state savings associations and the exception is adopted as proposed.

Owning equity securities that do not represent a control interest. For the same reasons previously stated in the preamble discussion of subpart A, no notice procedure is being adopted at this time. Staff has been instructed to undertake further study of the proposal.

Securities underwriting. Section 362.12(b)(4) of the final regulation allows an insured state savings association to acquire or retain an investment in a service corporation that underwrites or distributes securities that would not be permissible for a federal savings association to underwrite or distribute if notice is filed with the FDIC, the FDIC does not object to the notice before the end of the notice period, and a number of conditions are and continue to be met.

This exception enabling service corporations to underwrite or distribute securities is patterned on the exception found in subpart A (see § 362.4(b)(5)(ii)). In both cases, the state-chartered depository institution must conduct the securities activity in compliance with the core eligibility requirements, the same additional requirements listed for this activity in subpart A, and the investment and transaction limits. The savings association also must meet the capital requirements and the service corporation must meet the ''eligible subsidiary'' requirements as an ''eligible service corporation''. Since the requirements are the same as those imposed in subpart A and the risks of the activity are identical, the discussion in subpart A is not repeated here.

Notice of change in circumstance. Like subpart A, the final rule requires the insured state savings association to provide written notice to the appropriate Regional Office of the FDIC within 10 business days of a change in circumstances concerning its securities subsidiary authorized by § 362.12(b)(4). Under the regulation, a change in circumstances is described as a material change in the service corporation's business plan or management. Together with the insured state savings association's primary federal financial institution regulator, the FDIC believes that it may address a savings association's falling out of compliance with any of the other conditions of approval through the normal supervision and examination process.

The FDIC is concerned about changes in circumstances which result from changes in management or changes in a service corporation's business plan. If material changes to either condition occur, the regulation requires the association to submit a notice of such changes to the appropriate FDIC regional director (DOS) within 10 days of the material change. The material change standard includes such events as a change in chief executive officer of the service corporation or a change in investment strategy or type of business or activity engaged in by the service corporation. The FDIC received two comments concerning the change of circumstance notice. Both comments indicated that the notice is burdensome and unnecessary. The comments argue that a change in the chief executive office or investment strategies are routine. The FDIC places significant reliance on the management structure and business plan presented when an activity is approved for a service corporation. The FDIC does not consider either change to be routine and believes that it is important that the FDIC be aware of material changes in the operations of service corporations engaging in activities that are not permissible for a service corporation of a federal savings association. One comment requested that the notice period be extended from 10 to 30 days. The FDIC believes that both a change in management and a change in the business plan of the service corporation are matters that should receive significant consideration before these events occur. The FDIC does not believe that it is unreasonable to require notices of these events within 10 days. Therefore, the final regulation retains the requirement that a notice of change of circumstances be submitted to the

[15] The proposal would have authorized the lower tier company to engage in any activity permissible for a federal savings association; hold adjustable rate or money market preferred stock up to 15 percent of tier one capital; engage in activities (subject to certain exceptions) authorized by the FRB under section 4(c)(8) of the Bank Holding Company Act; or engage in activity not as principal.

Regional Director within 10 business days after any such change.

The FDIC will communicate its concerns regarding the continued conduct of an activity after a change in circumstances with the appropriate persons from the insured state savings association's primary federal banking agency. The FDIC will work with the identified persons from the primary federal banking agency to develop the appropriate response to the new circumstances.

The FDIC does not intend to require any savings association which falls out of compliance with eligibility conditions to immediately cease any activity in which the savings association had been engaged. Instead, the FDIC will deal with each situation on a case-by-case basis through its supervision and examination process. In short, the FDIC intends to utilize its supervisory and regulatory tools in dealing with any savings association's failure to meet the eligibility requirements on a continuing basis. The issue of the savings association's ongoing activities will be dealt with in the context of that effort. The FDIC believes that the case-by-case approach to whether a savings association will be permitted to continue an activity is preferable to forcing a savings association to, in all instances, immediately cease the activity. Such an inflexible approach could exacerbate an already unfortunate situation that probably is receiving supervisory attention.

Core eligibility requirements. The proposed regulation imports by reference the core eligibility requirements listed in subpart A. Refer to the discussion on this topic provided under subpart A for additional information. When reading the referenced discussion, ''subsidiary'' and ''majority-owned subsidiary'' should be replaced with ''service corporation''. Additionally, ''eligible subsidiary'' should be replaced with ''eligible service corporation''. Finally, ''insured state savings association'' should be read to replace ''bank'' or ''insured state bank''. Comments addressing these provisions and the FDIC's response are discussed in the relevant section of the preamble for subpart A. The FDIC received no comments directly relating to the application of these requirements to insured state savings associations.

Investment and transaction limits. The final regulation contains investment limits and other requirements that apply to an insured state savings association and its service corporations engaging in activities that are not permissible for a federal savings association if the requirements are imposed by FDIC order or expressly imposed by regulation. In general, the provisions: (1) Impose an aggregate limit on a savings association's investment in all service corporations that engage in an activity that is covered by the investment limits; (2) require extensions of credit from a savings association to these service corporations to be fully-collateralized when made; (3) prohibit low quality assets from being taken as collateral on such loans; and (4) require that transactions between the savings association and its service corporations be on an arm's length basis. The proposed limit restricting a savings association's investment in any one service corporation engaging in the same activity that is not permissible for a service corporation of a federal savings association was deleted for the same reason the requirement was dropped from subpart A.

Like the treatment accorded insured state banks, the regulation expands the definition of insured state savings association for the purposes of the investment and transaction limitations. A savings association includes not only the insured entity, but also any service corporation or subsidiary that is engaged in activities that are not subject to these investment and transaction limits. Sections 23A and 23B of the Federal Reserve Act combine a bank and all of its subsidiaries in imposing investment limitations and transaction restrictions between the bank and its affiliates. The FDIC is using the same concept in separating subsidiaries and service corporations conducting activities that are subject to investment and transaction limits from the insured state savings association and any other service corporations and subsidiaries engaging in activities not subject to the investment and transaction limits.

The only exception to these restrictions is for arm's length extensions of credit made by the savings association to finance sales of assets by the service corporation to third parties. These transactions do not need to comply with the collateral requirements and investment limitations, provided they meet certain arm's-length standards. The imposition of section 23A-type restrictions is intended to make sure that adequate safeguards are in place for the dealings between the insured state savings association and its service corporations.

Investment limits. In a manner similar to that applied to insured state banks in subpart A, the final rule imposes limits on certain of the insured state savings association's investments in service corporations conducting activities that are not permissible for a service corporation of a federal savings association. These investments are limited to 20 percent of the association's tier one capital for the aggregate of all activities covered by the investment limits. As is the case with the ''investment'' definition used in the relevant section of subpart A, investments subject to the applicable limits include: (1) Extensions of credit to any person or company for which an insured state savings association accepts securities issued by the service corporation as collateral; and (2) any extensions or commitments of credit to a third party for investment in the subsidiary, investment in a project in which the subsidiary has an interest, or extensions of credit or commitments of credit which are used for the benefit of, or transferred to, the subsidiary. These provisions also resemble items included in covered transactions subject to the section 23A limits.

However, the ''investment'' definition also is somewhat dissimilar from that used in subpart A due to underlying statutory differences. The definition of investment for insured state savings associations excludes extensions of credit provided to the service corporation and any of its debt securities owned by the savings association. While these items are included in the investment definition in subpart A, insured state banks are not, unlike state savings associations, required by law to deduct these items from regulatory capital. The investment definition coverage in subpart C has been limited because an insured state savings association is required by the Home Owners' Loan Act or OTS regulations to deduct from its regulatory capital any extensions of credit provided to a service corporation and any debt securities owned by the savings association that were issued by a service corporation engaging in activities that are not permissible for a national bank. 12 U.S.C. 1464(t)(5)(A). Since the regulatory exceptions in subpart C that invoke the investment limits are not activities permissible for a national bank, insured state savings associations are required by the referenced statute to deduct these items from regulatory capital. The FDIC finds no reason to impose investment limits on amounts completely deducted from capital and therefore imposes the investment limit only on items that are not deducted from regulatory capital.

Like subpart A, the regulation calculates the 20 percent limit based on tier one capital while section 23A uses total capital. As was discussed in reference to subpart A, the FDIC is using

tier one capital as its standard to create consistency throughout the regulation.

Transaction requirements. The arm's length transaction requirement, prohibition on purchasing low quality assets, the insider transaction restriction, and the anti-tying restriction are applicable between an insured state savings association and a service corporation to the same extent and in the same manner as that described in subpart A between an insured state bank and certain majority-owned subsidiaries. The discussion of this topic in subpart A discusses the comments and changes from the proposal.

Collateralization requirement. The collateralization requirement in § 362.4(d)(4) also is applicable between an insured state savings association and a service corporation to the same extent and in the same manner as described in subpart A. Refer to the discussion of this topic in subpart A for the treatment of the comments.

Capital requirements. Under the final rule, an insured state savings association using the notice process to invest in a service corporation engaging in certain activities not permissible for a federal savings association must be ''well-capitalized'' after deducting from its regulatory capital any investment in the service corporation, both debt and equity, unless otherwise relieved of this requirement. The bank's risk classification assessment under part 327 is also determined after making the same deduction. This standard reflects the FDIC's belief that only well-capitalized institutions should be allowed, either without notice or by using the notice process, to engage through service corporations in activities that are not permissible for service corporations of federal savings associations. All savings associations failing to meet this standard and wanting to engage in such activities should be subject to the scrutiny of the application process. The FDIC received no comments concerning this provision.

Approvals previously granted. The final regulation, at § 362.13, does not require insured state savings associations that have previously received consent by order or notice from this agency to reapply to continue the activity provided the savings association and service corporation, as applicable, continue to comply with the conditions of the order of approval. The FDIC does not intend to require insured state savings associations to request consent to engage in an activity which has already been approved.

Because previously granted approvals may contain conditions that are different from the standards that are established in the final rule, in certain circumstances, the insured state savings association may elect to operate under the restrictions of the rule, instead of the order. In that case, the insured state savings association may comply with the investment and transaction limitations between the savings association and its service corporations contained in § 362.12(c), the capital requirement detailed in § 362.12(d), and the service corporation restrictions as outlined in the term ''eligible service corporation'' (by substitution) and contained in § 362.4(c)(2) in lieu of any similar requirements in its approval order. Any conditions that are specific to a savings association's situation and do not fall within the above limitations will continue to be effective. The FDIC intends that once a savings association elects to follow these proposed restrictions instead of those in the approval order, it may not elect to revert to the applicable conditions of the order.

Real estate investment activities. Comments describing the contents of subpart A include an extensive discussion of the FDIC's concerns with real estate investment activities. Subpart A of the final regulation contains significant provisions regarding the real estate investment activities of majority-owned subsidiaries of insured state banks. Additionally, subpart B addresses real estate activities of majority-owned subsidiaries that may become permissible for national bank subsidiaries.

The FDIC believes real estate investment activities present similar risks when conducted by a service corporation of an insured state savings association. However, subpart C of the proposal does not incorporate any of the requirements imposed in subparts A and B on real estate activities conducted by bank subsidiaries. While the FDIC attempted to conform the treatment of insured state banks and their subsidiaries and that of insured state savings associations and their service corporations, differences in the governing statutes resulted in some variances.

Service corporations of federal savings associations may engage in numerous real estate investment activities and, therefore, these activities are permissible for service corporations of insured state savings associations. However, because real estate investment activities are not permissible for a national bank, insured state savings associations are required by the Home Owners' Loan Act or regulations issued by the OTS to deduct from their regulatory capital any investment in a service corporation engaging in these activities. This deduction includes both the savings association's investments in debt and equity of, and extensions of credit to, the service corporation. There are also statutory limitations on the amount of a savings association's investments in and credit extensions to service corporations.

Given that: (1) Real estate investment activities are permissible for service corporations of federal savings associations; (2) there are statutory requirements regarding the capital deduction; and (3) there are statutory limitations on investments and credit extensions, the proposal did not contain any provisions concerning the real estate investment activities of service corporations of insured savings associations. As a result, the arm's length transaction requirements, the prohibition on purchasing low quality assets, the insider transaction restriction, and the collateralization requirements were not applied to transactions between an insured savings association and a service corporation engaging in real estate investment activities. Additionally, neither the insured savings association nor the service corporation was required to meet the eligibility standards; nor was a notice required to be submitted to the FDIC (unless a notice is needed pursuant to proposed subpart D).

The FDIC specifically requested comment on whether provisions should be added to part 362 subjecting service corporations of insured savings state savings associations to the eligibility requirements and various restrictions implemented in subparts A and B. Despite this request, no comments were received addressing this issue. After further consideration, the FDIC has decided not to impose any of the discussed requirements at this time. The FDIC will instead continue to defer to the statutory authority enabling service corporations to engage in the subject real estate activities.

Notice that a federal savings association is conducting activities grandfathered under section 5(i)(4) of HOLA. Section 303.147 (as effective October 1, 1998, formerly § 303.13(g)) of the FDIC's current regulations requires any federal savings association that is authorized by section 5(i)(4) of HOLA to conduct activities that are not normally permitted for federal savings associations to file a notice of that fact with the FDIC. Section 5(i)(4) of HOLA provides that any federal savings bank chartered as such prior to October 15, 1982, may continue to make investments and continue to conduct

activities it was permitted to conduct prior to October 15, 1982. It also provides that any federal savings bank organized prior to October 15, 1982, that was formerly a state mutual savings bank may continue to make investments and engage in activities that were authorized to it under state law. Finally, the provision confers this grandfather on any federal savings association that acquires by merger or consolidation any federal savings bank that enjoys the grandfather.

The notice requirement contained in § 303.147 (as effective October 1, 1998, formerly § 303.13(g)) was deleted in the final regulation. The notice was not required by law and was formerly imposed by the FDIC as an information gathering tool. The FDIC determined that eliminating the notice will reduce burden and will not materially affect the FDIC's supervisory responsibilities.

D. Subpart D of Part 362 Acquiring, Establishing, or Conducting New Activities Through a Subsidiary by an Insured Savings Association

Section 362.14 Purpose and Scope

Subpart D implements the statutory requirement of section 18(m) of the FDI Act. Section 18(m) requires that prior notice be given to the FDIC when an insured savings association, either federal or state, establishes or acquires a subsidiary or engages in any new activity in a subsidiary. This requirement is based on the FDIC's role of ensuring that activities and investments of insured savings associations do not represent a significant risk to the affected deposit insurance fund. In fulfilling that role, the FDIC needs to be aware of the activities contemplated by subsidiaries of insured savings associations. It is noted that for purposes of this subpart, a service corporation is a subsidiary, but the term subsidiary does not include any insured depository institution as that term is defined in the FDI Act. Because this requirement applies to both federal and state savings associations, the final regulation segregates the implementing requirements of the FDIC's regulations into a separate subpart D. In that manner, the requirement is highlighted for both federal and state savings associations. The FDIC adopts § 362.14 without change from the proposal.

Notice of the acquisition or establishment of a subsidiary, or notice that an existing subsidiary will conduct new activities. Section 303.146 (as effective October 1, 1998, formerly § 303.13(f)) of the FDIC's current regulations establishes an abbreviated notice procedure concerning subsidiaries created to hold real estate acquired pursuant to DPC (after the first notice, additional real estate subsidiaries created to hold real estate acquired through DPC could be established after providing the FDIC with 14 days prior notice) and lists the content of the notice. The second item is also deleted because the FDIC seeks to conform all notice periods used in this regulation. While § 362.15 continues to require a prior notice, the required content of the notice was revised in a manner consistent with that required for other notices under this regulation and moved to § 303.141 of subpart H of part 303. The FDIC wants to make it clear that any notice or application submitted to the FDIC pursuant to a provision of subpart C of this regulation will satisfy the notice requirement of this subpart D.

The FDIC received no comments on either the proposed structure of this subpart or the proposed treatment of the required notices. The final regulation incorporates these changes as proposed, with one exception. Consistent with the current rule, the savings association must submit the notice at least 30 days before establishing the new subsidiary or commencing the new activity.

Part 303

Subpart G—Activities of Insured State Banks

Overview

As a part of this rulemaking, Part 303—Filing Procedures and Delegations of Authority, is amended to include a new subpart G containing application procedures and delegations of authority for the substantive matters covered by the regulation for insured state banks.[16] As discussed above, the FDIC has prepared a complete revision of part 303 of the FDIC's rules and regulations containing the FDIC's applications procedures and delegations of authority. As part of these revisions to part 303, subpart G of part 303 has been reserved for this purpose. The application procedures were detailed in subpart E of the part 362 proposal but are now being relocated to subpart G of part 303, to centralize all banking application and notice procedures in one convenient place.

The FDIC received four comments about its proposed application procedures. One commenter generally applauded the FDIC's adoption of expedited notice procedures as being consistent with congressional intent to reduce regulatory burden on banks. The remaining three comments are discussed in turn below. After careful consideration of these comments, the FDIC has decided they raise no issues warranting substantive changes to the proposed procedures. The FDIC has made certain technical changes to the proposed procedures, but these consist of minor revisions in order to make the procedures consistent with the other subparts of part 303, as adopted in its final form and published at 63 FR 44686 (August 20, 1998).

Section 303.120 Scope

This subpart contains the procedural and other information for any application or notice that must be submitted under the requirements specified for activities and investments of insured state banks and their subsidiaries under subparts A and B of part 362, including the format, information requirements, FDIC processing deadlines, and other pertinent guidelines or instructions. The regulation also contains delegations of authority from the Board of Directors to the director and deputy director of the Division of Supervision.

Definitions. The proposed subpart E of part 362 contained definitions of the following terms: ''Appropriate regional director'', ''appropriate deputy regional director'', ''appropriate regional office'', ''associate director'', ''deputy director'', ''deputy regional director'', ''DOS'', ''director'', and ''regional director''. These definitions have been eliminated since these terms are defined in part 303, and separate definitions are unnecessary.

Although other subparts of part 303 rely on part 303's definition of an ''eligible insured depository institution'' in connection with granting expedited processing for certain FDIC applications, subpart G does not rely on the part 303 definition. A bank's eligibility for expedited notice processing in connection with an approval required under subpart A or B of part 362 is determined under the criteria contained in part 362.

Section 303.121 Filing Procedures

This section explains to insured state banks where they should file, how they should file and the contents of any filing, including any copies of any application or notice filed with another agency.

This section also explains that the appropriate regional director may request additional information. The FDIC does not anticipate that there will

[16] Under the FDIC's current rules, these application requirements are located in various sections of three different regulations: 12 CFR 303, 12 CFR 337.4 and 12 CFR 362.

be a need routinely to request additional information; however, this reservation is made in anticipation of differences in the way activities are proposed to be conducted.

One commenter expressed concerns regarding the regulation's requirement that the bank submit a copy of the order or other document from the appropriate regulatory authority granting approval for the bank to conduct the activity, if such approval is necessary and has already been granted. The commenter was concerned that this would foreclose the bank from making simultaneous submissions to state regulatory authorities and the FDIC. To the contrary, the language at the end of the sentence, ''if such approval * * * has already been granted'' will accommodate parallel processing. The bank need not wait until the state has issued an approval before applying to the FDIC. The regulatory language permits the bank to make necessary submissions to the state and FDIC in whatever order the bank sees fit. Of course, banks are reminded that an FDIC approval under subpart A or B of part 362 is not sufficient on its own; the activity in question must still be authorized under state law, including any approvals thereunder, before the bank may commence the activity. Where the pendency of state approval creates uncertainty as to the manner or extent to which the activity will be conducted, the appropriate regional director will request additional information from the bank concerning the state approval, and the notice or application may not be sufficiently complete for the FDIC to be able to process it until such uncertainties are resolved.

Section 303.122 Processing

This section sets out the procedures for the FDIC's processing of notices and applications. The expedited processing period for notices will normally be 30 days, subject to extension for an additional 15 days upon written notice to the bank. If the FDIC removes a notice from expedited processing because of significant supervisory concerns, legal or policy issues, or other good cause, as set out in the rule, standard processing will be used. For notices removed in this manner, or for activities requiring a full application rather than a notice, the FDIC will normally review and act within 60 days after receipt of a completed application, subject to extension for an additional 30 days upon written notice to the bank. One comment supported the notice process as regulatory burden reduction. Two comments questioned the time periods for processing. One stated that the 30- and 60-day time frames do not reflect business reality. The commenter requested that institutions have advanced approval to invest up to 10 percent of capital. The other questioned the notice process, stating that the FDIC will not have sufficient opportunity to review the request. Because of the differences among the activities presented, the FDIC does not feel that advance approval is a viable alternative. Given normal lead times for business planning appropriate to a bank's decision to enter into a new field of business activity, and given that the regulation does not require FDIC approval on a project-by-project basis, the FDIC does not believe the proposed time periods will impede banks' ability to compete effectively. The notice and application procedures provide an expedited processing time, but the FDIC feels the time constraints are sufficient for appropriate supervisory consideration. Therefore, no changes have been made to the proposed processing times.

Section 303.123 Delegation of Authority

The authority to review and act upon applications and notices is delegated in this section. One substantive change to the existing delegation is the addition of the deputy director of the Division of Supervision. Another change authorizes the Director (DOS) to make determinations concerning instruments having the character of debt securities. This authority is granted to allow the FDIC to efficiently respond to market changes. Section 24 prohibits insured state banks from investing in equity securities. The FDIC has found that certain instruments have sufficient characteristics of debt securities that they may be excluded from the prohibition of investment in equity securities. If the capital markets create similar such instruments in the future, this provision permits the Director (DOS), either upon request or at the FDIC's instigation, to identify them as such and designate them as being eligible investments for state nonmember banks, subject to the 15 percent of tier one capital limit set under § 362.3. The FDIC would notify state banks of such determination by issuing a Financial Institution Letter, or through other appropriate means.

Subpart H—Activities of Insured Savings Associations

Overview

As a part of this rulemaking, part 303—Filing Procedures and Delegations of Authority, is amended to include a revised subpart H containing application procedures and delegations of authority for the substantive matters covered by the regulation for insured state savings associations. As discussed above, the FDIC has prepared a complete revision of part 303 of the FDIC's rules and regulations containing the FDIC's applications procedures and delegations of authority. As part of these revisions to part 303, subpart H of part 303 has been reserved for this purpose. The application procedures were detailed in subpart F of the part 362 proposal but are now being relocated to subpart H of part 303 to centralize all savings association application and notice procedures in one convenient place.

The FDIC received no comments about its proposed application procedures. The FDIC has made certain technical changes to the proposed procedures, but these changes consist of minor revisions to make the procedures consistent with the other subparts of part 303, as adopted in its final form.

Section 303.140 Scope

This subpart contains the procedural and other information for any application or notice that must be submitted under the requirements specified for activities and investments of insured state savings associations and their subsidiaries under subparts C and D or part 362, including the format, information requirements, FDIC processing deadlines, and other pertinent guidelines or instructions. The regulation also contains delegations of authority from the Board of Directors to the director and deputy director of the Division of Supervision.

Section 303.141 Definitions

The proposed subpart F contained definitions of the following terms: ''Appropriate regional director'', ''appropriate deputy regional director'', ''appropriate regional office'', ''associate director'', ''deputy director'', ''deputy regional director'', ''DOS'', ''director'', and ''regional director''. These definitions have been eliminated since these terms are defined in part 303 and separate definitions are unnecessary.

Although other subparts of part 303 rely on part 303's definition of an ''eligible insured depository institution'' in connection with granting expedited processing for certain FDIC applications, subpart H does not rely on the part 303 definition. A savings association's eligibility for expedited notice processing in connection with an approval required under subpart C or D of part 362 is determined under the criteria contained in part 362.

Section 303.141 Filing Procedures

This section explains to insured savings associations where they should file, how they should file and the contents of any filing, including any copies of any application or notice filed with another agency.

This section also explains that the appropriate regional director may request additional information. The FDIC does not anticipate that there will be a need routinely to request additional information; however, this reservation is made in anticipation of differences in the way activities are proposed to be conducted.

Section 303.142 Processing

This section sets out the procedures for the FDIC's processing of notices and applications. The expedited processing period for notices will normally be 30 days, subject to extension for an additional 15 days upon written notice to the bank. If the FDIC removes a notice from expedited processing because of significant supervisory concerns, legal or policy issues, or other good cause, as set out in the rule, standard processing will be used. For notices removed in this manner, or for activities requiring a full application rather than a notice, the FDIC will normally review and act within 60 days after receipt of a completed application, subject to extension for an additional 30 days upon written notice to the savings association.

Section 303.148 Delegation of Authority

The authority to review and act upon applications and notices is delegated in this section. One substantive change to the existing delegation is the addition of the deputy director of the Division of Supervision. Another change authorizes the Director (DOS) to make determinations concerning instruments having the character of debt securities. This authority is granted to allow the FDIC to efficiently respond to market changes. Section 28 prohibits insured state associations from investing in equity securities. The FDIC has found that certain instruments have characteristics of debt securities and may be excluded from the prohibition of investment in equity securities. If the capital markets create similar such instruments in the future, this provision permits the Director (DOS), either upon request or at the FDIC's instigation, to identify them as such and designate them as being eligible investments for state nonmember banks, up to the 15 percent of tier one capital limit set under § 362.3. The FDIC would notify state banks of such determination by issuing a Financial Institution Letter, or other appropriate means.

V. Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), the FDIC 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. Public comment was invited on two collections of information contained in the part 362 notice of proposed rulemaking and the two collections were submitted to the Office of Management and Budget (OMB) for review. No comment was received regarding either collection. OMB approved the first collection, Activities and Investments of Insured State Banks, under control number 3064–0111, which will expire November 30, 2000. OMB approved the second collection, Activities and Investments of Insured Savings Associations, under control number 3064–0104, which will expire November 30, 2000. The FDIC continues to welcome comment about the PRA aspects of this regulation. Such comment should identify the particular subpart and information collection for which consideration is desired and should be sent to Steven F. Hanft, Assistant Executive Secretary (Regulatory Analysis), Federal Deposit Insurance Corporation, Room F–4062, 550 17th Street NW, Washington, DC 20429.

VI. Regulatory Flexibility Act Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act, the FDIC certifies that this rule will not have a significant economic impact on a substantial number of small entities. The rule streamlines requirements for all insured state banks and insured state savings associations. The requirements for insured federal savings associations are statutory and remain unchanged by this rule. It simplifies the requirements that apply when insured state banks and insured state savings associations create, invest in, or conduct new activities through majority-owned corporate subsidiaries and service corporations, respectively, by eliminating requirements for any filing or reducing the burden from filing an application to filing a notice in other instances. The rule also simplifies the information required for both notices and applications. Whenever possible, the rule clarifies the expectations of the FDIC when it requires notices or applications to consent to activities by insured state banks and insured state savings associations. The rule will make it easier for small insured state banks and insured state savings associations to locate the rules that apply to their investments.

VII. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (Title II, Public Law 1004–121) provides generally for agencies to report rules to Congress for review. The reporting requirement is triggered when a federal agency issues a final rule. Accordingly, the FDIC will file the appropriate reports with Congress as required by SBREFA.

The Office of Management and Budget has determined that this final rule does not constitute a ''major rule'' as defined by SBREFA.

List of Subjects

12 CFR Part 303

Administrative practice and procedure, Authority delegations (Government agencies), Bank deposit insurance, Banks, banking, Bank merger, Branching, Foreign branches, Golden parachute payments, Insured branches, Interstate branching, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 337

Banks, banking, Reporting and recordkeeping requirements, Securities.

12 CFR Part 362

Administrative practice and procedure, Authority delegations (Government agencies), Bank deposit insurance, Banks, banking, Insured depository institutions, Investments, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons set forth above and under the authority of 12 U.S.C. 1819(a)(Tenth), the FDIC Board of Directors hereby amends 12 CFR chapter III as follows:

PART 303—FILING PROCEDURES AND DELEGATIONS OF AUTHORITY

1. The authority citation for part 303 is revised to read as follows:

Authority: 12 U.S.C. 378, 1813, 1815, 1816, 1817, 1818, 1819 (Seventh and Tenth), 1820, 1823, 1828, 1831a, 1831e, 1831*o*, 1831p–1, 1835a, 3104, 3105, 3108, 3207; 15 U.S.C. 1601–1607.

2. Revise the subpart G heading and add subpart G, consisting of §§ 303.120 through 303.123, to read as follows:

Subpart G—Activities of Insured State Banks

Sec.
303.120 Scope.
303.121 Filing procedures.
303.122 Processing.
303.123 Delegation of authority.

Subpart G—Activities of Insured State Banks

§ 303.120 Scope.

This subpart sets forth procedures for complying with notice and application requirements contained in subpart A of part 362 of this chapter, governing insured state banks and their subsidiaries engaging in activities which are not permissible for national banks and their subsidiaries. This subpart also sets forth procedures for complying with notice and application requirements contained in subpart B of part 362 of this chapter, governing certain activities of insured state nonmember banks, their subsidiaries, and certain affiliates.

§ 303.121 Filing procedures.

(a) *Where to file.* A notice or application required by subpart A or subpart B of part 362 of this chapter shall be submitted in writing to the appropriate regional director (DOS).

(b) *Contents of filing*—(1) *Filings generally.* A complete letter notice or letter application shall include the following information:

(i) A brief description of the activity and the manner in which it will be conducted;

(ii) The amount of the bank's existing or proposed direct or indirect investment in the activity as well as calculations sufficient to indicate compliance with any specific capital ratio or investment percentage limitation detailed in subpart A or B of part 362 of this chapter;

(iii) A copy of the bank's business plan regarding the conduct of the activity;

(iv) A citation to the state statutory or regulatory authority for the conduct of the activity;

(v) A copy of the order or other document from the appropriate regulatory authority granting approval for the bank to conduct the activity if such approval is necessary and has already been granted;

(vi) A brief description of the bank's policy and practice with regard to any anticipated involvement in the activity by a director, executive office or principal shareholder of the bank or any related interest of such a person; and

(vii) A description of the bank's expertise in the activity.

(2) [Reserved]

(3) *Copy of application or notice filed with another agency.* If an insured state bank has filed an application or notice with another federal or state regulatory authority which contains all of the information required by paragraph (b)(1) of this section, the insured state bank may submit a copy to the FDIC in lieu of a separate filing.

(4) *Additional information.* The appropriate regional director (DOS) may request additional information to complete processing.

§ 303.122 Processing.

(a) *Expedited processing.* A notice filed by an insured state bank seeking to commence or continue an activity under § 362.4(b)(3)(i), § 362.4(b)(5), or § 362.8(a)(2) of this chapter will be acknowledged in writing by the FDIC and will receive expedited processing, unless the applicant is notified in writing to the contrary and provided a basis for that decision. The FDIC may remove the notice from expedited processing for any of the reasons set forth in § 303.11(c)(2). Absent such removal, a notice processed under expedited processing is deemed approved 30 days after receipt of a complete notice by the FDIC (subject to extension for an additional 15 days upon written notice to the bank) or on such earlier date authorized by the FDIC in writing.

(b) *Standard processing for applications and notices that have been removed from expedited processing.* For an application filed by an insured state bank seeking to commence or continue an activity under § 362.3(a)(2)(iii)(A), § 362.3(b)(2)(i), § 362.3(b)(2)(ii)(A), § 362.3(b)(2)(ii)(C), § 362.4(b)(1), § 362.4(b)(2), § 362.4(b)(4), § 362.5(b)(2), § 362.8(a)(2), or § 362.8(b) of this chapter or for notices which are not processed pursuant to the expedited processing procedures, the FDIC will provide the insured state bank with written notification of the final action as soon as the decision is rendered. The FDIC will normally review and act in such cases within 60 days after receipt of a completed application or notice (subject to extension for an additional 30 days upon written notice to the bank), but failure of the FDIC to act prior to the expiration of these periods does not constitute approval.

§ 303.123 Delegations of authority.

(a) *Instruments having the character of debt securities.* Authority is delegated to the Director (DOS) to make determinations contemplated under §§ 362.2(h) and 362.3(b)(2)(iii)(B) of this chapter.

(b) *Other applications, notices, and actions.* The authority to review and act upon applications and notices filed pursuant to this subpart G and to take any other action authorized by this subpart G or subparts A and B of part 362 of this chapter is delegated to the Director (DOS), and except as limited by paragraph (a) of this section, to the Deputy Director and where confirmed in writing by the Director to an associate director and the appropriate regional director and deputy regional director.

3. Revise subpart H to read as follows:

Subpart H—Activities of Insured Savings Associations

Sec.
303.140 Scope.
303.141 Filing procedures.
303.142 Processing.
303.143 Delegation of authority.

Subpart H—Activities of Insured Savings Associations

§ 303.140 Scope.

This subpart sets forth procedures for complying with the notice and application requirements contained in subpart C of part 362 of this chapter, governing insured state savings associations and their service corporations engaging in activities which are not permissible for federal savings associations and their service corporations. This subpart also sets forth procedures for complying with the notice requirements contained in subpart D of part 362 of this chapter, governing insured savings associations which establish or engage in new activities through a subsidiary.

§ 303.141 Filing procedures.

(a) *Where to file.* All applications and notices required by subpart C or subpart D of part 362 of this chapter are to be in writing and filed with the appropriate regional director.

(b) *Contents of filing*—(1) *Filings generally.* A complete letter notice or letter application shall include the following information:

(i) A brief description of the activity and the manner in which it will be conducted;

(ii) The amount of the association's existing or proposed direct or indirect investment in the activity as well as calculations sufficient to indicate compliance with any specific capital ratio or investment percentage limitation detailed in subpart C or D of this chapter;

(iii) A copy of the association's business plan regarding the conduct of the activity;

(iv) A citation to the state statutory or regulatory authority for the conduct of the activity;

(v) A copy of the order or other document from the appropriate regulatory authority granting approval for the association to conduct the activity if such approval is necessary and has already been granted;

(vi) A brief description of the association's policy and practice with regard to any anticipated involvement in the activity by a director, executive officer or principal shareholder of the association or any related interest of such a person; and

(vii) A description of the association's expertise in the activity.

(2) [Reserved]

(3) *Copy of application or notice filed with another agency.* If an insured savings association has filed an application or notice with another federal or state regulatory authority which contains all of the information required by paragraph (b) (1) of this section, the insured state bank may submit a copy to the FDIC in lieu of a separate filing.

(4) *Additional information.* The appropriate regional director (DOS) may request additional information to complete processing.

§ 303.142 Processing.

(a) *Expedited processing.* A notice filed by an insured state savings association seeking to commence or continue an activity under § 362.11(b)(2)(i), § 362.12(b)(2)(i), or § 362.12(b)(4) of this chapter will be acknowledged in writing by the FDIC and will receive expedited processing, unless the applicant is notified in writing to the contrary and provided a basis for that decision. The FDIC may remove the notice from expedited processing for any of the reasons set forth in § 303.11(c)(2). Absent such removal, a notice processed under expedited processing is deemed approved 30 days after receipt of a complete notice by the FDIC (subject to extension for an additional 15 days upon written notice to the bank) or on such earlier date authorized by the FDIC in writing.

(b) *Standard processing for applications and notices that have been removed from expedited processing.* For an application filed by an insured state savings association seeking to commence or continue an activity under § 362.11(a)(2), § 362.11(b)(2), § 362.12(b)(1) of this chapter or for notices which are not processed pursuant to the expedited processing procedures, the FDIC will provide the insured state savings association with written notification of the final action as soon as the decision is rendered. The FDIC will normally review and act in such cases within 60 days after receipt of a completed application or notice (subject to extension for an additional 30 days upon written notice to the bank), but failure of the FDIC to act prior to the expiration of these periods does not constitute approval.

(c) *Notices of activities in excess of an amount permissible for a federal savings association; subsidiary notices.* Receipt of a notice filed by an insured state savings association as required by § 362.11(b)(3) or § 362.15 of this chapter will be acknowledged in writing by the appropriate regional director (DOS). The notice will be reviewed at the appropriate regional office, which will take such action as it deems necessary and appropriate.

§ 303.143 Delegations of authority.

(a) *Instruments having the character of debt securities.* Authority is delegated to the Director (DOS) to make determinations contemplated under §§ 362.2(h) and 362.3(b)(2)(iii)(B) of this chapter.

(b) *Other applications, notices, and actions.* The authority to review and act upon applications and notices filed pursuant to this subpart H and to take any other action authorized by this subpart H or subparts C and D of part 362 of this chapter is delegated to the Director (DOS), and except as limited by paragraph (a) of this section, to the Deputy Director and where confirmed in writing by the Director to an associate director and the appropriate regional director and deputy regional director.

PART 337—UNSAFE AND UNSOUND BANKING PRACTICES

4. The authority citation for part 337 continues to read as follows:

Authority: 12 U.S.C. 375a(4), 375b, 1816, 1818(a), 1818(b), 1819, 1820(d)(10), 1821(f), 1828(j)(2), 1831f, 1831f–1.

5. In § 337.4, a new paragraph (i) is added to read as follows:

§ 337.4 Securities activities of subsidiaries of insured nonmember banks; bank transactions with affiliated securities companies.

* * * * *

(i) *Coordination with part 362 of this chapter*—(1) *New subsidiary or affiliate relationships.* Beginning January 1, 1999, every insured state nonmember bank that establishes a new subsidiary relationship subject to the provisions of § 362.4(b)(4) or § 362.4(b)(5)(ii) of this chapter or a new affiliate relationship that is subject to § 362.8(b) of this chapter shall comply with § 362.4(b)(4), § 362.4(b)(5)(ii) or § 362.8(b) of this chapter, respectively, or to the extent the insured state nonmember bank's planned subsidiary or affiliate will not comply with all requirements thereunder, submit an application to the FDIC under § 362.4(b)(1) or § 362.8(b) of this chapter, respectively. This section shall not apply to such subsidiary or affiliate.

(2) *Existing insured state nonmember bank subsidiaries subject to § 362.4.* Applicable transition rules for insured state nonmember bank subsidiaries engaged, before January 1, 1999, in securities activities pursuant to this section and also subject to § 362.4 of this chapter are set out in § 362.5 of this chapter.

(3) *Continued effectiveness of this section.* Insured state nonmember banks establishing or holding subsidiaries or affiliates subject to this section, but not covered by § 362.4 or § 362.8 of this chapter, remain subject to the requirements of this section, except that to the extent such subsidiaries or affiliates engage only in activities permissible for a national bank directly, including such permissible activities that may require the subsidiary or affiliate to register as a securities broker, no notice under paragraph (d) of this section is required.

6. Part 362 is revised to read as follows:

PART 362—ACTIVITIES OF INSURED STATE BANKS AND INSURED SAVINGS ASSOCIATIONS

Subpart A—Activities of Insured State Banks

Sec.
362.1 Purpose and scope.
362.2 Definitions.
362.3 Activities of insured state banks.
362.4 Subsidiaries of insured state banks.
362.5 Approvals previously granted.

Subpart B—Safety and Soundness Rules Governing Insured State Nonmember Banks

362.6 Purpose and scope.
362.7 Definitions.
362.8 Restrictions on activities of insured state nonmember banks.

Subpart C—Activities of Insured State Savings Associations

362.9 Purpose and scope.
362.10 Definitions.
362.11 Activities of insured state savings associations.
362.12 Service corporations of insured state savings associations.
362.13 Approvals previously granted.

Subpart D—Acquiring, Establishing, or Conducting New Activities Through a Subsidiary by an Insured Savings Association

362.14 Purpose and scope.
362.15 Acquiring or establishing a subsidiary; conducting new activities through a subsidiary.

Authority: 12 U.S.C. 1816, 1818, 1819(a)(Tenth), 1828(m), 1831a, 1831e.

Subpart A—Activities of Insured State Banks

§ 362.1 Purpose and scope.

(a) This subpart, along with the notice and application procedures in subpart G of part 303 of this chapter, implements the provisions of section 24 of the Federal Deposit Insurance Act (12 U.S.C. 1831a) that restrict and prohibit insured state banks and their subsidiaries from engaging in activities and investments that are not permissible for national banks and their subsidiaries. The phrase ''activity permissible for a national bank'' means any activity authorized for national banks under any statute including the National Bank Act (12 U.S.C. 21 *et seq.*), as well as activities recognized as permissible for a national bank in regulations, official circulars, bulletins, orders or written interpretations issued by the Office of the Comptroller of the Currency (OCC).

(b) This subpart does not cover the following activities:

(1) Activities conducted other than ''as principal,'' defined for purposes of this subpart as activities conducted as agent for a customer, conducted in a brokerage, custodial, advisory, or administrative capacity, or conducted as trustee, or in any substantially similar capacity. For example, this subpart does not cover acting solely as agent for the sale of insurance, securities, real estate, or travel services; nor does it cover acting as trustee, providing personal financial planning advice, or safekeeping services;

(2) Interests in real estate in which the real property is used or intended in good faith to be used within a reasonable time by an insured state bank or its subsidiaries as offices or related facilities for the conduct of its business or future expansion of its business or used as public welfare investments of a type permissible for national banks; and

(3) Equity investments acquired in connection with debts previously contracted (DPC) if the insured state bank does not hold the property for speculation and takes only such actions as would be permissible for a national bank's DPC. The bank must dispose of the property within the shorter of the period set by federal law for national banks or the period allowed under state law. For real estate, national banks may not hold DPC for more than 10 years. For equity securities, national banks must generally divest DPC as soon as possible consistent with obtaining a reasonable return.

(c) A subsidiary of an insured state bank may not engage in real estate investment activities that are not permissible for a subsidiary of a national bank unless the bank does so through a subsidiary of which the bank is a majority owner, is in compliance with applicable capital standards, and the FDIC has determined that the activity poses no significant risk to the appropriate deposit insurance fund. This subpart provides standards for majority-owned subsidiaries of insured state banks engaging in real estate investment activities that are not permissible for a subsidiary of a national bank. Because of safety and soundness concerns relating to real estate investment activities, subpart B of this part reflects special rules for subsidiaries of insured state nonmember banks that engage in real estate investment activities of a type that are not permissible for a national bank, but may be otherwise permissible for a subsidiary of a national bank.

(d) The FDIC intends to allow insured state banks and their subsidiaries to undertake only safe and sound activities and investments that do not present significant risks to the deposit insurance funds and that are consistent with the purposes of federal deposit insurance and other applicable law. This subpart does not authorize any insured state bank to make investments or to conduct activities that are not authorized or that are prohibited by either state or federal law.

§ 362.2 Definitions.

For the purposes of this subpart, the following definitions will apply:

(a) *Bank, state bank, savings association, state savings association, depository institution, insured depository institution, insured state bank, federal savings association,* and *insured state nonmember bank* shall each have the same respective meaning contained in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(b) *Activity* means the conduct of business by a state-chartered depository institution, including acquiring or retaining an equity investment or other investment.

(c) *Change in control* means any transaction:

(1) By a state bank or its holding company for which a notice is required to be filed with the FDIC, or the Board of Governors of the Federal Reserve System (FRB), pursuant to section 7(j) of the Federal Deposit Insurance Act (12 U.S.C. 1817(j)) except a transaction that is presumed to be an acquisition of control under the FDIC's or FRB's regulations implementing section 7(j);

(2) As a result of which a state bank eligible for the exception described in § 362.3(a)(2)(iii) is acquired by or merged into a depository institution that is not eligible for the exception, or as a result of which its holding company is acquired by or merged into a holding company which controls one or more bank subsidiaries not eligible for the exception; or

(3) In which control of the state bank is acquired by a bank holding company in a transaction requiring FRB approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842), other than a one bank holding company formation in which all or substantially all of the shares of the holding company will be owned by persons who were shareholders of the bank.

(d) *Company* means any corporation, partnership, limited liability company, business trust, association, joint venture, pool, syndicate or other similar business organization.

(e) *Control* means the power to vote, directly or indirectly, 25 percent or more of any class of the voting securities of a company, the ability to control in any manner the election of a majority of a company's directors or trustees, or the ability to exercise a controlling influence over the management and policies of a company.

(f) *Convert its charter* means an insured state bank undergoes any transaction that causes the bank to operate under a different form of charter than it had as of December 19, 1991, except a change from mutual to stock form shall not be considered a charter conversion.

(g) *Equity investment* means an ownership interest in any company; any membership interest that includes a voting right in any company; any interest in real estate; any transaction which in substance falls into any of these categories even though it may be structured as some other form of business transaction; and includes an equity security. The term ''equity investment'' does not include any of the foregoing if the interest is taken as security for a loan.

(h) *Equity security* means any stock (other than adjustable rate preferred stock, money market (auction rate) preferred stock, or other newly developed instrument determined by the FDIC to have the character of debt

securities), certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, or voting-trust certificate; any security immediately convertible at the option of the holder without payment of substantial additional consideration into such a security; any security carrying any warrant or right to subscribe to or purchase any such security; and any certificate of interest or participation in, temporary or interim certificate for, or receipt for any of the foregoing.

(i) *Extension of credit, executive officer, director, principal shareholder,* and *related interest* each has the same respective meaning as is applicable for the purposes of section 22(h) of the Federal Reserve Act (12 U.S.C. 375b) and § 337.3 of this chapter.

(j) *Institution* shall have the same meaning as ''state-chartered depository institution.''

(k) *Majority-owned subsidiary* means any corporation in which the parent insured state bank owns a majority of the outstanding voting stock.

(l) *National securities exchange* means a securities exchange that is registered as a national securities exchange by the Securities and Exchange Commission pursuant to section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f) and the National Market System, i.e., the top tier of the National Association of Securities Dealers Automated Quotation System.

(m) *Real estate investment activity* means any interest in real estate (other than as security for a loan) held directly or indirectly that is not permissible for a national bank.

(n) *Residents of the state* includes individuals living in the state, individuals employed in the state, any person to whom the company provided insurance as principal without interruption since such person resided in or was employed in the state, and companies or partnerships incorporated in, organized under the laws of, licensed to do business in, or having an office in the state.

(o) *Security* has the same meaning as it has in part 344 of this chapter.

(p) *Significant risk to the deposit insurance fund* shall be understood to be present whenever the FDIC determines there is a high probability that any insurance fund administered by the FDIC may suffer a loss. Such risk may be present either when an activity contributes or may contribute to the decline in condition of a particular state-chartered depository institution or when a type of activity is found by the FDIC to contribute or potentially contribute to the deterioration of the overall condition of the banking system.

(q) *State-chartered depository institution* means any state bank or state savings association insured by the FDIC.

(r) *Subsidiary* means any company controlled by an insured depository institution.

(s) *Tier one capital* has the same meaning as set forth in part 325 of this chapter for an insured state nonmember bank. For other state-chartered depository institutions, the term ''tier one capital'' has the same meaning as set forth in the capital regulations adopted by the appropriate federal banking agency.

(t) *Well-capitalized* has the same meaning set forth in part 325 of this chapter for an insured state nonmember bank. For other state-chartered depository institutions, the term ''well-capitalized'' has the same meaning as set forth in the capital regulations adopted by the appropriate federal banking agency.

§ 362.3 Activities of insured state banks.

(a) *Equity investments.* (1) *Prohibited equity investments.* No insured state bank may directly or indirectly acquire or retain as principal any equity investment of a type that is not permissible for a national bank unless one of the exceptions in paragraph (a)(2) of this section applies.

(2) *Exceptions.* (i) *Equity investment in majority-owned subsidiaries.* An insured state bank may acquire or retain an equity investment in a subsidiary of which the bank is a majority owner, provided that the subsidiary is engaging in activities that are allowed pursuant to the provisions of or by application under § 362.4(b).

(ii) *Investments in qualified housing projects.* An insured state bank may invest as a limited partner in a partnership, or as a noncontrolling interest holder of a limited liability company, the sole purpose of which is to invest in the acquisition, rehabilitation, or new construction of a qualified housing project, provided that the bank's aggregate investment (including legally binding commitments) does not exceed, when made, 2 percent of total assets as of the date of the bank's most recent consolidated report of condition prior to making the investment. For the purposes of this paragraph (a)(2)(ii), *Aggregate investment* means the total book value of the bank's investment in the real estate calculated in accordance with the instructions for the preparation of the consolidated report of condition. *Qualified housing project* means residential real estate intended to primarily benefit lower income persons throughout the period of the bank's investment including any project that has received an award of low income housing tax credits under section 42 of the Internal Revenue Code (26 U.S.C. 42) (such as a reservation or allocation of credits) from a state or local housing credit agency. A residential real estate project that does not qualify for the tax credit under section 42 of the Internal Revenue Code will qualify under this exception if 50 percent or more of the housing units are to be occupied by lower income persons. A project will be considered residential despite the fact that some portion of the total square footage of the project is utilized for commercial purposes, provided that such commercial use is not the primary purpose of the project. *Lower income* has the same meaning as ''low income'' and ''moderate income'' as defined for the purposes of § 345.12(n) (1) and (2) of this chapter.

(iii) *Grandfathered investments in common or preferred stock; shares of investment companies.* (A) *General.* An insured state bank that is located in a state which as of September 30, 1991, authorized investment in:

(*1*)(*i*) Common or preferred stock listed on a national securities exchange (listed stock); or

(*ii*) Shares of an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (registered shares); and

(*2*) Which during the period beginning on September 30, 1990, and ending on November 26, 1991, made or maintained an investment in listed stock or registered shares, may retain whatever lawfully acquired listed stock or registered shares it held and may continue to acquire listed stock and/or registered shares, provided that the bank files a notice in accordance with section 24(f)(6) of the Federal Deposit Insurance Act in compliance with § 303.121 of this chapter and the FDIC processes the notice without objection under § 303.122 of this chapter. Approval will be granted only if the FDIC determines that acquiring or retaining the stock or shares does not pose a significant risk to the appropriate deposit insurance fund. Approval may be subject to whatever conditions or restrictions the FDIC determines are necessary or appropriate.

(B) *Loss of grandfather exception.* The exception for grandfathered investments under paragraph (a)(2)(iii)(A) of this section shall no longer apply if the bank converts its charter or the bank or its parent holding company undergoes a change in control. If any of these events occur, the bank may retain its existing

investments unless directed by the FDIC or other applicable authority to divest the listed stock or registered shares.

(C) *Maximum permissible investment.* A bank's aggregate investment in listed stock and registered shares under paragraph (a)(2)(iii)(A) of this section shall in no event exceed, when made, 100 percent of the bank's tier one capital as measured on the bank's most recent consolidated report of condition (call report) prior to making any such investment. The lower of the bank's cost as determined in accordance with call report instructions or the market value of the listed stock and shares shall be used to determine compliance. The FDIC may determine when acting upon a notice filed in accordance with paragraph (a)(2)(iii)(A)(*2*) of this section that the permissible limit for any particular insured state bank is something less than 100 percent of tier one capital.

(iv) *Stock investment in insured depository institutions owned exclusively by other banks and savings associations.* An insured state bank may acquire or retain the stock of an insured depository institution if the insured depository institution engages only in activities permissible for national banks; the insured depository institution is subject to examination and regulation by a state bank supervisor; the voting stock is owned by 20 or more insured depository institutions, but no one institution owns more than 15 percent of the voting stock; and the insured depository institution's stock (other than directors' qualifying shares or shares held under or acquired through a plan established for the benefit of the officers and employees) is owned only by insured depository institutions.

(v) *Stock investment in insurance companies*—(A) *Stock of director and officer liability insurance company.* An insured state bank may acquire and retain up to 10 percent of the outstanding stock of a corporation that solely provides or reinsures directors', trustees', and officers' liability insurance coverage or bankers' blanket bond group insurance coverage for insured depository institutions.

(B) *Stock of savings bank life insurance company.* An insured state bank located in Massachusetts, New York, or Connecticut may own stock in a savings bank life insurance company, provided that the savings bank life insurance company provides written disclosures to purchasers or potential purchasers of life insurance policies, other insurance products, and annuities that are consistent with the disclosures described in the Interagency Statement on the Retail Sale of Nondeposit Investment Products (FIL–9–94,[1] February 17, 1994) or any successor requirement which indicates that the policies, products, and annuities are not FDIC insured deposits, are not guaranteed by the bank and are subject to investment risks, including possible loss of the principal amount invested.

(b) *Activities other than equity investments*—(1) *Prohibited activities.* An insured state bank may not directly or indirectly engage as principal in any activity, that is not an equity investment, and is of a type not permissible for a national bank unless one of the exceptions in paragraph (b)(2) of this section applies.

(2) *Exceptions*—(i) *Consent obtained through application.* An insured state bank that meets and continues to meet the applicable capital standards set by the appropriate federal banking agency may conduct activities prohibited by paragraph (b)(1) of this section if the bank obtains the FDIC's prior written consent. Consent will be given only if the FDIC determines that the activity poses no significant risk to the affected deposit insurance fund. Applications for consent should be filed in accordance with § 303.121 of this chapter and will be processed under § 303.122(b) of this chapter. Approvals granted under § 303.122(b) of this chapter may be made subject to any conditions or restrictions found by the FDIC to be necessary to protect the deposit insurance funds from risk, to prevent unsafe or unsound banking practices, and/or to ensure that the activity is consistent with the purposes of federal deposit insurance and other applicable law.

(ii) *Insurance underwriting*—(A) *Savings bank life insurance.* An insured state bank that is located in Massachusetts, New York or Connecticut may provide as principal savings bank life insurance through a department of the bank, provided that the department meets the core standards of paragraph (c) of this section or submits an application in compliance with § 303.121 of this chapter and the FDIC grants its consent under the procedures in § 303.122(b) of this chapter, and the department provides purchasers or potential purchasers of life insurance policies, other insurance products and annuities written disclosures that are consistent with the disclosures described in the Interagency Statement on the Retail Sale of Nondeposit Investment Products (FIL–9–94, February 17, 1994) and any successor requirement which indicates that the policies, products and annuities are not FDIC insured deposits, are not guaranteed by the bank, and are subject to investment risks, including the possible loss of the principal amount invested.

(B) *Federal crop insurance.* Any insured state bank that was providing insurance as principal on or before September 30, 1991, which was reinsured in whole or in part by the Federal Crop Insurance Corporation, may continue to do so.

(C) *Grandfathered insurance underwriting.* A well-capitalized insured state bank that on November 21, 1991, was lawfully providing insurance as principal through a department of the bank may continue to provide the same types of insurance as principal to the residents of the state or states in which the bank did so on such date provided that the bank's department meets the core standards of paragraph (c) of this section, or submits an application in compliance with § 303.121 of this chapter and the FDIC grants its consent under the procedures in § 303.122(b) of this chapter.

(iii) *Acquiring and retaining adjustable rate and money market preferred stock.* (A) An insured state bank's investment of up to 15 percent of the bank's tier one capital in adjustable rate preferred stock or money market (auction rate) preferred stock does not represent a significant risk to the deposit insurance funds. An insured state bank may conduct this activity without first obtaining the FDIC's consent, provided that the bank meets and continues to meet the applicable capital standards as prescribed by the appropriate federal banking agency. The fact that prior consent is not required by this subpart does not preclude the FDIC from taking any appropriate action with respect to the activities if the facts and circumstances warrant such action.

(B) An insured state bank may acquire or retain other instruments of a type determined by the FDIC to have the character of debt securities and not to represent a significant risk to the deposit insurance funds. Such instruments shall be included in the 15 percent of tier one capital limit imposed in paragraph (b)(2)(iii)(A) of this section. An insured state bank may conduct this activity without first obtaining the FDIC's consent, provided that the bank meets and continues to meet the applicable capital standards as prescribed by the appropriate federal banking agency. The fact that prior consent is not required by this subpart does not preclude the FDIC from taking any appropriate action with respect to

[1] Financial institution letters (FILs) are available in the FDIC Public Information Center, room 100, 801 17th Street, N.W., Washington, D.C. 20429.

the activities if the facts and circumstances warrant such action.

(c) *Core standards.* For any insured state bank to be eligible to conduct insurance activities listed in paragraph (b)(2)(ii)(A) or (C) of this section, the bank must conduct the activities in a department that meets the following core separation and operating standards:

(1) The department is physically distinct from the remainder of the bank;

(2) The department maintains separate accounting and other records;

(3) The department has assets, liabilities, obligations and expenses that are separate and distinct from those of the remainder of the bank;

(4) The department is subject to state statute that requires its obligations, liabilities and expenses be satisfied only with the assets of the department; and

(5) The department informs its customers that only the assets of the department may be used to satisfy the obligations of the department.

§ 362.4 Subsidiaries of insured state banks.

(a) *Prohibition.* A subsidiary of an insured state bank may not engage as principal in any activity that is not of a type permissible for a subsidiary of a national bank, unless it meets one of the exceptions in paragraph (b) of this section.

(b) *Exceptions*—(1) *Consent obtained through application.* A subsidiary of an insured state bank may conduct otherwise prohibited activities if the bank obtains the FDIC's prior written consent and the insured state bank meets and continues to meet the applicable capital standards set by the appropriate federal banking agency. Consent will be given only if the FDIC determines that the activity poses no significant risk to the affected deposit insurance fund. Applications for consent should be filed in accordance with § 303.121 of this chapter and will be processed under § 303.122(b) of this chapter. Approvals granted under § 303.122(b) of this chapter may be made subject to any conditions or restrictions found by the FDIC to be necessary to protect the deposit insurance funds from risk, to prevent unsafe or unsound banking practices, and/or to ensure that the activity is consistent with the purposes of federal deposit insurance and other applicable law.

(2) *Grandfathered insurance underwriting subsidiaries.* A subsidiary of an insured state bank may:

(i) Engage in grandfathered insurance underwriting if the insured state bank or its subsidiary on November 21, 1991, was lawfully providing insurance as principal. The subsidiary may continue to provide the same types of insurance as principal to the residents of the state or states in which the bank or subsidiary did so on such date provided that:

(A)(*1*) The bank meets the capital requirements of paragraph (e) of this section; and

(*2*) The subsidiary is an ''eligible subsidiary'' as described in paragraph (c)(2) of this section; or

(B) The bank submits an application in compliance with § 303.121 of this chapter and the FDIC grants its consent under the procedures in § 303.122(b) of this chapter.

(ii) Continue to provide as principal title insurance, provided the bank was required before June 1, 1991, to provide title insurance as a condition of the bank's initial chartering under state law and neither the bank nor its parent holding company undergoes a change in control.

(iii) May continue to provide as principal insurance which is reinsured in whole or in part by the Federal Crop Insurance Corporation if the subsidiary was engaged in the activity on or before September 30, 1991.

(3) *Majority-owned subsidiaries' ownership of equity investments that represent a control interest in a company.* The FDIC has determined that investment in the following by a majority-owned subsidiary of an insured state bank does not represent a significant risk to the deposit insurance funds:

(i) Equity investment in a company engaged in real estate or securities activities authorized in paragraph (b)(5) of this section if the bank complies with the following restrictions and files a notice in compliance with § 303.121 of this chapter and the FDIC processes the notice without objection under § 303.122(a) of this chapter. The FDIC is not precluded from taking any appropriate action or imposing additional requirements with respect to the activity if the facts and circumstances warrant such action. If changes to the management or business plan of the company at any time result in material changes to the nature of the company's business or the manner in which its business is conducted, the insured state bank shall advise the appropriate regional director (DOS) in writing within 10 business days after such change. Investment under this paragraph is authorized if:

(A) The majority-owned subsidiary controls the company;

(B) The bank meets the core eligibility criteria of paragraph (c)(1) of this section;

(C) The majority-owned subsidiary meets the core eligibility criteria of paragraph (c)(2) of this section (including any modifications thereof applicable under paragraph (b)(5)(i) of this section), or the company is a corporation meeting such criteria;

(D) The bank's transactions with the majority-owned subsidiary, and the bank's transactions with the company, comply with the investment and transaction limits of paragraph (d) of this section;

(E) The bank complies with the capital requirements of paragraph (e) of this section with respect to the majority-owned subsidiary and the company; and

(F) To the extent the company is engaged in securities activities authorized by paragraph (b)(5)(ii) of this section, the bank and the company comply with the additional requirements therein as if the company were a majority-owned subsidiary.

(ii) Equity securities of a company engaged in the following activities, if the majority-owned subsidiary controls the company or the company is controlled by insured depository institutions, and the bank meets and continues to meet the applicable capital standards as prescribed by the appropriate federal banking agency. The FDIC consents that a majority-owned subsidiary may conduct such activity without first obtaining the FDIC's consent. The fact that prior consent is not required by this subpart does not preclude the FDIC from taking any appropriate action with respect to the activity if the facts and circumstances warrant such action:

(A) Any activity that is permissible for a national bank, including such permissible activities that may require the company to register as a securities broker;

(B) Acting as an insurance agency;

(C) Engaging in any activity permissible for an insured state bank under § 362.3(b)(2)(iii) to the same extent permissible for the insured bank thereunder, so long as instruments held under this paragraph (b)(3)(ii)(C), paragraph (b)(7) of this section, and § 362.3(b)(2)(iii) in the aggregate do not exceed the limit set by § 362.3(b)(2)(iii);

(D) Engaging in any activity permissible for a majority-owned subsidiary of an insured state bank under paragraph (b)(6) of this section to the same extent and manner permissible for the majority-owned subsidiary thereunder; and

(4) *Majority-owned subsidiary's ownership of certain securities that do not represent a control interest.* (i) *Grandfathered investments in common or preferred stock and shares of*

investment companies. Any insured state bank that has received approval to invest in common or preferred stock or shares of an investment company pursuant to § 362.3(a)(2)(iii) may conduct the approved investment activities through a majority-owned subsidiary of the bank without any additional approval from the FDIC provided that any conditions or restrictions imposed with regard to the approval granted under § 362.3(a)(2)(iii) are met.

(ii) *Bank stock.* An insured state bank may indirectly through a majority-owned subsidiary organized for such purpose invest in up to ten percent of the outstanding stock of another insured bank.

(5) *Majority-owned subsidiaries conducting real estate investment activities and securities underwriting.* The FDIC has determined that the following activities do not represent a significant risk to the deposit insurance funds, provided that the activities are conducted by a majority-owned subsidiary of an insured state bank in compliance with the core eligibility requirements listed in paragraph (c) of this section; any additional requirements listed in paragraph (b)(5)(i) or (ii) of this section; the bank complies with the investment and transaction limitations of paragraph (d) of this section; and the bank meets the capital requirements of paragraph (e) of this section. The FDIC consents that these listed activities may be conducted by a majority-owned subsidiary of an insured state bank if the bank files a notice in compliance with § 303.121 of this chapter and the FDIC processes the notice without objection under § 303.122(a) of this chapter. The FDIC is not precluded from taking any appropriate action or imposing additional requirements with respect to the activities if the facts and circumstances warrant such action. If changes to the management or business plan of the majority-owned subsidiary at any time result in material changes to the nature of the majority-owned subsidiary's business or the manner in which its business is conducted, the insured state bank shall advise the appropriate regional director (DOS) in writing within 10 business days after such change. Such a majority-owned subsidiary may:

(i) *Real estate investment activities.* Engage in real estate investment activities. However, the requirements of paragraph (c)(2) (ii), (v), (vi), and (xi) of this section need not be met if the bank's investment in the equity securities of the subsidiary does not exceed 2 percent of the bank's tier one capital; the bank has only one subsidiary engaging in real estate investment activities; and the bank's total investment in the subsidiary does not include any extensions of credit from the bank to the subsidiary, any debt instruments issued by the subsidiary, or any other transaction originated by the bank that is used to benefit the subsidiary.

(ii) *Securities activities.* Engage in the public sale, distribution or underwriting of securities that are not permissible for a national bank under section 16 of the Banking Act of 1933 (12 U.S.C. 24 Seventh), provided that the following additional conditions are, and continue to be, met:

(A) The state-chartered depository institution adopts policies and procedures, including appropriate limits on exposure, to govern the institution's participation in financing transactions underwritten or arranged by an underwriting majority-owned subsidiary;

(B) The state-chartered depository institution may not express an opinion on the value or the advisability of the purchase or sale of securities underwritten or dealt in by a majority-owned subsidiary unless the state-chartered depository institution notifies the customer that the majority-owned subsidiary is underwriting or distributing the security;

(C) The majority-owned subsidiary is registered with the Securities and Exchange Commission, is a member in good standing with the appropriate self-regulatory organization, and promptly informs the appropriate regional director (DOS) in writing of any material actions taken against the majority-owned subsidiary or any of its employees by the state, the appropriate self-regulatory organizations or the Securities and Exchange Commission; and

(D) The state-chartered depository institution does not knowingly purchase as principal or fiduciary during the existence of any underwriting or selling syndicate any securities underwritten by the majority-owned subsidiary unless the purchase is approved by the state-chartered depository institution's board of directors before the securities are initially offered for sale to the public.

(6) *Real estate leasing.* A majority-owned subsidiary of an insured state bank acting as lessor under a real property lease which is the equivalent of a financing transaction, meeting the lease criteria of paragraph (b)(6)(i) of this section and the underlying real estate requirements of paragraph (b)(6)(ii) of this section, does not represent a significant risk to the deposit insurance funds. A majority-owned subsidiary may conduct this activity without first obtaining the FDIC's consent, provided that the bank meets and continues to meet the applicable capital standards as prescribed by the appropriate federal banking agency. The fact that prior consent is not required by this subpart does not preclude the FDIC from taking any appropriate action with respect to the activity if the facts and circumstances warrant such action.

(i) *Lease criteria*—(A) *Capital lease.* The lease must qualify as a capital lease as to the lessor under generally accepted accounting principles.

(B) *Nonoperating basis.* The bank and the majority-owned subsidiary shall not, directly or indirectly, provide or be obligated to provide servicing, repair, or maintenance to the property, except that the lease may include provisions permitting the subsidiary to protect the value of the leased property in the event of a change in circumstances that increases the subsidiary's exposure to loss, or the subsidiary may take reasonable and appropriate action to salvage or protect the value of the leased property in such circumstances.

(ii) *Underlying real property requirements*—(A) *Acquisition.* The majority-owned subsidiary may acquire specific real estate to be leased only after the subsidiary has entered into:

(*1*) A lease meeting the requirements of paragraph (b)(6)(i) of this section;

(*2*) A legally binding written commitment to enter into such a lease; or

(*3*) A legally binding written agreement that indemnifies the subsidiary against loss in connection with its acquisition of the property.

(B) *Improvements.* Any expenditures by the majority-owned subsidiary to make reasonable repairs, renovations, and improvements necessary to render the property suitable to the lessee shall not exceed 25 percent of the majority-owned subsidiary's full investment in the real estate.

(C) *Divestiture.* At the expiration of the initial lease (including any renewals or extensions thereof), the majority-owned subsidiary shall, as soon as practicable but in any event no less than two years, either:

(*1*) Re-lease the property under a lease meeting the requirement of paragraph (b)(6)(i)(B) of this section; or

(*2*) Divest itself of all interest in the property.

(*7*) *Acquiring and retaining adjustable rate and money market preferred stock and similar instruments.* The FDIC has determined it does not present a significant risk to the deposit insurance

funds for a majority-owned subsidiary of an insured state bank to engage in any activity permissible for an insured state bank under § 362.3(b)(2)(iii), so long as instruments held under this paragraph, paragraph (b)(3)(ii)(C) of this section, and § 362.3(b)(2)(iii) in the aggregate do not exceed the limit set by § 362.3(b)(2)(iii). A majority-owned subsidiary may conduct this activity without first obtaining the FDIC's consent, provided that the bank meets and continues to meet the applicable capital standards as prescribed by the appropriate federal banking agency. The fact that prior consent is not required by this subpart does not preclude the FDIC from taking any appropriate action with respect to the activity if the facts and circumstances warrant such action.

(c) *Core eligibility requirements.* If specifically required by this part or by FDIC order, any state-chartered depository institution that wishes to be eligible and continue to be eligible to conduct as principal activities through a subsidiary that are not permissible for a subsidiary of a national bank must be an ''eligible depository institution'' and the subsidiary must be an ''eligible subsidiary''.

(1) A state-chartered depository institution is an ''eligible depository institution'' if it:

(i) Has been chartered and operating for three or more years, unless the appropriate regional director (DOS) finds that the state-chartered depository institution is owned by an established, well-capitalized, well-managed holding company or is managed by seasoned management;

(ii) Has an FDIC-assigned composite rating of 1 or 2 assigned under the Uniform Financial Institutions Rating System (UFIRS) (or such other comparable rating system as may be adopted in the future) as a result of its most recent federal or state examination for which the FDIC assigned a rating;

(iii) Received a rating of 1 or 2 under the ''management'' component of the UFIRS as assigned by the institution's appropriate federal banking agency;

(iv) Has a satisfactory or better Community Reinvestment Act rating at its most recent examination conducted by the institution's appropriate federal banking agency;

(v) Has a compliance rating of 1 or 2 at its most recent examination conducted by the institution's appropriate federal banking agency; and

(vi) Is not subject to a cease and desist order, consent order, prompt corrective action directive, formal or informal written agreement, or other administrative agreement with its appropriate federal banking agency or chartering authority.

(2) A subsidiary of a state-chartered depository institution is an ''eligible subsidiary'' if it:

(i) Meets applicable statutory or regulatory capital requirements and has sufficient operating capital in light of the normal obligations that are reasonably foreseeable for a business of its size and character within the industry;

(ii) Is physically separate and distinct in its operations from the operations of the state-chartered depository institution, provided that this requirement shall not be construed to prohibit the state-chartered depository institution and its subsidiary from sharing the same facility if the area where the subsidiary conducts business with the public is clearly distinct from the area where customers of the state-chartered depository institution conduct business with the institution. The extent of the separation will vary according to the type and frequency of customer contact;

(iii) Maintains separate accounting and other business records;

(iv) Observes separate business entity formalities such as separate board of directors' meetings;

(v) Has a chief executive officer of the subsidiary who is not an employee of the institution;

(vi) Has a majority of its board of directors who are neither directors nor officers of the state-chartered depository institution;

(vii) Conducts business pursuant to independent policies and procedures designed to inform customers and prospective customers of the subsidiary that the subsidiary is a separate organization from the state-chartered depository institution and that the state-chartered depository institution is not responsible for and does not guarantee the obligations of the subsidiary;

(viii) Has only one business purpose within the types described in paragraphs (b)(2) and (b)(5) of this section;

(ix) Has a current written business plan that is appropriate to the type and scope of business conducted by the subsidiary;

(x) Has qualified management and employees for the type of activity contemplated, including all required licenses and memberships, and complies with industry standards; and

(xi) Establishes policies and procedures to ensure adequate computer, audit and accounting systems, internal risk management controls, and has necessary operational and managerial infrastructure to implement the business plan.

(d) *Investment and transaction limits*—(1) *General.* If specifically required by this part or FDIC order, the following conditions and restrictions apply to an insured state bank and its subsidiaries that engage in and wish to continue to engage in activities which are not permissible for a national bank subsidiary.

(2) *Investment limits*—(i) *Aggregate investment in subsidiaries.* An insured state bank's aggregate investment in all subsidiaries conducting activities subject to this paragraph (d) shall not exceed 20 percent of the insured state bank's tier one capital.

(ii) *Definition of investment.* (A) For purposes of this paragraph (d), the term ''investment'' means:

(*1*) Any extension of credit to the subsidiary by the insured state bank;

(*2*) Any debt securities, as such term is defined in part 344 of this chapter, issued by the subsidiary held by the insured state bank;

(*3*) The acceptance by the insured state bank of securities issued by the subsidiary as collateral for an extension of credit to any person or company; and

(*4*) Any extensions of credit by the insured state bank to any third party for the purpose of making a direct investment in the subsidiary, making any investment in which the subsidiary has an interest, or which is used for the benefit of, or transferred to, the subsidiary.

(B) For the purposes of this paragraph (d), the term ''investment'' does not include:

(*1*) Extensions of credit by the insured state bank to finance sales of assets by the subsidiary which do not involve more than the normal degree of risk of repayment and are extended on terms that are substantially similar to those prevailing at the time for comparable transactions with or involving unaffiliated persons or companies;

(*2*) An extension of credit by the insured state bank to the subsidiary that is fully collateralized by government securities, as such term is defined in § 344.3 of this chapter; or

(*3*) An extension of credit by the insured state bank to the subsidiary that is fully collateralized by a segregated deposit in the insured state bank.

(3) *Transaction requirements*—(i) *Arm's length transaction requirement.* With the exception of giving the subsidiary immediate credit for uncollected items received in the ordinary course of business, an insured state bank may not carry out any of the following transactions with a subsidiary subject to this paragraph (d) unless the

transaction is on terms and conditions that are substantially the same as those prevailing at the time for comparable transactions with unaffiliated parties:

(A) Make an investment in the subsidiary;

(B) Purchase from or sell to the subsidiary any assets (including securities);

(C) Enter into a contract, lease, or other type of agreement with the subsidiary;

(D) Pay compensation to a majority-owned subsidiary or any person or company who has an interest in the subsidiary; or

(E) Engage in any such transaction in which the proceeds thereof are used for the benefit of, or are transferred to, the subsidiary.

(ii) *Prohibition on purchase of low quality assets.* An insured state bank is prohibited from purchasing a low quality asset from a subsidiary subject to this paragraph (d). For purposes of this subsection, ''low quality asset'' means:

(A) An asset classified as ''substandard'', ''doubtful'', or ''loss'' or treated as ''other assets especially mentioned'' in the most recent report of examination of the bank;

(B) An asset in a nonaccrual status;

(C) An asset on which principal or interest payments are more than 30 days past due; or

(D) An asset whose terms have been renegotiated or compromised due to the deteriorating financial condition of the obligor.

(iii) *Insider transaction restriction.* Neither the insured state bank nor the subsidiary subject to this paragraph (d) may enter into any transaction (exclusive of those covered by § 337.3 of this chapter) with the bank's executive officers, directors, principal shareholders or related interests of such persons which relate to the subsidiary's activities unless:

(A) The transactions are on terms and conditions that are substantially the same as those prevailing at the time for comparable transactions with persons not affiliated with the insured state bank; or

(B) The transactions are pursuant to a benefit or compensation program that is widely available to employees of the bank, and that does not give preference to the bank's executive officers, directors, principal shareholders or related interests of such persons over other bank employees.

(iv) *Anti-tying restriction.* Neither the insured state bank nor the majority-owned subsidiary may require a customer to either buy any product or use any service from the other as a condition of entering into a transaction.

(4) *Collateralization requirements.* (i) An insured state bank is prohibited from making an investment in a subsidiary subject to this paragraph (d) unless such transaction is fully-collateralized at the time the transaction is entered into. No insured state bank may accept a low quality asset as collateral. An extension of credit is fully collateralized if it is secured at the time of the transaction by collateral having a market value equal to at least:

(A) 100 percent of the amount of the transaction if the collateral is composed of:

(*1*) Obligations of the United States or its agencies;

(*2*) Obligations fully guaranteed by the United States or its agencies as to principal and interest;

(*3*) Notes, drafts, bills of exchange or bankers acceptances that are eligible for rediscount or purchase by the Federal Reserve Bank; or

(*4*) A segregated, earmarked deposit account with the insured state bank;

(B) 110 percent of the amount of the transaction if the collateral is composed of obligations of any state or political subdivision of any state;

(C) 120 percent of the amount of the transaction if the collateral is composed of other debt instruments, including receivables; or

(D) 130 percent of the amount of the transaction if the collateral is composed of stock, leases, or other real or personal property.

(ii) An insured state bank may not release collateral prior to proportional payment of the extension of credit; however, collateral may be substituted if there is no diminution of collateral coverage.

(5) *Investment and transaction limits extended to insured state bank subsidiaries.* For purposes of applying paragraphs (d)(2) through (d)(4) of this section, any reference to ''insured state bank'' means the insured state bank and any subsidiaries of the insured state bank which are not themselves subject under this part or FDIC order to the restrictions of this paragraph (d).

(e) *Capital requirements.* If specifically required by this part or by FDIC order, any insured state bank that wishes to conduct or continue to conduct as principal activities through a subsidiary that are not permissible for a subsidiary of a national bank must:

(1) Be well-capitalized after deducting from its tier one capital the investment in equity securities of the subsidiary as well as the bank's pro rata share of any retained earnings of the subsidiary;

(2) Reflect this deduction on the appropriate schedule of the bank's consolidated report of income and condition; and

(3) Use such regulatory capital amount for the purposes of the bank's assessment risk classification under part 327 of this chapter and its categorization as a ''well-capitalized'', an ''adequately capitalized'', an ''undercapitalized'', or a ''significantly undercapitalized'' institution as defined in § 325.103(b) of this chapter, provided that the capital deduction shall not be used for purposes of determining whether the bank is ''critically undercapitalized'' under part 325 of this chapter.

§ 362.5 Approvals previously granted.

(a) *FDIC consent by order or notice.* An insured state bank that previously filed an application or notice under part 362 in effect prior to January 1, 1999 (see 12 CFR part 362 revised as of January 1, 1998), and obtained the FDIC's consent to engage in an activity or to acquire or retain a majority-owned subsidiary engaging as principal in an activity or acquiring and retaining any investment that is prohibited under this subpart may continue that activity or retain that investment without seeking the FDIC's consent, provided that the insured state bank and its subsidiary, if applicable, continue to meet the conditions and restrictions of the approval. An insured state bank which was granted approval based on conditions which differ from the requirements of § 362.4(c)(2), (d) and (e) will be considered to meet the conditions and restrictions of the approval relating to being an eligible subsidiary, meeting investment and transactions limits, and meeting capital requirements if the insured state bank and subsidiary meet the requirements of § 362.4(c)(2), (d) and (e). If the majority-owned subsidiary is engaged in real estate investment activities not exceeding 2 percent of the tier one capital of a bank and meeting the other conditions of § 362.4(b)(5)(i), the majority-owned subsidiary's compliance with § 362.4(c)(2) under the preceding sentence may be pursuant to the modifications authorized by § 362.4(b)(5)(i). Once an insured state bank elects to comply with § 362.4 (c)(2), (d), and (e), it may not revert to the corresponding provisions of the approval order.

(b) *Approvals by regulation*—(1) *Securities underwriting.* If an insured state nonmember bank engages in securities activities covered by § 362.4(b)(5)(ii), and prior to January 1, 1999, engaged in securities activities under and in compliance with the restrictions of § 337.4 (b) through (c), § 337.4(e), or § 337.4(h) of this chapter,

having filed the required notice under § 337.4(d) of this chapter, the insured state bank may continue those activities if the bank and its majority-owned subsidiaries comply with the restrictions set forth in §§ 362.4(b)(5)(ii) and 362.4 (c), (d), and (e) by January 1, 2000. During the one-year period of transition between January 1, 1999, and January 1, 2000, the bank and its majority-owned subsidiary must meet the restrictions set forth in § 337.4 of this chapter until the requirements of §§ 362.4(b)(5)(ii) and 362.4 (c), (d) and (e) are met. If the bank will not meet these requirements, the bank must obtain the FDIC's consent to continue those activities under § 362.4(b)(1).

(2) *Grandfathered insurance underwriting.* An insured state bank which is directly providing insurance as principal pursuant to § 362.4(c)(2)(i) in effect prior to January 1, 1999 (see 12 CFR part 362 revised as of January 1, 1998), may continue that activity if it complies with the provisions of § 362.3(b)(2)(ii)(C) by April 1, 1999. An insured state bank indirectly providing insurance as principal through a subsidiary pursuant to § 362.3(b)(7) in effect prior to January 1, 1999 (see 12 CFR part 362 revised as of January 1, 1998), may continue that activity if it complies with the provisions of § 362.4(b)(2)(i) by April 1, 1999. During the ninety-day period of transition between January 1, 1999 and April 1, 1999, the bank and its majority-owned subsidiary must meet the restrictions set forth in § 362.4(c)(2)(i) or § 362.3(b)(7) in effect prior to January 1, 1999 (see 12 CFR part 362 revised as of January 1, 1998), as applicable, until the requirements of § 362.3(b)(2)(ii)(C) or § 362.4(b)(2)(i) are met. If the insured state bank or its subsidiary will not meet these requirements, as applicable, the insured state bank must submit an application in compliance with § 303.121 of this chapter and obtain the FDIC's consent in accordance with § 303.122(b) of this chapter.

(3) *Stock of certain corporations.* An insured state bank owning indirectly through a majority-owned subsidiary stock of a corporation that engages solely in activities permissible for a bank service corporation pursuant to § 362.4(c)(3)(iv)(C) in effect prior to January 1, 1999 (see 12 CFR part 362 revised as of January 1, 1998), or stock of a corporation which engages solely in activities which are not ''as principal'' pursuant to § 362.4(c)(3)(iv)(D) in effect prior to January 1, 1999 (see 12 CFR part 362 revised as of January 1, 1998), may continue that activity if it complies with the provisions of § 362.4(b)(3) by April 1, 1999. During the ninety-day period of transition between January 1, 1999 and April 1, 1999, the bank and its majority-owned subsidiary must meet the restrictions set forth in § 362.4(c)(3)(iv)(C) or § 362.4(c)(3)(iv)(D) in effect prior to January 1, 1999 (see 12 CFR part 362 revised as of January 1, 1998), as applicable, until the requirements of § 362.4(b)(3) are met. If the insured state bank or its subsidiary will not meet these requirements, as applicable, the insured state bank must apply for the FDIC's consent under § 362.4(b)(1).

(4) [Reserved]

(5) [Reserved]

(6) *Adjustable rate or money market preferred stock.* An insured state bank owning adjustable rate or money market (auction rate) preferred stock pursuant to § 362.4(c)(3)(v) in effect prior to January 1, 1999 (see 12 CFR part 362 revised as of January 1, 1998), in excess of the amount limit in § 362.3(b)(2)(iii) may continue to hold any overlimit shares of such stock acquired before January 1, 1999, until redeemed or repurchased by the issuer, but such stock shall be included as part of the amount limit in § 362.3(b)(2)(iii) when determining whether the bank may acquire new stock thereunder.

(c) *Charter conversions.* (1) An insured state bank that has converted its charter from an insured state savings association may continue activities through a majority-owned subsidiary that were permissible prior to the time it converted its charter only if the insured state bank receives the FDIC's consent. Except as provided in paragraph (c)(2) of this section, the insured state bank should apply under § 362.4(b)(1), submit any notice required under § 362.4(b) (4) or (5), or comply with the provisions of § 362.4(b) (3), (6), or (7) if applicable, to continue the activity.

(2) *Exception for prior consent.* If the FDIC had granted consent to the savings association under section 28 of the Federal Deposit Insurance Act (12 U.S.C. 1831(e)) prior to the time the savings association converted its charter, the insured state bank may continue the activities without providing notice or making application to the FDIC, provided that the bank and its subsidiary as applicable are in compliance with:

(i) The terms of the FDIC approval order; and

(ii) The provisions of § 362.4(c)(2), (d), and (e) regarding operating as an ''eligible subsidiary'', ''investment and transaction limits'', and ''capital requirements'.

(3) *Divestiture.* An insured state bank that does not receive FDIC consent shall divest of the nonconforming investment as soon as practical but in no event later than two years from the date of charter conversion.

Subpart B—Safety and Soundness Rules Governing Insured State Nonmember Banks

§ 362.6 Purpose and scope.

This subpart, along with the notice and application procedures in subpart G of part 303 of this chapter apply to certain banking practices that may have adverse effects on the safety and soundness of insured state nonmember banks. The FDIC intends to allow insured state nonmember banks and their subsidiaries to undertake only safe and sound activities and investments that would not present a significant risk to the deposit insurance fund and that are consistent with the purposes of federal deposit insurance and other law. The following standards shall apply for insured state nonmember banks to conduct real estate investment activities through a subsidiary if those activities are permissible for a national bank subsidiary but are not permissible for the national bank parent itself. Additionally, the following standards shall apply to affiliates of insured state nonmember banks that are not affiliated with a bank holding company if those affiliates engage in the public sale, distribution or underwriting of stocks, bonds, debentures, notes or other securities.

§ 362.7 Definitions.

For the purposes of this subpart, the following definitions apply:

(a) *Affiliate* shall mean any company that directly or indirectly, through one or more intermediaries, controls or is under common control with an insured state nonmember bank, but does not include a subsidiary of an insured state nonmember bank.

(b) *Activity, company, control, equity security, insured state nonmember bank, real estate investment activity, security,* and *subsidiary* have the same meaning as provided in subpart A of this part.

§ 362.8 Restrictions on activities of insured state nonmember banks.

(a) *Real estate investment activities by subsidiaries of insured state nonmember banks.* The FDIC has found that real estate investment activities may have adverse effects on the safety and soundness of insured state nonmember banks. Notwithstanding any interpretations, orders, circulars or official bulletins issued by the Office of the Comptroller of the Currency regarding activities permissible for

subsidiaries of a national bank that are not permissible for the parent national bank itself under 12 CFR 5.34(f), insured state nonmember banks may not establish or acquire a subsidiary that engages in such real estate investment activities unless the insured state nonmember bank:

(1) Has an approval previously granted by the FDIC and continues to meet the conditions and restrictions of the approval; or

(2) Meets the requirements for engaging in real estate investment activities as set forth in § 362.4(b)(5), and submits a corresponding notice in compliance with § 303.121 of this chapter and the FDIC processes the notice without objection under § 303.122(a) of this chapter; or submits an application in compliance with § 303.121 of this chapter and the FDIC grants its consent under the procedure in § 303.122(b) of this chapter.

(b) *Affiliation with securities companies.* The FDIC has found that an unrestricted affiliation between an insured state nonmember bank and a securities company may have adverse effects on the safety and soundness of insured state nonmember banks. An insured state nonmember bank which is affiliated with a company that is not treated as a bank holding company pursuant to section 4(f) of the Bank Holding Company Act (12 U.S.C. 1843(f)) is prohibited from becoming or remaining affiliated with any company that directly engages in the public sale, distribution or underwriting of stocks, bonds, debentures, notes, or other securities which is not permissible for a national bank unless it submits an application in compliance with § 303.121 of this chapter and the FDIC grants its consent under the procedure in § 303.122(b) of this chapter, or:

(1) The securities business of the affiliate is physically separate and distinct in its operations from the operations of the bank, provided that this requirement shall not be construed to prohibit the bank and its affiliate from sharing the same facility if the area where the affiliate conducts retail sales activity with the public is physically distinct from the routine deposit taking area of the bank;

(2) The affiliate has a chief executive officer who is not an employee of the bank;

(3) A majority of the affiliate's board of directors are not directors, officers, or employees of the bank;

(4) The affiliate conducts business pursuant to independent policies and procedures designed to inform customers and prospective customers of the affiliate that the affiliate is a separate organization from the bank and the state-chartered depository institution is not responsible for and does not guarantee the obligations of the affiliate;

(5) The bank adopts policies and procedures, including appropriate limits on exposure, to govern its participation in financing transactions underwritten by an underwriting affiliate;

(6) The bank does not express an opinion on the value or the advisability of the purchase or sale of securities underwritten or dealt in by an affiliate unless it notifies the customer that the entity underwriting, making a market, distributing or dealing in the securities is an affiliate of the bank;

(7) The bank does not purchase as principal or fiduciary during the existence of any underwriting or selling syndicate any securities underwritten by the affiliate unless the purchase is approved by the bank's board of directors before the securities are initially offered for sale to the public;

(8) The bank does not condition any extension of credit to any company on the requirement that the company contract with, or agree to contract with, the bank's affiliate to underwrite or distribute the company's securities;

(9) The bank does not condition any extension of credit or the offering of any service to any person or company on the requirement that the person or company purchase any security underwritten or distributed by the affiliate; and

(10) The bank complies with the investment and transaction limitations of § 362.4(d). For the purposes of applying these restrictions, references to the term ''subsidiary'' in § 362.4(d)(2), (3), and (4) shall be deemed to refer to the affiliate. For the purposes of applying these limitations, the term ''investment'' as defined in § 362.4(d)(2)(ii) shall also include any equity securities of the affiliate held by the insured state bank.

Subpart C—Activities of Insured State Savings Associations

§ 362.9 Purpose and scope.

(a) This subpart, along with the notice and application procedures in subpart H of part 303 of this chapter, implements the provisions of section 28 of the Federal Deposit Insurance Act (12 U.S.C. 1831e) that restrict and prohibit insured state savings associations and their service corporations from engaging in activities and investments of a type that are not permissible for federal savings associations and their service corporations. The phrase ''activity permissible for a federal savings association'' means any activity authorized for federal savings associations under any statute including the Home Owners' Loan Act (HOLA, 12 U.S.C. 1464 *et seq.*), as well as activities recognized as permissible for a federal savings association in regulations, official thrift bulletins, orders or written interpretations issued by the Office of Thrift Supervision (OTS), or its predecessor, the Federal Home Loan Bank Board.

(b) This subpart does not cover the following activities:

(1) Activities conducted by the insured state savings association other than ''as principal'', defined for purposes of this subpart as activities conducted as agent for a customer, conducted in a brokerage, custodial, advisory, or administrative capacity, or conducted as trustee, or in any substantially similar capacity. For example, this subpart does not cover acting solely as agent for the sale of insurance, securities, real estate, or travel services; nor does it cover acting as trustee, providing personal financial planning advice, or safekeeping services.

(2) Interests in real estate in which the real property is used or intended in good faith to be used within a reasonable time by an insured savings association or its service corporations as offices or related facilities for the conduct of its business or future expansion of its business or used as public welfare investments of a type and in an amount permissible for federal savings associations.

(3) Equity investments acquired in connection with debts previously contracted (DPC) if the insured savings association or its service corporation takes only such actions as would be permissible for a federal savings association's or its service corporation's DPC holdings.

(c) The FDIC intends to allow insured state savings associations and their service corporations to undertake only safe and sound activities and investments that do not present significant risks to the deposit insurance funds and that are consistent with the purposes of federal deposit insurance and other applicable law. This subpart does not authorize any insured state savings association to make investments or conduct activities that are not authorized or that are prohibited by either federal or state law.

§ 362.10 Definitions.

For the purposes of this subpart, the definitions provided in § 362.2 apply. Additionally, the following definitions apply to this subpart:

(a) *Affiliate* shall mean any company that directly or indirectly, through one

or more intermediaries, controls or is under common control with an insured state savings association.

(b) *Corporate debt securities not of investment grade* means any corporate debt security that when acquired was not rated among the four highest rating categories by at least one nationally recognized statistical rating organization. The term shall not include any obligation issued or guaranteed by a corporation that may be held by a federal savings association without limitation as to percentage of assets under subparagraphs (D), (E), or (F) of section 5(c)(1) of HOLA (12 U.S.C. 1464(c)(1) (D), (E), (F)).

(c) *Insured state savings association* means any state-chartered savings association insured by the FDIC.

(d) *Qualified affiliate* means, in the case of a stock insured state savings association, an affiliate other than a subsidiary or an insured depository institution. In the case of a mutual savings association, ''qualified affiliate'' means a subsidiary other than an insured depository institution provided that all of the savings association's investments in, and extensions of credit to, the subsidiary are deducted from the savings association's capital.

(e) *Service corporation* means any corporation the capital stock of which is available for purchase by savings associations.

§ 362.11 Activities of insured state savings associations.

(a) *Equity investments*—(1) *Prohibited investments.* No insured state savings association may directly acquire or retain as principal any equity investment of a type, or in an amount, that is not permissible for a federal savings association unless the exception in paragraph (a)(2) of this section applies.

(2) *Exception: Equity investment in service corporations.* An insured state savings association that is and continues to be in compliance with the applicable capital standards as prescribed by the appropriate federal banking agency may acquire or retain an equity investment in a service corporation:

(i) Not permissible for a federal savings association to the extent the service corporation is engaging in activities that are allowed pursuant to the provisions of or an application under § 362.12(b); or

(ii) Of a type permissible for a federal savings association, but in an amount exceeding the investment limits applicable to federal savings associations, if the insured state savings association obtains the FDIC's prior consent. Consent will be given only if the FDIC determines that the amount of the investment in a service corporation engaged in such activities does not present a significant risk to the affected deposit insurance fund. Applications should be filed in accordance with § 303.141 of this chapter and will be processed under § 303.142(b) of this chapter. Approvals granted under § 303.142(b) of this chapter may be made subject to any conditions or restrictions found by the FDIC to be necessary to protect the deposit insurance funds from significant risk, to prevent unsafe or unsound practices, and/or to ensure that the activity is consistent with the purposes of federal deposit insurance and other applicable law.

(b) *Activities other than equity investments*—(1) *Prohibited activities.* An insured state savings association may not directly engage as principal in any activity, that is not an equity investment, of a type not permissible for a federal savings association, and an insured state savings association shall not make nonresidential real property loans in an amount exceeding that described in section 5(c)(2)(B) of HOLA (12 U.S.C. 1464(c)(2)(B)), unless one of the exceptions in paragraph (b)(2) of this section applies. This section shall not be read to require the divestiture of any asset (including a nonresidential real estate loan), if the asset was acquired prior to August 9, 1989; however, any activity conducted with such asset must be conducted in accordance with this subpart. After August 9, 1989, an insured state savings association directly or through a subsidiary (other than, in the case of a mutual savings association, a subsidiary that is a qualified affiliate), may not acquire or retain any corporate debt securities not of investment grade.

(2) *Exceptions*—(i) *Consent obtained through application.* An insured state savings association that meets and continues to meet the applicable capital standards set by the appropriate federal banking agency may directly conduct activities prohibited by paragraph (b)(1) of this section if the savings association obtains the FDIC's prior consent. Consent will be given only if the FDIC determines that conducting the activity designated poses no significant risk to the affected deposit insurance fund. Applications should be filed in accordance with § 303.141 of this chapter and will be processed under § 303.142(b) of this chapter. Approvals granted under § 303.142(b) of this chapter may be made subject to any conditions or restrictions found by the FDIC to be necessary to protect the deposit insurance funds from significant risk, to prevent unsafe or unsound practices, and/or to ensure that the activity is consistent with the purposes of federal deposit insurance and other applicable law.

(ii) *Nonresidential realty loans permissible for a federal savings association conducted in an amount not permissible.* An insured state savings association that meets and continues to meet the applicable capital standards set by the appropriate federal banking agency may make nonresidential real property loans in an amount exceeding the amount described in section 5(c)(2)(B) of HOLA, if the savings association files a notice in compliance with § 303.141 of this chapter and the FDIC processes the notice without objection under § 303.142(a) of this chapter. Consent will be given only if the FDIC determines that engaging in such lending in the amount designated poses no significant risk to the affected deposit insurance fund.

(iii) *Acquiring and retaining adjustable rate and money market preferred stock.* (A) An insured state savings association's investment of up to 15 percent of the association's tier one capital in adjustable rate preferred stock or money market (auction rate) preferred stock does not represent a significant risk to the deposit insurance funds. An insured state savings association may conduct this activity without first obtaining the FDIC's consent, provided that the association meets and continues to meet the applicable capital standards as prescribed by the appropriate federal banking agency. The fact that prior consent is not required by this subpart does not preclude the FDIC from taking any appropriate action with respect to the activities if the facts and circumstances warrant such action.

(B) An insured state savings association may acquire or retain other instruments of a type determined by the FDIC to have the character of debt securities and not to represent a significant risk to the deposit insurance funds. Such instruments shall be included in the 15 percent of tier one capital limit imposed in paragraph (b)(2)(iii)(A) of this section. An insured state savings association may conduct this activity without first obtaining the FDIC's consent, provided that the association meets and continues to meet the applicable capital standards as prescribed by the appropriate federal banking agency. The fact that prior consent is not required by this subpart does not preclude the FDIC from taking any appropriate action with respect to the activities if the facts and circumstances warrant such action.

(3) *Activities permissible for a federal savings association conducted in an amount not permissible.* Except as provided in paragraph (b)(2)(ii) of this section, an insured state savings association may engage as principal in any activity, which is not an equity investment of a type permissible for a federal savings association, in an amount in excess of that permissible for a federal savings association, if the savings association meets and continues to meet the applicable capital standards set by the appropriate federal banking agency, the institution has advised the appropriate regional director (DOS) under the procedure in § 303.142(c) of this chapter within thirty days before engaging in the activity, and the FDIC has not advised the insured state savings association that conducting the activity in the amount indicated poses a significant risk to the affected deposit insurance fund. This section shall not be read to require the divestiture of any asset if the asset was acquired prior to August 9, 1989; however, any activity conducted with such asset must be conducted in accordance with this subpart.

§ 362.12 Service corporations of insured state savings associations.

(a) *Prohibition.* A service corporation of an insured state savings association may not engage in any activity that is not permissible for a service corporation of a federal savings association, unless it meets one of the exceptions in paragraph (b) of this section.

(b) *Exceptions*—(1) *Consent obtained through application.* A service corporation of an insured state savings association may conduct activities prohibited by paragraph (a) of this section if the savings association obtains the FDIC's prior written consent and the insured state savings association meets and continues to meet the applicable capital standards set by the appropriate federal banking agency. Consent will be given only if the FDIC determines that the activity poses no significant risk to the affected deposit insurance fund. Applications for consent should be filed in accordance with § 303.141 of this chapter and will be processed under § 303.142(b) of this chapter. Approvals granted under § 303.142(b) of this chapter may be made subject to any conditions or restrictions found by the FDIC to be necessary to protect the deposit insurance funds from risk, to prevent unsafe or unsound banking practices, and/or to ensure that the activity is consistent with the purposes of federal deposit insurance and other applicable law.

(2) *Service corporations conducting unrestricted activities.* The FDIC has determined that the following activities do not represent a significant risk to the deposit insurance funds:

(i) A service corporation of an insured state savings association may acquire and retain equity securities of a company engaged in securities activities authorized in paragraph (b)(4) of this section if the bank complies with the following restrictions and files a notice in compliance with § 303.141 of this chapter and the FDIC processes the notice without objection under § 303.142(a) of this chapter. The FDIC is not precluded from taking any appropriate action or imposing additional requirements with respect to the activity if the facts and circumstances warrant such action. If changes to the management or business plan of the company at any time result in material changes to the nature of the company's business or the manner in which its business is conducted, the insured state savings association shall advise the appropriate regional director (DOS) in writing within 10 business days after such change. Investment under this paragraph is authorized if:

(A) The service corporation controls the company;

(B) The savings association meets the core eligibility criteria of § 362.4(c)(1);

(C) The service corporation meets the core eligibility criteria of § 362.4(c)(2) (with references to the term ''subsidiary'' deemed to refer to the service corporation), or the company is a corporation meeting such criteria;

(D) The savings association's transactions with the service corporation comply with the investment and transaction limits of paragraph (c) of this section, and the savings association's transactions with the company comply with such limits as if it were a service corporation;

(E) The savings association complies with the capital requirements of paragraph (d) of this section with respect to the service corporation and the company; and

(F) The savings association and the company comply with the additional requirements of § 362.4(b)(5)(ii) (with references to the term ''majority-owned subsidiary'' deemed to refer to the company).

(ii) A service corporation of an insured state savings association may acquire and retain equity securities of a company engaged in the following activities, if the service corporation controls the company or the company is controlled by insured depository institutions, and the association continues to meet the applicable capital standards as prescribed by the appropriate federal banking agency. The FDIC consents that such activity may be conducted by a service corporation of an insured state savings association without first obtaining the FDIC's consent. The fact that prior consent is not required by this subpart does not preclude the FDIC from taking any appropriate action with respect to the activities if the facts and circumstances warrant such action.

(A) *Equity securities of a company that engages in permissible activities.* A service corporation may own the equity securities of a company that engages in any activity permissible for a federal savings association.

(B) *Equity securities of a company that acquires and retains adjustable-rate and money market preferred stock.* A service corporation may own the equity securities of a company that engages in any activity permissible for an insured state savings association under § 362.11(b)(2)(iii) so long as instruments held under this paragraph (b)(2)(ii)(B), paragraph (b)(2)(iv) of this section, and § 362.11(b)(2)(iii) in the aggregate do not exceed the limit set by § 362.11(b)(2)(iii).

(C) *Equity securities of a company acting as an insurance agency.* A service corporation may own the equity securities of a company that acts as an insurance agency.

(iii) *Activities that are not conducted ''as principal''.* A service corporation controlled by the insured state savings association may engage in activities which are not conducted ''as principal'' such as acting as an agent for a customer, acting in a brokerage, custodial, advisory, or administrative capacity, or acting as trustee, or in any substantially similar capacity.

(iv) *Acquiring and retaining adjustable-rate and money market preferred stock.* A service corporation may engage in any activity permissible for an insured state savings association under § 362.11(b)(2)(iii) so long as instruments held under this paragraph (b)(2)(iv), paragraph (b)(2)(ii)(B) of this section, and § 362.11(b)(2)(iii) in the aggregate do not exceed the limit set by § 362.11(b)(2)(iii).

(3) [Reserved]

(4) *Service corporations conducting securities underwriting.* The FDIC has determined that it does not represent a significant risk to the deposit insurance funds for a service corporation to engage in the public sale, distribution or underwriting of securities provided that the activity is conducted by a service corporation of an insured state savings association in compliance with the core eligibility requirements listed in

§ 362.4(c); any additional requirements listed in § 362.4(b)(5)(ii); the savings association complies with the investment and transaction limitations of paragraph (c) of this section; and the savings association meets the capital requirements of paragraph (d) of this section. The FDIC consents that these listed activities may be conducted by a service corporation of an insured state savings association if the savings association files a notice in compliance with § 303.141 of this chapter and the FDIC processes the notice without objection under § 303.142(a) of this chapter. The FDIC is not precluded from taking any appropriate action or imposing additional requirements with respect to the activities if the facts and circumstances warrant such action. If changes to the management or business plan of the service corporation at any time result in material changes to the nature of the service corporation's business or the manner in which its business is conducted, the insured state savings association shall advise the appropriate regional director (DOS) in writing within 10 business days after such change. For purposes of applying § 362.4 (b)(5)(ii) and (c) to this paragraph (b)(4), references to the terms ''subsidiary'' and ''majority-owned subsidiary'' in §§ 362.4(b)(5)(ii) and (c) shall be deemed to refer to the service corporation. For the purposes of applying § 362.4(c), references to the term ''eligible subsidiary'' in § 362.4(c) shall be deemed to refer to the eligible service corporation.

(c) Investment and transaction limits. The restrictions detailed in § 362.4(d) apply to transactions between an insured state savings association and any service corporation engaging in activities which are not permissible for a service corporation of a federal savings association if specifically required by this part or FDIC order. For purposes of applying the investment limits in § 362.4(d)(2), the term ''investment'' includes only those items described in § 362.4(d)(2)(ii)(A) (*3*) and (*4*). For purposes of applying § 362.4(d) (2), (3), and (4) to this paragraph (c), references to the terms ''insured state bank'' and ''subsidiary'' in § 362.4(d)(2), (3), and (4), shall be deemed to refer, respectively, to the insured state savings association and the service corporation. For purposes of applying § 362.4(d)(5), references to the terms ''insured state bank'' and ''subsidiary'' in § 362.4(d)(5) shall be deemed to refer, respectively, to the insured state savings association and the service corporations or subsidiaries.

(d) *Capital requirements.* If specifically required by this part or by FDIC order, an insured state savings association that wishes to conduct as principal activities through a service corporation which are not permissible for a service corporation of a federal savings association must:

(1) Be well-capitalized after deducting from its capital any investment in the service corporation, both equity and debt.

(2) Use such regulatory capital amount for the purposes of the insured state savings association's assessment risk classification under part 327 of this chapter.

§ 362.13 Approvals previously granted.

FDIC consent by order or notice. An insured state savings association that previously filed an application and obtained the FDIC's consent to engage in an activity or to acquire or retain an investment in a service corporation engaging as principal in an activity or acquiring and retaining any investment that is prohibited under this subpart may continue that activity or retain that investment without seeking the FDIC's consent, provided the insured state savings association and the service corporation, if applicable, continue to meet the conditions and restrictions of approval. An insured state savings association which was granted approval based on conditions which differ from the requirements of §§ 362.4(c)(2) and 362.12 (c) and (d) will be considered to meet the conditions and restrictions of the approval if the insured state savings association and any applicable service corporation meet the requirements of §§ 362.4(c)(2) and 362.12 (c) and (d). For the purposes of applying § 362.4(c)(2), references to the terms ''eligible subsidiary'' and ''subsidiary'' in § 362.4(c)(2) shall be deemed to refer, respectively, to the eligible service corporation and the service corporation.

Subpart D—Acquiring, Establishing, or Conducting New Activities Through a Subsidiary by an Insured Savings Association

§ 362.14 Purpose and scope.

This subpart implements section 18(m) of the Federal Deposit Insurance Act (12 U.S.C. 1828(m)) which requires that prior notice be given the FDIC when an insured savings association establishes or acquires a subsidiary or engages in any new activity in a subsidiary. For the purposes of this subpart, the term ''subsidiary'' does not include any insured depository institution as that term is defined in the Federal Deposit Insurance Act. Unless otherwise indicated, the definitions provided in § 362.2 apply to this subpart.

§ 362.15 Acquiring or establishing a subsidiary; conducting new activities through a subsidiary.

No state or federal insured savings association may establish or acquire a subsidiary, or conduct any new activity through a subsidiary, unless it files a notice in compliance with § 303.142(c) of this chapter at least 30 days prior to establishment of the subsidiary or commencement of the activity and the FDIC does not object to the notice. This requirement does not apply to any federal savings bank that was chartered prior to October 15, 1982, as a savings bank under state law or any savings association that acquired its principal assets from such an institution.

By order of the Board of Directors.

Dated at Washington, D.C. this 5th day of November, 1998.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 98–31152 Filed 11–30–98; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 303, 337, and 362

RIN 3064–AC20

Activities of Insured State Banks and Insured Savings Associations

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of proposed rulemaking.

SUMMARY: The FDIC is seeking public comment on its proposal to amend its rules and regulations governing activities and investments of insured state banks. The FDIC proposes to add safety and soundness standards to govern insured state nonmember banks that engage in the public sale, distribution or underwriting of stocks, bonds, debentures, notes or other securities through a subsidiary if those activities are permissible for a national bank subsidiary but are not permissible for the national bank itself. In addition, the FDIC proposes to require that insured state nonmember banks file a notice before commencing any activities permissible for subsidiaries of a national bank that are not permissible for the parent national bank itself. The FDIC also proposes to remove and reserve the provisions addressing, ''Securities Activities of Subsidiaries of Insured State Banks: Bank Transactions with Affiliated Securities Companies.'' The proposed effect of these amendments will be to require banks to notify the FDIC prior to conducting securities or other activities through subsidiaries that are not permissible for the bank itself. These amendments also will consolidate all securities activities regulation.

DATES: Comments must be received by February 1, 1999.

ADDRESSES: Send written comments to Robert E. Feldman, Executive Secretary, Attention: Comments/OES, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429. Comments may be hand delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m. (Fax number (202) 898–3838; Internet Address: comments@fdic.gov). Comments may be inspected and photocopied in the FDIC Public Information Center, Room 100, 801 17th Street, N.W. Washington, D.C. 20429, between 9:00 a.m. and 4:30 p.m. on business days.

FOR FURTHER INFORMATION CONTACT: Curtis Vaughn, Examination Specialist, (202/898–6759), Division of Supervision; Linda L. Stamp, Counsel, (202/898–7310) or Jamey Basham, Counsel, (202/898–7265), Legal Division, FDIC, 550 17th Street, N.W., Washington, D.C. 20429.

SUPPLEMENTARY INFORMATION:

I. Background

Recently, the FDIC reassessed part 362 of its rules, ''Activities and Investments of Insured State Banks'' (12 CFR part 362) and § 337.4 of its rules, ''Securities Activities of Subsidiaries of Insured State Banks: Bank Transactions with Affiliated Securities Companies'' (12 CFR 337.4). That reassessment resulted in an amended part 362 that is published as a final rule elsewhere in this issue of the **Federal Register**. Although, in connection with that reassessment, FDIC proposed removing § 337.4, the FDIC decided to leave that rule in place to retain the safety and soundness standards governing securities activities that are not subject to section 24 of the Federal Deposit Insurance Act (FDI Act) (12 U.S.C. 1831a) (discussed below) during a further comment period on rules that would govern those activities.

In this proposal, the FDIC seeks comment on proposed safety and soundness standards governing an insured state nonmember bank subsidiary engaging in the public sale, distribution or underwriting of stocks, bonds, debentures, notes or other securities permissible for a subsidiary of a national bank that are not permissible for the parent national bank directly. The proposal also requests comment on a proposed requirement that a notice be filed before an insured state nonmember bank subsidiary engages in any other activity permissible for a subsidiary of a national bank that is not permissible for the parent national bank directly. Under the proposal, the FDIC would remove and reserve § 337.4. The proposal is described in more detail below.

Part 362 of the FDIC's regulations implements the provisions of section 24 of the FDI Act. Section 24 was added to the FDI Act by the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) (Pub. L. 102–242). With certain exceptions, section 24 limits the direct equity investments of state chartered insured banks to equity investments of a type permissible for national banks. In addition, with certain exceptions, section 24 prohibits an insured state bank from engaging as principal in any type of activity that is not permissible for a national bank unless the bank meets applicable capital requirements and the FDIC determines that the activity will not pose a significant risk to the appropriate deposit insurance fund. Section 24 also prohibits an insured state bank subsidiary from engaging as principal in any activity or making any equity investment of a type that is not permissible for a national bank subsidiary unless the bank meets applicable capital requirements and the FDIC determines that the activity will not pose a significant risk to the appropriate deposit insurance fund.

Since section 24 was enacted, the Office of the Comptroller of the Currency (OCC) has confirmed—through its rule governing operating subsidiaries—that there may be activities that are not permissible for a national bank itself, but that are permissible for national bank subsidiaries. Effective December 31, 1996, the OCC amended its regulations governing the acquisition and establishment of operating subsidiaries by national banks. 12 CFR part 5. These regulations establish a process through which a national bank may seek approval to conduct activities in an operating subsidiary that are part of or incidental to the business of banking as determined by the OCC pursuant to 12 U.S.C. 24 (Seventh) or other statutory authority but that differ from the activities that are permissible for the national bank itself. The OCC always requires an application from a bank seeking to conduct a bank-impermissible activity in an operating subsidiary. If the activity proposed for the operating subsidiary has not been approved previously by the OCC, the OCC will publish a notice of the application in the **Federal Register** and solicit comment. The OCC may also follow this notice and comment procedure if the activity is one that the OCC has previously approved. 12 CFR 5.34(f).

The framework in the regulation sets up a review process that has two, equally important components. First, the OCC reviews operating subsidiary applications to determine whether the proposed activities are legally permissible for an operating subsidiary. Second, the OCC evaluates the proposal to determine whether it is consistent with safe and sound banking practices and OCC policy and does not endanger the safety or soundness of the particular parent national bank.

The operating subsidiary rule sets out a number of conditions, or firewalls, that the OCC will impose each time it approves the conduct of an activity in an operating subsidiary that the parent

bank could not do directly.[1] In addition, the rule contemplates the imposition of other bank-specific conditions tailored to the facts and circumstances presented by the individual application. To date, the OCC has received and published notice of three applications to conduct activities, through an operating subsidiary, which would not be permissible for a national bank. Two applications were filed by NationsBank, National Association, (Charlotte, North Carolina) to engage in limited real estate development activities in connection with bank premises and to provide real estate lease financing through operating subsidiaries of the bank. The FDIC, in its final rule published elsewhere in today's **Federal Register**, dealt with state nonmember banks which seek to engage in real estate activities permissible for a national bank only through a subsidiary (subpart B of the amended part 362).

Another application was filed by Zions First National Bank, (Salt Lake City, Utah) (Zions) to conduct municipal revenue bond underwriting activities on April 8, 1997. The OCC published notice and requested comment in the **Federal Register** on April 18, 1997. 62 FR 19171. On December 11, 1997, the OCC announced its approval of the Zions' application allowing an operating subsidiary of a national bank to engage in the activities of underwriting, dealing in, and investing in state and municipal revenue bonds, subject to certain safety and soundness requirements.[2]

This OCC approval means that the requirement under section 24 and subpart A of part 362, that an insured state nonmember bank apply to the FDIC for consent to engage in this activity through a subsidiary, no longer applies. However, the FDIC did not remove § 337.4 as proposed, but instead left § 337.4 in place to require that an insured state nonmember bank file a notice and comply with the FDIC's safety and soundness requirements to engage in the distribution or underwriting of stocks, bonds, debentures, notes or other securities through a subsidiary.[3]

Section 337.4 of the FDIC's regulations governs securities activities of subsidiaries of insured state nonmember banks as well as transactions between insured state nonmember banks and their securities subsidiaries and affiliates. The regulation was adopted in 1984 (49 FR 46723) and is designed to promote the safety and soundness of insured state nonmember banks that have subsidiaries which engage in securities activities that are impermissible for banks directly, under section 16 of the Banking Act of 1933 (12 U.S.C. 24 (Seventh)), commonly known as the Glass-Steagall Act. Section 337.4 requires that these subsidiaries qualify as bona fide subsidiaries; establishes transaction restrictions between a bank and its subsidiaries or other affiliates that engage in securities activities that are prohibited for banks under section 16; requires that an insured state nonmember bank give prior notice to the FDIC before establishing or acquiring any securities subsidiary; requires that disclosures be provided to securities customers in certain instances; and requires that a bank's investment in a securities subsidiary engaging in activities that are impermissible for a bank under section 16 be deducted from the bank's capital.

Under the current version of § 337.4, a subsidiary of a state nonmember bank that wanted to underwrite, deal in, and invest in municipal revenue bonds (securities of states and their political subdivisions that do not qualify under the OCC's current definition of general obligation bonds) would have to file a notice under § 337.4 and meet its requirements. To underwrite, deal in, or invest in municipal revenue bonds, the bank and its subsidiary would be required to:

1. File a notice at least 60 days prior to the consummation of the operation of the subsidiary;
2. Meet the ''bona fide subsidiary'' requirements as set forth in definition in § 337.4;
3. Deduct the capital invested in subsidiary from bank's total capital;
4. Underwrite only debt securities of investment grade, unless the subsidiary has been in continuous operation for the five year period preceding the notice.[4]

The applicability of § 337.4 is not impacted by the OCC's approval of the Zions application. The application of § 337.4 is independent of and was adopted prior to section 24 of the FDI Act and part 362. Section 337.4 is invoked based on the securities activities of the bank subsidiary and was adopted pursuant to an analysis of the Glass-Steagall Act undertaken in the early 1980s. In short, the regulation lists securities underwriting and distribution as an activity that will not pose a significant risk to the fund if conducted through a majority-owned subsidiary that operates in accordance with § 337.4. Now, in this rulemaking proceeding, the FDIC proposes to remove and reserve § 337.4 and address

[1] Under these conditions, the § 5.34(f) operating subsidiary generally must: be physically separate from the parent; hold itself out as a separate and distinct entity; use a different name; have adequate capital; maintain separate accounting and corporate records; have independent policies and procedures designed to inform customers of the independence of the subsidiary; negotiate contracts with the parent at arm's length; hold separate board meetings; have at least one-third of the members of the board who are not directors of the bank who have relevant expertise; and have internal controls to manage financial and operational risks. Moreover, if the operating subsidiary will be conducting activities as principal, additional safety and soundness conditions are imposed, including that the bank's equity investment in the subsidiary must be deducted from the bank's capital and assets, and the assets and liabilities of the subsidiary may not be consolidated with those of the bank. In addition, the OCC will apply sections 23A and 23B of the Federal Reserve Act (12 U.S.C. 371c and 371c–1) to transactions between the parent bank and its operating subsidiary.

[2] Zions applied to the OCC pursuant to 12 CFR 5.34(f) to commence a new activity in an existing operating subsidiary. The subsidiary would underwrite, deal in, and invest in securities of states and their political subdivisions. These securities include the following: (1) Obligations presently defined by the OCC as general obligations of states and political subdivisions (General Obligation Securities); and (2) other obligations of states and their political subdivisions that do not qualify under the OCC's current definitions as general obligations (Revenue Bonds). The OCC determined that the activity was permissible for an operating subsidiary under the authority of 12 U.S.C. 24 (Seventh) that allows a national bank to own operating subsidiaries that conduct activities that are incidental to the business of banking. In this case, the OCC determined that the activity of underwriting revenue bonds is incidental to banking by finding that underwriting revenue bonds is the functional equivalent or a logical outgrowth of activities that are currently conducted by national banks. However, the OCC reiterated that section 20 of the Glass-Steagall Act prohibits the affiliation of member banks with firms that principally engage in underwriting bank-ineligible securities. As a result, the OCC imposed a 25 percent revenue limitation on the Zions' subsidiary to conform to the limitation for section 20 subsidiaries set by Board of Governors of the Federal Reserve System. The OCC imposed the conditions set forth in § 5.34(f), including corporate separateness requirements and the applications of sections 23A and 23B of the Federal Reserve Act to transactions between the bank and its subsidiary. In addition, the OCC imposed other conditions tailored to the Zions' application. For example, it required disclosures to customers, including use of the Interagency Statement on Retail Sales of Nondeposit Investment Products (Interagency Statement), and limited opinions on the bonds by bank directors, officers and employees.

[3] Section 362.4 of the final regulation establishes rules by which subsidiaries of insured state banks may conduct certain securities activities which are not permissible for a national bank subsidiary. Section 362.8(b) established similar rules for securities affiliates of insured state nonmember bank subsidiaries of so-called ''nonbank bank holding companies.'' As is specified in § 337.4(i), the activities of such subsidiaries and affiliates are controlled by part 362, not § 337.4.

[4] According to the information provided in the application, the Zions' subsidiary appears to meet the 5-year operation test that § 337.4 would apply to a state nonmember bank subsidiary. Section 337.4 has no procedure for a bank to file an application to be relieved of the five year operation requirement; however, there is a waiver application procedure in § 337.10. Any such application would be granted at the discretion of the FDIC's Board of Directors.

the FDIC's standards governing bank subsidiary activities through part 362.

II. Description of the Proposal

In this proposal, the FDIC imposes safety and soundness constraints on insured state nonmember bank subsidiaries that engage in the public sale, distribution or underwriting of stocks, bonds, debentures, notes or other securities that may be permissible for a national bank subsidiary but are not permissible for a national bank directly. In this proposal, the FDIC also requires that an insured state nonmember bank file a 30-day advance notice before the bank's subsidiary may engage in other activities not permissible for a national bank directly that may be permissible for a national bank subsidiary. This 30-day advance notice is designed to allow the FDIC to review any such activity and consider whether safety and soundness considerations make it prudent that conditions be placed on FDIC's consent to allow such activities. The FDIC believes it gave sufficient notice in its August 26, 1997, proposal to amend part 362 that the FDIC could adopt a final rule governing the insured state nonmember bank subsidiaries that engage in the public sale, distribution or underwriting of stocks, bonds, debentures, notes or other securities that are not permissible for a national bank that are permissible for national bank subsidiaries. However because regulatory text was not provided in its earlier proposal, the FDIC believes that it is appropriate to provide an additional opportunity for public comment before approving a final rule to govern insured state nonmember bank subsidiaries that engage in the public sale, distribution or underwriting of stocks, bonds, debentures, notes or other securities that may be permissible for a national bank subsidiary but are not permissible for a national bank.

A. Requirements for Securities Activities

There are three general reasons the FDIC proposes the imposition of certain standards upon a state nonmember bank seeking to engage in the sale, distribution or underwriting of stocks, bonds, debentures, notes or other securities that may be permissible for a national bank subsidiary but are not permissible for a national bank itself: to ensure the bank is independent and operated in a manner consistent with safe and sound banking practices; to protect the insurance fund (the FDIC wants to avoid claims against the bank arising out of the public's misperception as to with whom it is dealing and in what capacity); and to comply with section 21 of the Glass-Steagall Act (12 U.S.C. 378), which prohibits securities companies from taking deposits and banks from engaging in certain securities activities. The FDIC has attempted to meet these goals in a manner that minimizes the burden to insured state nonmember banks without jeopardizing the FDIC's goals.

Thus, the FDIC proposal contains more flexible physical separation standards than exist in the current version of § 337.4. The FDIC views these proposed physical separation standards, coupled with the comprehensive requirements that include affirmative disclosures, investment limits, transaction requirements and capital standards, as adequate to protect bank safety and soundness, maintain the legal separation between the bank and its subsidiary and avoid customer confusion.

The FDIC also proposes to eliminate the different treatment of state nonmember bank subsidiaries depending upon the type of securities underwritten by the subsidiary. Instead, the FDIC is focusing on prudent management policies and practices, and the sufficiency of the subsidiary's capitalization. Additionally, the FDIC proposes to eliminate the tiered approach to the securities activities of the subsidiary, which limited for five years the underwriting by a new subsidiary to investment quality debt securities, investment quality equity securities, mutual funds that invest exclusively in investment quality equity securities and/or investment quality debt securities. Section 337.4 currently does not permit a subsidiary to engage in the public sale, distribution or underwriting of stocks, bonds, debentures, notes or other securities that are not permissible for a bank under section 16 of the Glass-Steagall Act, unless the subsidiary meets the bona fide definition and the activities are limited to underwriting of investment quality securities. Later, a subsidiary can engage in additional underwriting if it meets the definition of a bona fide subsidiary and the following additional conditions are met:

(a) The subsidiary is a member in good standing of the National Association of Securities Dealers (NASD);

(b) The subsidiary has been in continuous operation for a five-year period preceding the notice to the FDIC;

(c) No director, officer, general partner, employee or 10 percent shareholder has been convicted within five years of any felony or misdemeanor in connection with the purchase or sale of any security;

(d) Neither the subsidiary nor any of its directors, officers, general partners, employees, or 10 percent shareholders is subject to any state or federal administrative order or court order, judgment or decree arising out of the conduct of the securities business;

(e) None of the subsidiary's directors, officers, general partners, employees or 10 percent shareholders are subject to an order entered within five years issued by the Securities and Exchange Commission (SEC) pursuant to certain provisions of the Securities Exchange Act of 1934 or the Investment Advisors Act of 1940; and

(f) All officers of the subsidiary who have supervisory responsibility for underwriting activities have at least five years experience in similar activities at NASD member securities firms.

Current § 337.4 requires a bona fide subsidiary to be adequately capitalized, and therefore, these subsidiaries are required to meet the capital standards of the NASD and SEC. As a protection to the insurance fund, a bank's investment in these subsidiaries engaged in securities activities that would be prohibited to the bank under section 16 are not counted toward the bank's capital; that is, the investment in the subsidiary is deducted before compliance with capital requirements is measured.

The FDIC views its established separations for banks and securities firms as creating an environment in which the FDIC's responsibility to protect the insurance fund has been met without creating too much overlapping regulation for the securities firms. The FDIC maintains an open dialogue with the NASD and the SEC concerning matters of mutual interest. To that end, the FDIC entered into an agreement in principle with the NASD concerning examination of securities companies affiliated with insured institutions and has begun a dialogue with the SEC concerning the exchange of information which may be pertinent to the mission of the FDIC.

The number of banks which have subsidiaries engaging in securities activities that cannot be conducted by the bank itself is very small. These subsidiaries engage in the underwriting of debt and equity securities and distribution and management of mutual funds.

Since implementation of the FDIC's § 337.4 regulation, the relationships between banks and securities firms have not been a matter of supervisory concern due to the protections FDIC has in place. However, the FDIC realizes that in a time of financial turmoil these protections may not be adequate and a

program of direct examination could be necessary to protect the insurance fund. Thus, the continuation of the FDIC's examination authority in that area is important.

B. Notice Requirement for Other Activities Generally

Under a safety and soundness standard, subpart B of the revised part 362 requires insured state nonmember bank subsidiaries engaging in certain enumerated activities to meet certain standards established by the FDIC, even if the OCC has determined that the activity in question is permissible for a subsidiary of a particular national bank. Under the modifications contained in this proposal, the FDIC would obtain the opportunity to review situations in which a state nonmember bank subsidiary seeks to engage in any activity determined by the OCC to be permissible for a national bank through its subsidiary, rather than through the national bank itself. This review would be analogous to the safety and soundness evaluation undertaken by the OCC with respect to operating subsidiary applications filed under § 5.34(f) of its rules (12 CFR 5.34(f)). It also would provide the FDIC with an opportunity to impose appropriate conditions on the operations of the subsidiary. The FDIC's Board of Directors wants to ensure that the FDIC can make a determination if there are adverse effects on the safety and soundness of the insured state nonmember bank and reserve authority to impose appropriate conditions.

C. Authority

The FDIC's action in proposing this regulation is fully within the agency's authority and is consistent with its stated goal of safeguarding the safety and soundness of insured state nonmember banks. The courts have recognized that defining what constitutes an unsafe or unsound banking practice in a particular fact situation is within the domain of the banking agencies. The United States Court of Appeals for the Fifth Circuit, on two occasions, stated that ''[o]ne of the purposes of the banking acts is clearly to commit the progressive definition and eradication of such practices to the expertise of the appropriate regulatory agencies.'' *Groos National Bank* v. *Comptroller of the Currency*, 573 F.2d 880, 897 (5th Cir. 1978); *First National Bank of LaMargue* v. *Smith*, 610 F.2d 1258, 1265 (5th Cir. 1980). The United States Court of Appeals for the D.C. Circuit has stated with regard to the OCC's authority under section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818)—one of the statutory provisions from which the FDIC derives authority for this rulemaking—that ''the Comptroller is entitled to accomplish his regulatory responsibilities over ''unsafe and unsound'' practices both by cease and desist proceedings and by rules defining and explicating the practices which in his discretion he finds threatening to a stable and effective national banking system.'' *Independent Bankers Association of America* v. *Heimann*, 613 F.2d 1164, 1169 (D.C. Cir. 1979). In his testimony on financial modernization, the FDIC's Chairman recently confirmed the view that barriers between banking and commerce should be lowered cautiously and incrementally with safeguards to protect the insured bank.[5]

Under the proposed regulation, the FDIC is not waiving its right to address on a case-by-case basis practices, conduct, or acts that are not specifically addressed by this regulation which it finds constitute unsafe and unsound practices. The FDIC will continue to monitor bank direct and indirect involvement in securities activities and will take whatever future action is appropriate.

The FDIC requests comments about all aspects of this proposed revision to part 362. In addition, the FDIC is raising specific questions for public comment as set out in connection with the analysis of the proposal below.

III. Section by Section Analysis

A. Majority-owned Subsidiaries Engaging in the Public Sale, Distribution or Underwriting of Stocks, Bonds, Debentures, Notes or Other Securities That Are Not Permissible for a National Bank Under Section 16 of the Banking Act of 1933

1. Description of the Rule

In connection with its recent adoption of restrictions, under subpart A of part 362, for insured state bank subsidiaries seeking to engage in the sale, distribution or underwriting of stocks, bonds, debentures, notes or other securities that are not permissible for a national bank and its subsidiary, the FDIC has determined that such activities may involve risk. The FDIC consequently requires insured state banks to file a notice to conduct this activity through a majority-owned subsidiary. As long as the FDIC does not object to the notice, the bank may conduct the activity in compliance with the requirements set out in the rule. The fact that prior consent is not required by subpart A does not preclude the FDIC from taking any appropriate action with respect to the activities if the facts and circumstances warrant such action.

In developing the proposed amendments under consideration here, the FDIC did not see a need for differing treatment based on whether the insured state nonmember bank subsidiaries that engage in the public sale, distribution or underwriting of stocks, bonds, debentures, notes or other securities that are not permissible for a national bank are engaging in a similar activity that is permissible for a national bank subsidiary. In either instance, the proposal would provide the same comprehensive structure for insured state nonmember bank subsidiaries that engage in the public sale, distribution or underwriting of stocks, bonds, debentures, notes or other securities that are not permissible for a national bank.

Thus, the standards being proposed as amendments to subpart B addressing safety and soundness concerns are the same as those that were adopted in subpart A in the final rule. The difference is that the activities addressed in subpart A are not permissible for a national bank subsidiary while the activities addressed in subpart B are those that are permissible for a national bank subsidiary. Thus, the activities addressed in subpart A are addressed primarily under the authority found in section 24 of the FDI Act whereas the activities addressed in subpart B are addressed under the authority found in section 8 of the FDI Act.

The revised language would be located in subpart B of part 362 and would become part of proposed § 362.8(a).

Subpart A of part 362 does not grant authority to conduct activities or make investments; subpart A only gives relief from the prohibitions of section 24 of the FDI Act. In subpart A, the FDIC grouped the exception for insured state bank subsidiaries that engage in the public sale, distribution or underwriting of stocks, bonds, debentures, notes or other securities that are not permissible for a national bank together with the real estate exception in the structure of the regulation to promote uniform standards across activities. In a parallel fashion in subpart B, the FDIC proposes to group the exception for insured state nonmember banks that acquire or establish subsidiaries that engage in the public sale, distribution or underwriting of stocks, bonds, debentures, notes or other securities that are permissible for

[5] *See* ''Testimony on Financial Modernization'' of Andrew C. Hove, Jr., Chairman, Federal Deposit Insurance Corporation, Before the Subcommittee on Finance and Hazardous Materials, Committee on Commerce, United States House of Representatives, July 17, 1997.

a national bank only through a subsidiary together with the real estate exception in the structure of the regulation, to promote uniform standards across activities.

Similarly, the authority, constraints and notice process refers back to subpart A and incorporates the same requirements and limitations as govern securities underwriting activities thereunder. In both instances the proposal would require the insured state nonmember bank and its subsidiary to meet and continue to meet the following standards to engage in the activity after notice to the FDIC, rather than making a full application:

1. The bank must meet the requirements for an ''eligible depository institution;''[6]

2. The bank must be well capitalized after deducting its investment in the subsidiary;

3. The subsidiary must be an ''eligible subsidiary;''[7]

4. The bank and the subsidiary must comply with the investment limits, transaction requirements and collateralization requirements in dealing with each other;

5. The bank must adopt policies and procedures to govern its participation in financing transactions arranged by the subsidiary;

6. The bank may not express an opinion of value or advisability of securities underwritten by the subsidiary unless the customer is notified of the bank's relationship with the subsidiary;

7. The subsidiary must be registered with SEC and agree to notify the regional office of any material actions against the subsidiary by any state authorities or the SEC; and

8. The bank may not buy securities underwritten by the subsidiary as principal or fiduciary unless the bank's board of directors approves.

The proposed requirements are uniform with other part 362 notice procedures for insured state bank subsidiaries to engage in activities not permissible for national banks or their subsidiaries, and would recognize the level of risk present in subsidiaries that engage in the public sale, distribution or underwriting of stocks, bonds, debentures, notes or other securities that are not permissible for a national bank itself. These requirements are not all presently found in § 337.4 but the FDIC believes that only banks that are well-run and well-managed should be given the opportunity to engage in securities activities that are not permissible for a national bank under the streamlined notice procedures. These criteria are imposed as expedited processing criteria rather than substantive criteria. Banks not meeting these criteria that want to engage in these activities should be subject to the scrutiny of the application process. Although operations not permissible for a national bank are conducted and managed by a separate majority-owned subsidiary, such activities are part of the analysis of the consolidated financial institution. The condition of the institution and the ability of its management are an important component in determining if the risks of the securities activities will have a negative impact on the insured institution.

When the FDIC initially implemented § 337.4 on securities activities of subsidiaries of insured state nonmember banks, the FDIC determined that some risk may be associated with those activities. The FDIC continues to see a need to address that risk. The FDIC requests comment on the application of these safeguards to these activities, including the utility of management and board separations to limit controlling person liability and the inappropriate disclosure of material nonpublic information; the extent that any securities underwriting liability may have been reduced due to the enactment of The Private Securities Litigation Reform Act of 1995, Public Law 104–67; and the efficacy of more limited restrictions on officer and director interlocks to prevent both liability and information sharing and any related issues.[8]

2. Substantive Changes to the Subsidiary Underwriting Activities

Generally, these proposed amendments to subpart B, as compared to the current provisions of § 337.4 governing the state nonmember bank subsidiaries that engage in the public sale, distribution or underwriting of stocks, bonds, debentures, notes or other securities that are not permissible for a bank under section 16 of Glass-Steagall, have been streamlined to make compliance easier. In addition, state nonmember banks that deem any particular constraint to be burdensome may file an application with the FDIC to have the constraint removed for that bank and its majority-owned subsidiary.

The FDIC has proposed to eliminate those constraints that were deemed to overlap with other requirements or that could be eliminated and still maintain safety and soundness. The FDIC has determined that it can adequately monitor other securities activities through its regular reporting and examination processes. We invite comment on whether the elimination of the other notices now found in § 337.4, such as the notice requirement for any

[6] An ''eligible depository institution'' is a depository institution that: (1) Has been chartered and operating for at least three years or is in an acceptable holding company structure; (2) received an FDIC-assigned composite UFIRS rating of 1 or 2 at its most recent examination; (3) received a rating of 1 or 2 under the ''management'' component of the UFIRS at its most recent examination; (4) received at least a satisfactory CRA rating from its primary federal regulator at its last examination; (5) received a compliance rating of 1 or 2 from its primary federal regulator at its last examination; and (6) is not subject to any corrective or supervisory order or agreement.

[7] An entity is an ''eligible subsidiary'' if it: (1) Meets the capital requirements; (2) is physically separate and distinct in its operations; (3) maintains separate accounting and other records; (4) observes separate business formalities; (5) has a chief executive officer who is not an employee of the bank; (6) has a majority of its board of directors who are neither directors nor officers of the state-chartered depository institution; (7) conducts business pursuant to independent policies and procedures; (8) has only one business purpose; (9) has a current written business plan that is appropriate to the type and scope of business conducted by the subsidiary; (10) has adequate management; and (11) establishes policies and procedures to ensure adequate computer, audit and accounting systems, internal risk management controls, and has the necessary operational and managerial infrastructure to implement the business plan.

[8] Liability of ''controlling persons'' for securities law violations by the persons or entities they ''control'' is found in section 15 of the Securities Act of 1933, 15 U.S.C. 77o and section 20 of the Securities and Exchange Act of 1934, 15 U.S.C. 78t(a). Although the tests of liability under these statutes vary slightly, the FDIC is concerned that liability may be imposed on a parent entity that is a bank under the most stringent of these authorities in the securities underwriting setting. Under the Tenth Circuit's permissive test for controlling person liability, any appearance of an ability to exercise influence, whether directly or indirectly, and even if such influence cannot amount to control, is sufficient to cause a person to be a controlling person within the meaning of section 15 or section 20. Although liability may be avoided by proving no knowledge or good faith, proving no knowledge requires no knowledge of the general operations or actions of the primary violator and good faith requires both good faith and nonparticipation. *See First Interstate Bank of Denver, N.A.* v. *Pring*, 969 F.2d 891 (10th Cir. 1992), rev'd on other grounds, 511 U.S. 164 (1994); *Arena Land & Inv. Co. Inc.* v. *Petty*, 906 F. Supp. 1470 (D. Utah 1994); *San Francisco-Oklahoma Petroleum Exploration Corp.* v. *Carstan Oil Co., Inc.*, 765 F.2d 962 (10th Cir. 1985); *Seattle-First National Bank* v. *Carlstedt*, 978 F. Supp. 1543 (W.D. Okla. 1987). However, to the extent that any securities underwriting liability may have been reduced due to the enactment of The Private Securities Litigation Reform Act of 1995, Pub .L. 104–67, then the FDIC's concerns regarding controlling person liability may be reduced. It is likely that the FDIC will want to await the development of the standards under this new law before taking actions that could risk liability on a parent bank that has a subsidiary that engages in the public sale, distribution or underwriting of stocks, bonds, debentures, notes or other securities that are not permissible for a national bank.

securities activity in § 337.4(d), is appropriate.

The FDIC proposes the removal of the customer disclosures currently contained in § 337.4. Instead, the FDIC will be relying on the Interagency Statement on the Retail Sale of Nondeposit Investment Products (FIL–9–94,[9] February 17, 1994) (or any successor requirement) as applicable guidance to ensure that appropriate disclosures are made when the subsidiary's products are sold on bank premises, are sold by bank employees or are sold when the bank receives a referral fee. While the current regulation requires disclosures, those disclosures are similar but not identical to the disclosures required by the Interagency Statement. This change makes compliance easier. Comments submitted to the FDIC in connection with its recent revisions to subpart A of part 362 support this change and recognize that any retail sale of nondeposit investment products to bank customers under such circumstances are subject to the Interagency Statement. The FDIC requests comment on whether the Interagency Statement provides adequate disclosures for retail sales in a securities subsidiary and whether required compliance with that policy statement needs to be specifically mentioned in the regulatory text. Comment is invited on whether any other disclosures currently in § 337.4 should be retained or if any additional disclosures would be appropriate.

The FDIC proposes to continue to impose many of the safeguards found in section 23A of the Federal Reserve Act (12 U.S.C. 371c) and to impose the safeguards similar to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1). The FDIC requests comment on the restrictions that have been removed, including whether any of these restrictions should be reimposed for securities activities. The FDIC also invites suggestions for further improvements.

The FDIC proposes that the notice period be shortened from the existing 60 days to 30 days and that the required notice and application procedures be located in subpart G of part 303. Previously, specific instructions and guidelines on the form and content of any applications or notices required under § 337.4 were found within that section.

With regard to any insured state nonmember banks that have been engaging in these activities under a notice filed and in compliance with § 337.4, the proposed regulation would allow those activities to continue under the terms of that approval. This result differs from the approach set out in § 362.5(b) (applicable to state banks engaging in securities activities impermissible for a national bank and its subsidiary), which requires that the bank and its majority-owned subsidiaries meet the core eligibility requirements, the investment and transaction limitations, and capital requirements contained in § 362.4(c), (d), and (e). The FDIC did not consider the additional requirements to be necessary in subpart B, because we are not aware of any insured state nonmember banks having subsidiaries that are underwriting only securities that would fall under subpart B. We believe that any subsidiaries that are underwriting the types of securities regulated under subpart B already are required to follow the continuation requirements found in subpart A.

3. Notice for Change in Circumstances

The final rule in subpart A applicable to state banks engaging in securities activities impermissible for a national bank and its subsidiary (§ 362.4(b)(5)) requires the bank to provide written notice to the appropriate Regional Office of the FDIC within 10 business days of a change in circumstances. A change in circumstances is described as a material change in a subsidiary's business plan or management. Under the proposal, subpart B incorporates this requirement by reference. The FDIC believes that it can address a bank's falling out of compliance with any of the other requirements of the regulation through the normal supervision and examination process.

B. Other Activities Permissible for Subsidiaries of a National Bank That Are Not Permissible for a National Bank

In this proposal, the FDIC requires that an insured state nonmember bank file a 30-day advance notice before the bank's subsidiary may engage in other activities not permissible for a national bank that may be permissible for a national bank subsidiary. This 30-day advance notice is designed to allow FDIC to review any such activity and consider whether safety and soundness considerations make it prudent that conditions be placed on FDIC's consent to allow such activities.

Since section 24 was enacted, the OCC has confirmed through its rule governing operating subsidiaries that there may be activities that are permissible for national bank subsidiaries even though the parent national bank may not conduct them directly. The FDIC needs to review the activities and assess their safety and soundness in determining whether the activity is appropriate for an insured state nonmember bank's subsidiary. The FDIC also needs to determine whether any conditions should be placed on the conduct of that activity. The FDIC cannot assess the activities that may be approved in the future and adopt specific standards to govern those activities. This safety and soundness review and, if appropriate, the imposition of conditions should be done on a case-by-case basis. The FDIC has elected to limit its review to a 30-day period to limit the burden from this requirement.

IV. Additional Requests for Comments

The FDIC is specifically requesting comments that address the following:

(1) What criteria should the FDIC use to decide whether an activity that is permissible for a national bank subsidiary but not permissible for the national bank may be conducted in a safe and sound fashion by a subsidiary of an insured state nonmember bank?

(2) Should activities that are permissible for a national bank subsidiary but are not permissible for the national bank be limited to subsidiaries of insured state nonmember banks of a certain asset size, with a certain composite rating, *etc.*?

(3) What are the likely competitive effects of authorizing insured state nonmember banks to engage (through subsidiaries) in activities that are permissible for a national bank subsidiary but are not permissible for the national bank?

(4) Alternately, are there other approaches or methods which would facilitate access without compromising traditional safety and soundness concerns?

Comments addressing these issues and any other aspects of the general subject of permitting subsidiaries of insured state nonmember banks to engage in activities that are permissible for a national bank subsidiary but are not permissible for the national bank will be welcomed.

V. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.) the FDIC may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. The collection of information contained in this proposed rule has been submitted to

[9] Financial institution letters (FILs) are available in the FDIC Public Information Center, room 100, 801 17th Street, N.W., Washington, D.C. 20429.

OMB for review. Comments on the collection of information should be sent to the desk officer for the agencies: Alexander T. Hunt, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, DC 20503. Copies of comments should also be sent to: Steven F. Hanft, FDIC Clearance Officer, Office of the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, NW, Washington, DC 20429, (202) 898–3907. Comments may be hand-delivered to the guard station at the rear of the 17th Street building (located on F Street) on business days between 7:00 a.m. and 5:00 p.m. [Fax number (202) 898–3838; Internet address: COMMENTS@FDIC.GOV]. For further information on the Paperwork Reduction Act aspect of this rule, contact Steven F. Hanft at the above address.

Comment is solicited on:

(i) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(ii) 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;

(iii) The quality, utility, and clarity of the information to be collected; and

(iv) Ways to 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.

Title of the collection: The proposed rule will modify an information collection previously approved by OMB titled ''Activities and Investments of Insured State Banks'' under control number 3064–0111.

Summary of the collection: Generally, the collection includes the description of the activity in which an insured state bank or its subsidiary proposes to engage that would be impermissible absent the FDIC's consent or nonobjection, and information about the relationship of the proposed activity to the bank's and /or subsidiary's operation and compliance with applicable laws and regulations.

Need and Use of the information: The FDIC uses the information to determine whether to grant consent or provide a nonobjection for the insured state bank or its subsidiary to engage in the proposed activity that otherwise would be impermissible pursuant to section 8 of the FDI Act and 12 CFR part 362.

Proposed changes to the collection: The proposed rule will modify the collection in two ways. First, by adding, at § 362.8(a)(2), the requirement of a notice to the FDIC before the state nonmember bank through a subsidiary engages in either the public sale, distribution or underwriting of stocks, bonds, debenture, notes or other securities if those activities are permissible for a national bank subsidiary but are not permissible for the national bank itself. Second, by adding, at § 362.8(b), the requirement of a notice to the FDIC before the state nonmember bank through a subsidiary engages in activities that are permissible for a national bank subsidiary but are not permissible for the national bank itself. The contents of both notices are described at § 303.121(b) of the final part 362 rule also published in today's **Federal Register**.

Respondents: Banks or their subsidiaries desiring to engage in activities that would be impermissible absent the FDIC's consent or nonobjection.

Estimated annual burden resulting from this proposed rulemaking:

Frequency of response: Occasional

Number of responses: 1

Average number of hours to prepare a response: 8 hours

Total annual burden: 8 hours

VI. Regulatory Flexibility Act Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act, the FDIC certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities. As noted above in connection with the Paperwork Reduction Act, the FDIC estimates that the incidences in which insured state nonmember banks will be required to file a notice under the rule will be infrequent, and will not require significant time to complete. Furthermore, the proposed rule streamlines requirements for insured state nonmember banks. It simplifies the requirements that apply when insured state nonmember banks conduct certain securities activities through majority-owned corporate subsidiaries. Whenever possible, the rule clarifies the expectations of the FDIC when it requires notices or applications to consent to activities by insured state banks. The proposed rule will make it easier for small insured state banks to locate the rules that apply to their investments.

List of Subjects

12 CFR Part 303

Administrative practice and procedure, Authority delegations (Government agencies), Bank deposit insurance, Banks, banking, Bank merger, Branching, Foreign branches, Golden parachute payments, Insured branches, Interstate branching, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 337

Banks, banking, Reporting and recordkeeping requirements, Savings associations, Securities.

12 CFR Part 362

Administrative practice and procedure, Authority delegations (Government agencies), Bank deposit insurance, Banks, banking, Insured depository institutions, Investments, Reporting and recordkeeping requirements.

For the reasons set forth above and under the authority of 12 U.S.C. 1819(a) (Tenth), the FDIC Board of Directors hereby proposes to amend 12 CFR chapter III as follows:

PART 303—FILING PROCEDURES AND DELEGATIONS OF AUTHORITY

1. The authority citation for part 303 continues to read as follows:

Authority: 12 U.S.C. 378, 1813, 1815, 1816, 1817, 1818, 1819 (Seventh and Tenth), 1820, 1823, 1828, 1831a, 1831e, 1831o, 1831p–1, 1835a, 3104, 3105, 3108, 3207; 15 U.S.C. 1601–1607.

2. In § 303.122, the first sentence of paragraph (a) and the first sentence of paragraph (b) are revised to read as follows:

§ 303.122 Processing.

(a) *Expedited processing.* A notice filed by an insured state bank seeking to commence or continue an activity under § 362.4(b)(3)(i), § 362.4(b)(5), § 362.8(a)(2), or § 362.8(b) of this chapter will be acknowledged in writing by the FDIC and will receive expedited processing, unless the applicant is notified in writing to the contrary and provided a basis for that decision. * * *

(b) *Standard processing for applications and notices that have been removed from expedited processing.* For an application filed by an insured state bank seeking to commence or continue an activity under § 362.3(a)(iii)(A), § 362.3(b)(2)(i), § 362.3(b)(2)(ii)(C), § 362.4(b)(1), § 362.4(b)(2), § 362.4(b)(4), § 362.5(b)(2), § 362.8(a)(2), or § 362.8(c) of this chapter or for notices which are not processed pursuant to the expedited

processing procedures, the FDIC will provide the insured state bank with written notification of the final action as soon as the decision is rendered. * * *

PART 337—UNSAFE AND UNSOUND BANKING PRACTICES

4. The authority citation for part 337 continues to read as follows:

Authority: 12 U.S.C. 375a(4), 375b, 1816, 1818(a), 1818(b), 1819, 1820(d)(10), 1821(f), 1828(j)(2), 1831f, 1831f–1.

§ 337.4 [Removed and Reserved]

5. § 337.4 is removed and reserved.

PART 362—ACTIVITIES OF INSURED STATE BANKS AND INSURED SAVINGS ASSOCIATIONS

6. The authority citation for part 362 continues to read as follows:

Authority: 12 U.S.C. 1816, 1818, 1819(a) (Tenth), 1828(m), 1831a, 1831e.

Subpart B—Safety and Soundness Rules Governing Insured State Nonmember Banks

7. In § 362.6, remove the third sentence and add two sentences in its place to read as follows:

§ 362.6 Purpose and scope.

* * * The following standards shall apply for insured state nonmember banks to conduct either real estate investment or to engage in the public sale, distribution or underwriting of stocks, bonds, debentures, notes or other securities through a subsidiary if those activities are permissible for a national bank subsidiary but are not permissible for the national bank itself. The FDIC also requires that notices be filed before insured state nonmember banks conduct any other activities through a subsidiary if those activities are permissible for a national bank subsidiary but are not permissible for a national bank. * * *

8. In § 362.8, revise paragraph (a), redesignate paragraph (b) as paragraph (c) and add new paragraph (b) to read as follows:

§ 362.8 Restrictions on activities of insured state nonmember banks.

(a) *Real estate investment or engaging in the public sale, distribution or underwriting of stocks, bonds, debentures, notes or other securities through a subsidiary if those activities are permissible for a national bank subsidiary but are not permissible for the national bank itself.* The FDIC Board of Directors has found that, depending on the facts and circumstances presented by a particular case, real estate investment or engaging in the public sale, distribution or underwriting of stocks, bonds, debentures, notes or other securities activities may have adverse effects on the safety and soundness of an insured state nonmember bank. Therefore, an insured state nonmember bank may not establish or acquire a subsidiary that engages in such real estate investment or in the public sale, distribution or underwriting of stocks, bonds, debentures, notes or other securities activities unless the insured state nonmember bank:

(1) Has an approval previously granted by the FDIC and continues to meet the conditions and restrictions of the approval; or

(2) Meets the requirements for engaging in real estate investment or securities underwriting activities (as relevant) as set forth in § 362.4(b)(5), and submits a corresponding notice under § 303.121 and § 303.122(a) of this chapter to which no objection is taken by FDIC, or applies for and obtains the FDIC's consent in accordance with the procedures of § 303.121 and § 303.122(b) of this chapter.

(b) *Other activities permissible for subsidiaries of a national bank that are not permissible for a national bank.* The FDIC Board of Directors has found that depending on the facts and circumstances of a particular case, the conduct of an activity in a subsidiary of an insured state nonmember bank that is not permissible for a national bank may have adverse effects on the safety and soundness of the insured state nonmember bank. The FDIC Board of Directors has found that the FDIC cannot make a determination whether there are adverse effects on the safety and soundness of an insured state nonmember bank engaging through a subsidiary in an activity not permissible for a national bank but permissible for a subsidiary of a national bank, unless the FDIC has had an opportunity for prior review of the activities. Therefore, an insured state nonmember bank may not establish or acquire a subsidiary that engages in such an activity unless the insured state nonmember bank obtains the FDIC's consent. Consent will be given only if the FDIC determines the activity poses no adverse effects on the safety and soundness of the insured state nonmember bank. Notices should be filed in compliance with §§ 303.121 and 303.122(a) of this chapter. Approvals granted under § 303.122(a) of this chapter may be made subject to any conditions or restrictions found by the FDIC to be necessary to protect the deposit insurance funds from risk, prevent unsafe or unsound banking practices, and/or ensure that the activity is consistent with the purposes of federal deposit insurance and other applicable law. If the FDIC previously granted an approval to the insured state nonmember bank to engage in the activity, the bank need not file another notice under this section.

* * * * *

By order of the Board of Directors.

Dated at Washington, DC, this 5th day of November 1998.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 98–31151 Filed 11–30–98; 8:45 am]

BILLING CODE 6714–01–P

federal register

Tuesday
December 1, 1998

Part IV

Department of the Treasury

Office of Thrift Management

12 CFR Part 563

Financial Management Policies: Financial Derivatives; Final Rule and Thrift Bulletin 13a; Notice

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 563

[No. 98–116]

RIN 1550–AB13

Financial Management Policies; Financial Derivatives

ACTION: Final rule.

SUMMARY: The Office of Thrift Supervision (OTS) is issuing a final rule on financial derivatives. The final rule permits savings associations to engage in transactions involving financial derivatives to the extent that these transactions are authorized under applicable law and are otherwise safe and sound. In addition, the final rule describes the responsibilities of a savings association's board of directors and management with respect to financial derivatives. Elsewhere in today's **Federal Register**, OTS is publishing a Thrift Bulletin that provides supplemental supervisory guidance on the use of financial derivatives.

EFFECTIVE DATE: This final rule is effective January 1, 1999. OTS will not object if an institution wishes to apply this final rule beginning December 1, 1998.

FOR FURTHER INFORMATION CONTACT: Anthony G. Cornyn, Director of Risk Management, (202/906–5727), Ed Irmler, Senior Project Manager, (202/906–5730), Jonathan D. Jones, Senior Economist (202/906–5729), Risk Management; or Vern McKinley, Senior Attorney (202/906–6241), Regulations and Legislation Division, Office of the Chief Counsel, Office of Thrift Supervision, 1700 G Street, N.W., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. Background

OTS's current regulations on financial derivatives were first adopted over fifteen years ago.[1] These regulations have remained virtually unchanged, notwithstanding the development of new financial derivative instruments. On April 23, 1998, OTS proposed a comprehensive revision of these outmoded regulations.[2]

One of the goals of the proposed rule was to address the broad range of financial derivative transactions in which thrifts may currently engage. The current regulations address three types of financial derivatives: forward commitments, futures transactions and financial options transactions. *See* 12 CFR 563.173, 563.174 and 563.175. The current rules, thus, do not address all of the derivative instruments that have been developed over the past twenty years. Significantly, these rules do not address interest rate swaps, a derivative instrument that thrifts commonly use to address interest rate risk.

The overriding goal of the proposed rule, however, was to ensure the safe and sound management of the risks associated with financial derivatives. Accordingly, the proposed regulation emphasized that derivatives activities must be conducted in a safe and sound manner, and set forth the responsibilities of the board of directors and management with respect to financial derivatives.

The proposed rule was also intended to reduce regulatory burden consistent with statutory requirements for safe and sound operations. Accordingly, OTS proposed to delete regulatory requirements that were no longer considered to be essential for safety and soundness, redrafted other requirements as guidance, and revised the remaining existing requirements as broader and more flexible regulatory requirements for all types of financial derivative transactions. OTS's proposed approach, which relied more on guidance than detailed regulations, more closely resembled the bank regulatory agencies' approach with regard to banks' use of financial derivatives.[3]

At the same time it issued the proposed rule, OTS proposed comprehensive guidance regarding savings associations' risk management practices, including those pertaining to derivatives transactions.[4] Proposed Thrift Bulletin 13a (TB 13a) (''Management of Interest Rate Risk, Investment Securities, and Derivatives Activities'') included specific guidance on how thrifts should implement the Federal Financial Institutions Examination Council's ''Supervisory Policy Statement on Investment Securities and End-User Derivatives Activities'' (FFIEC policy statement).[5]

II. Summary of Public Comments

The public comment period on the proposed rule and the proposed thrift bulletin closed on June 22, 1998. One commenter, a savings association, filed a comment supporting the proposed rule.

The OTS received twenty-seven comments on proposed TB 13a. The substance of these comments is addressed in connection with the related TB 13a. Some of the commenters also addressed issues related to the proposed rule.

Several commenters suggested that the proposed thrift bulletin and the proposed regulation on financial derivatives should be finalized simultaneously. The OTS believes that TB 13a provides important and necessary guidance on the management of interest rate risk, investment securities and derivatives activities. Accordingly, it has made this guidance effective on the date of publication in the **Federal Register**. Subject to certain exceptions, however, 12 U.S.C. 4802(b) provides that new regulations and amendments to regulations prescribed by a Federal banking agency which impose additional reporting, disclosures, or other new requirements on an insured depository institution shall take effect on the first day of a calendar quarter which begins on or after the date on which the regulations are published in final form. Section 4802(b) also permits persons who are subject to such regulations to comply with the regulation before its effective date. Accordingly, OTS will not object if an institution wishes to apply the provisions of this final rule beginning with the date it is published in the **Federal Register**.

One commenter, a law firm representing numerous savings associations, noted that the proposed rule text would incorporate TB 13a in several places. Proposed § 563.172(c)(2), for example, states that the savings association's board of directors should review TB 13a and other applicable agency guidance on establishing a sound risk management program. Similarly, proposed § 563.172(d)(2) states that management should review the thrift bulletin and other applicable agency guidance on implementing a sound risk management program. The commenter also noted that OTS sought public comment on TB 13a, a procedural step that it does not generally follow for thrift bulletins. The commenter asked OTS to clarify whether the cross-references in the rule text and the procedures followed in promulgating the thrift bulletin were intended to change the legal status of guidance in the bulletin.

The inclusion of cross-references to TB 13a and other agency guidance in

[1] 44 FR 29870 (May 23, 1979) (Forward commitments); 46 FR 36832 (July 16, 1981) (Futures transactions); 47 FR 36625 (August 23, 1982) (Financial options).

[2] 63 FR 20252 (April 23, 1998).

[3] *See e.g.*, OCC Banking Circular 277 (October 27, 1993).

[4] 63 FR 20257 (April 23, 1998).

[5] 63 FR 20191 (April 23, 1998). The FFIEC policy statement provides general guidance on sound practices for managing the risks of investment securities and derivatives activities.

the rule text merely serves as a reference point to the board of directors and management in establishing and implementing written policy and procedures on financial derivatives. As such, the cross-references to TB 13a only provide guidance on how financial derivatives activities may be conducted in a safe and sound manner.[6] They do not alter the legal status of the guidance contained in the bulletin. Similarly, publication of TB 13a for public comment does not change its legal status as a thrift bulletin. Rather, the bulletin represents the Agency's best judgment in interpreting regulations and statutes which it administers. The administrative procedures used specifically to develop TB 13a were intended to provide OTS with public comment on all possible aspects of the management of interest rate risk, investment securities and derivative activities.

One commenter on the Thrift Bulletin urged the OTS to amend its capital regulations to eliminate the interest rate risk component at 12 CFR 567.7. The agency believes that a review of § 567.7 may have merit. However, neither the proposed Thrift Bulletin nor the notice of proposed rulemaking suggested that the OTS was considering any revision to its capital rules.

In order to get the full benefit of public comment on this issue, the OTS will shortly initiate a rulemaking that will examine the need to retain § 567.7 in light of the tools that are currently available to measure and control interest rate risk.

III. Final Rule

Since no commenter suggested substantive changes to the proposed rule and OTS has identified no other reasons to modify the text, OTS has adopted the proposed rule without substantive change. Elsewhere in today's **Federal Register**, OTS is also publishing a final TB 13a, which provides supplemental supervisory guidance on the use of financial derivatives.

IV. Executive Order 12866

OTS has determined that this final rule does not constitute a ''significant regulatory action'' for the purposes of Executive Order 12866.

V. Regulatory Flexibility Act Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act, OTS has determined that this final rule does not have a significant economic impact on a substantial number of small entities. The final rule reduces the burden of complying with detailed regulations and allows for more flexible treatment of derivatives activities for all institutions, including small institutions.

VI. Paperwork Reduction Act

The recordkeeping requirements contained in this final rule have been submitted to and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under OMB Control No. 1550–0094. Comments on all aspects of this information collection should be sent to Office of Management and Budget, Paperwork Reduction Project (1550), Washington, D.C. 20503 with copies to the Office of Thrift Supervision, Regulations and Legislation Division, Chief Counsel's Office, 1700 G Street, NW., Washington, D.C. 20552.

The information collection requirements contained in this rule are found in 12 CFR 563.172. OTS requires this information for the proper supervision of interest rate risk for its regulated savings associations. The likely respondents/recordkeepers are OTS-regulated savings associations.

Respondents/recordkeepers are not required to respond to the collections of information unless the collection displaces a current valid OMB control number.

VII. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104–4 (Unfunded Mandates Act) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. As discussed above, this final rule reduces regulatory burden by eliminating unnecessarily restrictive regulations. OTS has, therefore, determined that the effect of the final rule will not result in expenditures by State, local, or tribal governments or by the private sector of $100 million or more. Accordingly, OTS has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

List of Subjects in 12 CFR Part 563

Accounting, Advertising, Crime, Currency, Investments, Reporting and recordkeeping requirements, Savings associations, Securities, Surety bonds.

Accordingly, the Office of Thrift Supervision amends part 563, chapter V, title 12, Code of Federal Regulations as set forth below:

PART 563—OPERATIONS

1. The authority citation for part 563 continues to read as follows:

Authority: 12 U.S.C. 375b, 1462, 1462a, 1463, 1464, 1467a, 1468, 1817, 1820, 1828, 3806, 42 U.S.C. 4106.

§§ 563.173, 563.174, 563.175 [Removed]

2. Sections 563.173, 563.174, and 563.175 are removed.

3. Section 563.172 is added to read as follows:

§ 563.172 Financial derivatives.

(a) *What is a financial derivative?* A financial derivative is a financial contract whose value depends on the value of one or more underlying assets, indices, or reference rates. The most common types of financial derivatives are futures, forward commitments, options, and swaps. A mortgage derivative security, such as a collateralized mortgage obligation or a real estate mortgage investment conduit, is not a financial derivative under this section.

(b) *May I engage in transactions involving financial derivatives?* (1) If you are a federal savings association, you may engage in a transaction involving a financial derivative if you are authorized to invest in the assets underlying the financial derivative, the transaction is safe and sound, and you otherwise meet the requirements in this section.

(2) If you are a state-chartered savings association, you may engage in a transaction involving a financial derivative if your charter or applicable state law authorizes you to engage in such transactions, the transaction is safe and sound, and you otherwise meet the requirements in this section.

(3) In general, if you engage in a transaction involving a financial derivative, you should do so to reduce your risk exposure.

(c) *What are my board of directors' responsibilities with respect to financial derivatives?* (1) Your board of directors is responsible for effective oversight of financial derivatives activities.

(2) Before you may engage in any transaction involving a financial derivative, your board of directors must establish written policies and

[6] OTS has incorporated other similar cross-references into its regulations. *See* 12 CFR 562.2(b) which cross-references guidance in OTS bulletins, and examination handbooks.

procedures governing authorized financial derivatives. Your board of directors should review Thrift Bulletin 13a, ''Management of Interest Rate Risk, Investment Securities, and Derivatives Activities,'' and other applicable agency guidance on establishing a sound risk management program.

(3) Your board of directors must periodically review:

(i) Compliance with the policies and procedures established under paragraph (c)(2) of this section; and

(ii) The adequacy of these policies and procedures to ensure that they continue to be appropriate to the nature and scope of your operations and existing market conditions.

(4) Your board of directors must ensure that management establishes an adequate system of internal controls for transactions involving financial derivatives.

(d) *What are management's responsibilities with respect to financial derivatives?* (1) Management is responsible for daily oversight and management of financial derivatives activities. Management must implement the policies and procedures established by the board of directors and must establish a system of internal controls. This system of internal controls should, at a minimum, provide for periodic reporting to the board of directors and management, segregation of duties, and internal review procedures.

(2) Management must ensure that financial derivatives activities are conducted in a safe and sound manner and should review Thrift Bulletin 13a, ''Management of Interest Rate Risk, Investment Securities, and Derivatives Activities'' (available at the address listed at § 516.1 of this chapter), and other applicable agency guidance on implementing a sound risk management program.

(e) *What records must I keep on financial derivative transactions?* You must maintain records adequate to demonstrate compliance with this section and with your board of directors' policies and procedures on financial derivatives.

Dated: November 20, 1998.

By the Office of Thrift Supervision.

Ellen Seidman,

Director.

[FR Doc. 98–31673 Filed 11–30–98; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

[No. 98–117]

Financial Management Policies

AGENCY: Office of Thrift Supervision.

ACTION: Notice of final thrift bulletin.

SUMMARY: The Office of Thrift Supervision (OTS) is adopting Thrift Bulletin 13a, which provides guidance on the management of interest rate risk, investment securities, and derivatives activities. The Bulletin also describes the guidelines OTS examiners will use in assigning the ''Sensitivity to Market Risk'' component rating under the Uniform Financial Institutions Rating System.

EFFECTIVE DATE: December 1, 1998.

FOR FURTHER INFORMATION CONTACT: Ed Irmler, Senior Project Manager, (202) 906–5730 or Anthony G. Cornyn, Director, Risk Management Division, (202) 906–5727, Office of Thrift Supervision.

SUPPLEMENTARY INFORMATION: The Office of Thrift Supervision is today adopting the attached document, Thrift Bulletin 13a (TB 13a), Management of Interest Rate Risk, Investment Securities, and Derivatives Activities. This Bulletin provides guidance on a wide range of topics in the area of interest rate risk management, including several on which the Federal Financial Institutions Examination Council (FFIEC) has issued related guidance. OTS believes that adoption of this Bulletin will simultaneously improve its supervision of interest rate risk management and reduce regulatory burden on thrift institutions.

The Bulletin updates OTS's minimum standards for thrift institutions' interest rate risk management practices with regard to board-approved risk limits and interest rate risk measurement systems. The guidance in this Bulletin, thus, replaces Thrift Bulletin 13 (Responsibilities of the Board of Directors and Management with Regard to Interest Rate Risk), Thrift Bulletin 13–1 (Implementation of Thrift Bulletin 13), and Thrift Bulletin 13–2 (Implementation of Thrift Bulletin 13). The Bulletin makes several significant changes. First, under TB 13a, institutions no longer set board-approved limits or provide measurements for the plus and minus 400 basis point interest rate scenarios prescribed by the original TB 13. The Bulletin also changes the form in which those limits should be expressed. Second, the Bulletin provides guidance on how OTS will assess the prudence of an institution's risk limits. Third, the Bulletin raises the size threshold above which institutions should calculate their own estimates of the interest rate sensitivity of Net Portfolio Value (NPV) from $500 million to $1 billion in assets. Fourth, the Bulletin specifies a set of desirable features that an institution's risk measurement methodology should utilize. Finally, the Bulletin provides an extensive discussion of ''sound practices'' for interest rate risk management.

TB 13a also contains guidance on thrifts' investment and derivatives activities. As described in the FFIEC's Supervisory Statement on Investment Securities and End-User Derivative Activities, (FFIEC Policy Statement), [1] the FFIEC-member agencies have discontinued use of the three-part test for suitability of investment securities. Accordingly, the Bulletin describes the types of analysis institutions should perform prior to purchasing securities or financial derivatives. The Bulletin also provides guidelines on the use of certain types of securities and financial derivatives for purposes other than reducing portfolio risk. The final regulation on financial derivatives, published elsewhere in this issue of the **Federal Register**, as supplemented by the guidance in this final TB 13a, replaces existing regulations governing futures (12 CFR 563.173), forward commitments (12 CFR 563.174), and options (12 CFR 563.175). TB 13a also replaces guidance contained in Thrift Bulletin 52 (Supervisory Statement of Policy on Securities Activities), Thrift Bulletin 52–1 (''Mismatched'' Floating Rate CMOs), and Thrift Bulletin 65 (Structured Notes).

Finally, TB 13a provides detailed guidelines for implementing part of the Notice announcing the revision of the Uniform Financial Institutions Rating System (i.e., the CAMELS rating system), published by the FFIEC. [2] That publication announced revised interagency policies, that among other things, established the Sensitivity to Market Risk component rating (the ''S'' rating). TB 13a provides quantitative guidelines for an initial assessment of an institution's level of interest rate risk. Examiners have broad discretion in implementing those guidelines. It also provides guidelines concerning the factors examiners consider in assessing the quality of an institution's risk management systems and procedures. Guidance on the topic of assigning the ''S'' rating is largely new, though TB 13a replaces the rather limited guidelines contained in New Directions Bulletin 95–10.

[1] 63 FR 20191 (April 23, 1998).

[2] 61 FR 67021 (December 19, 1996).

Differences Between Proposed and Final Versions of TB 13a

On April 23, 1998, OTS published a proposed TB 13a. [3] The content of the final TB 13a is, in most respects, the same as the proposed TB 13a. Two significant changes were made, however, in response to comment letters.

1. Guidelines for Assessing the Level of Risk

The guidelines examiners will use to initially assess the level of interest rate risk at an institution, for purposes of assigning the Sensitivity to Market Risk (''S'') component rating were contained in a matrix shown as Table 1 in the proposed TB. Based on comments received and on further analysis, OTS has decided to revise those guidelines. The revised guidelines are contained in Part IV.A.3 of TB 13a. A comparison of the ratings that are likely to result from the final guidelines with those from the proposed guidelines is contained in Part 1.d of the discussion of comments, below.

2. Transactions in Financial Derivatives or Complex Securities that Do Not Reduce Risk

Part III.A.3 of the proposed TB stated that the use of financial derivatives or complex securities with high price sensitivity should generally be limited to transactions that lower an institution's interest rate risk. An institution using such instruments for purposes other than reducing portfolio risk should do so in accordance with safe and sound practices and:

(a) Obtain written authorization from its board of directors to use such instruments for a purpose other than to reduce risk; and

(b) Ensure that, after the proposed transaction(s), the institution's Post-shock NPV Ratio would not be less than 6 percent.

As a result of comments received, OTS has decided to reduce the 6 percent threshold in condition (b), above, to 4 percent. The reasons for this change are discussed below in Part 3.g of the discussion of comments.

Summary of Comments

The comment period ended on June 22, 1998. OTS received twenty-seven comments. Commenters included: twenty savings associations, five trade associations, one law firm, and one

[3] 63 FR 20257 (April 23, 1998).

registered investment adviser. Furthermore, OTS met with representatives of several institutions and an industry trade group to discuss the proposed TB. The following summary identifies and discusses the major issues raised in the comment letters and OTS's responses to the issues.

1. General Issues

a. Coordination With Banking Agencies

Several commenters argued that OTS should coordinate the TB with guidance issued by the other banking agencies. A number suggested that OTS should adopt the guidance that the other federal banking agencies have adopted with respect to the management of both interest rate risk and investment and derivatives activities.

As a member of the FFIEC, OTS works closely with the other banking agencies on the coordination of supervisory policies. When appropriate, OTS and the other members of the FFIEC adopt uniform policies.[4] At the same time, the members of the FFIEC recognize that it is not possible to achieve uniformity in all areas of supervision and regulation. OTS's supervisory efforts have, since at least the mid-1980s, placed more emphasis on interest rate risk than have other regulators. This difference in emphasis reflects the nature of the thrift industry's basic business which has historically given thrift institutions a propensity toward maturity mismatching. OTS has utilized the economic value concept (as described in the proposed TB) to measure interest rate risk since the adoption of the original TB 13 in 1989. The guidelines described in the proposed TB do not represent so much a new initiative to be coordinated with the other agencies, as an attempt to update and improve consistency across OTS-regulated institutions in the application of OTS's existing approach to assessing interest rate risk.

The proposed guidelines for investment securities and financial derivatives are more detailed than those published in the FFIEC Policy Statement, but are completely consistent with that policy statement. OTS believes the added level of detail in its guidelines will be helpful to examiners and will result in greater consistency of application. OTS also believes the level of detail will be helpful to institutions, not because OTS has a desire to ''micromanage'' those institutions, but because OTS wants to reduce needless uncertainty about how to interpret the guidance and how examiners will apply it.

b. Competitive Equity

A number of commenters argued that thrifts would be harmed competitively because other financial institutions do not have comparable guidelines, with respect to either the acquisition of securities and derivatives or the ''S'' rating. This is not a valid criticism. The purpose of TB 13a is two-fold: (1) to provide guidance to thrift institutions on the management of interest rate risk, including investment and derivative activities, and (2) to describe the framework that OTS examiners will use in assigning the ''S'' rating component. Both the proposed guidelines on the management of interest rate risk and the framework for assigning ''S'' ratings are consistent with guidelines issued by the other federal banking agencies. The only significant constraint in the guidelines is on the ability of a small fraction of the thrift industry to acquire financial derivatives and some volatile securities for purposes other than reducing market risk. This aspect of the guidelines is appropriate, as the limitation applies only to those institutions least able to bear additional risk.

Comparing the fairness of ''S'' ratings at OTS-regulated institutions with those at other institutions is not a straightforward exercise because of the typically higher levels of interest rate risk that one might expect at thrifts. As stated earlier, the proposed guidelines for the ''S'' rating do not so much reflect a new approach in the way OTS assesses interest rate risk but rather provide quantitative guidance to examiners in applying the current assessment process. Thrifts have competed successfully under that process for a number of years. Moreover, it is highly unlikely that the guidelines would result in harsher ''S'' ratings than OTS examiners have assigned historically. Available evidence (see section 1.d below) indicates that the opposite might occur.

c. De Facto Capital Requirement

A number of commenters asserted that the proposed guidelines for assigning the ''S'' rating would create a *de facto* higher capital requirement. This criticism is not valid for several reasons. First, the proposed TB reflects the concept that institutions with higher levels of capital should have greater freedom to engage in risk-taking. Thus, for a given amount of interest rate risk—as indicated by the Sensitivity Measure—institutions with higher Post-shock NPV Ratios receive better ''S'' components ratings under the guidelines (see Glossary in TB 13a for definitions of these terms). The fact that examiners also assign a capital adequacy (i.e., ''C'') component rating to the institution under the CAMELS rating system does not undermine the validity of this approach for gauging the level of risk. If capital appears to be ''double counted'' with this approach to assigning the S rating, it is only because capital adequacy—the ability to absorb unexpected losses—is central to evaluating an institution's safety and soundness.

Second, the CAMELS rating system explicitly calls for consideration of an institution's capital position in assessing the ''S'' component rating. For example, the description of the 2 rating says in part : ''The level of earnings and capital provide adequate support for the degree of market risk taken by the institution [emphasis added].''[5] Moreover, other risk assessments under the CAMELS rating system also consider capitalization. For example, the rating level of 1 of the asset quality (''A'') component rating is described in the interagency document as: ''A rating of 1 indicates strong asset quality and credit administration practices. Identified weaknesses are minor in nature and risk exposure is modest in relation to capital protection and management's abilities . . . [emphasis added].''[6]

Third, unlike a regulatory minimum capital requirement, the guidelines do not establish a minimum level of capital. There are only two ways in which an institution can achieve compliance with a regulatory minimum capital requirement—raise additional capital or shrink the asset base. Under the guidelines, however, institutions have the third option of reducing the level of interest rate risk in their portfolio. Even institutions with very low Post-shock NPV Ratios can receive ratings of 1 or 2 if their level of interest rate risk is also very low.

Finally, even if one subscribes to the view that the guidelines are a form of capital requirement, it is doubtful that the guidelines would require generally higher capital requirements for the industry because overall CAMELS ratings are unlikely to change, as will be discussed in section 1.d, below.

Several commenters argued that the guidelines would create incentives to take additional credit risk. Some institutions that anticipate receiving a lower ''S'' rating under the proposed guidelines might choose to reduce

[4] See Section 303 of the Riegle Community Development and Regulatory Improvement Act of 1994. Pub.L. 103–325 (September 25, 1994).

[5] 61 FR at 67029.

[6] 61 FR at 67027.

interest rate risk, while simultaneously increasing credit risk to maintain profitability levels. Determining the tradeoff between these two types of risk is not new, however, it is a normal part of the business of running a depository institution. The institution must decide for itself what it will do, subject to safety and soundness considerations.

Several commenters claimed that the guidelines would disadvantage ''traditional'' portfolio lenders that concentrate on making fixed-rate mortgage loans. Some institutions that concentrate on fixed-rate mortgages are highly interest rate sensitive and are, therefore, more prone to receiving a poor ''S'' rating. Nonetheless, many such institutions would fare quite well under the proposed guidelines because they maintain relatively high levels of economic capital (NPV), mitigating the high sensitivity. Other alternatives available to such an institution are to reduce the extent of the maturity mismatch by adjusting their product mix or to engage in hedging activities.

Another commenter suggested that OTS should not revise TV 13 at this time because interest rates have been relatively stable. The present time offers an ideal opportunity to adopt the proposed changes. Establishing sound regulatory policies is most difficult during times of stress or when the industry is unhealthy, because even good policies may exacerbate problems in some segments of the industry. Today's industry is stronger than it has been in years, interest rates have been generally falling, earnings have been solid, the industry is well-capitalized, and the number of problem institutions is very low. This is an ideal environment in which to revise sound interest rate risk guidelines.

d. Anticipated Impact of Guidelines

Table 1, in Part IV.A.3 of the proposed TB, was a matrix containing the guidelines OTS proposed to use in initially assessing the Level of Interest Rate Risk in determining the ''S'' component rating. Many commenters were concerned that those proposed guidelines would adversely affect the ''S'' component ratings of the industry. Several commenters urged OTS to review empirical evidence on how institutions would be affected by the guidelines before adopting the proposal. OTS did analyze how institutions might be rated under the proposed guidelines. A summary of this analysis is shown in the table below.

BILLING CODE 6720–01–P

Comparison of Actual Component Ratings
with Proposed Rating Guidelines and Final Rating Guidelines

	1	2	3	4
Actual S Ratings	32%	57%	10%	1%
Using Proposed Rating Guidelines[1]:				
o Alone	63	23	14	1
o With "M" Rating as Proxy for Qualitative Assessment	25	52	20	3
Using Final Rating Guidelines[2]:				
o Alone	73	20	6	1
o With "M" Rating as Proxy for Qualitative Assessment	28	55	14	3

[1] The "Proposed Rating Guidelines" ratings matrix had four rows in which the Post-shock NPV Ratio had the following ranges: Under 4%, 4% to 8%, 8% to 12%, and Over 12%. The matrix had four columns in which the Interest Rate Sensitivity Measure had the following ranges: 0 to 100 b.p., 100 to 200 b.p., 200 to 400 b.p., and Over 400 b.p.

[2] The "Final Rating Guidelines" matrix has four rows in which the Post-shock NPV Ratio has been changed to the following ranges: Under 4%, 4% to 6%, 6% to 10%, and Over 10%. The four columns of the matrix are unchanged from the Proposed Guidelines.

BILLING CODE 6720–01–C

The first row of the table shows the distribution of the actual ''S'' component ratings assigned during the most recent examination cycle. About one-third of all institutions received an ''S'' rating of 1 at their most recent examination. More than half received a rating of 2.

The second row shows what the distribution would have been if those same component ratings had been determined by applying the Proposed Rating Guidelines in a totally mechanical way (i.e., with no consideration for the quality of risk management practices, using the NPV data available at the time of each institution's examination). Although the proportion of institutions with ''S'' ratings of 3 increased (from 10% of all institutions to 14%), the ratings of many more institutions improved than worsened under this simple analysis. These results, however, omit the effect of the examiner's assessment of the institution's risk management practices.

Table 2, in Part III.C of the proposed TB, described how various combinations of Level of Interest Rate Risk and Quality of Risk Management Practices would likely translate into different ratings for the ''S'' component. The third row of the table here shows the ratings distribution that would have occurred had the guidelines in Tables 1 and 2 of the proposed TB both been applied mechanically—and had examiners assessed each institution's Quality of Risk Management Practices to be of identical quality as the actual Management (''M'') component rating assigned the institution. The ratings in this row are significantly harsher than those in the previous row. In fact, they overstate considerably the amount by which the ratings would worsen from the previous row. An institution's ''M'' rating is often downgraded for reasons other than concerns about its interest rate risk management practices (e.g., asset quality problems, credit underwriting deficiencies, etc.). Consequently, the ratings that result from using the ''M'' component rating as a proxy for an examiner's qualitative assessment of an institution's risk management practices will be overly severe. If the guidelines in Tables 1 and 2 of the proposed TB had actually been applied, the proportions of the industry receiving each ''S'' rating would probably have fallen between the proportions shown in the second and third rows of the table. While broadly similar to the ''S'' ratings actually assigned, it is likely they would have resulted in somewhat greater numbers of 3 and 4 ratings than were actually assigned.

After considering the comments and the updated analysis, OTS has decided to adopt a less stringent set of guidelines for assessing the level of risk (see Table 1 in the final TB). The remaining two rows of the table above show how these ''Final Rating Guidelines'' compare with the actual ''S'' ratings and with the ''Proposed Rating Guidelines.'' The reasons for this change are as follows.

The current ''S'' ratings reflect the evaluation of experienced OTS examiners. OTS believes that, in the aggregate, its examiners' conclusions appropriately characterize the current distribution of risk and risk management practices in the thrift industry. The purpose of the guidelines is to provide examiners with a common starting point for assessing an individual institution's sensitivity to interest rate risk. This, in turn, should help produce more consistent ratings. While individual institutions' ratings may change as examiners use their discretion in applying these guidelines, OTS believes the overall distribution of ratings will likely remain the same.

Consequently, the choice between the two sets of rating guidelines was based on two factors. First, during the last examination cycle, the Final Rating Guidelines would have produced more 1 ratings than the Proposed Rating Guidelines, but would have produced fewer 3 ratings. A high proportion of 1 ratings might raise ratings expectations of some institutions that may be unfounded because of examiner concerns with risk management practices, but this disparity is not a major flaw in the guidelines. Whether the ''S'' component rating turns out to be a 1 or 2 rarely has a significant effect on the outcome of the overall examination.

The second factor, the difference in the 3 ratings assigned under the two sets of rating guidelines, has a greater potential to substantively affect an institution because it heightens the possibility that a composite rating of 3 or worse may be assigned. Absent any consideration of the institution's risk management practices, the Proposed Rating Guidelines would have resulted in about 15% of OTS thrifts receiving ratings of 3 or worse. In fact, only about 11% of thrifts received ratings of 3 or worse. This suggests that the Proposed Rating Guidelines might be too harsh, particularly when qualitative assessments are factored in. The Final Rating Guidelines would, by themselves, have assigned ratings of 3 or worse to only about 7% of institutions. With the effects of the qualitative assessments factored in, that proportion might well have increased, but it likely would have been closer to the proportion of 3s and 4s actually assigned (11%) than would have been the case under the Proposed Rating Guidelines. On that basis, the Final Rating Guidelines are preferable.

2. Legal Status of TB 13a and Interest Rate Risk Capital Component Regulation

OTS received comments regarding the legal status of Thrift Bulletin 13a and the future of the interest rate risk component of the risk based capital requirement. OTS has addressed these issues in its final rule on financial derivatives, published elsewhere in today's issue of the **Federal Register**.

3. Comments Pertaining to Specific Parts of Proposed TB 13a

a. Limits on Change in NPV

One commenter criticized the two exhibits in Part II.A.1 of the proposed TB. These exhibits illustrated the interest rate risk limits a board of directors might establish. The commenter argued that the exhibits were unrealistically conservative and should be revised to portray a more typical institution. OTS has decided the exhibits and much of the accompanying discussion are unnecessary. The final Bulletin replaces the two exhibits with a simple discussion of how a board might choose to specify its limits.

b. Prudence of IRR Limits

As described in Part II.A.3 of the proposed TB, an institution's interest rate risk limits generally will not be considered prudent if the limits permit NPV ratios that would ordinarily be considered to be of ''Significant Risk'' or to warrant an ''S'' rating of 3 or worse. Several commenters objected that this approach is too restrictive of the board's choices.

OTS has decided to retain this approach for several reasons. First, it is no more restrictive than the guidelines contained in Table 1 for assessing the level of interest rate risk (discussed above). Moreover, this approach is a reasonable basis for assessing board limits and is consistent with the measurement approach used throughout the TB. If the board permits a level of risk that would ordinarily be considered ''Significant'' based on OTS's rating guidelines, it would be inconsistent for OTS to consider those limits to be sufficiently conservative. The final TB, however, emphasizes that this evaluation is not a simple pass-or-fail judgment, and, moreover, that it is just one factor in the examiner's qualitative assessment.

c. Revision of IRR Limits

Another commenter criticized the discussion in Part II.A.4 of the proposed TB regarding revisions to a board's interest rate risk limits. The commenter argued that this discussion imposed unnecessary ''micromanagement'' on the industry. This section addresses the practice of revising board limits to accommodate existing violations of previously set limits. This practice is generally inappropriate, has occurred too frequently at some institutions, and may be indicative of deficiencies in board oversight. Explicit discussion of such practices should reduce their incidence.

d. Interest Rate Sensitivity of NPV for Institutions Above $1 Billion in Assets

Under Part II.B.2 of the proposed TB, institutions with more than $1 billion in assets would be expected to determine their own NPV measures. Several commenters recommended that OTS, like the FFIEC, accept any reasonable model for measuring risk, not just NPV models. For internal management purposes, institutions are free to use whatever risk measurement systems they find most useful. However, from a regulatory perspective, NPV measurements provide a valuable characterization of an institution's interest rate risk. NPV provides a consistent measure that considers all future cash flows expected to result from all on- and off-balance sheet financial instruments, while also considering embedded options. NPV, thus, provides the agency with a yardstick against which risk at any thrift may be measured and compared with that of other institutions. For that reason, OTS collects financial data that permits it to calculate NPV for all institutions over $300 million, and many under that size. These NPV estimates are, however, necessarily based on generic assumptions regarding such factors as prepayment rates and deposit decay rates. Because of the importance of ensuring the safety and soundness of large institutions, OTS believes large institutions should have the means of improving these regulatory measures and be able to accurately measure NPV internally, taking into account the institution's individual characteristics.

Rather than expecting institutions to calculate NPV even if they do not use it as a management tool, one commenter recommended that OTS should simply provide such institutions with the OTS NPV results. However, large institutions have already incurred the cost of establishing an NPV measurement system based on the guidelines in Thrift Bulletin 13, published in January 1989. As there will be some ongoing costs of maintaining that system, OTS did consider exempting some large institutions from internal NPV modeling. OTS agrees with the other FFIEC agencies, however, that large, sophisticated institutions should be capable of measuring the economic value of equity and assessing their interest rate sensitivity. Accordingly, OTS has not changed this guideline.

One commenter argued that institutions with internal models should not have to file Schedule CMR, which provides the financial data used by the OTS Model. OTS believes there is value in collecting such data and calculating the OTS NPV estimates even for institutions that also calculate their own. Any two models will seldom produce exactly the same results because of differences in their calculation methodologies, factual data inputs, or assumptions. Hence, the two sets of results may be used to provide a check on one another. The cost of filing Schedule CMR for an institution that maintains a sophisticated measurement system of its own should be minimal. Further, this process permits the production of peer group comparisons, which provide useful information for OTS and for boards of directors. No change is being made to the CMR filing requirements.

e. Investment Securities and Financial Derivatives

Several commenters stated that the proposed guidelines for investment securities and derivatives in Part III of the proposed TB are not necessary, and that OTS should adopt the FFIEC Policy Statement without modification. In issuing that Statement, OTS and the other agencies recognized that the guidance contained in the FFIEC Policy Statement might not be sufficient for the purposes of each agency. In fact, the FFIEC Policy states that, ''Each agency may issue additional guidance to assist institutions in the implementation of the statement.'' [7] This language provides the member agencies, including OTS, with the ability to issue more detailed guidance on securities and derivatives activities, including guidance on pre-purchase analysis and stress testing.

While the FFIEC Policy Statement provides sound guidance on investment securities and end-user derivatives activities, OTS determined it would be desirable to explain to the industry how it will interpret and implement the FFIEC Policy Statement, particularly in those areas where some additional clarification or specificity is needed. Accordingly, OTS has decided to use TB 13a to implement the FFIEC Policy Statement.

f. Analysis and Stress Testing

Several commenters objected to the guidance in Part III.A of the proposed TB addressing pre-purchase analysis and stress testing of complex securities and financial derivatives. These commenters also stated that such guidance conflicts with, or is more onerous than, the FFIEC Policy Statement. The commenters also asserted that the OTS guidance would place OTS-supervised institutions at a competitive disadvantage vis-a-vis non-OTS-supervised institutions.

The FFIEC Policy Statement states that institutions should conduct a pre-purchase analysis for ''complex instruments, less familiar instruments, and potentially volatile instruments.'' [8] (The FFIEC Policy Statement does not define the terms ''complex instruments,'' ''less familiar instruments,'' or ''potentially volatile instruments.'') The FFIEC Policy Statement states that:

For relatively more complex instruments, less familiar instruments, and potentially volatile instruments, institutions should fully address pre-purchase analyses in their policies. Price sensitivity analysis is an effective way to perform the pre-purchase analysis of individual instruments. For example, a pre-purchase analysis should show the impact of an immediate parallel shift in the yield curve of plus and minus 100, 200, and 300 basis points. Where appropriate, such analysis should encompass a wider range of scenarios, including non-parallel changes in the yield curve. A comprehensive analysis may also take into account other relevant factors, such as changes in interest rate volatility and changes in credit spreads.[9]

Some commenters may have interpreted this statement to mean that a pre-purchase analysis showing the price impact of parallel shifts in the yield curve of plus and minus 100, 200, and 300 basis points is not expected for complex securities and derivatives. OTS, however, disagrees with that interpretation. Management should understand the price sensitivities of investments and derivatives prior to their acquisition. Moreover, the pre-purchase analysis guidance in the proposed TB is consistent with the FFIEC Policy Statement. This guidance

[7] 63 FR 20191.

[8] 63 FR at 20195.

[9] 63 FR at 20195.

is designed to foster sound investment practice and should not disadvantage savings associations vis-a-vis other depository institutions.

Several commenters indicated that the proposed guidelines for analyzing/testing securities and derivatives are too detailed and go beyond the guidance in the FFIEC Policy Statement. OTS has concluded that the detail in the proposed guidelines is appropriate and is consistent with the FFIEC Policy Statement.

One commenter stated that the guidelines for analyzing/testing securities and derivatives should focus only on the plus and minus 200 basis point scenarios. There is considerable benefit to be derived from evaluating potential investment and derivative transactions in the context of several alternative scenarios. The advantage of conducting multiple scenario analysis is that decision-makers will consider environments that they might otherwise ignore. Moreover, as shown in the portion of the FFIEC Policy Statement quoted above, OTS and the other members of the FFIEC agree that the stress testing of securities and derivatives should not be limited to the plus and minus 200 basis point rate scenario.

g. Limitation on Transactions Involving Derivatives and Complex Securities With High Price Sensitivity

A number of commenters criticized Part III.A.3 of the proposed TB on transactions involving derivatives and complex securities with high price sensitivity. Under the proposal, an institution should not engage in a ''risk increasing transaction'' involving derivatives or complex securities with high price sensitivity if the transaction would cause the institution's Post-shock NPV Ratio to fall below 6 percent.

One commenter stated that the 6 percent threshold is not needed because guidelines calling for self-imposed risk limits will serve the purpose of constraining excessive risk taking. Another commenter noted that the 6 percent threshold is problematic because some hedging transactions may reduce risk in some—but not all—interest rate scenarios. One commenter noted that the threshold may discourage transactions where the incremental increase in risk may be insignificant. Another commenter noted that the proposed 6 percent limitation is more onerous that the former FFIEC ''high-risk test,'' which was recently eliminated.

Upon reconsideration, OTS has concluded that the proposed 6 percent threshold may be too restrictive, particularly in light of the other safeguards in the TB. For example, board-approved interest rate risk limits should discourage institutions from engaging in risk-increasing transactions that would cause their institution's Post-shock NPV Ratio to fall to a low level. Moreover, if an institution intends to use derivatives or complex securities with high price sensitivity for purposes other than reducing market risk, it should obtain the prior approval of its board of directors. In addition, the examiner guidance for assigning ''S'' ratings should discourage institutions with relatively low Post-shock NPV Ratios from using such instruments for non-risk-reducing purposes. Accordingly, OTS is lowering the 6 percent threshold to 4 percent in the final Thrift Bulletin 13a. Under the guidelines for the ''S'' rating, institutions with less than a 4 percent Post-shock NPV Ratio will typically receive adverse ratings unless they have very low interest rate sensitivity. In general, the use of financial derivatives or complex securities with high price sensitivity should be limited to transactions that lower an institution's interest rate risk.

h. Significant Transactions

Several commenters objected to guidance, in Part III.A.1 of the proposed TB, that institutions should conduct a pre-purchase portfolio sensitivity analysis for any ''significant transaction'' involving securities or financial derivatives. Under the proposed guidelines, a significant transaction is defined as any transaction that might reasonably be expected to increase an institution's Sensitivity Measure by more than 25 basis points. The definition of a ''significant transaction,'' was intended to provide a wide ''safe harbor'' for savings associations by limiting the number of transactions subject to the incremental portfolio analysis. Very few transactions are likely to be large enough to meet the 25 basis point test.

Several commenters noted that by defining a ''significant transaction'' in quantitative terms, OTS might encourage institutions to circumvent the guidance for pre-purchase analysis by entering into a series of smaller transactions. One commenter noted that the FFIEC Policy Statement is silent on what is a significant transaction and indicated that the definition should be left to management. The FFIEC Policy states, ''When the incremental effect of an investment position is likely to have a significant effect on the risk profile of the institution, it is a sound practice to analyze the effect of such a position on the overall financial condition of the institution.'' [10] Another commenter suggested that the definition of ''significant'' transaction should vary depending on an institution's financial condition and management sophistication.

Although some institutions might enter into smaller transactions to avoid the proposed guidance on incremental portfolio analysis, institutions would have little to gain by doing so. It is clearly in an institution's self-interest to understand how significant transactions might alter its overall interest rate sensitivity. Moreover, while few transactions meet the proposed 25 basis point threshold, the analysis called for by the guidelines should not be a burden to well-run institutions that have adequate risk monitoring systems in place.

The suggestion that the definition of ''significant'' should vary with the financial condition and management sophistication of the institution is reasonable and is consistent with OTS's risk-based approach to supervision. In this instance, however, OTS believes that it is more beneficial to provide certainty by adopting a simple rule of thumb under which incremental portfolio analyses would be expected only relatively infrequently. Accordingly, OTS has decided to retain the 25 basis point threshold for defining a significant transaction.

i. Definition of Complex Securities

Several commenters criticized the proposed definition of a ''complex security'' in Part III.A of the proposed TB. Several commenters also noted that identifying selected types of complex securities for special analysis is inconsistent with the FFIEC Policy Statement, which did not define the term. A few respondents argued that the term should be left undefined, fearing that an explicit definition would discourage thrifts from buying complex securities because such securities might be viewed negatively by examiners.

OTS and the other members of the FFIEC agree that ''complex securities'' require more analysis than non-complex securities. The FFIEC Policy states: ''For relatively more complex instruments, less familiar instruments, and potentially volatile instruments, institutions should fully address pre-purchase analysis in their policies.'' [11] OTS recognizes that the proposed definition of a ''complex security'' is imprecise. Nevertheless, we believe the definition will provide guidance and

[10] 63 FR at 20195.

[11] 63 FR at 20195.

will avoid—or at least reduce—disagreements between examiners and thrift management.

Some commenters thought that the proposed definition of a ''complex security'' was overly broad. Others noted that the proposed definition included securities that few would consider to be truly complex and excluded others—such as mortgage-pass-through-securities—that are actually highly complex. As defined in proposed TB 13a, the term ''complex security'' includes any collateralized mortgage obligation, real estate mortgage conduit, callable mortgage-pass through security, stripped-mortgage-backed-security, structured note, and any security not meeting the definition of an ''exempt security.'' An ''exempt security'' includes: (1) standard mortgage-pass-through securities, (2) non-callable, fixed rate securities, and (3) non-callable floating rate securities whose interest rate is (a) not leveraged (i.e., not based on a multiple of the index), and (b) at least 400 basis points from the lifetime rate cap at the time of purchase.

While OTS recognizes that the proposed definition is imperfect and that certain securities that would be classified as ''complex'' under the proposed definition, such as ''plain vanilla'' CMO tranches, are viewed as non-complex securities by some market participants, OTS doubts that attempts to develop a highly refined definition of a complex security would be well received. Accordingly, OTS has decided to leave the proposed definition of a complex security substantially intact. However, OTS is simplifying the definition of an ''exempt security.'' Under the modified definition, an ''exempt security'' includes non-callable, ''plain vanilla'' instruments of the following types: (1) mortgage-pass-through securities, (2) fixed-rate securities, and (3) floating rate securities.

j. Overemphasis on Price Sensitivity

One respondent suggested that the guidelines for pre-purchase analysis in the proposed TB should focus on earnings sensitivity and total return analysis, not just on price sensitivity. OTS agrees that institutions should not focus on price sensitivity to the exclusion of other relevant considerations. Accordingly, the final Bulletin has been modified to stress the importance of taking other factors, such as total return, into account in conducting pre-purchase analysis.

k. Use of Dealer/Issuer Information

One commenter suggested that Part III.A.1 of the proposed TB be modified to permit the use of dealer/issuer information in conducting pre-purchase analysis. The FFIEC Policy states that institutions should conduct their own in-house pre-acquisition analysis, or to the extent possible, make use of specific third party analyses that are independent of the seller or counterparty. Similarly, the proposed TB states that an institution may rely on an analysis conducted by an independent third party (i.e., someone other than the seller or counterparty), provided management understands the analysis and its key assumptions. Nothing in the FFIEC Policy or TB 13a prohibits an institution from using information provided by a dealer or issuer; however, both caution against relying solely on dealer/issuer generated analysis for pre-purchase analysis.

l. Assessing the Level of Interest Rate Risk

Several commenters objected to the guidelines for determining the level of interest rate risk, in Part IV.A of the proposed TB. Commenters argued that NPV is a liquidation model that is not relevant for a going concern. As defined in the proposed TB, NPV does not attempt to account for the effects of all future actions by an institution (e.g., reinvestment decisions, business growth, strategy changes, etc.). As such, it may technically be considered a liquidation analysis, but that does not diminish its relevance for ''going concerns.'' Mutual funds are going concerns, yet their net asset value is clearly of interest to shareholders. Borrowers may be viewed as going concerns, yet their net worth is of interest to lenders. A depository institution's NPV represents the major part of its total economic value and is, therefore, of concern to both shareholders and regulators. Furthermore, the value of existing holdings is subject to less uncertainty than other components of an institution's economic value, such as the net value of possible future business, the measurement of which relies on a host of assumptions beyond those necessary to calculate NPV.

Many commenters argued that the proposed guidelines relied too heavily on the OTS Model. Most institutions do not have a means of calculating NPV internally. For those that do, the TB permits examiners to use internal results in lieu of the results of the OTS Model. The degree of reliance the examiner will place on the institution's model is a matter of judgment. It will depend on many factors, including the perceived quality of the institution's model, the quality of the data and assumptions used to drive it, and how well the examiner believes the OTS Model fits the circumstances at the institution. If an institution has no internal model, or uses an unacceptable method of calculation, OTS will place primary reliance on the OTS Model to measure interest rate risk. This is appropriate because it provides examiners with a means of assessing the level of IRR of all institutions using a single, objective, standard of measure.

A number of commenters argued that the proposed guidelines are too focused on NPV, rather than on earnings. Though the proposed TB encourages institutions to have a means of calculating the interest rate sensitivity of their projected earnings, NPV provides a superior measure for regulatory purposes. NPV sensitivity considers all projected cash flows from all financial instruments and contracts to which an institution is currently a party. Earnings measures do not take adequate account of the significant customer options that are often embedded in financial instruments. Earnings measures also typically are relatively short-term in nature—most often just 1 to 3 years of future earnings are projected. Earnings measures may, thus, ignore net cash flows farther in the future, where serious earnings shortfalls might occur.

Many commenters argued that the proposed guidelines place too much emphasis on capital, which is already separately evaluated by examiners. As discussed above, the TB relies strongly on the concept that institutions with higher levels of economic capital should have greater freedom to engage in risk-taking. Thus, for a given amount of interest rate risk—as indicated by the Sensitivity Measure—institutions with higher Post-shock NPV Ratios receive better ''S'' component ratings under the guidelines in Table 1. The fact that examiners also assign a capital adequacy (*i.e.*, ''C'') component rating to the institution does not change the validity of this approach to gauging the level of risk. If capital appears to be ''double counted'' by this approach, it is only because capital adequacy—the ability to absorb potential losses—is central to evaluating an institution's safety and soundness. Moreover, this approach is consistent with the language of the interagency Uniform Financial Institutions Rating System for the ''S'' rating. For example, the description of the 2 rating says in part: ''The level of earnings and capital

provide adequate support for the degree of market risk taken by the institution [emphasis added].'' [12]

Several commenters argued that the proposed guidelines for the level of IRR should not focus on the level of the NPV Ratio, but rather only on its sensitivity. As explained above, the Uniform Financial Institutions Rating System explicitly incorporates consideration of capitalization into the assessment of the ''S'' component rating. It would be unfair and largely counterproductive to good management to assign the ''S'' rating on the basis of the Sensitivity Measure alone, as suggested in this comment.

Consider, for example, two institutions. The first has a Post-shock NPV Ratio of 1% and the second has a Post-shock NPV Ratio of 15%. Both have Sensitivity Measures of 300 basis points, indicating that their Post-shock NPV Ratios are 3 percentage points below their respective Pre-shock Ratios. While both institutions would suffer the same decline in economic value in an adverse interest rate environment, the first institution has much less of a buffer against that risk than the second. In fact, the level of interest rate risk at the first is ''high'' relative to its ability to bear that risk, while the level of interest rate risk at the second is ''minimal.'' The proposed rating guidelines appropriately reflect that difference.

Several commenters argued that OTS provided no rationale for the NPV levels in Table 1. The matrix in Table 1 establishes guidelines that, for a given level of the ''S'' rating, permits institutions with a greater ability to absorb potential losses to take more interest rate risk. The guidelines also broadly reflect the component ratings actually assigned by examiners in the past.

Under OTS's New Directions Bulletin 95–10, institutions with Post-shock NPV Ratios below 4 percent and more than 200 b.p. of interest rate sensitivity were generally presumed to warrant a component rating of 4 or 5. Those two thresholds provided the initial features of the matrix: Post-shock Ratios below 4 percent would be in the lowest row. The line between ''significant risk'' and ''high risk'' in that row would be a Sensitivity Measure of 200 b.p. From that starting point, successively higher rows in the matrix were defined as corresponding to better levels of the ''S'' rating. Thresholds were chosen to approximate the proportionate distributions of actual ratings. (As discussed earlier, in the final TB some thresholds have been modified.)

In recognition of the practical limits on an institution's ability to reduce risk, the leftmost column of Table 1 (Sensitivity Measure between 0–100 b.p.) was established so that institutions with very low Post-shock Ratios but lower than average Sensitivity Measures would not be adversely rated. Such institutions may have capital adequacy problems, but are not considered interest rate risk problems.

Several commenters argued that the ratings guidelines should not be based on today's extremely healthy industry statistics. The economic environment for the past several years has been highly conducive to producing healthy, very well-capitalized thrift institutions. It is possible that OTS may revise the guidelines in the future should circumstances change. As discussed earlier, the guidelines in the final TB are somewhat less stringent than the proposed guidelines and may, thus, mitigate this criticism.

Several commenters suggested alternative matrices for the guidelines for the level of risk in Table 1.

One commenter proposed determining the level of risk by comparing an institution's Sensitivity Measure with qualitative factors, such as planned corrective actions to be taken if rates move adversely. This proposal, however, would be highly speculative and not take into account the Post-shock NPV Ratio, which is critical in assessing an institution's ability to bear risk.

Another commenter objected to the guidelines in Table 1 because the guidelines suggest that an institution with a Post-shock NPV Ratio of 11.99% and an interest rate Sensitivity Measure of 401 b.p. poses ''significant risk'' while an institution with 2% and 99 b.p. poses only ''moderate risk.'' The commenter is correct in arguing that the former institution is better suited to absorb the risk than the latter. Institutions in the lower left cell of the matrix are, however, special cases. Institutions in that cell have low NPV ratios and, thus, little capacity to absorb risk of any kind. There are, however, practical limits to how far they can reduce their level of interest rate risk. Thus, if an institution with a Post-shock NPV Ratio below 4% has a Sensitivity Measure of less than 100 b.p. (which is typically well below average) the guidelines treat it as having only moderate risk (a 2 rating), rather than significant risk (a 3 rating).

Another commenter proposed revising Table 1 to compare the Interest Rate Sensitivity Measure with the Pre-shock NPV Ratio (instead of the Post-shock NPV Ratio actually used in the Table). The commenter argued that this would avoid ''double counting'' the adverse impact of the rate shock. The commenter's proposal is based on the premise that the percentage change in NPV is the relevant measurement standard. OTS believes that the amount of capital remaining after the adverse shock is more pertinent. An institution with a large percentage change in NPV that retains a large amount of NPV is able to bear that risk safely.

A fourth commenter proposed that institutions with a Post-shock NPV Ratio exceeding 6% warrant a rating of 1, whatever the Sensitivity Measure. Higher levels of interest rate sensitivity require higher Post-shock NPV. OTS does not believe the commenter's approach is sufficiently conservative given (1) the possibility of rapid changes in interest rates (not necessarily immediate shocks) of more than 200 b.p., (2) the possibility of changes in the shape or the slope of the yield curve, and (3) inaccuracies in measuring risk.

m. Examiner Use of Guidelines on Level of Risk

One commenter recommended that the guidelines in Table 1, of Part IV.A.3 of the proposed TB, should focus on more than one time period. Explicit procedures for analysis of multiple time periods would complicate the guidelines and would add to the unfounded perception that OTS is attempting to micromanage the examination process. The proposed TB stated that examiners should take into consideration any relevant trends in an institution's interest rate risk. Additional guidance is not necessary.

One commenter recommended that OTS should warn its examiners that the NPV levels in the guidelines are ''for discussion purposes and not standards for assessing risk.'' The proposed guidelines are exactly that: guidelines. The proposed guidelines establish a common set of criteria for translating quantitative risk estimates into the categories described in the ratings descriptions (*i.e.*, ''minimal risk'', ''moderate risk'', etc.). Rather than relying on hundreds of examiners to invent their own standards independently and hoping that those standards will be consistent with one another, the guidelines provide a common starting point for examiners. They are only starting points because examiners must consider many complex facts, both quantitative and qualitative, in their evaluation of the institution's risk level and in assigning the rating.

Several commenters opined that examiners will not deviate from the guidelines. The final version of the TB emphasizes that the guidelines are only

[12] 61 FR at 67029.

a starting point in an examiner's assessment of the ''S'' rating. For example, New Directions Bulletin 95–10, a precursor to the proposed TB, stated that, ''Institutions with a [Post-shock NPV] Ratio below 4% and a Sensitivity Measure over 200 basis points will ordinarily receive a 4 or 5 rating for the ''L'' component [rating].'' Yet, examiners did not assign ratings of 4 or 5 to all institutions that fit this description.

n. Calculation of NPV Ratios

Several commenters discussed the calculation of NPV and the NPV Ratio. Two argued that the NPV Ratio should be redefined so that ''deposit intangibles'' (*i.e.*, the difference between the face value of deposits and their economic value) are not treated as assets. OTS initially presented deposit intangibles as assets on the Interest Rate Risk Exposure Report to resemble the presentation of core deposit intangibles on the balance sheet under GAAP. Commenters, however, pointed out that treating deposit intangibles as assets depresses NPV ratios. For example, the NPV ratio of the average institution in December 1997 would have been 10 basis points higher in the base case (10.34 vs. 10.24 percent) and 19 basis points higher (8.96 vs. 8.77 percent) in the +200 b.p. rate shock scenario, if the deposit intangibles had been presented as contra-liabilities or if deposits had simply been shown at their present values. Removing the deposit intangibles from the asset side would also be more logically consistent with the purpose of the NPV ratio, which is to relate an institution's NPV to the size of the institution. An institution does not actually grow if it replaces a $100 borrowing with $100 of retail accounts, yet because the latter type of liability contributes to the deposit intangible, the denominator of the NPV ratio increases.

Accordingly, OTS will study whether it should to move deposit intangibles to the liability side of the Interest Rate Risk Exposure Report by reporting deposits at their present value. Though NPV ratios would generally rise as a result of this format change, the amount of the change is so small that OTS would not modify the guidelines in Table 1 to compensate for it. There are many data processing considerations involved in making such a change, however. The small amount of improvement in the NPV ratios may not warrant the cost and potential confusion the change would entail.

One commenter urged OTS to solve the analytical problems involved in estimating core deposit value sensitivity before finalizing the proposed TB. Refining the OTS Model is an ongoing activity. Among other issues, OTS is working on updating its modeling of core deposits. Examiners are currently using the results of the OTS Model during their safety and soundness examinations. There is no reason to wait for all revisions to be completed before finalizing the TB. While the OTS Model does not yet fully customize its treatment of core deposit behavior to individual institutions, a degree of customization is performed for institutions that report several items of additional optional information (on Schedule CMR, lines 659 through 661). Yet, relatively few institutions avail themselves of that opportunity.

Another commenter argued that by valuing purchased goodwill as zero in the calculation of NPV, OTS disadvantages institutions that have been involved in mergers using purchase accounting. OTS disagrees with that criticism.

NPV is defined as the economic value of an institution's existing assets, less the economic value of its existing liabilities, plus the net economic value of any existing off-balance sheet contracts. In other words, NPV is the net economic value of an institution's portfolio of identifiable assets and liabilities. If two institutions merge, the NPV of the resulting entity will consist of the combined net economic value of the two portfolios, or more simply, the combined NPV will be the sum of the individual NPVs. The value of the two portfolios will not change merely because the institutions have merged. Yet, that is exactly what would occur if goodwill were included as a component of the combined institution's NPV; the resulting NPV would be larger than the sum of the two constituent NPVs. The source of the confusion is that the commenter is attempting to measure more than just the value of the portfolio.

Goodwill is defined as the amount by which the purchase price of an acquired entity exceeds the net fair value of its identifiable assets, liabilities, and off-balance sheet financial instruments. Thus, by definition, goodwill represents value over and above the net economic value of the acquired institution's portfolio of identifiable assets and liabilities. As a practical matter, goodwill reflects the buyer's (and seller's) assessment of the economic value of unidentifiable intangibles (such as a well-trained staff, a good franchise from which to conduct future business, etc.) at the acquired institution. All institutions, not just those involved in acquisitions, possess unidentifiable intangibles that may be expected to have economic value. Unfortunately, the economic value of such intangibles is extremely difficult to quantify, and determining how their economic value will change under different interest rate scenarios makes the task even more difficult. For those reasons, OTS limits itself to estimating the interest rate risk inherent in institutions' portfolios of identifiable financial and non-financial assets and liabilities. It is not that a broader measure is undesirable, but simply that such a measure is impractical as a regulatory measure of risk.

Several institutions commented that the OTS Model does not accurately reflect every institution's circumstances, and that ratings based on those results are unfair. The OTS Model does rely on many generic, industry-wide assumptions and circumstances at individual institutions may differ from these assumptions. There will often be offsetting errors so that the ''bottom line'' result will still be reasonable for such an institution, but it is certainly possible that the OTS Model might materially over-or understate the level of risk at an institution. There are, however, two defenses against an unfair rating. The first is the judgment of the examiner. The second defense is the institution itself. The guidelines explicitly permit the use of institutions' internal results in assessing the level of risk in situations where the OTS Model is demonstrably incorrect.

o. Assessing the Quality of Risk Management

One commenter recommended that in assessing the quality of risk management practices at an institution, discussed in Part IV.B of the proposed TB, examiners should consider the institution's historical earnings results. Examiners may well consider an institution's historical earnings stability in judging the quality of its risk management practices. All factors that an examiner considers relevant may bear on his or her assessment.

p. Combining Assessments of the Level of Risk and Risk Management Practices

A number of commenters stated that the guidelines in Table 2, of Part IV.C of the proposed TB, place too much weight on quantitative factors and insufficient weight on qualitative ones (*i.e.*, good risk management should be able to offset a higher level of risk). The proposed guidelines shown in Table 2 represent an accurate implementation of the interagency CAMELS rating system. Moreover, the proposition that good risk management can fully offset higher levels of risk is questionable. The interest rate sensitivity of NPV is a

measure of the amount of risk embedded in the current portfolio. There is little evidence that managers can successfully anticipate the magnitude or direction of movements in interest rates. While skillful management may be able to alter an institution's risk level quickly in response to changes in market conditions, it is not certain that management will actually take any action in such an eventuality. For example, during the interest rate shock that occurred in 1994, few institutions responded with swift portfolio restructuring.

Practically speaking, however, both the assessment of risk management practices and the assignment of the S component rating are currently—and will remain—inexact processes that are heavily dependent on examiner judgment. Strong risk management practices cannot help but influence examiners to be inclined favorably toward the institution in assigning the ''S'' component rating. Accordingly, no change is being made to the guidelines in Table 2 of the proposal.

The final Thrift Bulletin is set forth below.

Thrift Bulletin 13a: Management of Interest Rate Risk, Investment Securities, and Derivatives Activities

Summary: This Thrift Bulletin provides guidance to management and boards of directors of thrift institutions on the management of interest rate risk, including the management of investment and derivatives activities. In addition, it describes the framework examiners will use in assigning the ''Sensitivity to Market Risk'' (or ''S'') component rating.

Thrift Bulletin 13a replaces Thrift Bulletins 13, 13–1, 13–2, 52, 52–1, and 65, and New Directions Bulletin 95–10.

Contents

Part I: Background
A. Definition and Sources of Interest Rate Risk
Part II: OTS Minimum Guidelines Regarding Interest Rate Risk
A. Interest Rate Risk Limits
B. Systems for Measuring Interest Rate Risk
Part III: Investment Securities and Financial Derivatives
A. Analysis and Stress Testing
B. Record-Keeping
C. Supervisory Assessment of Investment and Derivatives Activities
Part IV: Guidelines for the ''Sensitivity to Market Risk'' Component Rating
A. Assessing the Level of Interest Rate Risk
B. Assessing the Quality of Risk Management
C. Combining Assessments of the Level of Risk and Risk Management Practices
D. Examiner Judgment
Part V: Supervisory Action
Appendix A: Evaluating Prudence of Interest Rate Risk Limits
Appendix B: Sound Practices for Market Risk Management
Appendix C: Excerpt from Interagency Uniform Financial Institutions Rating System
Appendix D: Glossary

Part I: Background

An effective interest rate risk (IRR) management process that maintains interest rate risk within prudent levels is important for the safety and soundness of any financial institution. This is especially true for thrift institutions, which by the nature of their business, are particularly prone to IRR. In recognition of that fact, 12 CFR 563.176 requires institutions to implement proper IRR management procedures. In January 1989, OTS issued Thrift Bulletin 13 (TB 13), Responsibilities of the Board of Directors and Management with Regard to Interest Rate Risk, to provide guidance in the area of IRR management. Since TB 13 was first issued, a great deal of progress has been made in the areas of IRR measurement technology and IRR management. The present Thrift Bulletin, TB 13a, updates the guidelines contained in the original TB 13. It also provides guidance implementing the Federal Financial Institutions Examination Council's Supervisory Policy Statement on Investment Securities and End-User Derivative Activities (63 Fed. Reg. 20191 [1998]) and OTS's final rule on financial derivatives at Section 563.172. The following Thrift Bulletins are hereby rescinded:

TB 13: Responsibilities of the Board of Directors and Management with Regard to Interest Rate Risk;
TB 13–1: Implementation of Thrift Bulletin 13;
TB 13–2: Implementation of Thrift Bulletin 13;
TB 52: Supervisory Statement of Policy on Securities Activities;
TB 52–1: ''Mismatched'' Floating Rate CMOs; and
TB 65: Structured Notes.

Also rescinded is New Directions Bulletin 95–10, Interim Policy On Supervisory Action to Address Interest Rate Risk.

A. Definition and Sources of Interest Rate Risk

The term ''interest rate risk'' refers to the vulnerability of an institution's financial condition to movements in interest rates. Although interest rate risk is a normal part of financial intermediation, excessive interest rate risk poses a significant threat to an institution's earnings and capital. Changes in interest rates affect an institution's earnings by altering interest-sensitive income and expenses. Changes in interest rates also affect the underlying value of an institution's assets, liabilities, and off-balance sheet instruments because the present value of future cash flows (and in some cases, the cash flows themselves) change when interest rates change.

Savings associations confront interest rate risk from several sources. These include repricing risk, yield curve risk, basis risk, and options risk.

1. *Repricing Risk*. The primary form of interest rate risk arises from timing differences in the maturity and repricing of assets, liabilities, and off-balance sheet positions. While such repricing mismatches are fundamental to the business, they can expose a savings association's income and economic value fluctuations as interest rates vary. For example, a thrift that funded a long-term, fixed-rate loan with a short-term deposit could face a decline in both the future income arising from the position and its economic value if interest rates increase. These declines occur because the cash flows on the loan are fixed, while the interest paid on the funding is variable, and therefore increases after the short-term deposit matures.

2. *Yield Curve Risk*. Repricing mismatches can also expose a thrift to changes in both the slope and shape of the yield curve. Yield curve risk arises when unexpected shifts of the yield curve have adverse effects on an institution's income or economic value. For example, suppose an institution has variable-rate assets whose interest rate is indexed to the 1-year Treasury rate and which are funded by variable-rate liabilities having the same repricing date but indexed to the 3-month Treasury rate. A flattening of the yield curve will have an adverse impact on the institution's income and economic value, even though a parallel movement in the yield curve might have no effect.

3. *Basis Risk*. Another source of interest rate risk arises from imperfect correlation in the adjustment of the rates earned and paid on different financial instruments with otherwise similar repricing characteristics. When interest rates change, these differences can cause changes in the cash flows and earnings spread between assets, liabilities and off-balance sheet instruments of similar maturities or repricing frequencies. For example, a strategy of funding a three-year loan that reprices quarterly based on the three-month U.S. Treasury bill rate, with a three-year deposit that reprices quarterly based on three-month LIBOR, exposes the institution to the

risk that the spread between the two index rates may change unexpectedly.

4. *Options Risk.* Interest rate risk also arises from options embedded in many financial instruments. An option provides the holder the right, but not the obligation, to buy, sell, or in some manner alter the cash flows of an instrument or financial contract. Options may be stand alone instruments such as exchange-traded options and over-the-counter (OTC) contracts, or they may be embedded within standard instruments. Instruments with embedded options include bonds and notes with call or put provisions, loans which give borrowers the right to prepay balances, adjustable rate loans with interest rate caps or floors that limit the amount by which the rate may adjust, and various types of non-maturity deposits which give depositors the right to withdraw funds at any time, often without any penalties. If not adequately managed, the asymmetrical payoff characteristics of instruments with option features can pose significant risk, particularly to those who sell them, since the options held, both explicit and embedded, are generally exercised to the advantage of the holder.

Part II: OTS Minimum Guidelines Regarding Interest Rate Risk

OTS has established specific minimum guidelines for thrift institutions to observe in two areas of interest rate risk management. The first guideline concerns establishment and maintenance of board-approved limits on interest rate risk. The second, concerns institutions' ability to measure their risk level.

A. Interest Rate Risk Limits

Effective control of interest rate risk begins with the board of directors, which defines the institution's tolerance for risk. OTS regulation § 563.176 requires all institutions to establish board-approved interest rate risk limits.

1. *Limits on Change in Net Portfolio Value.* All institutions should establish and demonstrate quarterly compliance with board-approved limits on interest rate risk that are defined in terms of net portfolio value (NPV).[1] These limits should specify the minimum NPV Ratio[2] the board is willing to allow under current interest rates and for a range of six hypothetical interest rate scenarios. The hypothetical scenarios are represented by immediate, permanent, parallel movements in the term structure of interest rates of plus and minus 100, 200, and 300 basis points from the actual term structure observed at quarter end.[3] The level of detail with which the limits are specified depends on the board's preferences. In their simplest form, the limits could specify a single minimum NPV Ratio which would apply to all seven rate scenarios, while more detailed limits might specify a different minimum NPV Ratio for each of the scenarios.

2. *Limits on Earnings Sensitivity.* Many institutions also set risk limits expressed in terms of the interest rate sensitivity of projected earnings. Such limits can provide a useful supplement to the NPV-based limits. Although institutions are not required by OTS to establish limits and conduct analysis in terms of earnings sensitivity, OTS considers it a good management practice for institutions to estimate the interest rate sensitivity of their earnings and to incorporate this analysis into their business plan and budgeting process. The institution has total discretion over the type of earnings sensitivity analysis and all details of how that analysis is performed. However, OTS encourages institutions to develop earnings simulations utilizing base case and adverse interest rate scenarios and to compare results to actual earnings on a quarterly basis.

3. *Prudence of IRR Limits.* In assessing the prudence of their institution's NPV limits, as well as in evaluating their institution's current level of risk relative to the rest of the industry, the board of directors will find it useful to refer to the quarterly OTS publication, Thrift Industry Interest Rate Risk Measures.[4] This publication contains statistical data about key interest rate risk measures for the industry. The board should also be aware that examiners will evaluate the institution's IRR limits as part of their assessment of the quality of the institution's risk management practices. See Part IV.B.2, Prudence of Limits, and Appendix A, Evaluating Prudence of Interest Rate Risk Limits, for discussion of this topic.

4. *Revision of IRR Limits.* Interest rate risk limits reflect the board of directors' risk tolerance. Although the board should periodically re-evaluate the appropriateness of the institution's interest rate risk limits, particularly after a significant change in market interest rates, any changes should receive careful consideration and be documented in the minutes of the board meeting.

If the institution's level of risk at some point does violate the board's limits, that fact should be recorded in the minutes of the board meeting, along with management's explanation for that occurrence. Depending on the circumstances and the board's tolerance for risk, the board may elect to revise the risk limits. Alternatively, the board may wish to retain the existing limits and direct management to adopt an acceptable plan for an orderly return to compliance with the limits.

Recurrent changes to interest rate risk limits for the purpose of accommodating instances in which the limits have been, or are about to be, breached may be indicative of inadequate risk management practices and procedures.

B. Systems for Measuring Interest Rate Risk

Key elements in managing market risk are identifying, measuring, and monitoring interest rate risk. To ensure compliance with its board's IRR limits and to comply with OTS regulation § 563.176, each institution must have a way to measure its interest rate risk. OTS guidelines for interest rate risk measurement systems are as follows, though examiners have broad discretion to require more rigorous systems.

1. *Interest Rate Sensitivity of NPV for Institutions below $1 Billion in Assets.* Unless otherwise directed by their OTS Regional Director, institutions below $1 billion in assets may usually rely on the quarterly NPV estimates produced by OTS and distributed in the Interest Rate Risk Exposure Report. If such an institution owns complex securities (see Glossary for definition) whose recorded investment exceeds 5 percent of total assets, the institution should be able to measure or have access to measures of the economic value of those securities under the range of interest rate scenarios

[1] Net portfolio value (NPV) is defined as the net present value of an institution's existing assets, liabilities, and off-balance sheet contracts. In the original TB 13, this measure was referred to as the ''market value of portfolio equity'' (MVPE). A detailed description of how OTS defines and calculates NPV is provided in the manual entitled, The OTS Net Portfolio Value Model.

[2] An institution's NPV Ratio for a given interest rate scenario is calculated by dividing the net portfolio value that would result in that scenario by the present value of the institution's assets in that same scenario and is expressed in percentage terms. The NPV ratio is analogous to the capital-to-assets ratio used to measure regulatory capital, but NPV is measured in terms of economic values (or present values) in a particular rate scenario. These limits represent a change in format from those called for by the original TB 13. They will provide a greater degree of comparability across institutions and will mesh better with the OTS guidelines for the Sensitivity to Market Risk component rating, described later in this Bulletin.

[3] Institutions that do not file Schedule CMR of the Thrift Financial Report and do not have a means of calculating NPV should have suitable alternative limits.

[4] Thrift Industry Interest Rate Risk Measures is published for a particular quarter approximately seven weeks after the end of that quarter. It may be retrieved using the OTS PubliFax system, at (202) 906–5660, or from the OTS World Wide Web site, http://www.ots.treas.gov/quarter.html

described in Part II.A.1, Limits on Change in Net Portfolio Value. The institution may rely on the OTS estimates for the other financial instruments in its portfolio, unless examiners direct otherwise.

2. *Interest Rate Sensitivity of NPV for Institutions above $1 Billion in Assets.* Those institutions with more than $1 billion in assets should measure their own NPV and its interest rate sensitivity. OTS examiners will look for the following desirable methodological features in evaluating the quality of such institutions' NPV measurement systems:

(a) The institution's NPV estimates utilize information on its financial holdings that is generally more detailed than the information reported on Schedule CMR.

(b) Value is ascribed only to financial instruments currently in existence or for which commitments or other contracts currently exist (i.e., future business is not included in NPV).

(c) Values are, where feasible, based directly or indirectly on observed market prices.

(d) Zero-coupon (spot) rates of the appropriate maturities are used to discount cash flows.

(e) Implied forward interest rates are used to model adjustable rate cash flows.

(f) Cash flows are adjusted for reasonable non-interest costs the institution will incur in servicing both its assets and liabilities.

(g) Valuations take account of embedded options using, at a minimum, the static discounted cash flow technique, but preferably using more rigorous options pricing techniques (which normally produce a value greater than zero even for out-of-the-money options).

(h) Valuation of deposits is based, at least in part, on institution-specific data regarding retention rates of existing deposit accounts and the rates offered by the institution on deposits. Preferably, the institution would base these valuations on sound econometric research into such data.

Examiners may determine an institution should use more sophisticated measurement techniques for individual financial instruments or categories of instruments where they believe it is warranted (e.g., because of the volume and price sensitivity of a group of financial instruments; because of concern that the institution's results may materially misstate the level of risk; because of the combination of a low Post-shock NPV Ratio and high Sensitivity Measure; etc.). In any case, the institution should be familiar with the details of the assumptions, term structure, and logic used in performing the measurements. Measures obtained from financial screens or vendors may, therefore, not always be adequate.

In addition to the prescribed parallel-shock interest rate scenarios described above, OTS recommends that institutions evaluate the effects of other stressful market conditions (e.g., non-parallel movements in the term structure, basis changes, changes in volatility), as well as the effects of breakdowns in key assumptions (e.g., prepayment and core deposit attrition rates).

3. *Integration of Risk Measurement and Operations.* As part of their assessment of the quality of an institution's risk management practices, examiners will consider the extent to which the institution's risk measurement process is integrated with management decision-making. Examiners will evaluate whether, in making significant operational decisions (e.g., changes in portfolio structure, investments, business planning, derivatives activities, funding decisions, pricing decisions, etc.), the institution considers their effect on the level of interest rate risk. Institutions may do this by using an earnings sensitivity approach, an NPV sensitivity approach, or any other reasonable approach. The institution has discretion over all aspects of such analysis. The analysis, however, should not be merely pro forma in nature, but rather should be an active factor in the institution's decision-making process. If evidence of such integration is not apparent, examiner criticism or an adverse rating may result.

Part III: Investment Securities and Financial Derivatives

A. Analysis and Stress Testing

Management should exercise diligence in assessing the risks and returns (including expected total return) associated with investment securities and financial derivatives. As a matter of sound practice, prior to taking an investment position or initiating a derivatives transaction, an institution should:

(a) Ensure that the proposed transaction is legally permissible for a savings institution;

(b) Review the terms and conditions of the security or financial derivative;

(c) Ensure that the proposed transaction is allowable under the institution's investment or derivatives policies;

(d) Ensure that the proposed transaction is consistent with the institution's portfolio objectives and liquidity needs;

(e) Exercise diligence in assessing the market value, liquidity, and credit risk of the security or financial derivative;

(f) Conduct a pre-purchase portfolio sensitivity analysis for any significant transaction involving securities or financial derivatives (as described below in Significant Transactions);

(g) Conduct a pre-purchase price sensitivity analysis of any complex security [5] or financial derivative [6] prior to taking a position (as described below in Complex Securities and Financial Derivatives).

1. *Significant Transactions.* A ''significant transaction'' is any transaction (including one involving instruments other than complex securities) that might reasonably be expected to increase an institution's Sensitivity Measure by more than 25 basis points. Prior to undertaking any significant transaction, management should conduct an analysis of the incremental effect of the proposed transaction on the interest rate risk profile of the institution. The analysis should show the expected change in the institution's net portfolio value (with and without the proposed transaction) that would result from an immediate parallel shift in the yield curve of plus and minus 100, 200, and 300 basis points. In general, an institution should conduct its own analysis. It may, however, rely on analysis conducted by an independent third-party (i.e., someone other than the seller or counterparty) provided management understands the analysis and its key assumptions.

Institutions with less than $1 billion in assets that do not have the internal modeling capability to conduct such an incremental analysis may use the most recent quarterly NPV estimates for their institution provided by OTS to estimate the incremental effect of a proposed

[5] For purposes of this Thrift Bulletin, the term ''complex security'' includes any collateralized mortgage obligation (''CMO''), real estate mortgage investment conduit (''REMIC''), callable mortgage pass-through security, stripped-mortgage-backed-security, structured note, and any security not meeting the definition of an ''exempt security.'' An ''exempt security'' includes non-callable, ''plain vanilla'' instruments of the following types: (1) mortgage-pass-through securities, (2) fixed-rate securities, and (3) floating-rate securities.

[6] The following financial derivatives are exempt from the pre-purchase analysis called for above: commitments to originate, purchase, or sell mortgages. To perform the pre-purchase analysis for derivatives whose initial value is zero (e.g., futures, swaps), the institution should calculate the change in value as a percentage of the notional principal amount.

transaction on the sensitivity of its net portfolio value.[7]

2. *Complex Securities and Financial Derivatives.* Prior to taking a position in any complex security or financial derivative, an institution should conduct a price sensitivity analysis (i.e., pre-purchase analysis) of the instrument. At a minimum, the analysis should show the expected change in the value of the instrument that would result from an immediate parallel shift in the yield curve of plus and minus 100, 200, and 300 basis points. Where appropriate, the analysis should encompass a wider range of scenarios (e.g., non-parallel changes in the yield curve, changes in interest rate volatility, changes in credit spreads, and in the case of mortgage-related securities, changes in prepayment speeds). In general, an institution should conduct its own in-house pre-acquisition analysis. An institution may, however, rely on an analysis conducted by an independent third-party (i.e., someone other than the seller or counterparty) provided management understands the analysis and its key assumptions.

Investments in complex securities and the use of financial derivatives by institutions that do not have adequate risk measurement, monitoring, and control systems may be viewed as an unsafe and unsound practice.

3. *Risk Reduction.* In general, the use of financial derivatives or complex securities with high price sensitivity[8] should be limited to transactions and strategies that lower an institution's interest rate risk as measured by the sensitivity of net portfolio value to changes in interest rates. An institution that uses financial derivatives or invests in such securities for a purpose other than that of reducing portfolio risk should do so in accordance with safe and sound practices and should:

(a) Obtain written authorization from its board of directors to use such instruments for a purpose other than to reduce risk; and

(b) Ensure that, after the proposed transaction(s), the institution's Post-shock NPV Ratio would not be less than 4 percent.

The use of financial derivatives or complex securities with high price sensitivity for purposes other than to reduce risk by institutions that do not meet the conditions set forth above may be viewed as an unsafe and unsound practice.

B. Record-Keeping

Institutions must maintain accurate and complete records of all securities and derivatives transactions in accordance with 12 CFR 562.1. Institutions should retain any analyses (including pre-and post-purchase analyses) relating to investments and derivatives transactions and make such analyses available to examiners upon request.

In addition, for each type of financial derivative instrument authorized by the board of directors, the institution should maintain records containing:

(a) The names, duties, responsibilities, and limits of authority (including position limits) of employees authorized to engage in transactions involving the instrument;

(b) A list of approved counterparties with which transactions may be conducted;

(c) A list showing the credit risk limit for each approved counterparty; and

(d) A contract register containing key information on all outstanding contracts and positions.

The contract registers should specify the type of contract, the price of each open contract, the dollar amount, the trade and maturity dates, the date and manner in which contracts were offset, and the total outstanding positions.

Where deferred gains or losses on derivatives from hedging activities have been recorded consistent with generally accepted accounting principles (GAAP), the institution should maintain appropriate supporting documentation.[9]

C. Supervisory Assessment of Investment and Derivatives Activities

Examiners will assess the overall quality and effectiveness of the institution's risk management process governing investment and derivatives activities. In making such assessments, examiners will take into account compliance with the guidelines set forth above and the quality of the institution's risk management process. The quality of the institution's risk management process will be evaluated in the context of Appendix B, Sound Practices for Market Risk Management.

Part IV: Guidelines for the "Sensitivity to Market Risk" Component Rating

Consistent with the interagency Uniform Financial Institutions Rating System, or CAMELS rating system, of which an excerpt is attached as Appendix C, the "Sensitivity to Market Risk" component rating (i.e., the "S" rating) is based on examiners' conclusions about two dimensions: (1) an institution's level of market risk and (2) the quality of its practices for managing market risk. This section discusses the guidelines that examiners will use in assessing the two dimensions and combining those assessments into a component rating. Because few thrift institutions have significant exposure to foreign exchange risk or commodity or equity price risks, interest rate risk will generally be the only form of market risk to be assessed under this component rating.

A. Assessing the Level of Interest Rate Risk

Examiners will base their conclusions about an institution's level of interest rate risk—the first dimension for determining the "S" component rating—primarily on the interest rate sensitivity of the institution's net portfolio value. The two specific measures of risk that will receive examiners' primary attention are the Interest Rate Sensitivity Measure and the Post-shock NPV Ratio (see Glossary for definitions).

OTS uses risk measures based on NPV for several reasons. First, the NPV measures are more readily comparable across institutions than internally generated measures of earnings sensitivity. Second, NPV focuses on a longer-term analytical horizon than institutions' internally generated earnings sensitivity measures. (The interest rate sensitivity of earnings is typically measured over a short-term horizon such as a year, while NPV is based on all future cash flows anticipated from an institution's existing assets, liabilities, and off-balance sheet contracts.) Third, the NPV-based measures take better account of the embedded options present in the typical thrift institution's portfolio.

1. *Interest Rate Sensitivity Measure.* In assessing the level of interest rate risk, a high (i.e., risky) Interest Rate Sensitivity Measure, by itself, may not give cause for supervisory concern when the institution has a strong capital position. Because an institution's risk of failure is inextricably linked to capital and, hence, to its ability to absorb

[7] Institutions that are exempt from filing Schedule CMR and that choose not to file voluntarily, should ensure that no transaction—whether involving complex securities, financial derivatives, or any other financial instruments—causes the institution to fall out of compliance with its board of directors' interest rate risk limits.

[8] For purposes of this Bulletin, "complex securities with high price sensitivity" include those whose price would be expected to decline by more than 10 percent under an adverse parallel change in interest rates of 200 basis points.

[9] In June 1998, the FASB issued SFAS No. 133, "Accounting for Derivative Instruments and Hedging Activities." Under SFAS No. 133, all "derivative instruments," as defined therein, including those used for hedging purposes, would be accounted for at fair value. Accordingly, under that Standard, deferred gains and losses on "derivative instruments" from hedging activities will no longer be reported.

adverse economic shocks, an institution with a high level of economic capital (i.e., NPV) may be able safely to support a high Sensitivity Measure.

2. *Post-Shock NPV Ratio.* The Post-shock NPV Ratio is a more comprehensive gauge of risk than the Sensitivity Measure because it incorporates estimates of the current economic value of an institution's portfolio, in addition to the reported capital level and interest rate risk sensitivity. There are three potential causes of a low (i.e., risky) Post-shock NPV Ratio: (i) low reported capital; (ii) significant unrecognized depreciation in the value of the portfolio; or (iii) high interest rate sensitivity. Although the first two of these, low reported capital and significant unrecognized depreciation in portfolio value, may cause supervisory concern (and receive attention under the portions of the examination devoted to evaluating Capital Adequacy, Asset Quality, or Earnings), they do not necessarily represent an ''interest rate risk problem.'' Only when an institution's low Post-shock Ratio is, in whole or in part, caused by high interest rate sensitivity is an interest rate risk problem suggested. That condition is reflected in the guidelines discussed below.

3. *Guidelines for Determining the Level of Interest Rate Risk.* In describing the five levels of the ''S'' component rating, the interagency uniform ratings system established several broad, descriptive levels of risk: ''minimal,'' ''moderate,'' ''significant,'' ''high,'' and ''imminent threat.'' The following interest rate risk levels are ordinarily indicated for OTS-regulated institutions, based on the combination of each institution's Post-shock NPV Ratio and Interest Rate Sensitivity Measure. (These guidelines are summarized in Table 1 below.) These risk levels are for guidance, they are not mandatory; examiners utilize them as starting points in their ratings assessments but have broad discretion to exercise judgment (see Part IV.D, Examiner Judgment).

An institution with a Post-shock NPV Ratio below 4% and an Interest Rate Sensitivity Measure of:

(a) More than 200 basis points will ordinarily be characterized as having ''high'' risk. Such an institution will typically receive a 4 or 5 rating for the ''S'' component.[10]

(b) 100 to 200 basis points will ordinarily be characterized as having ''significant'' risk. Such an institution will typically receive a 3 rating for the ''S'' component.

(c) 0 to 100 basis points will ordinarily be characterized as having ''moderate'' risk. Such an institution will typically receive a rating of 2 for the ''S'' component. If the institution's sensitivity is extremely low, a rating of 1 may be supportable unless the institution is likely to incur larger losses under rate shocks other than the parallel shocks depicted in the OTS NPV Model.

An institution with a Post-shock NPV Ratio between 4% and 6% and an Interest Rate Sensitivity Measure of:

(a) More than 400 basis points will ordinarily be characterized as having ''high'' risk. Such an institution will typically receive a 4 or 5 rating for the ''S'' component.

(b) 200 to 400 basis points will ordinarily be characterized as having ''significant'' risk. Such an institution will typically receive a 3 rating for the ''S'' component.

(c) 100 to 200 basis points will ordinarily be characterized as having ''moderate'' risk. Such an institution will typically receive a 2 rating for the ''S'' component.

(d) 0 to 100 basis points will ordinarily be characterized as having ''minimal'' risk. Such an institution will typically receive a rating of 1 for the ''S'' component.

An institution with a Post-shock NPV Ratio between 6% and 10% and an Interest Rate Sensitivity Measure of:

(a) More than 400 basis points will ordinarily be characterized as having ''significant'' risk. Such an institution will typically receive a 3 rating for the ''S'' component.

(b) 200 to 400 basis points will ordinarily be characterized as having ''moderate'' risk. Such an institution will typically receive a 2 rating for the ''S'' component.

(c) Less than 200 basis points will ordinarily be characterized as having ''minimal'' risk. Such an institution will typically receive a rating of 1 for the ''S'' component.

An institution with a Post-shock NPV Ratio of more than 10% and an Interest Rate Sensitivity Measure of:

(a) More than 400 basis points will ordinarily be characterized as having ''moderate'' risk. Such an institution will typically receive a 2 rating for the ''S'' component.

(b) Less than 400 basis points will ordinarily be characterized as having ''minimal'' risk. Such an institution will typically receive a rating of 1 for the ''S'' component.

[10] According to the interagency uniform ratings system (61 Fed. Reg. 67029 [1996]), the level of market risk at a 4-rated institution is ''high,'' while that at a 5-rated institution is so high as to pose ''an imminent threat to its viability.'' Under the Prompt Corrective Action regulation, 12 CFR Part 565, supervisory action is tied to regulatory capital. An institution's viability is, therefore, directly dependent on regulatory capital, not on economic capital. Because regulatory capital can remain positive for an extended period of time after economic capital has become zero or negative, the NPV measures are not by themselves indicators of near-term viability. For an institution's level of interest rate risk to constitute an imminent threat to viability, the institution will typically have a high level of interest rate risk and will have other serious financial problems that place it in imminent danger of closure.

Table 1
Summary of Guidelines for the "Level of Interest Rate Risk"

Post-Shock NPV Ratio	Interest Rate Sensitivity Measure			
	0 - 100 b.p.	100-200 b.p.	200-400 b.p.	Over 400 b.p.
Over 10%	Minimal Risk (1)	Minimal Risk (1)	Minimal Risk (1)	Moderate Risk (2)
6% to 10%	Minimal Risk (1)	Minimal Risk (1)	Moderate Risk (2)	Significant Risk (3)
4% to 6%	Minimal Risk (1)	Moderate Risk (2)	Significant Risk (3)	High Risk (4)
Below 4%	Moderate Risk (2)	Significant Risk (3)	High Risk (4)	High Risk (4)

In Table 1 the numbers in parentheses represent the ''S'' component ratings that examiners would typically use as starting points in their analysis, assuming there are no deficiencies in the institution's risk management practices. Examiners may assign a different rating based on their interpretation of the facts and circumstances at each institution.

4. *Internal* vs. *OTS Risk Measures.* In applying the guidelines described above, examiners will encounter three general types of situations regarding the availability of risk measures.

First, if the institution does not have internal NPV measures, but does file Schedule CMR, examiners will use the NPV measures produced by OTS. In such instances, examiners must be aware of the importance of accurate reporting by the institution on Schedule CMR, particularly of items for which the institution provides its own market value estimates in the various interest rate scenarios, such as for mortgage derivative securities. They must also be aware of circumstances in which the OTS measures may overstate or understate the sensitivity of an institution's financial instruments.

Second, if the institution does produce its own NPV measures, examiners will have to decide whether to use the institution's or OTS's risk measures.

(a) If the institution's own measures and those produced by OTS are broadly consistent and result in the same risk category (e.g., ''minimal risk,'' ''moderate risk,'' etc.), the choice between using the institution's measures or the OTS estimates probably does not matter, though examiners should attempt to ascertain the reasons for any major discrepancies between the two sets of results.

(b) If the institution's NPV measures place it in a different risk category than the OTS measures do, examiners (in consultation with their Regional Capital Markets group or the Washington Risk Management Division) should determine which financial instruments are the source of that discrepancy. If the institution's valuations for those instruments are judged more reliable than OTS's, the institution's results will be used to replace the OTS results for those financial instruments in calculating NPV in the various interest rate scenarios.

(c) If examiners have reason to doubt both the institution's own measures and those produced by OTS, they may modify (in consultation with their Regional Capital Markets group or the Washington Risk Management Division) either or both measures to arrive at NPV measures that the examiners consider reasonable.

In deciding whether to rely on an institution's internal NPV measures, examiners will ensure that the institution's measures are produced in a manner that is broadly consistent with the OTS measures. (The major methodological points to consider are described in Part II.B, Systems for Measuring Interest Rate Risk.)

The third situation examiners will encounter is one in which the institution calculates no internal NPV measures and does not report on Schedule CMR. Because no NPV results will be available in such cases, the guidelines are not directly applicable. In addition to reviewing the institution's balance sheet structure in such cases, examiners will review whatever interest rate risk measurement and management tools the institution uses to comply with § 563.176. Depending on their findings regarding the institution's general level of risk and its risk management practices, examiners might reconsider the appropriateness of the institution's continued exemption from filing Schedule CMR.

B. Assessing the Quality of Risk Management

In drawing conclusions about the quality of an institution's risk management practices—the second dimension of the ''S'' component rating—examiners will assess all significant facets of the institution's risk management process. To aid in that assessment, examiners will refer to Appendix B of this Bulletin which provides a set of Sound Practices for Market Risk Management. These sound practices suggest the sorts of management practices institutions of varying levels of sophistication may utilize. As (i) the size of the institution increases, (ii) the complexity of its assets, liabilities, or off-balance sheet contracts increases, or (iii) the overall level of interest rate risk at the institution increases, its risk management process should exhibit more of the elements included in the Sound Practices and should display a greater degree of formality and rigor. Because there is no formula for determining the adequacy of such systems, examiners will make that determination on a case-by-case basis. Examiners will take the following eight factors, among others, into consideration in assessing the quality of an institution's risk management practices.

1. *Oversight by Board and Senior Management.* Examiners will assess the quality of oversight provided by the institution's board and senior management. That assessment may have many facets, as described in Appendix B, Sound Practices for Market Risk Management.

2. *Prudence of Limits.* Examiners will assess the prudence of the institution's board-approved interest rate risk limits.

Ordinarily, a set of IRR limits will raise examiner concerns if the limits permit the institution to have a Post-shock NPV Ratio and Interest Rate Sensitivity Measure that would ordinarily warrant an ''S'' component rating of 3 or worse. (For examples of how examiners will make that determination, see Appendix A, Evaluating Prudence of Interest Rate Risk Limits.) Depending on the level of concern, such limits may result in examiner criticism or an adverse ''S'' component rating.

3. *Adherence to Limits.* Examiners will assess the degree to which the institution adheres to its interest rate risk limits. Frequent exceptions to the board's limits may indicate weak interest rate risk management practices. Similarly, recurrent changes to the institution's limits to accommodate exceptions to the limits may reflect ineffective board oversight.

4. *Quality of System for Measuring NPV Sensitivity.* Examiners will consider whether the quality of the institution's risk measurement and monitoring system is commensurate with the institution's size, the complexity of its financial instruments, and its level of interest rate risk. Examiners will generally expect the quality of an institution's system for measuring the interest rate sensitivity of NPV to be consistent with the descriptions in Part II.B, Systems for Measuring Interest Rate Risk.

5. *Quality of System for Measuring Earnings Sensitivity.* OTS places considerable reliance on NPV analysis to assess an institution's interest rate risk. Other types of measures may, however, be considered in evaluating an institution's risk management practices. In particular, utilization of a well-supported earnings sensitivity analysis may be viewed as a favorable factor in determining an institution's component rating. In fact, all institutions are encouraged to measure the interest rate sensitivity of projected earnings. Despite inherent limitations,[11] such analyses can provide useful information to an institution's management.

Methodologies used in measuring earnings sensitivity vary considerably among different institutions. To assist examiners in reviewing the earnings modeling process, institutions should have clear descriptions of the methodologies and assumptions used in their models. Of particular importance are the type of rate scenarios used (e.g., instantaneous or gradual, consistent with forward yield curve) and assumptions regarding new business (i.e., type of assets, dollar amounts, and interest rates). In addition, formulas for projecting interest rate changes on existing business (e.g., ARMs, transaction deposits) should be clearly described and any major differences from analogous formulas used in the OTS NPV Model should be explained and supported.

6. *Integration of Risk Management with Decision-Making.* Examiners will consider the extent to which the results of an institution's risk measurement system are used by management in making operational decisions (e.g., changes in portfolio structure, investments, derivatives activities, business planning, funding decisions, pricing decisions). This is of particular significance if the institution's Post-shock NPV Ratio is relatively low, and thus provides less of an economic buffer against loss.

Examiners will evaluate whether management considers the effect of significant operational decisions on the institution's level of interest rate risk. The form of analysis used for measuring that effect (earnings sensitivity, NPV sensitivity, or any other reasonable approach) and all details of the measurement are up to the institution. That analysis should be an active factor in management's decision-making and not be generated solely to avoid examiner criticism. In the absence of such a decision-making process, examiner criticism or an adverse rating may be appropriate.

7. *Investments and Derivatives.* Examiners will consider the adequacy of the institution's risk management policies and procedures regarding investment and derivatives activities. See Part III of this Bulletin, Investment Securities and Financial Derivatives, for a detailed discussion.

8. *Size Complexity, and Risk Profile.* Under the interagency uniform ratings descriptions, an institution's risk management practices are evaluated relative to the institution's ''size, complexity, and risk profile.'' Thus, a small institution with a simple portfolio and a consistently low level of risk may receive an ''S'' rating of 1 even if its risk management practices are fairly rudimentary. A large institution with these same characteristics would be expected to have more rigorous risk management practices, but would not be held to the same risk management standards as a similarly sized institution with either a higher level of risk or a portfolio containing complex securities or financial derivatives. An institution making a conscious business decision to maintain a low risk profile by investing in low risk products or maintaining a high level of capital may not require elaborate and costly risk management systems.

C. Combining Assessments of the Level of Risk and Risk Management Practices

Guidelines examiners will use in assessing an institution's level of risk and the quality of its risk management practices have been described in the two previous sections. This section provides guidelines for combining those two assessments into an ''S'' component rating for the institution.

The interagency uniform ratings descriptions specify the criteria for the ''S'' component ratings in terms of the level of risk and the quality of risk management practices (see Appendix C). For example:

> A rating of 1 indicates that market risk sensitivity is well controlled and that there is minimal potential that the earnings performance or capital position will be adversely affected. * * * [*emphasis added*] [12]

Thus, if market risk is less than ''well controlled'' (*i.e.,* ''adequately controlled,'' ''in need of improvement,'' or ''unacceptable''), the institution does not qualify for a component rating of 1. Likewise, if the level of market risk is more than ''minimal'' (*i.e.,* ''moderate,'' ''significant,'' or ''high''), the institution similarly does not qualify for a rating of 1.

Applying the same logic to the descriptions of the 2, 3, 4, and 5 levels of the ''S'' component rating results in the ratings guidelines shown in Table 2. That table summarizes how various combinations of examiner assessments about an institution's ''level of interest rate risk'' and ''quality of risk management practices'' translate into a suggested rating.[13]

Two important caveats must be noted about this table. First, the two dimensions are not totally independent of one another, because the quality of risk management practices is evaluated relative to an institution's level of risk (among other things). Thus, for example, an institution's risk management practices are more likely to be assessed as ''well controlled'' if the institution has minimal risk than if it has a higher level of risk. Second, as described

[11] The effectiveness of an earnings sensitivity model to identify interest rate risk depends on the composition of an institution's portfolio. In particular, management should recognize that such models generally do not fully take account of longer-term risk factors.

[12] 61 Fed. Reg. 67029 (1996).

[13] Some of the combinations of risk management quality and level of risk shown in the table will rarely, if ever, be encountered (*e.g., an institution with ''unacceptable'' risk management practices, but a ''minimal'' level of risk). For the sake of completeness, however, all cells of the matrix are shown.*

further in the next section, the ratings shown in Table 2 provide a starting point, but examiners have broad discretion to exercise judgment and deviate from them.

Table 2
"S" Component-Rating Guidelines in Matrix Form

Quality of Risk Management Practices*	Level of Interest Rate Risk			
	Minimal Risk	Moderate Risk	Significant Risk	High Risk**
Well Controlled	S=1	S=2	S=3	S=4 or 5
Adequately Controlled	S=2	S=2	S=3	S=4 or 5
Needs Improvement	S=3	S=3	S=3	S=4 or 5
Unacceptable	S=4	S=4	S=4	S=4 or 5

* The Quality of Risk Management Practices is evaluated relative to an institution's size, complexity, and level of interest rate risk.

** To receive a component rating of 5, an institution's level of interest rate risk must be an "imminent threat to its viability." Such an institution will typically have a high level of interest rate risk *and* will have other serious financial problems that place it in imminent danger of closure.

D. Examiner Judgment

Blind adherence to the guidelines is undesirable. Examiners have a responsibility to exercise judgment in assigning ratings based on the facts they encounter at each institution. This section provides a non-exhaustive list of factors examiners might consider in applying the ''S'' rating guidelines to a particular institution.

1. *Judgment in Assessing the Level of Risk.* In assessing the level of interest rate risk, the likelihood that examiners will deviate from the guidelines in Table 1 is heightened in cases where the Post-shock NPV Ratio and the Interest Rate Sensitivity Measure are both near cell boundaries. For example, there is no material difference between an institution whose Post-shock Ratio and Sensitivity Measure, are, respectively, 4.01% and 199 b.p. and one where they are 3.99% and 201 b.p., yet the guidelines in Table 1 suggest a 2 rating for the former and a 4 for the latter. Clearly, the row and column boundaries of the cells in the table must be interpreted as transition zones or ''gray areas,'' rather than as precise cut-off points, between suggested ratings. As such, examiners will more commonly deviate from the stated guidelines in the vicinity of cell borders than in their interior. Open-ended cells are another instance where examiners will more commonly deviate from the guidelines. For example, in assessing an institution whose Sensitivity Measure is well beyond 400 b.p., an examiner might very well determine that its level of risk is higher than the guidelines in the rightmost column of Table 1. In applying the guidelines in Table 1, many considerations may cause an examiner to reach a different conclusion than suggested by the guidelines. Such considerations include the following:

(a) The trend in the institution's risk measures during recent quarters.

(b) The trend in the institution's risk measures compared with those of the rest of the industry in recent quarters. (Comparison with the results for the industry as a whole often provides a useful backdrop for evaluating an institution's results, particularly during a period of volatile interest rates.)

(c) The examiner's level of comfort with the overall accuracy of the available risk measures as applied to the particular products of the institution.

(d) The existence of items with particularly volatile or uncertain interest rate sensitivity for which the examiner wants to allow an added margin for possible error.

(e) The effect of any restructuring that may have occurred since the most recently available risk measures.

(f) Other available evidence that causes the examiner to favor a higher or lower risk assessment than that suggested by the guidelines.

2. *Judgment in Assessing the Quality of Risk Management Practices.* Conclusions about the quality of risk management practices should be based, in part, on the institution's level of risk, with less risky institutions requiring less rigorous risk management practices. Considerations listed in the Judgment in Assessing the Level of Risk, above, may therefore cause the examiner to modify his or her assessment of the institution's risk management practices. In addition, if changes have occurred in the institution's level of risk since the last evaluation, the examiner may wish to reassess the quality of the institution's risk management practices in light of these changes.

Part V: Supervisory Action

If supervisory action to address interest rate risk is needed, examiners will discuss the problem with management and obtain their commitment to correct the problem as quickly as practicable.

If deemed necessary, examiners will request a written plan from the board and management to reduce interest rate sensitivity, increase capital, or both. The plan should include specific risk measure targets. If the initial plan is inadequate, examiners will require amendment and re-submission. Examiners will document the corrective strategy and results and review progress at case reviewing meetings.

For institutions with composite ratings of 4 or 5, the presumption of formal enforcement action generally requires a supervisory agreement, cease

and desist order, prompt corrective action directive, or other formal supervisory action. If an institution's interest rate risk increases between examinations, examiners will consider whether a downgrade of the ''S'' component rating or the composite rating is warranted. Examiners will obtain quarterly progress reports (more frequently if the situation is severe). Where appropriate, examiners may require the institution to develop the capacity to conduct its own modeling.

Appendix A: Evaluating Prudence of Interest Rate Risk Limits

The basic principle examiners will use in evaluating the prudence of an institution's risk limits is whether they permit NPV to drop to a level where the Post-shock NPV Ratio and Sensitivity Measure would suggest an ''S'' component rating of 3 or worse under the guidelines for the Level of Risk (reproduced here as Table 1).

Table 1
Summary of Guidelines for the "Level of Interest Rate Risk"

Post-Shock NPV Ratio	Interest Rate Sensitivity Measure			
	0 - 100 b.p.	100-200 b.p.	200-400 b.p.	Over 400 b.p.
Over 10%	Minimal Risk (1)	Minimal Risk (1)	Minimal Risk (1)	Moderate Risk (2)
6% to 10%	Minimal Risk (1)	Minimal Risk (1)	Moderate Risk (2)	Significant Risk (3)
4% to 6%	Minimal Risk (1)	Moderate Risk (2)	Significant Risk (3)	High Risk (4)
Below 4%	Moderate Risk (2)	Significant Risk (3)	High Risk (4)	High Risk (4)

Examples of Evaluating the Prudence of Interest Rate Risk Limits

The following examples illustrate how OTS examiners will evaluate an institution's interest rate risk limits. In each example, the interest rate risk limits approved by the institution's board of directors are shown in column [b]. These specify a minimum NPV Ratio for each of the interest rate scenarios shown in column [a]. The NPV Ratios currently estimated for the institution for each rate scenario are shown in column [c].

Example Institution A

Institution A has a detailed set of interest rate risk limits by which the board of directors specifies a minimum NPV Ratio for each of the seven rate shock scenarios described in Part II.A.1 of this bulletin.

INSTITUTION A—LIMITS AND CURRENT NPV RATIOS

Rate shock (in basis points) [a]	Board limits (minimum NPV ratios) [b]	Institution's current NPV ratios) [c]
+300	6.00%	10.00%
+200	7.00	11.50
+100	8.00	12.50
0	9.00	13.00
−100	10.00	13.25
−200	11.00	13.50
−300	12.00	13.75

To assess the prudence of Institution A's interest rate risk limits, examiners will evaluate the risk measures permitted under those limits relative to the guidelines for the Level of Risk in Table 1. The Post-shock NPV Ratio permitted by the institution's board limits is 7.00% (from the +200 b.p. scenario in column [b], above). The Sensitivity Measure permitted by the limits is not known; it depends on the actual level of the base case NPV Ratio, which will probably be higher than the limit for the base case scenario. Examiners will, therefore, use the institution's current Sensitivity Measure (based on OTS's results or those of the institution) in performing their evaluation. Institution A's current Sensitivity Measure is 150 basis points (i.e., [13.00%–11.50%], the NPV Ratios in the 0 b.p. and +200 b.p. scenarios in column [c], above).

Referring to Table 1, the Post-shock NPV Ratio allowed by the institution's limits falls into the ''6% to 10%'' row and its current Sensitivity Measure falls into the ''100 to 200 b.p.'' column. The rating suggested by Table 1 is, therefore, a 1, and Institution A's risk limits would, thus, probably be considered prudent.[14]

Example Institution B

[14] This example assumes there are no significant deficiencies in the institution's risk management practices.

INSTITUTION B—LIMITS AND CURRENT NPV RATIOS

Rate shock (in basis points) [a]	Board limits (minimum NPV ratios [b]	Institution's current NPV ratios) [c]
+300	6.00%	6.00%
+200	7.00	8.50
+100	8.00	11.00
0	9.00	13.00
−100	10.00	14.00
−200	11.00	14.50
−300	12.00	15.00

Institution B has identical interest rate risk limits as Institution A, but is considerably more interest rate sensitive than Institution A at the present time. Institution B's Sensitivity Measure is 450 b.p. (i.e., [13.00%–8.50%]). For purposes of applying the guidelines in Table 1 to the limits, the Post-shock NPV Ratio of 7.00% permitted by the institution's board limits falls into the ''6% to 10%'' row. Its current Sensitivity Measure, however, falls into the ''Over 400 b.p.'' column of Table 1. The rating suggested by the guidelines is therefore a 3, and Institution B's risk limits would probably not be considered sufficiently prudent. Even though its limits are identical to those of Institution A, its much higher current Sensitivity Measure requires the support of a higher Post-shock NPV Ratio than the minimum permitted by the board limits.

Example Institution C

INSTITUTION C—LIMITS AND CURRENT NPV RATIOS

Rate shock (in basis points) [a]	Board limits (minimum NPV ratios) [b]	Institution's current NPV ratios [c]
+300	6.00%	6.00%
+200	6.00	8.50
+100	6.00	11.00
0	6.00	13.00
−100	6.00	14.00
−200	6.00	14.50
−300	6.00	15.00

Institution C has the same current NPV Ratios as Institution B. Its board of directors has established the institution's interest rate risk limits as a single minimum NPV Ratio of 6% that applies to all seven rate shock scenarios. In assessing the prudence of those limits, therefore, the Post-shock NPV Ratio permitted by the limits is 6.00%. The current Sensitivity Measure, like that of Institution B, is 450 b.p.

In applying the Table 1 guidelines to the limits, Institution C's Post-shock NPV Ratio is in either the ''4% to 6%'' or the ''6% to 10%'' row and its Sensitivity Measure in the ''Over 400 b.p.'' column of Table 1. The rating suggested by the table is, therefore, a 3 or a 4, and so Institution C's risk limits would also probably not be considered sufficiently prudent.

Example Institution D

INSTITUTION D—LIMITS AND CURRENT NPV RATIOS

Rate shock (in basis points) [a]	Board limits (minimum NPV ratios) [b]	Institution's current NPV ratios [c]
+300	3.50%	2.50%
+200	3.50	3.25
+100	3.50	3.75
0	3.50	4.00
−100	3.50	4.25
−200	3.50	4.50
−300	3.50	4.75

Institution D has quite a low base case level of economic capital, and its board limits recognize that fact by permitting low NPV Ratios. Furthermore, the institution's level of interest rate risk currently exceeds the board limits (i.e., the current NPV Ratios in the +200 and +300 scenarios are below the board's 3.50% minimum). While examiners

would be very likely to express concern about that aspect of the institution's risk management process, the limits themselves might still be viewed as prudent.

To determine whether the institution's limits are prudent, examiners will use the Post-shock NPV Ratio of 3.50% permitted by the limits and the institution's current Sensitivity Measure of 75 basis points (i.e., [4.00%–3.25%]). In applying Table 1, the Post-shock NPV Ratio permitted by the limits falls into the ''Below 4%'' row and the current Sensitivity Measure falls into the ''0 to 100 b.p.'' column. The rating suggested by Table 1 is therefore a 2, and assuming that Institution A's Sensitivity Measure has been consistently low, its risk limits would probably be considered prudent. Because of the critical importance of the Sensitivity Measure in this determination, examiners might well arrive at a different conclusion if they lack assurance that the institution has the ability to maintain that measure at its current, low level. Thus, if the Sensitivity Measure has been volatile in the past or if examiners have concerns about the quality of the institution's risk management practices, they might well conclude that the risk limits are not sufficiently prudent.

Appendix B: Sound Practices for Market Risk Management

This section describes the key elements for effective management of market risk exposures. These key elements encompass sound practices for both interest rate risk management and the management of investment and derivatives activities. The degree of formality and rigor with which an institution implements these elements in its own risk management system should be consistent with the institution's size, the complexity of its financial instruments, its tolerance for risk, and the level of market risk at which it actually operates.

A. Board and Senior Management Oversight

Effective oversight is an integral part of an effective risk management program. The board and senior management should understand their oversight responsibilities regarding interest rate risk management and the management of investment and derivatives activities conducted by their institution.

Board of Directors. The board of directors should approve broad strategies and major policies relating to market risk management and ensure that management takes the steps necessary to monitor and control market risk. The board of directors should be informed regularly of the institution's risk exposures.

The board of directors has ultimate responsibility for understanding the nature and level of risk taken by the institution. Board oversight need not involve the entire board, but may be carried out by an appropriate subcommittee of the board. The board, or an appropriate subcommittee of board members, should:

- Approve broad objectives and strategies and major policies governing interest rate risk management and investment and derivatives activities.
- Provide clear guidance to management regarding the board's tolerance for risk.
- Ensure that senior management takes steps to measure, monitor, and control risk.
- Review periodically information that is sufficient in timeliness and detail to allow it to understand and assess the institution's interest rate risk and risks related to investment and derivatives activities.
- Assess periodically compliance with board-approved policies, procedures, and risk limits.
- Review policies, procedures and risk limits at least annually.

Although board members are not required to have detailed technical knowledge, they should ensure that management has the expertise needed to understand the risks incurred by the institution and that the institution has personnel with the expertise needed to manage interest rate risk and conduct investment and derivative activities in a safe and sound manner.

Senior Management. Senior management should ensure that the institution's operations are effectively managed, that appropriate risk management policies and procedures are established and maintained, and that resources are available to conduct the institution's activities in a safe and sound manner.

Senior management is responsible for the daily oversight and management of the institution's activities, including the implementation of adequate risk management polices and procedures. To carry out its responsibilities, senior management should:

- Ensure that effective risk management systems are in place and properly maintained. An institution's risk management systems should include (1) systems for measuring risk, valuing positions, and measuring performance, (2) appropriate risk limits, (3) a comprehensive reporting and review process, and (4) effective internal controls.
- Establish and maintain clear lines of authority and responsibility for managing interest rate risk and for conducting investment and derivatives activities.
- Ensure that the institution's operations and activities are conducted by competent staff with technical knowledge and experience consistent with the nature and scope of their activities.
- Provide the board of directors with periodic reports and briefings on the institution's market-risk related activities and risk exposures.
- Review periodically the institution's risk management systems, including related policies, procedures, and risk limits.

Lines of Responsibility and Authority for Managing Market Risk. Institutions should identify the individuals and/or committees responsible for risk management and should ensure there is adequate separation of duties in key elements of the risk management process to avoid potential conflicts of interest. Institutions should have a risk management function (or unit) with clearly defined duties that is sufficiently independent from position-taking functions.

Institutions should identify the individuals and/or committees responsible for conducting risk management. Senior management should define lines of authority and responsibility for developing strategies, implementing tactics, and conducting the risk measurement and reporting functions.

The risk management unit should report directly to both senior management and the board of directors, and should be separate from, and independent of, business lines. The function may be part of, or may draw its staff from, more general operations (e.g., the audit, compliance, or Treasury units). Large institutions should, however, have a separate risk management unit, particularly if the Treasury unit is also a profit center. Smaller institutions with limited resources and personnel should provide additional oversight by outside directors in order to compensate for the lack of separation of duties.

Management should ensure that sufficient safeguards exist to minimize the potential that individuals initiating risk-taking positions may inappropriately influence key control functions of the risk management process such as the development and enforcement of policies and procedures, the reporting of risks to senior

management, and the conduct of back-office functions.

B. Adequate Policies and Procedures

Institutions should have clearly defined risk management policies and procedures. The board of directors has ultimate responsibility for the adequacy of those policies and procedures; senior management and the institution's risk management function have immediate responsibility for their design and implementation. Policies and procedures should be reviewed periodically and revised as needed.

Interest Rate Risk. Institutions should have written policies and procedures for limiting and controlling interest rate risk. Such policies and procedures should be consistent with the institution's strategies, financial condition, risk-management systems, and tolerance for risk. An institution's policies and procedures (or documentation issued pursuant to such policies) should:

- Address interest rate risk at the appropriate level(s) of consolidation. (Although the board will generally be most concerned with the consolidated entity, it should be aware that accounting and legal restrictions may not permit gains and losses occurring in different subsidiaries to be netted.)
- Delineate lines of responsibility and identify individuals or committees responsible for (1) developing interest rate risk management strategies and tactics, (2) making interest rate risk management decisions, and (3) conducting oversight.
- Identify authorized types of financial instruments and hedging strategies.
- Describe a clear set of procedures for controlling the institution's aggregate interest rate risk exposure.
- Define quantitative limits on the acceptable level of interest rate risk for the institution.
- Define procedures and conditions necessary for exceptions to policies, limits, and authorizations.

Investment and Derivatives Activities. Institutions should have written policies and procedures governing investment and derivatives activities. Such policies and procedures should be consistent with the institution's strategies, financial condition, risk-management systems, and tolerance for risk. An institution's policies and procedures (or documentation issued pursuant to such policies) should:

- Identify the staff authorized to conduct investment and derivatives activities, their lines of authority, and their responsibilities.
- Identify the types of authorized investment securities and derivative instruments.
- Specify the type and scope of pre-purchase analysis that should be conducted for various types or classes of investment securities and derivative instruments.
- Define, where appropriate, position limits and other constraints on each type of authorized investment and derivative instrument, including constraints on the purpose(s) for which such instruments may be used.
- Identify dealers, brokers, and counterparties that the board or a committee designated by the board (e.g., a credit policy committee) has authorized the institution to conduct business with and identify credit exposure limits for each authorized entity.
- Ensure that contracts are legally enforceable and documented correctly.
- Establish a code of ethics and standards of professional conduct applicable to personnel involved in investment and derivatives activities.
- Define procedures and approvals necessary for exceptions to policies, limits, and authorizations.

Policies and procedures governing investment and derivatives activities may be embedded in other policies, such as the institution's interest rate risk policies, and need not be stand-alone documents.

C. Risk Measurement, Monitoring, and Control Functions

Interest Rate Risk Measurement. Institutions should have interest rate risk measurement systems that capture all material sources of interest rate risk. Measurement systems should utilize accepted financial concepts and risk measurement techniques and should incorporate sound assumptions and parameters. Management should understand the assumptions underlying their systems. Ideally, institutions should have interest rate risk measurement systems that assess the effects of interest rate changes on both earnings and economic value.

An institution's interest rate risk measurement system should address all material sources of interest rate risk including repricing, yield curve, basis and option risk exposures. In many cases, the interest rate sensitivity of an institution's mortgage portfolio will dominate its aggregate risk profile. While all of an institution's holdings should receive appropriate treatment, instruments whose interest rate sensitivity may significantly affect the institution's overall results should receive special attention, as should instruments whose embedded options may have a significant effect on the results.

The usefulness of any interest rate risk measurement system depends on the validity of the underlying assumptions and accuracy of the methodologies. In designing interest rate risk measurement systems, institutions should ensure that the degree of detail about the nature of their interest-sensitive positions is commensurate with the complexity and risk inherent in those positions.

Management should assess the significance of the potential loss of precision in determining the extent of aggregation and simplification used in its measurement approach.

Institutions should ensure that all material positions and cash flows, including off-balance-sheet positions, are incorporated into the measurement system. Where applicable, these data should include information on the coupon rates or cash flows of associated instruments and contracts. Any adjustments to underlying data should be documented, and the nature and reasons for the adjustments should be understood. In particular, any adjustments to expected cash flows for expected prepayments or early redemptions should be documented.

Key assumptions used to measure interest rate risk exposure should be re-evaluated at least annually. Assumptions used in assessing the interest rate sensitivity of complex instruments should be documented and reviewed periodically.

Management should pay special attention to those positions with uncertain maturities, such as savings and time deposits, which provide depositors with the option to make withdrawals at any time. In addition, institutions often choose not to change the rates paid on these deposits when market rates change. These factors complicate the measurement of interest rate risk, since the value of the positions and the timing of their cash flows can change when interest rates vary. Mortgages and mortgage-related instruments also warrant special attention due to the uncertainty about the timing of cash flows introduced by the borrowers' ability to prepay.

IRR Limits. Institutions should establish and enforce risk limits that maintain exposures within prudent levels. Management should ensure that the institution's interest rate risk exposure is maintained within self-imposed limits. A system of interest rate risk limits should set prudent boundaries for the level of interest rate risk for the institution and, where

appropriate, should also provide the capability to set limits for individual portfolios, activities, or business units.

Limit systems should also ensure that positions exceeding limits or predetermined levels receive prompt management attention.

Senior management should be notified immediately of any breaches of limits. There should be a clear policy as to how senior management will be informed and what action should be taken. Management should specify whether the limits are absolute in the sense that they should never be exceeded or whether, under specific circumstances, breaches of limits can be tolerated for a short period of time.

Limits should be consistent with the institution's approach to measuring interest rate risk.

Interest rate risk limits should be tied to specific scenarios for movements in market interest rates and should include ''high stress'' interest rate scenarios.

Limits may also be based on measures derived from the underlying statistical distribution of interest rates, using ''earnings-at-risk'' or ''value-at-risk'' techniques.

Stress Testing. Institutions should measure their risk exposure under a number of different scenarios and consider the results when establishing and reviewing their policies and limits for interest rate risk.

Institutions should use interest rate scenarios that are sufficiently varied to encompass different stressful conditions.

Stress tests should include ''worst case'' scenarios in addition to more probable scenarios. Possible stress scenarios might include abrupt changes in the general level of interest rates, changes in the relationships among key market rates (i.e., basis risk), changes in the slope and the shape of the yield curve (i.e., yield curve risk), changes in the liquidity of key financial markets or changes in the volatility of market rates. In conducting stress tests, special consideration should be given to instruments or positions that may be difficult to liquidate or offset in stressful situations. Management and the board of directors should periodically review both the design and the results of such stress tests and ensure that appropriate contingency plans are in place.

Market Risk Monitoring and Reporting. Institutions should have accurate, informative, and timely management information systems, both to inform management and to support compliance with board policy. Reports for monitoring and controlling market risk exposures should be provided on a timely basis to the board of directors and senior management.

The board of directors and senior management should review market risk reports (i.e., interest rate risk reports and reports on investment and derivatives activities) on a regular basis (at least quarterly). While the types of reports prepared for the board and various levels of management will vary, they should include:

- Summaries of the institution's aggregate interest rate risk and other market risk exposures including results of stress tests;
- Reports on the institution's compliance with risk management policies, procedures, and limits;
- Reports comparing the institution's level of interest rate risk with other savings associations using industry data provided by OTS;
- A summary of any major differences between the results of the OTS Net Portfolio Value Model and the institution's own results; and
- Summaries of internal and external reviews of the institution's risk management framework, including reviews of policies, procedures, risk measurement and control systems, and risk exposures.

D. Internal Controls

Institutions should have an adequate system of internal controls over their interest rate risk management process. A fundamental component of the internal control system involves regular independent reviews and evaluations of the effectiveness of the system.

Internal controls should be an integral part of an institution's risk management system. The controls should promote effective and efficient operations, reliable financial and regulatory reporting, and compliance with relevant laws, regulations, and institutional policies. An effective system of internal control for interest rate risk should include:

- effective policies, procedures, and risk limits;
- an adequate process for measuring and evaluating risk;
- adequate risk monitoring and reporting systems;
- a strong control environment; and
- continual review of adherence to established policies and procedures.

Institutions are encouraged to have their risk measurement systems reviewed by knowledgeable outside parties. Reviews of risk measurement systems should include assessments of the assumptions, parameter values, and methodologies used. Such a review should evaluate the system's accuracy and recommend solutions to any identified weaknesses. The results of the review, along with any recommendations for improvement, should be reported to senior management and the board, and acted upon in a timely manner.

Institutions should review their system of internal controls at least annually. Reviews should be performed by individuals independent of the function being reviewed. Results should be reported to the board. The following factors should be considered in reviewing an institution's internal controls:

- Are risk exposures maintained at prudent levels?
- Are the risk measures employed appropriate to the nature of the portfolio?
- Are board and senior management actively involved in the risk management process?
- Are policies, controls, and procedures well documented?
- Are policies and procedures followed?
- Are the assumptions of the risk measurement system well documented?
- Are data accurately processed?
- Is the risk management staff adequate?
- Have risk limits been changed since the last review?
- Have there been any significant changes to the institution's system of internal controls since the last review?
- Are internal controls adequate?

E. Analysis and Stress Testing of Investments and Financial Derivatives

Management should undertake a thorough analysis of the various risks associated with investment securities and derivative instruments prior to making an investment or taking a significant position in financial derivatives and periodically thereafter. Major initiatives involving investments and derivatives transactions should be approved in advance by the board of directors or a committee of the board.

As a matter of sound practice, prior to taking an investment position or initiating a derivatives transaction, an institution should:

- Ensure that the proposed investment or derivative transaction is legally permissible for a savings institution.
- Review the terms and conditions of the investment instrument or derivative contract.
- Ensure that the proposed transaction is allowable under the institution's investment or derivatives policies.
- Ensure that the proposed transaction is consistent with the

institution's portfolio objectives and liquidity needs.

- Exercise diligence in assessing the market value, liquidity, and credit risk of any investment security or derivative instrument.
- Conduct a price sensitivity analysis of the security or financial derivative prior to taking a position.
- Conduct an analysis of the incremental effect of any proposed transaction on the overall interest rate sensitivity of the institution.

Prior to taking a position in any complex securities or financial derivatives, it is important to have an understanding of how the future direction of interest rates and other changes in market conditions could affect the instrument's cash flows and market value. In particular, management should understand:

- the structure of the instrument;
- the best-case and worst-case interest rates scenarios for the instrument;
- how the existence of any embedded options or adjustment formulas might affect the instrument's performance under different interest rate scenarios;
- the conditions, if any, under which the instrument's cash flows might be zero or negative;
- the extent to which price quotes for the instrument are available;
- the instrument's universe of potential buyers; and
- the potential loss on the instrument (i.e., the potential discount from its fair value) if sold prior to maturity.

F. Evaluation of New Products, Activities, and Financial Instruments

Involvement in new products, activities, and financial instruments (assets, liabilities, or off-balance sheet contracts) can entail significant risk, sometimes from unexpected sources. Senior management should evaluate the risks inherent in new products, activities, and instruments and ensure that they are subject to adequate review procedures and controls.

Products, activities, and financial instruments that are new to the organization should be carefully reviewed before use or implementation. The board, or an appropriate committee, should approve major new initiatives involving new products, activities, and financial instruments.

Prior to authorizing a new initiative, the review committee should be provided with:

- a description of the relevant product, activity, or instrument;
- an analysis of the appropriateness of the proposed initiative in relation to the institution's overall financial condition and capital levels; and
- a description of the procedures to be used to measure, monitor, and control the risks of the proposed product, activity, or instrument.

Management should ensure that adequate risk management procedures are in place in advance of undertaking any significant new initiatives.

Appendix C: Excerpt From Interagency Uniform Financial Institutions Rating System [15]

Sensitivity to Market Risk

The sensitivity to market risk component reflects the degree to which changes in interest rates, foreign exchange rates, commodity prices, or equity prices can adversely affect a financial institution's earnings or economic capital. When evaluating this component, consideration should be given to: management's ability to identify, measure, monitor, and control market risk; the institution's size; the nature and complexity of its activities; and the adequacy of its capital and earnings in relation to its level of market risk exposure.

For many institutions, the primary source of market risk arises from non-trading positions and their sensitivity to changes in interest rates. In some larger institutions, foreign operations can be a significant source of market risk. For some institutions, trading activities are a major source of market risk.

Market risk is rated based upon, but not limited to, an assessment of the following evaluation factors:

- The sensitivity of the financial institution's earnings or the economic value of its capital to adverse changes in interest rates, foreign exchange rates, commodity prices, or equity prices.
- The ability of management to identify, measure, monitor, and control exposure to market risk given the institution's size, complexity, and risk profile.
- The nature and complexity of interest rate risk exposure arising from non-trading positions.
- Where appropriate, the nature and complexity of market risk exposure arising from trading and foreign operations.

Ratings

1. A rating of 1 indicates that market risk sensitivity is well controlled and that there is minimal potential that the earnings performance or capital position will be adversely affected. Risk management practices are strong for the size, sophistication, and market risk accepted by the institution. The level of earnings and capital provide substantial support for the degree of market risk taken by the institution.

2. A rating of 2 indicates that market risk sensitivity is adequately controlled and that there is only moderate potential that the earnings performance or capital position will be adversely affected. Risk management practices are satisfactory for the size, sophistication, and market risk accepted by the institution. The level of earnings and capital provide adequate support for the degree of market risk taken by the institution.

3. A rating of 3 indicates that control of market risk sensitivity needs improvement or that there is significant potential that the earnings performance or capital position will be adversely affected. Risk management practices need to be improved given the size, sophistication, and level of market risk accepted by the institution. The level of earnings and capital may not adequately support the degree of market risk taken by the institution.

4. A rating of 4 indicates that control of market risk sensitivity is unacceptable or that there is high potential that the earnings performance or capital position will be adversely affected. Risk management practices are deficient for the size, sophistication, and level of market risk accepted by the institution. The level of earnings and capital provide inadequate support for the degree of market risk taken by the institution.

5. A rating of 5 indicates that control of market risk sensitivity is unacceptable or that the level of market risk taken by the institution is an imminent threat to its viability. Risk management practices are wholly inadequate for the size, sophistication, and level of market risk accepted by the institution. [Emphasis added.]

Appendix D: Glossary

Alternate Interest Rate Scenarios: Scenarios that depict hypothetical shocks to, or movements in, the current term structure of interest rates. As currently utilized in the OTS NPV Model, there are eight alternate interest rate scenarios, depicting shocks in which the term structure has been changed by the same amount at all maturities. The changes currently depicted in the alternate scenarios range from—400 basis points to +400 basis points. (Institutions need only provide board limits for scenarios ranging from − 300 to +300 basis points.)

Base Case: A term sometimes used for the prevailing term structure of interest rates (i.e., the current interest rate scenario). Also known as the ''pre-

[15] 61 Fed. Reg. 67029 (1996).

shock'' or ''no shock'' scenario, one not subjected to a change in interest rates. This is in contrast to, say, the plus or minus 100 basis point rate shock scenarios.

CAMELS Rating System: A uniform ratings system, applied to all banks, thrifts, and credit unions, which provides an indication of an institution's overall condition.. The six factors of the CAMELS rating system represent Capital Adequacy, Asset Quality, Management, Earnings, Liquidity, and Sensitivity to Market Risk. Quantitative and qualitative factors are used to establish a rating, ranging from 1 to 5 for each CAMELS component rating. A rating of 1 represents the best rating and least degree of concern, while a 5 rating represents the worst rating and greatest degree of concern. The six CAMELS component ratings are used in developing the overall Composite Rating for an institution.

Complex Securities: The term ''complex security'' includes any collateralized mortgage obligation (''CMO''), real estate mortgage investment conduit (''REMIC''), callable mortgage pass-through security, stripped-mortgage-backed-security, structured note, and any security not meeting the definition of an ''exempt security.'' An ''exempt security'' includes non-callable, ''plain vanilla'' instruments of the following types: (1) mortgage-pass-through securities, (2) fixed-rate securities, and (3) floating-rate securities.

Composite Rating: A rating that summarizes an institution's overall condition under the CAMELS rating system. This overall rating is expressed through a numerical scale of 1 through 5, with 1 representing the best rating and least degree of concern, and 5 representing the worst rating and highest degree of concern.

Financial Derivative: Any financial contract whose value depends on the value of one or more underlying assets, indices, or reference rates. The most common types of financial derivatives are futures, forward commitments, options, and swaps. A mortgage derivative security, such as a collateralized mortgage obligation or a real estate mortgage investment conduit, is not a financial derivative under this definition.

Interest Rate Risk: The vulnerability of an institution's financial condition to movements in interest rates. Changes in interest rates affect an institution's earnings and economic value.

Interest Rate Risk Exposure Report: A quarterly report, sent by OTS to all institutions that file Schedule CMR, presenting the results of the OTS NPV Model for each institution.

Interest Rate Sensitivity Measure: The magnitude of the decline in an institution's NPV Ratio that occurs as a result of an adverse rate shock of 200 basis points. The measure equals the difference between an institution's Pre-shock NPV Ratio and its Post-shock NPV Ratio and is expressed in basis points. In general, institutions that have significant imbalances between the interest rate sensitivity (i.e., duration) of their assets and liabilities tend to have high Interest Rate Sensitivity Measures.

MVPE: The abbreviation for Market Value of Portfolio Equity, a term previously used for Net Portfolio Value. This term is no longer used by OTS because some of the factors used to determine NPV may not be market based.

NPV: The abbreviation for Net Portfolio Value which equals the present value of expected net cash flows from existing assets minus the present value of expected net cash flows from existing liabilities plus the present value of net expected cash flows from existing off-balance sheet contracts.

Post-shock NPV Ratio: Along with the Sensitivity Measure, one of the two primary measures of interest rate risk used by OTS. The ratio is determined by dividing an institution's NPV by the present value of its assets, where both the numerator and denominator are measured after a 200 basis point increase or decrease in market interest rates, whichever produces the smaller ratio. A higher Post-shock Ratio indicates a lower level of interest rate risk. Also sometimes referred to as the ''Exposure Measure.''

Pre-shock NPV Ratio: Ratio determined by dividing an institution's NPV by the present value of its assets, where both the numerator and denominator are measured in the base case. The ratio is a measure of an institution's economic capitalization. It is also referred to as the ''Base Case NPV Ratio.''

Prompt Corrective Action: A system of enforcement actions, established under the Federal Deposit Insurance Corporation Improvement Act of 1991, that regulators are required to take against insured institutions whose capital falls below certain critical thresholds.

''S'' Component Rating: see ''Sensitivity to Market Risk Component Rating.''

Schedule CMR: A section of the Thrift Financial Report that is used by OTS to collect financial data for the OTS NPV Model.

Sensitivity Measure: see ''Interest Rate Sensitivity Measure.''

Sensitivity to Market Risk'' Component Rating: The component rating in the CAMELS rating system designed to express the degree to which changes in interest rates, foreign exchange rates, commodity prices, or equity prices can adversely affect a financial institution's earnings or economic capital. The rating is based on two components: an institution's level of market risk and the quality of its practices for managing market risk. The ''S'' component rating.

Shocked Rate Scenarios: see ''Alternate Interest Rate Scenarios.''

Structured Notes: Structured notes include fixed-income securities with embedded options or derivative-like features where the bond's coupon, average life, or redemption value is dependent on a reference rate, an index, or formula. The term ''structured notes'' includes but is not limited to: dual-indexed floaters, de-leveraged floaters, inverse floaters, leveraged inverse floaters, ratchet floaters, range floaters, leveraged cap floaters, stepped cap/floor floaters, capped callable floaters, stepped spread floaters, multi-step bonds, indexed amortization notes, etc. Standard, non-leveraged, floating rate securities (i.e., those whose interest rate is not based on a multiple of the index) are not considered structured notes for purposes of this Thrift Bulletin.

Uniform Financial Institutions Rating System: see ''CAMELS Rating System'' and ''Composite Rating.''

Value-at-risk: A measure of market risk. An estimate of the maximum potential loss in economic value over a given period of time for a given probability level.

Dated: November 20, 1998.

By the Office of Thrift Supervision.

Ellen Seidman,

Director.

[FR Doc. 98–31672 Filed 11–30–98; 8:45 am]

BILLING CODE 6720–01–P

federal register

Tuesday
December 1, 1998

Part V

Department of Health and Human Services

Food and Drug Administration

21 CFR Part 201 et al.

Prescription Drug Product Labeling; Medication Guide Requirements; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 201, 208, 314, 601, and 610

[Docket No. 93N–0371]

RIN 0910–AA37

Prescription Drug Product Labeling; Medication Guide Requirements

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is establishing requirements for the distribution of patient labeling for selected prescription human drug and biological products used primarily on an outpatient basis. The agency is requiring the distribution of patient labeling, called Medication Guides, for certain products that pose a serious and significant public health concern requiring distribution of FDA-approved patient medication information. The intent of this action is to improve public health by providing information necessary for patients to use their medications safely and effectively. FDA believes that this program will result in direct improvements in the safe and effective use of prescription medications.

DATES: This regulation is effective June 1, 1999. Written comments on the information collection requirements should be submitted by February 1, 1999.

ADDRESSES: Submit written comments on the information collection requirements to the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT:

Nancy M. Ostrove, Center for Drug Evaluation and Research (HFD–40), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–2828, (Ostrove@CDER.FDA.GOV).

Toni M. Stifano, Center for Biologics Evaluations and Research (HFM–20), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852, 301–827–3028, (Stifano@A1.CBER.FDA.GOV).

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of August 24, 1995 (60 FR 44182), FDA published a proposed rule entitled, ''Prescription Drug Product Labeling; Medication Guide Requirements,'' under which the agency would encourage development and distribution of written patient medication information by the private sector. This information was intended to supplement oral counseling from health care professionals. The agency proposed distribution goals and performance standards for this information. The agency proposed to survey the marketplace in the years 2000 and 2006 to determine how much patient medication information is being distributed and whether it is useful. The 1995 proposal sought comment on two approaches FDA could take if the private sector's voluntary program failed to reach the predetermined goals.

The proposal also included provisions that would permit the agency to require FDA-approved written patient information (Medication Guides) for distribution with prescription drug and biological products that pose a ''serious and significant public health concern requiring immediate distribution of FDA-approved patient medication information.'' (For the purposes of this document, the shorter term ''serious and significant concern'' will be used to refer to those drug products that FDA determines require Medication Guides for safe and effective use by the public.) The agency indicated that it would use this authority only on limited occasions.

In the proposal, FDA stated its position that patient information about the risks and benefits of prescription drug and biological products is necessary for patients to use these products safely and effectively. The overall patient medication information program was proposed to provide patients with the information needed to improve their use of prescription drug and biological products. Furthermore, FDA demonstrated in the preamble to the proposed rule that the program could result in substantial health care cost savings by reducing the harm caused by inappropriate drug use and enhancing the benefits of drugs by facilitating their proper use.

FDA originally provided 90 days for public comment, and, in response to requests, extended the comment period for an additional 30 days until December 22, 1995 in the **Federal Register** of November 24, 1995 (60 FR 58025). In the **Federal Register** of January 30, 1996 (61 FR 2971), the agency announced a public workshop to be held on February 14 and 15, 1996, to discuss issues related to defining the useful information that would be provided in the voluntary program. The agency also sought written comments on issues raised at the workshop. Comments were accepted until March 6, 1996.

As the agency was reviewing these and other comments on the proposed rule, Congress enacted legislation regarding patient labeling. This legislation, section 601 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, for the fiscal year ending September 30, 1997 (Pub. L. 104–180) (the Appropriations Act), established a voluntary private-sector process under which national organizations representing health care providers, consumers, pharmaceutical companies, and other interested parties were to collaborate in the development of a long-range plan to achieve the goals of FDA's proposed rule concerning patient labeling as previously described. The legislation adopted the distribution and information quality goals of the proposed rule. The law further required that the plan developed by these organizations be submitted to the Secretary of Health and Human Services (the Secretary) for acceptance, rejection, or modification before implementation. The collaborative process established by this legislation has been completed and the long-range private-sector plan has been accepted by the Secretary.

While section 601 of the Appropriations Act limits the authority of the Secretary to implement FDA's proposed rule regarding written information voluntarily provided to consumers, there is specific legislative history that makes it clear that section 601 does not preclude FDA from using its existing authority to implement a mandatory program for the small number of products that pose a ''serious and significant concern'' and require distribution of patient information. That legislative history states that section 601:

> [i]s not to be construed as prohibiting the FDA from using its existing authority or regulatory authority to require as part of the manufacturers' approved product labeling the dispensing of written information inserts to consumers on a case-by-case basis with select prescription drugs to meet certain patient safety requirements.

Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Bill, 1997, S. Rept. 104–317, 104th Cong., 2d sess., p. 132, July 11, 1996.

In light of this legislation, the agency is deleting the provisions of the proposed rule that dealt with the private sector voluntary program, and is limiting this final rule to the mandatory program covering products of ''serious and significant concern.'' Because the voluntary program is not part of this

final rule, the agency will not summarize and respond to comments relating only to those provisions. Instead, this document will focus on the comments concerning the program for products of ''serious and significant concern.''

The final rule incorporates most of the provisions of the proposed rule regarding the mandatory program for products of ''serious and significant concern'' and provides additional clarification regarding how the agency would identify products that require a Medication Guide. Additional changes have been made that reflect the narrowed focus of the final rule. Highlights of the final rule are summarized, followed by a summary and discussion of the comments.

II. Highlights of the Final Rule

The final rule establishes a patient medication information program under which Medication Guides will be required for a small number of products that FDA determines pose a serious and significant public health concern requiring distribution of FDA-approved patient information necessary for the product's safe and effective use. FDA anticipates that an average, no more than 5 to 10 products per year would require such information.

The major provisions of the medication information program for products of ''serious and significant concern'' and the changes from the proposed rule follow.

A. General Provisions (Part 208, Subpart A)

1. Scope and Purpose

A number of changes have been made to the provisions in part 208 (21 CFR part 208) to reflect the narrowed focus of this final regulation in response to section 601 of the Appropriations Act, and to clarify its purpose and scope. Section 208.1(a) has been changed to indicate that the final regulation does not cover voluntarily distributed patient information for most prescription drugs, but rather covers products of ''serious and significant concern.'' The phrase ''that FDA determines pose a serious and significant public health concern requiring distribution of FDA-approved patient information'' was added to § 208.1(a) to accomplish this change.

Section 208.1(a) of the 1995 proposed rule stated that the requirements applied to products ''administered primarily on an outpatient basis without direct supervision by a health professional.'' FDA has changed the term ''administered'' in this context to the term ''used,'' because ''administered'' is likely to be misinterpreted as involving administration by another individual. In addition, the agency has determined that Medication Guides may, on rare occasions, be required for products of ''serious and significant concern'' that are used on an inpatient basis or under the supervision of a health professional. This change has been made by moving the word ''primarily'' to immediately follow the word ''applies'' in the second sentence of § 208.1(a). In light of this change, the last sentence of proposed § 208.1(a) has been deleted, because it is no longer needed.

Under the proposed rule, the patient information program applied to all new prescriptions, but only upon request by the patient for refill prescriptions. Because of the narrowed focus of this final rule and because the agency believes that the patient information that will be provided in Medication Guides is important to the safe and effective use of a product, it is necessary to require the distribution of a Medication Guide with every prescription for that product. Accordingly, § 208.1(a) has been changed so that patient information required under this part must be provided for all prescriptions of the drug, whether they are new prescriptions or refills and regardless of whether the information is requested by the patient.

Section 208.1(b) as proposed has been deleted because the final regulation no longer covers voluntarily distributed patient information. This change was made because of the enactment of section 601 of the Appropriations Act, which created a process under which national organizations representing consumers, health professionals, pharmaceutical companies, and others developed a plan for the voluntary distribution of patient information. This legislation specifically prohibits the implementation of the proposed rule if a plan acceptable to the Secretary is developed and submitted within the statutory time period. The accompanying legislative history makes it clear, however, that the agency was not precluded from requiring FDA-approved patient leaflets for drugs of serious and significant concern under its existing authority. New § 208.1(b) describes the purpose of patient labeling required under the final regulation.

The information will be required if the agency determines that it is necessary to patients' safe and effective use of the drug product. The agency added this provision to clarify the regulations when it will require Medication Guides and to reflect the agency's intention to make the decision to require a Medication Guide carefully and on a case-by-case basis. This approach to Medication Guides is consistent with the legislative history of the Appropriations Act discussed earlier in this preamble. The new language in § 208.1(b) also helps differentiate required Medication Guides from the voluntary private sector program.

Section 208.1(c) as proposed has been deleted. Its primary purpose was to provide a standard against which voluntarily distributed patient information would be evaluated. However, the voluntary program is no longer part of this regulation. The agency believes that the substance of this provision is valuable, however, and has therefore changed § 208.20, Content and format of a Medication Guide, to include all of the elements of proposed § 208.1(c). These elements are also closely related to the criteria adopted during the collaborative private-sector process.

New § 208.1(c) of the final rule describes when FDA may require a Medication Guide. Patient labeling will be required if the agency determines that one or more of the following circumstances exists:

(1) The drug product is one for which patient labeling could help prevent serious adverse effects.

(2) The drug product is one that has serious risk(s) (relative to benefits) of which patients should be made aware because information concerning the risk(s) could affect patients' decision to use, or to continue to use, the product.

(3) The drug product is important to health and patient adherence to directions for use is crucial to the drug's effectiveness. FDA believes that these circumstances will apply to a very small group of products. These circumstances have been clarified to address comments that they were overly broad.

Proposed § 208.1(d) has been deleted as unnecessary because the final regulation applies only to ''serious and significant'' products.

2. Definitions

Section 208.3 contains definitions of important terms used in part 208. Several changes have been made in this section to help clarify the Medication Guide program. Numerous comments conveyed confusion about what constitutes a ''Medication Guide,'' for example, whether the term refers to voluntary private sector patient information or mandated FDA-approved patient information. Therefore, in the final rule new § 208.3(h) defines ''Medication Guide'' to mean FDA-approved patient labeling conforming to

the specifications set forth in part 208 and other applicable regulations. This term now applies only to patient information required for products of ''serious and significant concern.''

The agency on its own initiative added new § 208.3(e) to include a definition of the term ''drug product.'' The purpose of adding this new definition is to make it clear that the term, as it is used in this final regulation, applies to the finished dosage form of both drug and biological products. Because of the addition of this definition, the subsequent provisions in § 208.3 have been renumbered.

In preparing the final rule, the agency revised the definition of the ''manufacturer'' of a drug product to be consistent with the definition of the ''manufacturer'' of a biological product. The definition of a ''manufacturer'' in the proposed rule inadvertently referred only to the person who actually produced the drug product, while the definition for biologicals included both the actual producer of the product as well as the person who is an applicant for a license where the applicant is responsible for complying with the product and establishment standards. This latter meaning of the term corresponds most closely to the definition of an ''applicant'' as that term is used in the new drug regulations in part 314 (21 CFR part 314). Therefore, FDA has included the definition of ''applicant'' in § 314.3(b) in the definition of a drug product manufacturer in § 208.3(g). It is important for two reasons that both meanings of ''manufacturer'' be included in the definition of the term for purposes of this final rule. First, FDA intends that each person potentially or actually in the chain of distribution of a product be subject to the distribution requirements in § 208.24 and for that reason both the producer of the product and the person responsible for the product application must be included. Second, for purposes of identifying the person who is responsible for the content and format requirements in § 208.20 and the requirement of obtaining FDA approval of the Medication Guide in § 208.24(a), the agency wishes to clarify that it is the person who is responsible for the product application.

The agency has also added a definition of the term ''packer'' in new § 208.3(i). Packers are subject to the provisions of this final rule and a definition was needed to distinguish a packer from a manufacturer or distributor.

Section 208.3(k) of this final regulation provides a definition of the terms ''serious risk'' and ''serious adverse effect'' that states that these terms mean an adverse drug experience, or the risk of such an experience, as that term is defined elsewhere in the regulations governing drug and biological products. The purpose of adding this definition is to further narrow the scope of this regulation in response to many comments complaining of the breadth of the agency's proposed criteria for identifying products of ''serious and significant concern.'' (See previous discussion of § 208.1 (b) and (c).)

B. General Requirements for a Medication Guide (Part 208, Subpart B)

1. Content and Format of a Medication Guide

Section 208.20 now contains the requirements for both the content and format of Medication Guides. This section sets forth the specific categories of information about a product that a Medication Guide shall contain, as well as statements that shall appear on a Medication Guide. The agency has generally retained from the proposal the text and order of the headings under which the information shall appear and has also now grouped the information under the appropriate heading. This section also includes specifications for minimum letter height or type size, legibility, and presentation considerations. The combined provision is more concise and the reorganization makes the requirements clearer. The agency notes that the content and format criteria in the final rule are virtually the same as those adopted in the private sector plan discussed earlier.

The order specified in § 208.20(b) starts with a presentation of the most important information patients should know about the product to use it safely and effectively, i.e., why the product poses a serious and significant public health concern requiring distribution of FDA-approved written patient information. This section is being included in place of the summary section originally proposed by FDA. The agency made this change because it believes that it is redundant to include in such a short document a summary section containing information elaborated in other sections.

This section is followed by sections addressing the product's indications for use, contraindications, directions for use, precautions, and possible side effects. The final rule does not specify where in this order other information (e.g., storage instructions and specific instructions for using products that are not orally administered (e.g., injectables, patches)) may be placed. As reflected in § 208.20(b)(9), the rule permits the insertion of additional headings or subheadings as appropriate for specific Medication Guides.

Other changes have been made in § 208.20 of the final rule. As mentioned above, the agency believes that the criteria for determining useful information that were proposed in § 208.1(c) are important and has retained them in the final rule. All of the criteria that Medication Guides must meet, however, are now contained in a single section of this final rule (§ 208.20(a)).

The agency on its own has added language to § 208.20(a)(2) to reinforce the fact that a Medication Guide, while based on the approved labeling, should be understandable to laypersons and therefore need not use the identical language in the approved labeling.

Other small changes have been made in § 208.20 as well. Section 208.20(a)(7) and (b)(1) now require that a Medication Guide contain the established or proper name of the drug in order to recognize the terminology used for biologicals. (See 21 CFR 600.3(k)). The introductory sentence of § 208.20(b) has been changed to make it clear that only the headings that have relevance to the drug product should be included in a Medication Guide. Other changes have been made throughout § 208.20(b) to emphasize that only specific, important information about the drug product should be included in a Medication Guide. These changes are being made so that the effectiveness of the patient labeling is not reduced by its being too long or including irrelevant information.

FDA has added the following language to § 208.20(b)(3) relating to the product's indications: ''In appropriate circumstances, this section may also explain the nature of the disease or condition the drug product is intended to treat, as well as the benefit(s) of treating the condition.'' This addition is designed to allow, when relevant, a fuller discussion that could include the benefits of treatment.

Finally, FDA has made two changes to § 208.20(b)(8). First, § 208.20(b)(8)(ii) has been changed to make it clear that a Medication Guide must contain a statement that a drug product should not be used for a condition other than that for which it is prescribed. This change is made to avoid any confusion with the statement that drugs may sometimes be prescribed for uses not described in the Medication Guide. Second, § 208.20(b)(8)(iii) has been changed to make it clear that the name and address of the dispenser may be included in a Medication Guide. The

name and address of the manufacturer, distributor, or packer of a drug product that is not also a biological product or of the manufacturer or distributor of a drug product that is also a biological product is required. This change was made to correct a drafting error in proposed § 208.20(b)(8)(iii) that would have allowed the dispenser's name alone to appear on a Medication Guide.

2. Distributing and Dispensing a Medication Guide

Section 208.24 sets forth the requirements for distributing and dispensing Medication Guides. The agency has made several changes to this section to make clear the responsibilities of each person distributing a drug product subject to this part. The agency has added new § 208.24(a) that explicitly requires the manufacturer to obtain FDA approval of the Medication Guide before it can be distributed. Although this requirement had been stated indirectly in the proposed rule regarding products of ''serious and significant concern,'' the agency believed it should be stated clearly in the final rule. Because the majority of Medication Guides will be required at the time of approval, it is appropriate for FDA to approve the text of both patient labeling and professional labeling at the same time.

Section 208.24(b) states the manufacturer's basic responsibility for ensuring that Medication Guides are available for distribution to patients. Under § 208.24(b), a manufacturer shall provide to distributors, packers, or authorized dispensers to which it ships the drug product, either Medication Guides in sufficient numbers, or the means to produce Medication Guides in sufficient numbers, to permit the authorized dispenser to provide a Medication Guide to each patient who receives a prescription for the drug product. The agency generally expects that the ''means to produce'' shall include a computer file of the Medication Guide for use with a computerized patient medication information program. Section 208.24(c) states the responsibility of the distributor or packer that receives Medication Guides, or the means to produce Medication Guides, to provide them to each authorized dispenser to whom it ships a container of drug product.

FDA has changed § 208.24 in several places to make it clear that packers are covered by this final regulation. It appears that packers had been inadvertently omitted from the proposal. The change is intended to make it clear that, in situations where a Medication Guide is distributed with the product, each person in the distribution chain has the responsibility of ensuring that the Medication Guide remains with the product so that it can reach the authorized dispenser.

FDA has also deleted the phrase ''finished dosage form'' from several places in § 208.24 of this rule. This phrase is no longer needed because the agency has added a definition of ''drug product'' in § 208.3(e) that clarifies that the term refers to products in finished dosage form.

Section 208.24 has been changed in several places to reflect the fact that Medication Guides must be dispensed with every prescription for a drug product subject to this part, and not just with new prescriptions or if requested by a patient for a refill prescription. This change is needed because it will be necessary for patients to have the information in a Medication Guide in order to use a product of ''serious and significant concern'' safely and effectively. It is therefore important for patients to receive this information each time they obtain the drug product.

Some comments noted that dispensers may not know if Medication Guides are provided with the product, affixed on the container, or contained within the package. Therefore, in the final rule, a new § 208.24(d) has been created that states that the label of each container of drug product (which now, because of the added definition of drug product, includes both large volume containers of finished dosage form and unit-of-use containers) shall instruct the authorized dispenser to provide a Medication Guide to each patient to whom the drug product is dispensed, and shall state how the Medication Guide is provided. This new section also requires that these statements be made in a prominent and conspicuous manner. The agency on its own initiative has amended both § 208.24(d) and the regulations governing labeling of biological products to make clear how manufacturers can comply with the requirements of § 208.24(d) if a container label is too small for the required statement. (See § 610.60(a)(7).)

Section 208.24(c) of the proposed rule required the manufacturer and distributor to provide a Medication Guide with each unit-of-use container intended to be dispensed to a patient. FDA has omitted this paragraph from the final rule. This provision is not necessary because the responsibility to provide Medication Guides to the authorized dispenser is clear from the other changes to § 208.24. Further, FDA wishes to provide manufacturers, distributors, and packers flexibility in the ways that they can meet that responsibility. If a manufacturer chooses to provide Medication Guides electronically for a product in a unit-of-use container, they may now do so because of this change.

Proposed § 208.24(d) stated that the requirements of part 208 could be met by the manufacturer, distributor, or any other person acting on behalf of the manufacturer or distributor. This section further provided that a manufacturer or distributor could satisfy the requirements of part 208 with a Medication Guide printed by a distributor or authorized dispenser. This provision was intended to enable manufacturers and distributors to make use of third-party information systems that could simplify the process of dispensing patient information leaflets to patients. The proposal envisioned that third parties would most likely both create and distribute Medication Guides to authorized dispensers under the voluntary private-sector program. Proposed § 208.24(d) has been deleted from this final rule. The agency believes that it is no longer necessary because the final rule applies only to Medication Guides for products of ''serious and significant concern'' that will be approved by the agency and will be part of these products' approved labeling.

Section 208.24(f) was modified in response to several comments. A change has been made to make it clear that wholesalers, as well as authorized dispensers, are not subject to section 510 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360) that requires registration of producers of drugs and listing of drugs in commercial distribution if they change the container, wrapper, or labeling of any drug product, as long as the change is due solely to an act performed under part 208.

3. Exemptions and Deferrals

Section 208.26 provides the circumstances under which there may be exemptions from, or deferrals of, content and format requirements for Medication Guides, and exemption from the distribution of Medication Guides to patients under certain circumstances.

Proposed § 208.26(b) provided, in part, that a licensed practitioner or an authorized dispenser could determine that it is not in the best interests of a patient to receive a Medication Guide. FDA has changed this provision to allow only the licensed practitioner who prescribes a drug product to direct that a Medication Guide be withheld from a patient.

Section 208.26(b) has also been modified to address concerns about

possible perceived interference by FDA in the judgments of health care professionals with respect to withholding a Medication Guide from a patient. The final rule does not contain the proposed sentence that would have required authorized dispensers to provide Medication Guides for a particular product under all circumstances. Consequently, only the patient, and not FDA, can overrule the licensed practitioner's decision to withhold a Medication Guide from that patient.

Section 208.26(c) as proposed provided that a Medication Guide was not required to be dispensed in an emergency, or where the manufacturer, distributor, or authorized dispenser did not have a Medication Guide available and could document a good faith effort to provide one. Section 208.26(d) as proposed set forth a small business exemption for certain authorized dispensers. However, this exemption only applied to the broad comprehensive program of distribution of patient information. It did not apply to Medication Guides for products of ''serious and significant'' concern.

The agency has deleted both proposed § 208.26(c) and (d) from this final rule. FDA does not believe that such exemptions are appropriate for Medication Guides that are required for a very small number of products of ''serious and significant concern'' and that provide information necessary to the safe and effective use of the product.

III. Comments on the Proposed Rule

FDA received approximately 100 comments in response to the 1995 proposed rule and the request for comments associated with the February 1996 public workshop. The comments came from individual consumers and consumer organizations, academics, individual pharmacists, physicians, and other health care professionals, health professional associations, trade associations, and prescription drug and biological product manufacturers, attorneys, and others. A number of comments submitted examples of patient information leaflets currently being distributed. Several comments misunderstood the proposed rule and commented as though FDA was seeking to immediately establish a mandatory Medication Guide program to provide patient labeling for all prescription drug and biological products.

A. Patient Information—Legal Authority

1. Some comments stated that the proposal regulates the professional practice of pharmacy, which is the purview of the State boards of pharmacy. The comments stated that FDA cannot extend its statutory authority to regulate product labeling to require that pharmacists distribute information about prescription medications that they dispense. One comment added that this initiative would set a precedent for FDA to impose other regulations on individual health care professionals.

Both the proposal and the final rule seek to assure that patients receive information necessary to the safe and effective use of prescription drug products. Federal courts have affirmed FDA's authority to require the dispensing of patient labeling for prescription drugs, and that such requirement does not interfere with the practice of medicine (*Pharmaceutical Mfr. Ass'n (PMA)* v. *FDA*, 484 F. Supp. 1179 (D. Del. 1980), *aff'd per curiam*, 634 F. 2d 106 (3d Cir. 1980)).

In *PMA* v. *FDA*, the court stated that ''[t]he fact that the practice of medicine is an area traditionally regulated by the states does not invalidate those provisions of the act which may at times impinge on some aspect of a doctor's practice'' (*Id.* at 1188). The court reasoned that the regulation at issue, which required pharmacists and dispensing physicians to distribute patient labeling with prescription drugs containing estrogens, did not forbid a physician from prescribing a prescription drug product, nor did it limit the physician's exercise of professional judgement (*Id.*). Moreover, the court stated that the regulation not only did not limit the information that a physician may provide to his or her patients, but rather it fostered open discussions between physicians and patients (*Id.*). Similarly, this final rule does not inhibit a prescriber or pharmacist from exercising his or her professional judgement, nor does it limit the information that can be given to the patient. The prescriber or pharmacist may add to the information and discuss any aspect of the product with the patient, thereby promoting better communication between health care professionals and their patients.

FDA also does not agree that it lacks statutory authority over written information about prescription drug products that is dispensed by pharmacists. The agency's authority for this final rule was set forth in the proposed rule (60 FR 44182 at 44210). In short, under section 502(a) of the act (21 U.S.C. 352), a drug product is misbranded if its labeling is false or misleading in any particular. Further, under section 505 (d) and (e) of the act (21 U.S.C. 355 (d) and (e)), FDA must refuse to approve an application and may withdraw the approval of an application if the labeling for the drug is false or misleading in any particular.

Section 201(n) of the act (21 U.S.C. 321) describes the concept of ''misleading'' and specifically provides that in determining whether the labeling of a drug is misleading, there shall be taken into account not only representations or suggestions made in the labeling, but also the extent to which the labeling:

> [f]ails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the [drug] * * * under the conditions of use prescribed in the labeling * * * or under such conditions of use as are customary or usual.

These provisions, along with section 701(a) of the act (21 U.S.C. 371), authorize FDA to issue regulations designed to ensure that patients using prescription drug products receive information that is material with respect to the consequences which may result from the use of these products under labeled conditions. The proposed rule also described the agency's authority for requiring Medication Guides for generic drugs and biological products.

The act authorizes FDA to regulate the marketing of drug products so that they are safe and effective for their intended uses and are properly labeled. As previously stated, FDA has determined that written patient labeling containing information on warnings, precautions, contraindications, side effects, directions for use, and other information is necessary for the safe and effective use of prescription drug products of ''serious and significant concern.''

2. Several comments contended that FDA lacks the legal authority to request (or require) patient labeling for prescription drug products. One comment cited section 503(b)(2) of the act (21 U.S.C. 353), which expressly exempts prescription medications from the requirement for ''adequate directions for use.''

FDA does not agree with these comments. As previously discussed in response to comment number 1 of this document, the agency's authority to require patient labeling for prescription drugs has been upheld by the courts (*PMA* v. *FDA*, 484 F. Supp. 1179 (D. Del. 1980), *aff'd per curiam*, 634 F. 2d 106 (3d Cir. 1980)).

Section 503(b)(2) of the act exempts dispensed prescription drugs from the ''adequate directions for use'' requirements under section 502(f) of the act, but does not prohibit FDA from imposing a requirement under section 502(a) that pharmacists dispense labeling directed to the patient that is

intended to promote the safe and effective use of these products. In fact, section 503(b)(2) of the act specifically makes labeling dispensed by pharmacists subject to section 502(a) of the act. Section 503(b)(2) of the act was intended to clarify certain statutory requirements of the 1938 act related to the dispensing of prescription drug products. Section 503(b)(2) of the act was not directed toward limiting the Government's authority to require that pharmacists dispense labeling specifically directed to patients. This interpretation of the act was upheld in *PMA* v. *FDA* at 1185–1186.

3. One comment contended that FDA is proposing to create a new subcategory of prescription drugs—those that pose a ''serious and significant public health concern''—and that it lacks statutory authority to do so. The comment contended that the act does not grant FDA the authority to instruct manufacturers after approval of what the contents of their labeling must be.

FDA does not agree that it is creating a new subcategory of prescription drugs. The final rule will merely require that those prescription drugs deemed to pose a serious and significant public health concern be dispensed with patient information to ensure they are used safely and effectively.

Under section 502(a) of the act, a product is misbranded if its labeling is false or misleading in any particular. Section 201(n) of the act provides that labeling may be misleading if it fails to reveal facts that are material with respect to the consequences which may result from the use of the product under customary or usual conditions of use. In addition, under section 505(e) of the act, FDA may withdraw the approval of an application if, on the basis of new information, the labeling for the drug is false or misleading in any particular and was not corrected by the applicant within a reasonable time after written notice from the agency.

Accordingly, manufacturers have a continuing obligation to assure that their drugs' labeling is not false or misleading. Thus, if FDA determines that information about the use of a product should be included in the labeling to prevent the product from being misbranded, it is irrelevant whether FDA makes that determination before or after approval. Oftentimes, after an approved product gains widespread use in the general population, adverse events or other consequences regarding the use of the product are discovered. If the agency were not permitted to revise required labeling based on the product's market experience, its ability to protect the public health would be seriously undermined.

4. One comment noted that FDA has authority to determine that the product as labeled is unsafe or ineffective based on information before the agency, and if it so determines, it may withdraw approval, under section 505(e) of the act. In the case of this rule, the comment stated that FDA has not articulated what procedures it expects to follow to make the determination under section 505(e) of the act.

If such a case arises, FDA will use the procedures set forth in the act and the Public Health Service Act, and their implementing regulations.

5. Several comments stated that FDA has the authority to establish a mandatory patient labeling program only after notice and comment rulemaking on a drug-by-drug basis, and that one regulation requiring patient labeling for all products denies manufacturers due process.

It is well settled that the act authorizes FDA to require patient labeling for prescription drugs (*PMA* v. *FDA*, 484 F. Supp. 1179 (D. Del. 1980), *aff'd per curiam*, 634 F. 2d 106 (3d Cir. 1980); ''Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Bill, 1997,'' S. Rept. 104–317, 104th Cong., 2d sess., p. 132, July 11, 1996). FDA does not believe that the Medication Guide rulemaking raises any due process issues. First, FDA provided notice and opportunity for public comment on the proposed program. Second, unlike the proposal, the final rule only applies to prescription products that pose a serious and significant public health concern requiring distribution of necessary patient information. In terms of the specific information required in Medication Guides, sponsors will have an opportunity to discuss the specific content with the agency, to request an exemption or deferral of certain Medication Guide requirements (see § 208.26(a)), and to appeal an agency decision if the sponsor disagrees. (See 21 CFR part 10, Administrative Practices and Procedures.) Third, the agency has set forth the circumstances in which it will determine which products pose a serious and significant public health concern requiring distribution of written patient information (see § 208.1(c)). This decision may be challenged as well.

Although FDA used notice and comment rulemaking to require patient package inserts for certain prescription drug products in the 1960's and 1970's, this proved to be overly cumbersome and impractical. The agency notes that in the 1980's and 1990's, the vast majority of patient package inserts were instituted on a voluntary basis by the sponsor or incorporated as part of the approved product labeling at the time of initial approval of the product. FDA did not engage in notice and comment rulemaking for any of these patient package inserts.

Furthermore, the agency notes that individual notice and comment rulemaking is not required for changes to the labeling of FDA-regulated products. FDA has the statutory authority to regulate prescription product labeling, while holders of new drug applications (NDA's), abbreviated new drug applications (ANDA's), and product license applications (PLA's) have the continuing obligation to ensure that their products' labeling does not cause the product to be misbranded.

Moreover, general patient medication information requirements need not be based on a drug-by-drug identification of specific hazards. Rather, general requirements are amply justified by the data presented in the 1995 proposed rule demonstrating that there is substantial noncompliance by patients with drug therapy, that providing patients with information about drugs increases the degree to which they use them properly, and that existing drug-dispensing mechanisms are not adequately providing the information to patients.

6. Some comments contended that the provision of patient labeling would adversely affect the legal liability of manufacturers, physicians, pharmacists, and other prescribers or dispensers of prescription drug products by abrogating the ''learned intermediary doctrine.'' Some comments urged that FDA provide for Federal preemption of State regulation with respect to civil tort liability claims and other labeling requirements. The comments claimed that without preemption, FDA regulation would encourage ''failure to warn'' claims and challenges to the adequacy of the patient labeling, especially compared to professional labeling.

Tort liability can not be a major consideration for FDA which must be guided by the basic principles and requirements of the act in its regulatory activities. Nevertheless, FDA does not believe that this rule would adversely affect civil tort liability for several reasons. First, tort liability depends on a number of factors surrounding the manufacture, distribution, sale, and use of a product, and the nature of the injury, and not just on the information provided or not provided to patients. Second, the agency believes that

providing patients with written information about the proper use of prescription drug products of ''serious and significant concern'' could reduce potential liability by improving patient compliance and patient monitoring of serious adverse events, thus decreasing drug-induced injuries and hospitalizations. Written information could also represent a clear opportunity for patients to be made aware that certain risks accompany drug therapies, and that not all serious adverse events are caused by deficiencies in the drug product or actions of the health professional. Third, the written patient medication information provided does not alter the duty, or set the standard of care for manufacturers, physicians, pharmacists, and other dispensers. Fourth, no evidence has been presented that patient labeling currently required by FDA regulation has caused a noticeable change in tort rules affecting civil liability. The courts have not recognized an exception to the ''learned intermediary'' defense in situations where FDA has required patient labeling, and the courts seem increasingly reluctant to recognize new exceptions to this defense.

FDA believes that the information required under these regulations is necessary for patients to safely and effectively use prescription drug products that have been determined to be of ''serious and significant concern.'' In most cases, the information required by FDA will be such that States will have little reason to impose additional labeling requirements. Additionally, Federal preemption could unduly interfere with the goals and objectives of existing State programs imposed under the Omnibus Budget Reconciliation Act (OBRA) of 1990, which requires that pharmacists offer to counsel Medicaid patients about their prescription drugs. Many States have extended this requirement to all patients who receive prescription drugs, and some States have required that patients receive written medication information. This final rule is intended to complement these State efforts, not replace or hinder them.

FDA does not believe that the evolution of state tort law will cause the development of standards that would be at odds with the agency's regulations. FDA's regulations establish the minimal standards necessary, but were not intended to preclude the states from imposing additional labeling requirements. States may authorize additional labeling but they cannot reduce, alter, or eliminate FDA-required labeling.

To reduce liability concerns brought about by the perception that medication information must be tailored to each individual patient, the final rule has been changed to eliminate references to individual patients. FDA believes that Medication Guides for products of ''serious and significant concern'' should provide important and specific risk and benefit information that is applicable generally to the largest number of patients. Health care professionals bear the primary responsibility for informing individuals about patient-specific benefits, risks, and directions for using prescription medication.

7. Some comments stated that manufacturers should be responsible only for providing medical and scientific information about their products to health care professionals. Several comments stated that the health care provider is in the best position to supply personalized information because the manufacturer's advertising, medical, or legal departments cannot possibly craft patient-specific information.

As previously indicated, FDA agrees that health care providers who directly communicate with patients are in the best position to educate patients by personalizing oral and written information. However, FDA does not agree that manufacturers should not be responsible for informing patients about their products when circumstances make this important. Thus, manufacturers have been required to provide patients with information about certain products, such as oral contraceptives. Likewise, the final regulations will require that manufacturers develop and disseminate patient information only for selected medications that the agency has determined cannot be used safely and effectively without patient information.

8. Some comments stated that Executive Order 12866 permits FDA to issue only such regulations as are ''necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public.'' Noting FDA's assertion that numerous sources of prescription medication information suitable for distribution to patients have been developed, the comments concluded that the regulation would violate Executive Order 12866.

FDA believes that the final rule is in compliance with Executive Order 12866. To date, the private sector has not succeeded in providing prescription medication information to a large portion of Americans. Section 601 of the Appropriations Act will provide the private sector with sufficient time to meet the legislation's goal of distributing high quality information to a large number of consumers. These goals permit significant variability in the content of patient information. This final regulation applies only to a small number of products that are of ''serious and significant concern.'' Therefore, these regulations are consistent with section 1(b)(8) of Executive Order 12866, which states that ''Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt'' (58 FR 51735, October 4, 1993). The final rule requires the development of Medication Guides only for those few medications where the need for patient information is critical to proper use of the drugs. In those cases, a voluntary system will not suffice because it would not satisfy the ''compelling public need'' for good patient guidance.

9. One comment insisted that the entire proposed rule and preamble is too vague and as such cannot be commented on in a meaningful manner.

The agency has reviewed both the proposed rule and public comments and has concluded that the proposed rule is sufficiently clear. Moreover, no other comment stated that the proposed rule was either vague or ambiguous. Despite this consensus, FDA has made changes in the final rule to make the program clearer, in particular more specifically defining the circumstances under which a Medication Guide will be required for a drug product.

B. Medication Guide

10. Several comments argued that providing written information is not an effective intervention, citing a number of studies indicating no significant changes in compliance with medication instructions. Other comments stated that FDA makes a number of ''unsubstantiated'' assumptions regarding the impact of written material on improved interaction with health care professionals, on decreased unnecessary physician visits, and on improved quality of health care. Some comments argued that FDA erroneously assumes that a direct relationship exists between providing patient information and improved health outcomes.

FDA believes that the research consistently concludes that written information can improve patient knowledge, and that improved patient knowledge about how and when to take medication, and what to expect from taking the medication, contributes to

better medication-taking behavior, including regimen adherence. The agency's conclusions are based upon published literature cited in the August 24, 1995, proposal (60 FR 44182 at 44233 through 44235). For example, estimates of hospital admissions caused by preventable adverse drug reactions (ADR's) and noncompliance were based upon a thorough literature review. To achieve the most accurate estimate, FDA relied upon a meta-analysis of this literature and upon additional studies that directly examined the cause of hospitalizations (Ref. 1). Estimates of the number of preventable ADR's, as distinguished from nonpreventable ADR's, were based upon an analysis made by the study's authors.

FDA agrees that health care problems are multifaceted, requiring a number of interventions. FDA maintains, however, that patients' knowledge about their treatments (which is consistently improved by written information) can and will contribute to such improvement. The experience FDA has had with written information (evaluated by Rand and oral contraceptive studies) (Refs. 2 and 3), with voluntarily supplied information (cited in the proposal in 60 FR 44182 at 44187), and the experiences in other nations with patient package inserts (Ref. 4) demonstrate that patient information does generally contribute to improvements in the parameters measured. Although it is true that FDA's analysis makes certain assumptions, the agency believes that they are valid. For example, patients who discuss the utilization of medications in a more informed manner have better quality interactions with a health care professional.

11. Several comments stated that a ''one size fits all'' mentality will not work because different patients have different needs in acquiring and understanding medication information. In contrast, one comment pointed to research indicating that many groups share preferences for quality information. For example, older and younger adults share preferences regarding how medication information should be organized (which was in a manner similar to the suggested Medication Guide format), and better remember instructions if they are presented in the preferred grouping and order.

The final rule specifies both content and format requirements to ensure that every affected patient receives certain basic information, the content of which is tailored to the individual drug. The modest format requirements are based on the best available research and contain such common sense provisions as a minimum type size generally readable even by older individuals with reduced visual abilities. The content provisions are more extensive and contain every category of information that might be needed for any drug requiring patient labeling. FDA notes, however, that it does not expect each Medication Guide to contain information in all of the categories specified in § 208.20 because not every category will be relevant to every drug. Rather, the agency expects that a Medication Guide will contain only that information that is necessary for the safe and effective use of the particular drug. In recognizing the need for a certain amount of flexibility in the design and content of Medication Guides, the final rule provides in § 208.26(a) that FDA will consider changes to any Medication Guide requirement, except those contained in § 208.20(a)(2) and (a)(6), on the basis that the requirement is inapplicable, unnecessary, or contrary to patients' best interests. FDA has determined that it would never exempt a Medication Guide from the requirements that it be scientifically accurate and based on the product's approved professional labeling, or that it contain the legend identifying it as a Medication Guide. The agency anticipates exempting Medication Guides from specific content requirements that are shown to be inapplicable, unnecessary, or contrary to patients' best interests. The agency believes that this approach provides sufficient standardization to ensure uniform quality of Medication Guides, while also providing the flexibility to allow each Medication Guide to be tailored to the specific product and its population.

FDA agrees with the comment concerning the value of instructions presented in a preferred grouping and order. Accordingly, the final rule continues to require the order of presentation of certain specific headings. This was discussed more fully in section II of this document.

12. Some comments stated that medication information could, through suggestion, cause patients to develop the side effects listed, while other comments disagreed with this view. Some comments cited studies (Ref. 5) indicating that patient leaflets would increase patients' anxiety, causing them either not to initiate therapy or to discontinue it. One comment asserted that previous government-mandated patient leaflets have overemphasized risks, leading to decreased compliance.

The effect of receiving written information on patients' propensity to report side effects has been evaluated in several studies (Refs. 6 and 7), most of which have not found an increase in suggestion-induced side effects. For example, in a study by Morris and Kanouse (Ref. 8), patients taking thiazide medication were asked to report any health problems they experienced. The patients who were given a leaflet mentioning side effects were no more likely to report ''health problems'' following the initiation of the regimen than those who did not receive a leaflet. However, those who received the leaflet were more likely to say that the health problem was caused by the medication. The authors concluded that the leaflet did not cause suggestion-induced side effects, but did increase the attribution of reactions to the action of the medication. It is unclear how many of these side effects attributions were warranted by the action of the ingested medication or some other factor. However, the authors noted that if leaflets help patients understand the causes of their reactions, patients can better decide how to respond to these reactions.

Although there have been anecdotal reports of increases in anxiety and deterrence in taking medications, FDA is not aware of any studies that document such an effect and therefore disagrees with the comments on this point. An FDA-sponsored study reported by the RAND corporation in 1981 measured the broad-scale impact of a variety of patient leaflets (Ref. 2). The postulated negative effects did not occur. Few patients demonstrated increased anxiety, there was no significant decrease in reported compliance, and few (3 of 2,000) patients returned their medication.

FDA does not agree that patient leaflets already in use have overemphasized risks. These patient leaflets, such as those for oral contraceptives, have been written for medications that pose significant risks to patients. It is essential that the healthy young women who use oral contraceptives be informed that the products can increase the risks of sudden life-threatening outcomes, especially when the risks can be avoided or reduced by the patient (e.g., by not smoking). The agency strives for a balanced description of the benefits and risks of taking the medication in the patient leaflets it approves. To reinforce that balance, the agency has changed § 208.20(b)(3) to allow discussion of the benefits of treatment.

13. Some comments stated that patient information would detrimentally affect patients' relationships with health care providers. These comments

variously suggested that patient information would reduce incentives for health care providers to communicate with patients, or would inappropriately increase the number or length of patients' contacts with health care providers because the information could confuse or alarm patients. Other comments stated that FDA did not properly emphasize the importance of the physician in the patient encounter, arguing that physicians should decide if and when the patients should receive a Medication Guide.

FDA agrees that health care providers should be the primary source of information about medications for their patients. The purpose of written information is to reinforce and supplement, not to interfere with, the doctor-patient relationship. This final rule is intended to help ensure that patients receive accurate and easy-to-understand information necessary for the safe and effective use of their medications, and to provide pharmacists, physicians, nurses, and other counselors with information that can supplement oral counseling. As discussed in the proposal (60 FR 44182 at 44188 through 44189), virtually all studies indicate that a combination of written and oral information works better than either of these interventions alone to increase patients' knowledge about their medications.

FDA does not believe that written information will be detrimental to patients' relationships with their health care providers. Rather, written information should improve this relationship by improving patients' ability to communicate about their medications. Improved education should also increase patients' ability to take care of themselves and to make more knowledgeable inquiries of health professionals. Research indicates that for most patients the information in the patient leaflet for oral contraceptives did not change the length of patients' visits. It did, however, influence the content of the interaction, focusing more of the interaction on the medication (Ref. 3).

FDA's 1992 and 1994 surveys of people initiating prescription medication treatment (Refs. 9, 10, and 11) indicated that the increased use of written patient information did not decrease the amount of orally supplied information.

14. One comment pointed out that labeling changes occur frequently during the life cycle of a product. Thus, distribution of revised Medication Guides resulting from these changes will need to be carefully controlled to ensure that the most up-to-date information is available for dissemination to the patient.

Section 208.20(b)(8)(iv) of the final rule requires that the date of the most recent revision be printed on the Medication Guide so that patients who receive multiple materials can identify the most recent information. FDA does not contemplate that changes in professional labeling would necessarily require changes in patient information. However, if changes in the professional labeling are significant enough to affect a product's Medication Guide, the manufacturer would be required to make related changes at the same time.

15. Some comments stated that the final rule should not require approval of all written information prior to its use. Instead, they urge that the rule should simply specify topics to be included and require clarity, but that FDA audit, as opposed to preapprove, such information. Similarly, one comment suggested that prior approval should not be required for ''minor changes,'' such as the company name or address.

The final rule requires that FDA approve a Medication Guide prior to distribution to ensure that it is consistent with the package insert and is adequate to help ensure safe and effective product use. Because Medication Guides will be required only for drug products of ''serious and significant concern,'' FDA believes that prior approval of the information necessary to the safe and effective use of the product is especially important. The agency will allow only very minor changes to be made without prior approval and has accordingly revised § 314.70(b)(3)(ii) (21 CFR 314.70(b)(3)(iii)) and § 601.12(f) (21 CFR 601.12(f)) to indicate that. The agency has added the change to § 601.12(f), which was not included in the proposal, to make the requirements for drug and biological products the same.

16. One comment suggested that FDA be held to a 30-day approval time on NDA supplements for patient labeling, and that if 30 days pass without comment by FDA, the patient labeling should be automatically approved.

As discussed previously in this document, Medication Guides would most often be required at the time of product approval. Thus, most Medication Guides would be covered under the timeframes designated under the Prescription Drug User Fee Act (PDUFA) (21 U.S.C. 379).

However, for the rare situations in which Medication Guides are required subsequent to product approval, PDUFA timeframes are not relevant unless new clinical information is submitted in support of the labeling changes. Under these circumstances, FDA will endeavor to approve these changes as quickly as possible.

17. Some comments urged that the regulations require patient labeling to be standardized in format and content, much like food labeling requirements, and be harmonized with international requirements.

Consistent with the views of many consumer groups, FDA agrees that a standard format would be extremely helpful in aiding readers to quickly find information of particular interest. However, the agency was persuaded by the written comments and presentations at the February 1996 public workshop that flexibility should be afforded in the design of Medication Guides. Different medications and patient populations may require somewhat different presentations to ensure that information is effectively communicated.

FDA has determined that the best approach is to retain the standardized format but be flexible enough to allow changes when they are needed to more effectively communicate with a special population or to permit innovation. The final rule specifies the order of topics, the text of the headings to be used, and the location of required contents within the headings. FDA will consider changes to the format and content if the requirements are inapplicable, unnecessary, or contrary to patients' best interests. In reviewing requests for changes, the agency will be interested in receiving any data regarding more effective design or methods of communication.

FDA believes that Medication Guides are different from the numerical listings of food labels because of the wider variety of issues and more complex meanings covered in a patient leaflet. The greater difficulty of communicating medication information justifies departure from the standard format.

Regulations in Europe standardize the formats of patient leaflets within but not across countries. Therefore, the extent to which U.S. standards for Medication Guide formats would be consistent with evolving format standards being developed through the International Conference on Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH) is unclear at this time.

18. One comment suggested that § 208.1(a) be revised to read that ''[t]his part does not apply to prescription drug products administered in an institutional setting (such as hospitals, nursing homes, *doctors' and dentists' offices*, or other health care facilities *such as clinics*), or in emergency

situations.'' [Emphasis in original comment.]

FDA does not agree with this comment. Section 208.1(a) states that part 208 applies primarily to medications used on an outpatient basis without direct supervision by a health professional. In addition to the wording change in § 208.1(a) of the final rule that reflects the regulation's focus on providing Medication Guides for all prescriptions for drug products of ''serious and significant concern,'' the agency made the small change of moving the word ''primarily'' in the second sentence of § 208.1(a) to immediately follow the word ''applies.'' This was done to make it clear that Medication Guides will usually be required for products used on an outpatient basis without the direct assistance of a health care provider.

The agency believes that on rare occasions it may be necessary to require a Medication Guide for a product that is used in a physician's office or other health care facility, and this change reflects the agency's desire for the flexibility to accomplish this. The agency notes that prescribers would not be exempt from providing mandatory Medication Guides if they dispense a product to patients for outpatient use.

19. One comment disagreed with FDA's reasoning as to why the Medication Guide proposal relates to prescription products that are used ''primarily on an outpatient basis without direct supervision by a health care professional.'' The comment asserted that this reasoning is incorrect in that these outpatients are, indeed, under the direct supervision of a physician or pharmacist.

The comment misunderstands FDA's use of the phrase ''direct supervision.'' The agency uses the phrase to describe situations in which a health professional is administering the medication on site, whether it is at a physician's office or at a health facility.

20. One comment stated that FDA should clearly define how it identified, developed, and tested the seven components of ''useful'' information.

To identify and develop the seven components, FDA relied on several studies it conducted involving various aspects of patient information (Refs. 2, 12, 13, and 14), as well as other published studies (Ref. 15). Additionally, FDA relied on a number of clear writing manuals (Refs. 16, 17, 18, and 19) and legibility guidelines used by the nonprescription drug industry (Ref. 20). FDA also relied on its extensive experience gained over the past two decades developing and approving patient labeling, as well as preliminary advice obtained from the pharmaceutical industry, pharmacy and medical professional organizations, and consumer groups. All of this information and guidance was combined to create the list of seven components. This list was published in the 1995 proposed rule to obtain public comment. Furthermore, the agency held a public workshop in February 1996 to obtain additional comment on the seven components. The agency maintained a public docket for comment until March 6, 1996, to accept comments specific to these seven components (Ref. 9). Based on information and comments received during the workshop and comment period, the agency made certain changes to the components.

FDA proposed these criteria for identifying and evaluating the quality of the information included in leaflets voluntarily distributed to patients. While the voluntary private-sector program for which the seven components were originally developed is outside the scope of this final rule, the agency believes that these criteria are important and has therefore retained them as requirements for Medication Guides. The broad acceptance of these components has been affirmed by Congress by their inclusion in the Medication Guide language contained in the 1997 Appropriations Act and their use in the voluntary private-sector program.

21. The 1995 proposed rule defined the criterion of scientific accuracy to mean consistency with FDA-approved product labeling, and proposed requiring that Medication Guides include the verbatim statement ''Medicines are sometimes prescribed for purposes other than those listed in a Medication Guide.'' Many comments stated that patients could become confused and experience problems if a product was prescribed for an off-label use or regimen that was not described in their medication information sheet.

The agency does not believe that a change in response to these comments is warranted. The comments did not explain why patients would become confused or elaborate on the problems that might ensue. Moreover, the agency believes that the statement to be included in Medication Guides is sufficiently clear and will be helpful to patients. If patients have questions about the product's use, this may stimulate profitable discussion with an appropriate health care professional.

22. Several comments stated that FDA's criteria for determining whether a product would be designated as being of ''serious and significant concern'' and hence that it would be accompanied by a Medication Guide are so broad as to include all pharmaceutical products, providing little or no guidance to manufacturers. Some comments stated that FDA's purpose in requiring 10 drugs or drug classes each year was to eventually require Medication Guides for all prescription drugs.

FDA agrees that the proposed criteria for determining whether products or classes of products must be accompanied by Medication Guides can be more narrowly defined. Although the agency asked for comments on the appropriateness of the criteria, there were no suggestions made for improving them. Therefore, FDA has made several changes of its own in the final rule to clarify the purpose of Medication Guides and to describe more clearly the circumstances in which medications will be determined to be of ''serious and significant concern'' requiring Medication Guides.

The agency has rewritten § 208.1(b) describing the informational goals of Medication Guides. This section states that the agency must determine that information is ''necessary'' to patients' safe and effective use of the product. This is a high standard that will be met in only a small number of cases.

To conclude that the information is necessary, the agency must find that one or more of the three circumstances in § 208.1(c) exists. The four cases discussed in the preamble to the proposed rule have been condensed to three circumstances in order to avoid redundancy and to further clarify the circumstances in which FDA will require a Medication Guide. The three circumstances are: (1) The drug product is one for which patient labeling could help prevent serious adverse effects; (2) The drug product is one that has serious risk(s) (relative to benefits) of which patients should be made aware because information concerning the risk(s) could affect patients' decisions to use, or to continue to use, the product; or (3) The drug product is important to health and patient adherence to directions for use is crucial to the drug's effectiveness. These circumstances describe those situations in which patients *must* have information to use their medications safely and effectively.

FDA does not expect that these circumstances will be regularly presented and thereby determine that Medication Guides are required for many or most medications. Rather, the agency intends to require patient labeling only if it is needed for the safe use of the product or critical to the effective use of the drug, and expects that this will be infrequent. In reviewing its past recommendations that

manufacturers prepare patient labeling for particular products, FDA has determined that it initially overestimated the number of products or product classes per year that would be required to have a Medication Guide. FDA now estimates that on average no more than 5 to 10 products per year would be determined to be of ''serious and significant concern'' and would thus require Medication Guides.

The following examples will illustrate in more detail each of the three circumstances in which a Medication Guide will be required:

(1) Where patient labeling could prevent serious adverse effects:

These are cases in which there is a known ''risk control strategy'' (e.g., recognition of the early warning signs of lactic acidosis, a potentially fatal side effect, during metformin treatment so that the drug can be stopped and a physician contacted immediately) or where easily taken preventive measures can prevent harm, such as using sun block to avoid serious photosensitivity reactions with photofrin, or avoiding a concomitant therapy that can lead to a dangerous accumulation of the drug.

(2) Where there are serious risks (relative to benefits) of which patients should be made aware because the information could affect patients' decisions to use, or continue to use, the drug:

This is a case where the risk of a drug is relatively great, greater than a patient would anticipate given the relatively benign condition being treated (e.g., isotretinoin is used to treat acne, not usually considered a seriously morbid condition, but the drug can cause severe birth defects in an exposed fetus), where understanding the adverse effects is critical to a choice among alternative treatments with different safety and effectiveness profiles (e.g., choice of barrier contraception versus oral, injectable, or implantable birth control), or where there is an important relation of duration of use to risk (e.g., increased risk of endometrial cancer with chronic administration of oral estrogens, or increased risk of habituation with prolonged use of benzodiazepine hypnotics).

(3) Where the drug product is important to health and patient adherence to directions for use is crucial to the drug's effectiveness:

This is a case where nonadherence could compromise patients' health by interfering with effectiveness; e.g., labeling could remind people that taking alendronate sodium at least one-half hour before the first food, beverage, or medication of the day with plain water only (other beverages, food, and some medications are likely to reduce the absorption of alendronate), is essential to the drug's effectiveness in treating osteoporosis.

Medication Guides would not be required for general admonitions, such as, ''Remember to take your antihypertensive medication daily.'' Rather, Medication Guides would be used to communicate messages specific to the serious risks associated with certain medications.

FDA wishes to note its expectation that the vast majority of Medication Guides will be required when a product is first approved. Consistent with past procedures when recommending that certain products should include FDA-approved patient labeling, FDA intends to notify sponsors by letter, during the product's review process, that a Medication Guide is required for the product.

In general, FDA does not anticipate determining that currently marketed products are of ''serious and significant concern,'' unless there is a compelling public health need. At this time, the only currently marketed products for which FDA intends to require Medication Guides are products in classes for which FDA has requested that manufacturers supply patient labeling, but where some manufacturers have failed to provide this information (e.g., benzodiazepine hypnotics and nonsedating antihistamines with boxed warnings). FDA believes that patients receiving similar medications, with similar risks, should receive similar approved patient labeling for all products in the specific pharmacologic class. A Medication Guide will also be required when new information becomes available raising a serious safety or efficacy concern about an FDA-approved drug.

Over the years, FDA has approved a number of patient information leaflets. Some of these leaflets concerning a class of drugs (e.g., oral contraceptives, estrogen replacement products) have been required under notice and comment rulemaking. In addition, some manufacturers have supplied, and FDA has approved, patient information leaflets for several other drug products (e.g., isotretinoin, metformin, alendronate sodium, and epoetin alpha).

Manufacturers whose approved labeling already includes patient-directed labeling must continue to distribute such labeling. FDA believes that this information provides a valuable service to patients that should not be disrupted. In time, FDA intends to review all existing patient labeling to determine whether it is subject to this part. If existing patient labeling is found to meet the circumstances in § 208.1(c), FDA will notify sponsors directly of such determinations and will allow them sufficient time to conform such labeling to the requirements of this final rule.

23. One comment argued that because prescription drug wholesalers have no contact with patients they satisfy the definition of ''distributors'' under proposed § 208.3. Consequently, the comment suggests that FDA more clearly define the roles of dispensers and distributors.

FDA agrees that drug wholesalers should not be considered dispensers under proposed § 208.3(a), but rather as distributors under § 208.3(d). FDA acknowledges that in several places in the proposal, the term ''distributor'' was used when, in fact, the term ''dispenser'' should have been used. These inconsistencies have been corrected in the final rule.

24. A number of comments addressed the relatively large number of Spanish-speaking individuals in the United States and the need for Spanish (and other language) Medication Guides. One comment suggested that existing computer data bases could be adapted easily to translate patient information into foreign languages commonly spoken in the United States. One comment claimed that proposed § 208.20(a), mandating that Medication Guides be in English, is inconsistent with FDA's request for comments on how best to provide information to populations who do not speak English. One comment stated that FDA should permit verbatim translations of Medication Guides without requiring a submission for approval.

FDA encourages, but the final rule does not require, the dispensing of patient information in foreign languages, in low literacy formats, or in braille for visually impaired consumers. Given the development of technology, translations and Medication Guides in other formats may become easier to distribute. However, FDA believes that most of these populations still could benefit from English language leaflets because, for example, a relative or friend could translate the information.

Section 208.20(a)(1) does not prohibit, in addition to English language leaflets, either the distribution of faithful translations, such as materials in other languages or braille, or materials in simplified texts, or using icons or symbols. FDA continues to believe that a multifaceted communications system would help ensure that all consumers receive meaningful patient information.

FDA believes that due to sometimes subtle differences among languages,

including syntax and connotation, translation requires judgment and expertise. While the distribution of translations is encouraged, translations would not satisfy § 208.20(a)(1). Moreover, FDA frequently disagrees with sponsors about the appropriate translation of labeling language. The final rule does not require that translations receive FDA approval, but § 208.20(a)(1) requires, that when they are used, they be distributed along with English language texts.

25. Several comments suggested that § 208.20(b)(1) be modified to permit the established name to be used as the most prominent product name and permit the trade name(s) to be listed secondarily.

Application of § 208.20(a)(7) and (b)(1) of the final rule would permit the established name of the product to be more prominent than the brand or trade name. Implementing section 502(e)(1)(B) of the act, § 208.20(a)(7) of the final rule requires that the established name be printed in type at least one-half the height of that used for any proprietary name. Consequently, the established name can be as large as desired, provided that it is no less than one-half the height of the brand or trade name.

26. Several comments suggested that § 208.20(b)(5)(iv) be modified to include what the patient should do if several doses of the drug are missed or if the patient discontinues the regimen.

No change is necessary to § 208.20(b)(5)(iv) in response to these comments. The provision gives manufacturers the ability to include information on missed doses of a medication of ''serious and significant concern.'' The agency has modified this provision to include the phrase ''where there are data to support the advice.'' This change was made to emphasize that any advice of this type must be based on appropriate data or information.

27. Several comments claimed that the required content of a Medication Guide emphasizes the presentation of risks without similar stress on benefits. Some pointed out, for example, that one of the prototype Medication Guides in the proposal includes information that overemphasizes the risks associated with the medication.

FDA has long maintained that patients need to receive a fair balance of risk and benefit information. FDA does not object to the presentation of product benefit information if it is supported by scientific evidence and is consistent with approved professional labeling. In fact, the agency has added a new sentence to § 208.20(b)(3) to make it clear that, when appropriate, a discussion of benefits of treatment can be included in a Medication Guide. On the other hand, because some medications have potentially serious effects, FDA believes that it is vitally important for patients to receive a truthful description of products' risks.

While FDA believes that benefit information is often understood, the agency is open to learning more about how to communicate risk and benefit information so that patients receive a fair and balanced picture of their medications, without undue emphasis on either risks or benefits.

28. Several comments urged that FDA avoid class labeling, i.e., providing the same information for various products within a class of drugs. Medication Guides, they argued, should be product-specific, rather than class-specific, to address issues unique to particular products.

FDA has accepted both product-specific and class labeling approaches in its past approval of patient labeling and believes that class labeling can be appropriate for products in narrowly-defined pharmacologic classes. FDA will review drug product labeling when the agency believes that information can be safely applied to the specific covered product.

29. Several comments suggested that the currently available ''imprint system,'' or other descriptors of color, shape, markings, etc., be incorporated in the patient information to facilitate patients' coordinating their medication with the proper patient information. Other comments noted that these descriptors would be excessive.

FDA encourages systems that ensure that the patient is able to identify the individual products dispensed. However, a single system may be difficult to implement. For example, in large pharmacies, dispensers may be unaware when generic suppliers with a different imprint are switched, necessitating a corresponding change in the patient information. Because of the excessive burden that would be imposed, FDA will not require that imprints or other descriptors be included in patient information.

30. One comment asked that the medicine's expiration date be stamped on the patient information. Another comment suggested that patient information sheets include the pharmacist's or provider's telephone number so that patients will know where to call to get their follow up questions answered.

The medicine's expiration date applies only to products stored in the manufacturer's container. Once the product is removed from the pharmacy's storage conditions, the original expiration date may no longer be valid. Further, many state pharmacy laws require that an expiration date appear on the medication vial dispensed to the patient. Generally, this date is 1 year from the time of dispensing. FDA will not require that patient information include the medicine's expiration date because it is not possible for the dispenser to know the medication's true expiration date.

FDA encourages pharmacists or providers to include their telephone number in the information they give to patients. Many State Boards of Pharmacy rules require that the label on the medication container include the pharmacy's name, address, and telephone number.

31. A number of comments suggested the use of pictograms or icons in addition to text, especially for patients with limited reading skills.

FDA believes that, while pictograms may be helpful in explaining concepts, and icons helpful in providing graphically pleasing and memorable text, it is not clear that these devices are able to communicate concepts adequately regarding the use of prescription medications without the addition of the textual material. Accordingly, FDA will not require the incorporation of icons or pictograms in Medication Guides. However, the agency believes that icons or pictograms, when used in addition to text, are useful and may permit their incorporation on a case-by-case basis if requested by the manufacturer.

32. The proposal solicited comments on page limits (60 FR 44182 at 44208). One comment noted that it may be difficult to explain technical information in consumer language if the page length is limited, especially because page size and length will vary with the computer equipment used by the dispenser. Another comment argued that the rule should not specify page dimensions because the amount and type of information will vary from product to product.

FDA agrees that a required page limit could put unnecessary constraints on the communication of important information. However, it is important to note that FDA expects that Medication Guides will include only the information necessary for the safe and effective use of the product and other information required to provide needed context. Medication Guides should not exhaustively detail all information known about the product. FDA is concerned that, if unrestrained, lengthy information could result in unnecessary or even dangerous barriers to the

effective communication of important concepts. Therefore, the agency will establish a two-page limit as a goal for the communication of the essential information to be included in Medication Guides. Graphic representations, charts or other material supportive of, or in addition to, the essential information should be placed in an ''appendix'' located at the end of the leaflet. The agency will consider overall length and the inclusion of supportive material in its evaluation of the understandability and legibility of the Medication Guide.

33. Several comments suggested that § 208.20(a)(4) (§ 208.22(a) of the proposed rule) be modified to require at least 12 point type size, rather than 10 point, as proposed.

FDA acknowledges that many prescription drug users are elderly and may have difficulty discerning words written in small type sizes. Ten point minimum type is larger than that used in many commonly read materials, e.g., newspapers. FDA notes that legibility is determined by a number of factors other than type size. The 10 point minimum was based on the need to balance legibility concerns and patients' reluctance to read longer materials.

34. A number of comments made suggestions for: (1) Optimal presentation of information for patients (e.g., bulleting, outlines, contrast, typeface, leading); (2) the inclusion of specific types of information (e.g., potential treatment outcomes, managing side effects); and (3) providing greater flexibility in the presentation and language used in patient information.

FDA appreciates the comments and suggestions and believes that the final rule provides an appropriate amount of flexibility. The final rule contains a minimum type size in § 208.20(a)(4) and also requires in § 208.20(a)(5) that the information be legible and clearly presented, and, where appropriate, use boxes, bolding, and other highlighting techniques to emphasize portions of the text. In addition, § 208.20(b) of the final rule contains general content requirements for Medication Guides which the agency has said should be tailored to include only those categories of information relevant to the drug product and the need for the Medication Guide. Furthermore, § 208.26(a) provides that changes from the format (and content) requirements will be considered when the requirements are inapplicable, unnecessary, or contrary to patients' best interests. These provisions will provide sufficient flexibility in the design of Medication Guides.

35. One comment recommended that the final rule require that patient information accompany all medication samples distributed by health care providers.

Under the final rule, Medication Guides are to be dispensed with all prescriptions of drug products that the agency determines are of ''serious and significant concern.'' Prescription drug samples are dispensed under an oral or written prescription of a licensed practitioner. Accordingly, a Medication Guide must be provided with samples of prescription drug products that FDA determines are of ''serious and significant concern.''

36. Some comments questioned manufacturer compliance under a variety of conditions, such as when changes are made to the Medication Guide, especially for products that are not in unit-of-use packaging. Others questioned whether the agency would request a recall of Medication Guides if important changes are needed. The comments also questioned how the manufacturer could be held accountable or be allowed to confirm the accuracy of the information if third parties are able to make changes to the Medication Guide. Some comments also asked about what criteria must be met for personalized Medication Guides.

In general, FDA intends that changes in Medication Guides be incorporated into the next printing of labeling. If clinically significant information necessitates a change in a Medication Guide, FDA will ask that manufacturers expedite the next printing to incorporate the change as rapidly as is reasonably possible. In addition, FDA could request that manufacturers notify health care professionals, such as by sending ''Dear Health Professional'' letters, and rapidly distribute replacement patient information. FDA would also expect manufacturers to use or adapt whatever systems are already in place for making changes to the professional labeling to make changes to Medication Guides.

In response to the comment on personalized information, written medication information may be customized by individual health care practitioners for individual patients by including, for example, the prescription number, the name, address, and/or telephone number of the authorized dispenser and/or licensed practitioner, the specific dosage regimen prescribed, or by including other patient-specific information on leaflets. This information may precede or follow the required information in the Medication Guide, but in no case should the information be more prominent than, or obscure, any required information. FDA believes that such personalization falls within the practice of medicine and pharmacy. However, this final rule pertains only to Medication Guides for drug products of ''serious and significant concern,'' and the information in them must be approved by the agency before they can be distributed. Thus, third parties cannot make substantive changes to a Medication Guide, except in the limited context of personalizing it. Finally, under § 314.70(b)(3) and § 601.12(f), FDA will permit manufacturers to make only very minor changes to Medication Guides without submission of a labeling supplement.

37. One comment stated that the distribution of Medication Guides by drug manufacturers to pharmacies, directly or through drug wholesalers, is not feasible because pharmacies use a variety of operating system platforms and proprietary software. The comment claimed that disks provided by manufacturers or wholesalers may not be compatible with existing systems because, for example, information may be formatted inconsistently with the printing specifications. The comment argued, therefore, that the rule would require that suppliers individualize disks for dispensers, and that such a requirement is overly burdensome.

FDA agrees with the comment that pharmacies use a variety of computer systems. The final rule, in § 208.24(b), however, permits manufacturers and distributors to provide either hard copies of patient information or the ''means'' for disseminating information. FDA believes that providing manufacturers and distributors with this degree of flexibility will encourage them to develop readily adaptable systems for distributing required Medication Guides. FDA believes that some manufacturers will choose to package certain products in unit-of-use or bulk containers with hard copies of the Medication Guides affixed to the product container. Other manufacturers will work with information system vendors to incorporate Medication Guides into existing pharmacy software systems.

The agency wishes to emphasize that it is ultimately the responsibility of manufacturers to ensure that authorized dispensers receive sufficient numbers of Medication Guides that can, in turn, be dispensed to patients with selected products that pose a ''serious and significant'' public health concern. This requirement would not be fulfilled, for example, by a manufacturer providing a pharmacy with Medication Guides in a form that the pharmacy could not use. In cases where unit-of-use packaging or

printed copies of Medication Guides attached to bulk packages are not used, the agency feels that market forces will contribute to manufacturers working with the various third-party information providers to ensure that their computerized systems can provide printouts of Medication Guides.

38. One comment argued that the rule would require that manufacturers ''provide the dispensers with the means to ensure distribution'' of Medication Guides to each patient without adequately defining ''the means.'' The comment asked whether manufacturers would be required to pay dispensers, provide computer equipment, or develop some other mechanism to ensure that dispensers could distribute Medication Guides. The comment also asked whether manufacturers would be liable for pharmacists' failure to distribute, or distributing the wrong Medication Guide, and whether drug manufacturers have a duty to educate pharmacists about the information contained in the leaflet. Other comments noted that pharmacists currently rely on patient information data bases developed by others, and argued that it would be excessively burdensome to require that pharmacists maintain hard copies of every manufacturer's Medication Guide.

Section 208.24 of the final rule requires that manufacturers provide distributors and authorized dispensers with the means to distribute Medication Guides to patients. To allow for flexibility, FDA did not specify the means, but instead provided examples of effective means, such as providing authorized dispensers with patient information software. As suggested by some comments, FDA believes that most manufacturers will contract with third parties or large pharmacy chains who would develop acceptable dispensing mechanisms that pharmacists could easily incorporate into their practice. The final rule does not specify additional requirements because the agency wants to encourage private-sector innovation.

Section 208.24(e) requires that authorized dispensers provide Medication Guides to patients. A manufacturer has fulfilled its obligation under the final rule by providing those who dispense its products with Medication Guides in sufficient numbers or the means to produce Medication Guides.

39. Several comments objected to the requirement in proposed § 208.24(c) that patient information be distributed with each unit-of-use package, for both new prescriptions and refills, arguing that manufacturers should be allowed the same options of either providing sufficient paper copies with each shipment, or providing the dispenser with the means to supply Medication Guides without the use of paper, regardless of how the product is packaged.

FDA has accepted the comment's suggestion that the agency exercise greater flexibility in the distribution of patient information for unit-of-use packaged medications. This was not an easy decision and may be reconsidered if alternatives do not succeed in regularly providing patients with the needed information. A unit-of-use package with enclosed patient information guarantees that patients receive the information. No alternative system does so. Although unit-of-use packaging is not the usual packaging in the United States, it is the standard in Europe and thus familiar to any sponsors with international experience.

Proposed § 208.24(c), which would have required the distribution of Medication Guides with each unit-of-use package intended for distribution to patients, has been deleted. This deletion will permit manufacturers the same options for distributing Medication Guides for unit-of-use and bulk dispensed medications. However, to ensure that authorized dispensers know which unit-of-use packaged products contain Medication Guides (so dispensers will know whether or not to dispense a separate Medication Guide), the term ''large volume'' as a modifier of the term ''container'' has been deleted every place it appeared in § 208.24. In addition, the agency has made changes to § 208.24(d) to require that the label of each container of drug product for which a Medication Guide is required instruct the authorized dispenser to provide a Medication Guide and tell the dispenser how the Medication Guide is provided. Because this information is so important, the agency has also added the requirement that these statements appear on the label in a prominent and conspicuous manner.

40. One comment noted that proposed § 208.24(f) specifically exempts authorized dispensers who print Medication Guides from the establishment registration and drug listing requirements of section 510 of the act. The comment contended that this exemption should also apply to prescription drug wholesalers who have never been required to register and list their products with FDA.

Section 510 of the act requires any person (including prescription drug wholesalers), unless exempt by statute (section 510(g)) or by regulation (21 CFR 207.10), who, among other things, changes the container, wrapper, or labeling of any drug product in furtherance of its distribution to register with the agency, as well as to list the product with the agency. FDA does not believe that section 510 of the act would apply to wholesalers who serve merely to pass on Medication Guides from manufacturers to authorized dispensers. On the other hand, if drug wholesalers make changes to the content of a Medication Guide, just as if they had made changes to the content of the professional labeling, they would be required to register and list their products with FDA.

41. One comment suggested that proposed § 208.26(b), which permitted physicians and pharmacists to withhold a Medication Guide from a patient, be amended to permit the withholding of Medication Guides only if the information ''would harm the patient or interfere with the course of treatment.'' The comment also suggested that the rule require that the prescriber note the reason for withholding the Medication Guide in the patient's record, and that only physicians, not pharmacists, should determine whether Medication Guides should be withheld.

The agency agrees with this comment in part. Section 208.26(b) has been changed to permit only the licensed practitioner who prescribes a drug to direct that a Medication Guide be withheld if it is not in the patient's best interest because of significant concerns about the effect of the information on the patient. Authorized dispensers who are not licensed practitioners may not withhold a Medication Guide. If the patient requests information about a prescription drug subject to this final rule, however, § 208.26(b) requires that the dispenser provide one, regardless of the licensed practitioner's concern. Licensed practitioners may include, depending on the jurisdiction, pharmacists, nurses, physician assistants, and other health professionals, as well as physicians. Any of these practitioners who have prescribing authority may direct that a Medication Guide be withheld. FDA does not believe that practitioners should be required to document the reason for directing that a Medication Guide be withheld when such decision is deemed to be in a patient's best interest.

FDA believes that it is appropriate to limit this authority because Medication Guides required under this final rule will contain information of crucial importance for the safe and effective use of the product. The agency expects that licensed practitioners will direct that Medication Guides be withheld

relatively rarely, and that the decision will be based on special individual circumstances or characteristics of their patients.

42. Several comments stated that the proposed regulations substitute the agency's judgment for that of the health care professional regarding the information individual patients need. Some comments argued that practitioners should decide if and when a patient should receive a Medication Guide, or relevant part(s) thereof. The comments maintain that the rule interferes with the practice of medicine by requiring that Medication Guides be distributed to all patients, even when a health care professional has determined that an individual patient should not receive such information.

The final rule is limited to requiring Medication Guides for products FDA determines present health care concerns so significant that patients must have written information about the products. Medication Guides under this rule will contain information necessary to patients' safe and effective use of the products. FDA does not believe that providing such information interferes with the practice of medicine. The final rule does not limit the information that health care providers may impart to patients concerning prescribed medications. If physicians disagree with specific aspects of the patient labeling supplied by the manufacturer, they are free to discuss the matter fully with patients, noting their concerns and views. FDA believes the final rule encourages patients to engage in this kind of open discussion with their health care provider. Also, as noted above, the final rule permits a licensed practitioner to instruct that a Medication Guide be withheld from an individual patient if the practitioner believes that it would not be in the patient's best interest to receive the information. Only the patient can overrule this instruction by specifically requesting the Medication Guide.

43. One comment suggested that the final rule exempt only those medications administered under emergency conditions. Another comment suggested that while the distribution of Medication Guides in emergency situations would be impractical, a good faith effort should be made by health care professionals to assure that the patient receives a copy as soon as practicable. In the case of hospitals, one comment advocated that Medication Guides be given to patients upon discharge, if not before. Others argued that Medication Guides should be given to institutionalized patients or their designees, including those in hospitals, long-term care facilities, and prisons. Still others stated that Medication Guides should be made available in physicians' offices.

FDA has determined that routinely distributing Medication Guides to institutionalized patients is unnecessary because medications dispensed in such facilities are usually administered directly by health care professionals who are readily available to answer patients' questions about their medications. FDA encourages health care institutions to make copies of Medication Guides available to patients who request them, and to maintain compilations of Medication Guides at convenient locations so that interested patients have access to them. However, where the agency determines that the circumstances or characteristics of a particular drug make it necessary, FDA will require the distribution of a Medication Guide to institutionalized patients.

FDA believes that distribution requirements should be sufficiently flexible to permit licensed practitioners to instruct that a Medication Guide be withheld when the information is deemed inappropriate for an individual patient. However, FDA emphasizes that Medication Guides cannot be withheld from patients who request them.

C. Economic/Environmental Issues

44. Several comments stated that FDA's estimated cost for developing patient information was flawed. One comment stated that a particular drug manufacturer took 16 person-months of effort (eight professionals, full-time for 2 months) to develop the patient information for Proscar® and that FDA should rely on this estimate for the effort needed to produce a new Medication Guide.

FDA agrees that drug manufacturers' recent experiences provide the best source of information for estimating the average cost of developing a new Medication Guide. Indeed, FDA used this sort of information in its Regulatory Impact Assessment, which relied on the July 1993 issue of *Pharmaceutical Executive* (Ref. 21), in which Merck Pharmaceuticals' manager of information services states that ''[d]evelopment of the PPI was a 6-month process, including initial drafting, research to ensure that potential users of Proscar® understood the important information about the medicine contained in the PPI, and revision and refinement based on the results of our research.'' The article further explains that Merck elected to conduct readability and comprehensibility studies during the development phase.

FDA would not require manufacturers to conduct this level of evaluation prior to issuing a new Medication Guide. Medication Guides are designed to draw upon readily available professional labeling. Even patient labeling drafted at the time of initial drug approval would be based upon the professional labeling, often, FDA assumes, utilizing the same staff that developed the professional label. FDA believes that minimal additional staff, such as a medical writer skilled in writing for laypersons, would be needed; therefore, most of the staff who would work on Medication Guides would be extremely familiar with the medication and its professional labeling. FDA considers 6 months to be an upper bound estimate for developing an original Medication Guide because Merck conducted testing beyond that required to develop the patient information for Proscar®.

45. Several industry comments claimed that FDA underestimated, perhaps by as much as 30 percent, the annual compensation for nonproduction staff.

FDA believes that the estimated $70,000 salary used in its analysis is a fair estimation and may even overstate the average salary. According to the Bureau of Labor Statistics Monthly Report of Earnings, nonproduction workers in the Pharmaceutical Preparations Industry (SIC 2834) earned an average of $49,579 in 1992. The U.S. Bureau of Economic Analysis (BEA), National Income and Product Reports, reported that the ratio of total compensation to wages within this industry is 1.249, resulting in total average 1992 compensation for a nonproduction employee in the pharmaceutical industry of $61,924. The BEA also reported that the average increase in compensation between 1992 and 1994 was 6.3 percent. Thus, the average total compensation for a nonproduction employee in the pharmaceutical industry in 1994 was $65,825. FDA has used $70,000 as a reasonable estimate of this compensation.

46. Several comments stated that FDA should prepare and publish an environmental impact statement (EIS) regarding the effects of the proposed rule, given the agency estimate that the average pharmacy will use 28,600 pages of computer paper and 23 dot matrix printer ribbons annually, and that the agency assumes a total of 71,386 pharmacy outlets use 2,041,688,200 pages of computer paper and discarded 1,641,901 printer ribbons annually.

FDA does not agree that it should develop either an environmental assessment (EA) or an EIS for this rule. This comment relied on environmental impact figures that were based on the effects of a voluntary program of disseminating written patient information concerning all prescription drugs from the proposed rule. The final rule has a much narrower focus because it applies only to a small number of products of ''serious and significant concern'' and therefore is not dependant on the outcomes achieved by a voluntary program. Thus, these figures are not accurate for this program. Further, 21 CFR 25.24(a)(11) provides a categorical exclusion from the preparation of an EA for actions that establish by regulation labeling requirements for marketing articles if there is no increase in the existing levels of use or change in the intended uses of the product or its substitutes. The requirement for mandatory Medication Guides for medications of ''serious and significant concern'' will not produce such change because about as many products (on average no more than 5 to 10 per year) will be affected as are currently affected by agency requests that their manufacturers voluntarily produce patient labeling for the products to ensure safe and effective use.

47. One comment noted that the proposal's analysis under the Paperwork Reduction Act demonstrates the large amount of paperwork to implement this program but does not count the cost to produce this paperwork.

FDA did include such costs in its economic evaluation. The Paperwork Reduction Act requires FDA to estimate the costs, in terms of hours, of reporting and recordkeeping resulting from Government regulations. This estimate was included in the proposal in a table included in section XIV (60 FR 44182 at 44233). The analysis of impacts in the proposal (60 FR 44182 at 44210 through 44213) presented monetary costs of implementing a comprehensive mandatory program, if it were to be instituted. This estimate included a variety of recordkeeping functions, e.g., cost of printing and dispensing Medication Guides and development costs incurred by manufacturers. Further, given the narrowed focus of the final rule, the costs of the paperwork burden, as well as other costs, will be low because only a small number of Medication Guides will be required. However, in recalculating these costs for consistency with the final rule, FDA included manufacturers' resources needed to produce and obtain approval for Medication Guide revisions.

IV. Analysis of Impacts

FDA has examined the impact of the final rule under Executive Order 12866, under the Regulatory Flexibility Act (5 U.S.C. 601–612) and under the Unfunded Mandates Reform Act (Pub. L. 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages, distributive impacts, and equity).

Under the Regulatory Flexibility Act, unless an agency certifies that a rule will not have a significant economic impact on a substantial number of small entities, the agency must analyze regulatory options that would minimize any significant impact of the rule on small entities. The Unfunded Mandates Reform Act requires (in section 202) that agencies prepare an assessment of anticipated costs and benefits before proposing any expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million in any one year (adjusted annually for inflation).

The agency has reviewed this final rule and has determined that the rule is consistent with the principles set forth in the Executive Order and in these two statutes. Further, the agency finds that the rule will not have a significant effect on a substantial number of small entities, and that it imposes no unfunded mandates to State, local or tribal governments. Indeed, as explained below, the expected annual incremental costs of this rule will not require expenditures significantly above what would be likely to occur in the absence of regulation.

The final rule articulates the agency's decision to require mandatory Medication Guides for those prescription drug products identified as posing a ''serious and significant concern.'' Only when information is critical to patients'' safety will a manufacturer be required to distribute this information. In its absence, patients would be more likely to fail to adhere to therapeutically critical directions or to recognize signs and symptoms of both preventable and unpreventable adverse reactions. Such improper use of prescription medications can increase morbidity and mortality by contributing to additional or prolonged illness. As current estimates of the annual direct medical costs related to the improper use of prescribed medications exceed $20 billion, even small reductions in the incidence of such events would yield significant savings.

Currently, patient labeling for most high risk products is developed voluntarily by manufacturers on a case-by-case basis. No formal mechanism exists, however, to ensure that all exposed patients receive concise, understandable information, or that the information they do receive is best for consumer protection.

As described previously, FDA currently works with industry on a product-by-product basis to develop patient information sheets for the small number of products that pose the most serious public health risks. The agency does not expect this rule to significantly increase the frequency of this practice, nor will any additional information typically be required because the determining criteria will not change. Nevertheless, the voluntary nature of the current process may result in occasional disagreements between the agency and manufacturers of drug products with ''serious and significant concerns.'' These disagreements and negotiations would delay or preclude patients receiving necessary information. On average, therefore, based on past practice, FDA estimates that, each year, no more than 5 to 10 products with ''serious and significant concerns'' would develop patient information sheets. Only one of these products, however, would not have developed these sheets voluntarily. Thus only one additional product with a ''serious and significant concern'' may have to develop a Medication Guide as a result of this rule. In FDA's view, the nature and magnitude of the adverse outcomes that may result from the misuse of even this one additional product of ''serious and significant concern'' warrants the implementation of a limited, clearly articulated regulation.

The existence of regulations that mandate the inclusion of critical patient information in a standardized format will ensure that all patients who use drug products with ''serious and significant concerns'' receive adequate information on their medication. For example, the identification of certain products with ''Medication Guide'' information will increase patients'' ability to recognize products of ''serious and significant concern'' that require their thorough and careful monitoring. Further, the communication of critical information concerning serious risks and directions for use will improve consumers' ability to identify and to learn essential prescription drug information. In addition, while approximately 70 percent of all patients

have reported receiving patient information, this rule will ensure that all affected patients receive these Medication Guides.

Second, by identifying the criteria, format, contents, and other requirements of patient information, manufacturers will be aware of the need for Medication Guides for products under development. Thus, this rule will increase the sponsors' ability to work in conjunction with FDA to develop this information as part of the traditional review package, facilitating FDA's timely review of the information and helping to assure that drug approvals are not delayed. In the absence of this rule, the ad hoc practice of developing patient information would continue in its currently less efficient and more burdensome form.

Because FDA and industry currently work to assure the development and distribution of this patient information, and because these activities would continue even in the absence of this rule, the rule will impose minimal incremental costs on the industry. Almost every year, several firms are asked by FDA to develop patient information leaflets, and there is no reason to believe that this total number would change substantially. Consequently, as noted above, the agency estimates that one additional product each year will be required to develop information as a direct result of this rule. FDA has estimated a cost of under $12,000 (or 2-resource months) to develop a patient information sheet for a new drug product. Thus, this incremental compliance cost to manufacturers would be about $12,000 per year.

Similarly, the distribution of information for the affected products will continue in the same manner. About half of these products (such as oral contraceptives) may be distributed in unit-of-use packaging that contains patient information sheets. These information sheets may cost manufacturers about an additional 2 cents per package for printing and paper. Alternatively, patient information for those products designated as posing a ''serious and significant concern,'' but not marketed in unit-of-use packaging, are distributed through a variety of information channels, including individual leaflets that circulate with the products, or automated systems that print individual leaflets from larger data bases. Most retail pharmacies, regardless of size, already distribute this information to consumers. FDA anticipates that these activities will continue, as the rule does not dictate any particular distribution approach, but places the ultimate responsibility for ensuring the content and availability of patient information with the manufacturer of the drug product. Moreover, the issuance of this rule will encourage third-party electronic information vendors to incorporate this mandatory patient information into their systems.

According to FDA estimates, approximately 70 percent of all pharmacies supply patient information with prescriptions. The remaining 30 percent will be required to provide medication guides for all drug products with ''serious and significant concerns.'' No more than 5 to 10 such products are expected each year. FDA estimates that each affected drug product may account for 100,000 annual prescriptions, each Medication Guide will consist of one printed page, 50 percent of the affected products are manufactured in unit-of-use packages, and 5 seconds of pharmacist time is necessary to dispense each guide. Based on these assumptions, within 10 years, the total cost for all pharmacies to include Medication Guides for the 50 to 100 identified drugs equals $434,000 to $868,000 (about 9 cents per prescription dispensed). The incremental cost of providing these Medication Guides (accounting for the 70 percent current compliance) would be about 30 percent of this amount, or $130,000 to $260,000 per year.

In sum, the actions described in this regulation will formalize the agency's current policy and impose few incremental costs on the affected industry sectors. Public health will be enhanced by ensuring the wider availability of consistent and understandable patient information for products of ''serious and significant concern.''

With respect to the Regulatory Flexibility Act, even if a few additional products would require patient information sheets, the costs described above would not impose a significant effect on any entity. Thus, the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

V. Environmental Impact

The agency has determined under 21 CFR 25.30(a) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VI. Paperwork Reduction Act of 1995

This final rule contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The title, description, and respondent description of the collection of information are shown below with an estimate of the annual reporting burden. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Title: Prescription Drug Product Labeling; Medication Guide Requirements

Description: This final rule imposes reporting requirements on manufacturers of drug products that pose a serious and significant public health concern. These manufacturers will be required to develop Medication Guides for such products and submit them to FDA for approval.

FDA estimates that on average no more than 5 to 10 products annually would fall under the ''serious and significant concern'' classification and thus require mandatory Medication Guides. FDA believes that four of these products (estimating conservatively) would be newly approved. One already-marketed product would require a Medication Guide, with two ''supplementary'' Medication Guides needed for products in the same narrow therapeutic class, and one Medication Guide needed for a generic product in this class. FDA's regulatory impact analysis estimated that applicants would need approximately 2 months of full-time effort (320 hours) to develop for submission to FDA a ''model'' Medication Guide that would be consistent with the requirements in § 208.20. (A ''model'' Medication Guide is for a medication in a class that has no previous Medication Guide.) ''Supplementary'' Medication Guides would require approximately half that time (160 hours), and generic Medication Guides would require 1/20th of the time (16 hours). FDA also estimates that one ''serious and significant'' Medication Guide sponsor annually may wish to request an exemption or deferral from specific Medication Guide requirements and that this would take approximately 4 hours.

In addition, FDA estimates that two existing Medication Guides annually might require minor changes under § 314.70(b)(3)(ii) or § 601.12(f), necessitating 3 days (24 hours) of full-time effort.

Under § 208.24(e), authorized dispensers are required to provide a Medication Guide directly to the patient (or the patient's agent) upon dispensing a product for which a Medication Guide is required. Thus, the final rule imposes a third-party reporting burden on authorized dispensers, who, for the most part, will be pharmacists. FDA estimates that, over the next 3 years, assuming that 5 Medication Guides are required annually, an average of 10 Medication Guides annually would be available for prescribing and dispensing. Assuming a base of approximately 100,000 prescriptions dispensed for each of these products annually, and subtracting from this base the approximately 50 percent of products with Medication Guides that are dispensed in unit-of-use packages, results in a total of 500,000 prescriptions annually for products that pose a ''serious and significant public health concern.'' Based on data collected in 1996, the agency estimates that at least 70 percent of patients are already receiving some kind of patient medication information voluntarily provided by pharmacists when they dispense prescriptions. Therefore, this final rule would represent an incremental burden, in terms of third party reporting, for only 30 percent, or about 150,000, of these prescriptions. Given 60,574 pharmacies, including chains, independents, and food/drug combinations, this represents an average of 2.5 prescriptions per store, per year. Because FDA estimates that, on average, it would take a pharmacist approximately 5 seconds (.0014 hour) to provide a Medication Guide to a patient, the overall annual third party reporting burden for this final rule is approximately 212 hours.

No estimate for recordkeeping burden is necessary because the recordkeeping provision in the proposed rule (proposed § 208.26(c)) has been eliminated and this final rule contains no other recordkeeping provisions.

Description of Respondents: Businesses or other for-profit organizations.

Although the August 24, 1995, proposed rule (60 FR 44182) provided a 90-day comment period under the Paperwork Reduction Act of 1980, and this final rule incorporates the comments received, as required by 44 U.S.C. section 3507(d), FDA is providing an additional opportunity for public comment under the Paperwork Reduction Act of 1995, which applies to this final rule and became effective after the expiration of the comment period. Therefore, FDA now invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology. Individuals and organizations may submit comments on the information collection provisions of this final rule by February 1, 1999. Comments should be directed to the Dockets Management Branch (address above).

At the close of the 60-day comment period, FDA will review the comments received, revise the information collection provisions as necessary, and submit these provisions to OMB for review. FDA will publish a notice in the **Federal Register** when the information collection provisions are submitted to OMB, and an opportunity for public comment to OMB will be provided at that time. Prior to the effective date of this final rule, FDA will publish a notice in the **Federal Register** of OMB's decision to approve, modify, or disapprove the information collection provisions. 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.

ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR section	No. of respondents	Annual frequency per response	Total annual responses	Hours per response	Total hours
208.20	8	1	8	242	1,936
314.70(b)(3)(ii) or 601.12(f)	2	1	2	24	48
208.24(e)	60,574	2.5	150,000	.0014	212
208.26(a)	1	1	1	4	4
Total					2,200

[1]There are no capital costs or operating and maintenance costs associated with this information collection.

VII. References

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

1. Mullen, P. D., and L. W. Green, ''Measuring Patient Drug Information Transfer: An Assessment of the Literature,'' Pharmaceutical Manufacturers Association, Washington, DC, 1983.

2. Kanouse, D. E. et al., ''Informing Patients About Drugs: Summary Report on Alternative Designs for Prescription Drug Leaflets,'' Rand Corp., Santa Monica, CA, 1981.

3. Morris, L. A., M. Mazis, and E. Gordon, ''A Survey of the Effects of Oral Contraceptive Patient Information, *Journal of the American Medical Association, 238(23),* 2504–2508, 1977.

4. Gibbs, S., W. E. Waters, and C. F. George, ''The Benefits of Prescription Information Leaflets (2),'' *British Journal of Clinical Pharmacology,* 28:345–351, 1989.

5. Guarino, R., ''PPI: The Proper Prescription?'' *Food Drug and Cosmetic Law Journal,* 34:116, 1979.

6. Howland, S., M. G. Baker, and T. Poe, ''Does Patient Education Cause Side Effects? A Controlled Trial,'' *The Journal of Family Practice,* 31:62–64, 1990.

7. Lamb, G. C., S. S. Green, and J. Heron, ''Can Physicians Warn Patients of Potential Side Effects Without Fear of Causing Those Side Effects?'' *Archives of Internal Medicine,* 154:2753–2756, 1994.

8. Morris, L. A., and D. E. Kanouse, ''Informing Patients About Drug Side Effects,'' *Journal of Behavioral Medicine,* 5:363–373, 1982.

9. Docket No. 93N–0371.

10. Morris, L. A. et al., ''Patient Receipt of Prescription Drug Information,'' National Technical Information Service, No. PB84–100031, 1984, Springfield, VA.

11. Morris, L. A. et al., ''A National Survey of Prescription Drug Information Provided to Patients,'' National Technical Information Service, No. PB86–186947/XAB, 1986, Springfield, VA.

12. Morris, L. A., A. M. Myers, and D. G. Thilman, ''Application of the Readability Concept to Patient-oriented Drug Information,'' *American Journal of Hospital Pharmacy,* 37:1504–1509, 1980.

13. Morris, L. A., and D. Kanouse, ''Consumer Reactions to the Tone of Written Drug Information,'' *American Journal of Hospital Pharmacy*, 38:667–671, 1981.

14. Morris, L. A., M. Hastak, and M. Mazis, ''Consumer Comprehension of Environmental Advertising and Labeling Claims,'' *Journal of Consumer Affairs*, 29: 328–350, 1995.

15. Morris, L. A., and D. Kanouse, ''Consumer Reactions to Differing Amounts of Written Drug Information,'' *Drug Intelligence and Clinical Pharmacy*, 14:531–536, 1980.

16. Backinger, C. L., and P. A. Kingsley, ''Write It Right: Recommendations for Developing User Instructions for Medical Devices Used in Home Health Care,'' Department of Health and Human Services, Publication No. FDA 93–4258, 1993.

17. Doak, C. C., L. G. Doak, and J. H. Root, ''Teaching Patients with Low Literacy Skills,'' Philadelphia, J. B. Lippincott Co., 1985.

18. Felker, D. B. et al., ''Guidelines for Document Designers,'' Washington, DC, American Institutes for Research, 1981.

19. Mettger, W., and J. Mara, ''Clear and Simple: Developing Print Materials for Low-Literacy Readers,'' Bethesda, MD, National Cancer Institute, 1992.

20. Nonprescription Drug Manufacturers Association, ''Label Readability Guidelines,'' Washington, DC.

21. Koberstein, W., ''Reach the People: The Progress of Direct-to-Consumer Communications,'' *Pharmaceutical Executive*, 7: 36–58, July 1993.

List of Subjects

21 CFR Part 201

Drugs, Labeling, Reporting and recordkeeping requirements.

21 CFR Part 208

Drugs, Patient labeling, Reporting and recordkeeping requirements.

21 CFR Part 314

Administrative practice and procedure, Confidential business information, Drugs, Reporting and recordkeeping requirements.

21 CFR Part 601

Administrative practice and procedure, Biologics, Confidential business information.

21 CFR Part 610

Biologics, Labeling, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, Chapter I of Title 21 of the Code of Federal Regulations is amended to read as follows:

PART 201—LABELING

1. The authority citation for 21 CFR part 201 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 355, 358, 360, 360b, 360gg–360ss, 371, 374, 379e; 42 U.S.C. 216, 241, 262, 264.

2. Section 201.57 is amended by revising paragraph (f)(2) to read as follows:

§ 201.57 Specific requirements on content and format of labeling for human prescription drugs.

* * * * *

(f) * * *

(2) Information for patients: This subsection of the labeling shall contain information to be given to patients for safe and effective use of the drug, e.g., precautions concerning driving or the concomitant use of other substances that may have harmful additive effects. Any printed patient information or Medication Guide required under this chapter to be distributed to the patient shall be referred to under the ''Precautions'' section of the labeling and the full text of such patient information or Medication Guide shall be reprinted at the end of the labeling. The print size requirements for the Medication Guide set forth in § 208.20 of this chapter, however, do not apply to the Medication Guide that is reprinted in the professional labeling.

* * * * *

3. Part 208 is added to read as follows:

PART 208—MEDICATION GUIDES FOR PRESCRIPTION DRUG PRODUCTS

Subpart A—General Provisions

Sec.
208.1 Scope and purpose.
208.3 Definitions.

Subpart B—General Requirements for a Medication Guide

208.20 Content and format of a Medication Guide.
208.24 Distributing and dispensing a Medication Guide.
208.26 Exemptions and deferrals.

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 355, 356, 357, 360, 371, 374; 42 U.S.C. 262.

Subpart A—General Provisions

§ 208.1 Scope and purpose.

(a) This part sets forth requirements for patient labeling for human prescription drug products, including biological products, that the Food and Drug Administration (FDA) determines pose a serious and significant public health concern requiring distribution of FDA-approved patient information. It applies primarily to human prescription drug products used on an outpatient basis without direct supervision by a health professional. This part shall apply to new prescriptions and refill prescriptions.

(b) The purpose of patient labeling for human prescription drug products required under this part is to provide information when the FDA determines in writing that it is necessary to patients' safe and effective use of drug products.

(c) Patient labeling will be required if the FDA determines that one or more of the following circumstances exists:

(1) The drug product is one for which patient labeling could help prevent serious adverse effects.

(2) The drug product is one that has serious risk(s) (relative to benefits) of which patients should be made aware because information concerning the risk(s) could affect patients' decision to use, or to continue to use, the product.

(3) The drug product is important to health and patient adherence to directions for use is crucial to the drug's effectiveness.

§ 208.3 Definitions.

For the purposes of this part, the following definitions shall apply:

(a) *Authorized dispenser* means an individual licensed, registered, or otherwise permitted by the jurisdiction in which the individual practices to provide drug products on prescription in the course of professional practice.

(b) *Dispense to patients* means the act of delivering a prescription drug product to a patient or an agent of the patient either:

(1) By a licensed practitioner or an agent of a licensed practitioner, either directly or indirectly, for self-administration by the patient, or the patient's agent, or outside the licensed practitioner's direct supervision; or

(2) By an authorized dispenser or an agent of an authorized dispenser under a lawful prescription of a licensed practitioner.

(c) *Distribute* means the act of delivering, other than by dispensing, a drug product to any person.

(d) *Distributor* means a person who distributes a drug product.

(e) *Drug product* means a finished dosage form, e.g., tablet, capsule, or solution, that contains an active drug ingredient, generally, but not necessarily, in association with inactive ingredients. For purposes of this part, drug product also means biological product within the meaning of section 351(a) of the Public Health Service Act.

(f) *Licensed practitioner* means an individual licensed, registered, or otherwise permitted by the jurisdiction

in which the individual practices to prescribe drug products in the course of professional practice.

(g) *Manufacturer* means for a drug product that is not also a biological product, both the manufacturer as described in § 201.1 and the applicant as described in § 314.3(b) of this chapter, and for a drug product that is also a biological product, the manufacturer as described in § 600.3(t) of this chapter.

(h) *Medication Guide* means FDA-approved patient labeling conforming to the specifications set forth in this part and other applicable regulations.

(i) *Packer* means a person who packages a drug product.

(j) *Patient* means any individual, with respect to whom a drug product is intended to be, or has been, used.

(k) *Serious risk or serious adverse effect* means an adverse drug experience, or the risk of such an experience, as that term is defined in §§ 310.305, 312.32, 314.80, and 600.80 of this chapter.

Subpart B—General Requirements for a Medication Guide

§ 208.20 Content and format of a Medication Guide.

(a) A Medication Guide shall meet all of the following conditions:

(1) The Medication Guide shall be written in English, in nontechnical, understandable language, and shall not be promotional in tone or content.

(2) The Medication Guide shall be scientifically accurate and shall be based on, and shall not conflict with, the approved professional labeling for the drug product under § 201.57 of this chapter, but the language of the Medication Guide need not be identical to the sections of approved labeling to which it corresponds.

(3) The Medication Guide shall be specific and comprehensive.

(4) The letter height or type size shall be no smaller than 10 points (1 point = 0.0138 inches) for all sections of the Medication Guide, except the manufacturer's name and address and the revision date.

(5) The Medication Guide shall be legible and clearly presented. Where appropriate, the Medication Guide shall also use boxes, bold or underlined print, or other highlighting techniques to emphasize specific portions of the text.

(6) The words ''Medication Guide'' shall appear prominently at the top of the first page of a Medication Guide. The verbatim statement ''This Medication Guide has been approved by the U.S. Food and Drug Administration'' shall appear at the bottom of a Medication Guide.

(7) The brand and established or proper name of the drug product shall appear immediately below the words ''Medication Guide.'' The established or proper name shall be no less than one-half the height of the brand name.

(b) A Medication Guide shall contain those of the following headings relevant to the drug product and to the need for the Medication Guide in the specified order. Each heading shall contain the specific information as follows:

(1) The brand name (e.g., the trademark or proprietary name), if any, and established or proper name. Those products not having an established or proper name shall be designated by their active ingredients. The Medication Guide shall include the phonetic spelling of either the brand name or the established name, whichever is used throughout the Medication Guide.

(2) The heading, ''What is the most important information I should know about (name of drug)?'' followed by a statement describing the particular serious and significant public health concern that has created the need for the Medication Guide. The statement should describe specifically what the patient should do or consider because of that concern, such as, weighing particular risks against the benefits of the drug, avoiding particular behaviors (e.g., activities, drugs), observing certain events (e.g., symptoms, signs) that could prevent or mitigate a serious adverse effect, or engaging in particular behaviors (e.g., adhering to the dosing regimen).

(3) The heading, ''What is (name of drug)?'' followed by a section that identifies a drug product's indications for use. The Medication Guide may not identify an indication unless the indication is identified in the indications and usage section of the professional labeling for the product required under § 201.57 of this chapter. In appropriate circumstances, this section may also explain the nature of the disease or condition the drug product is intended to treat, as well as the benefit(s) of treating the condition.

(4) The heading, ''Who should not take (name of drug)?'' followed by information on circumstances under which the drug product should not be used for its labeled indication (its contraindications). The Medication Guide shall contain directions regarding what to do if any of the contraindications apply to a patient, such as contacting the licensed practitioner or discontinuing use of the drug product.

(5) The heading, ''How should I take (name of drug)?'' followed by information on the proper use of the drug product, such as:

(i) A statement stressing the importance of adhering to the dosing instructions, if this is particularly important;

(ii) A statement describing any special instructions on how to administer the drug product, if they are important to the drug's safety or effectiveness;

(iii) A statement of what patients should do in case of overdose of the drug product; and

(iv) A statement of what patients should do if they miss taking a scheduled dose(s) of the drug product, where there are data to support the advice, and where the wrong behavior could cause harm or lack of effect.

(6) The heading ''What should I avoid while taking (name of drug)?'' followed by a statement or statements of specific, important precautions patients should take to ensure proper use of the drug, including:

(i) A statement that identifies activities (such as driving or sunbathing), and drugs, foods, or other substances (such as tobacco or alcohol) that patients should avoid when using the medication;

(ii) A statement of the risks to mothers and fetuses from the use of the drug during pregnancy, if specific, important risks are known;

(iii) A statement of the risks of the drug product to nursing infants, if specific, important risks are known;

(iv) A statement about pediatric risks, if the drug product has specific hazards associated with its use in pediatric patients;

(v) A statement about geriatric risks, if the drug product has specific hazards associated with its use in geriatric patients; and

(vi) A statement of special precautions, if any, that apply to the safe and effective use of the drug product in other identifiable patient populations.

(7) The heading, ''What are the possible or reasonably likely side effects of (name of drug)?'' followed by:

(i) A statement of the adverse reactions reasonably likely to be caused by the drug product that are serious or occur frequently.

(ii) A statement of the risk, if there is one, of patients' developing dependence on the drug product.

(8) General information about the safe and effective use of prescription drug products, including:

(i) The verbatim statement that ''Medicines are sometimes prescribed for purposes other than those listed in a Medication Guide'' followed by a statement that patients should ask

health professionals about any concerns, and a reference to the availability of professional labeling;

(ii) A statement that the drug product should not be used for a condition other than that for which it is prescribed, or given to other persons;

(iii) The name and place of business of the manufacturer, packer, or distributor of a drug product that is not also a biological product, or the name and place of business of the manufacturer or distributor of a drug product that is also a biological product, and in any case the name and place of business of the dispenser of the product may also be included; and

(iv) The date, identified as such, of the most recent revision of the Medication Guide placed immediately after the last section.

(9) Additional headings and subheadings may be interspersed throughout the Medication Guide, if appropriate.

§ 208.24 Distributing and dispensing a Medication Guide.

(a) The manufacturer of a drug product for which a Medication Guide is required under this part shall obtain FDA approval of the Medication Guide before the Medication Guide may be distributed.

(b) Each manufacturer who ships a container of drug product for which a Medication Guide is required under this part is responsible for ensuring that Medication Guides are available for distribution to patients by either:

(1) Providing Medication Guides in sufficient numbers to distributors, packers, or authorized dispensers to permit the authorized dispenser to provide a Medication Guide to each patient receiving a prescription for the drug product; or

(2) Providing the means to produce Medication Guides in sufficient numbers to distributors, packers, or authorized dispensers to permit the authorized dispenser to provide a Medication Guide to each patient receiving a prescription for the drug product.

(c) Each distributor or packer that receives Medication Guides, or the means to produce Medication Guides, from a manufacturer under paragraph (b) of this section shall provide those Medication Guides, or the means to produce Medication Guides, to each authorized dispenser to whom it ships a container of drug product.

(d) The label of each container or package, where the container label is too small, of drug product for which a Medication Guide is required under this part shall instruct the authorized dispenser to provide a Medication Guide to each patient to whom the drug product is dispensed, and shall state how the Medication Guide is provided. These statements shall appear on the label in a prominent and conspicuous manner.

(e) Each authorized dispenser of a prescription drug product for which a Medication Guide is required under this part shall, when the product is dispensed to a patient (or to a patient's agent), provide a Medication Guide directly to each patient (or to the patient's agent) unless an exemption applies under § 208.26.

(f) An authorized dispenser or wholesaler is not subject to section 510 of the Federal Food, Drug, and Cosmetic Act, which requires the registration of producers of drugs and the listing of drugs in commercial distribution, solely because of an act performed by the authorized dispenser or wholesaler under this part.

§ 208.26 Exemptions and deferrals.

(a) FDA on its own initiative, or in response to a written request from an applicant, may exempt or defer any Medication Guide content or format requirement, except those requirements in § 208.20 (a)(2) and (a)(6), on the basis that the requirement is inapplicable, unnecessary, or contrary to patients' best interests. Requests from applicants should be submitted to the director of the FDA division responsible for reviewing the marketing application for the drug product, or for a biological product, to the application division in the office with product responsibility.

(b) If the licensed practitioner who prescribes a drug product subject to this part determines that it is not in a particular patient's best interest to receive a Medication Guide because of significant concerns about the effect of a Medication Guide, the licensed practitioner may direct that the Medication Guide not be provided to the particular patient. However, the authorized dispenser of a prescription drug product subject to this part shall provide a Medication Guide to any patient who requests information when the drug product is dispensed regardless of any such direction by the licensed practitioner.

PART 314—APPLICATIONS FOR FDA APPROVAL TO MARKET A NEW DRUG OR AN ANTIBIOTIC DRUG

4. The authority citation for 21 CFR part 314 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 355, 357, 371, 374, 379e.

5. Section 314.50 is amended by revising the first and third sentences of the introductory text, paragraph (c)(2)(i), the first sentence of paragraph (d)(5)(vi)(*b*), paragraph (e)(2)(ii), and the fourth sentence in paragraph (l)(1) to read as follows:

§ 314.50 Content and format of an application.

Applications and supplements to approved applications are required to be submitted in the form and contain the information, as appropriate for the particular submission, required under this section. * * * An application for a new chemical entity will generally contain an application form, an index, a summary, five or six technical sections, case report tabulations of patient data, case report forms, drug samples, and labeling, including, if applicable, any Medication Guide required under part 208 of this chapter. * * *

* * * * *

(c) * * *

(2) * * *

(i) The proposed text of the labeling, including, if applicable, any Medication Guide required under part 208 of this chapter, for the drug, with annotations to the information in the summary and technical sections of the application that support the inclusion of each statement in the labeling, and, if the application is for a prescription drug, statements describing the reasons for omitting a section or subsection of the labeling format in § 201.57 of this chapter.

* * * * *

(d) * * *

(5) * * *

(vi) * * *

(*b*) The applicant shall, under section 505(i) of the act, update periodically its pending application with new safety information learned about the drug that may reasonably affect the statement of contraindications, warnings, precautions, and adverse reactions in the draft labeling and, if applicable, any Medication Guide required under part 208 of this chapter. * * *

* * * * *

(e) * * *

(2) * * *

(ii) Copies of the label and all labeling for the drug product (including, if applicable, any Medication Guide required under part 208 of this chapter) for the drug product (4 copies of draft labeling or 12 copies of final printed labeling).

* * * * *

(l) * * *

(1) * * * Information relating to samples and labeling (including, if

applicable, any Medication Guide required under part 208 of this chapter), described in paragraph (e) of this section, is required to be submitted in hard copy. * * *

* * * * *

6. Section 314.70 is amended by revising paragraph (b)(3) to read as follows:

§ 314.70 Supplements and other changes to an approved application.

* * * * *

(b) * * *

(3) *Labeling.* (i) Any change in labeling, except one described in paragraphs (c)(2) or (d) of this section.

(ii) If applicable, any change to a Medication Guide required under part 208 of this chapter, except for changes in the information specified in § 208.20(b)(8)(iii) and (b)(8)(iv).

* * * * *

7. Section 314.94 is amended by revising paragraph (a)(8) to read as follows:

§ 314.94 Content and format of an abbreviated application.

* * * * *

(a) * * *

(8) *Labeling*—(i) *Listed drug labeling.* A copy of the currently approved labeling (including, if applicable, any Medication Guide required under part 208 of this chapter) for the listed drug referred to in the abbreviated new drug application, if the abbreviated new drug application relies on a reference listed drug.

(ii) *Copies of proposed labeling.* Copies of the label and all labeling for the drug product including, if applicable, any Medication Guide required under part 208 of this chapter (4 copies of draft labeling or 12 copies of final printed labeling).

(iii) *Statement on proposed labeling.* A statement that the applicant's proposed labeling including, if applicable, any Medication Guide required under part 208 of this chapter is the same as the labeling of the reference listed drug except for differences annotated and explained under paragraph (a)(8)(iv) of this section.

(iv) *Comparison of approved and proposed labeling.* A side-by-side comparison of the applicant's proposed labeling including, if applicable, any Medication Guide required under part 208 of this chapter with the approved labeling for the reference listed drug with all differences annotated and explained. Labeling (including the container label, package insert, and, if applicable, Medication Guide) proposed for the drug product must be the same as the labeling approved for the reference listed drug, except for changes required because of differences approved under a petition filed under § 314.93 or because the drug product and the reference listed drug are produced or distributed by different manufacturers. Such differences between the applicant's proposed labeling and labeling approved for the reference listed drug may include differences in expiration date, formulation, bioavailability, or pharmacokinetics, labeling revisions made to comply with current FDA labeling guidelines or other guidance, or omission of an indication or other aspect of labeling protected by patent or accorded exclusivity under section 505(j)(4)(D) of the act.

* * * * *

PART 601—LICENSING

8. The authority citation for 21 CFR part 601 continues to read as follows:

Authority: 21 U.S.C. 321, 351, 352, 353, 355, 360, 360c–360f, 360h–360j, 371, 374, 379e, 381; 42 U.S.C. 216, 241, 262, 263; 15 U.S.C. 1451–1561.

9. Section 601.2 is amended by revising the first sentence in the introductory text of paragraph (a) and paragraph (c)(1)(viii) to read as follows:

§ 601.2 Applications for establishment and product licenses; procedures for filing.

(a) To obtain a license for any establishment or product, the manufacturer shall make application to the Director, Center for Biologics Evaluation and Research, on forms prescribed for such purposes, and in the case of an application for a product license, shall submit data derived from nonclinical laboratory and clinical studies which demonstrate that the manufactured product meets prescribed standards of safety, purity, and potency; with respect to each nonclinical laboratory study, either a statement that the study was conducted in compliance with the requirements set forth in part 58 of this chapter, or, if the study was not conducted in compliance with such regulations, a brief statement of the reason for the noncompliance; statements regarding each clinical investigation involving human subjects contained in the application, that it either was conducted in compliance with the requirements for institutional review set forth in part 56 of this chapter or was not subject to such requirements in accordance with § 56.104 or § 56.105 of this chapter, and was conducted in compliance with requirements for informed consent set forth in part 50 of this chapter; a full description of manufacturing methods; data establishing stability of the product through the dating period; sample(s) representative of the product to be sold, bartered, or exchanged or offered, sent, carried, or brought for sale, barter, or exchange; summaries of results of tests performed on the lot(s) represented by the submitted sample(s); and specimens of the labels, enclosures, containers, and, if applicable, any Medication Guide required under part 208 of this chapter proposed to be used for the product. * * *

* * * * *

(c)(1) * * *

(viii) Specimens of the labels, enclosures, containers, and, if applicable, any Medication Guide required under part 208 of this chapter proposed to be used for the product.

* * * * *

10. Section 601.12 is amended by revising the second sentence of paragraph (f)(1), and paragraph (f)(3)(i) to read as follows:

§ 601.12 Changes to an approved application.

* * * * *

(f) * * *

(1) * * * Except as described in paragraphs (f)(2) and (f)(3) of this section, an applicant shall submit a supplement describing a proposed change in the package insert, package label, container label, or, if applicable, a Medication Guide required under part 208 of this chapter, and include the information necessary to support the proposed change. * * *

* * * * *

(3) * * *

(i) An applicant shall submit any final printed package insert, package label, container label, or Medication Guide required under part 208 of this chapter incorporating the following changes in an annual report submitted to FDA each year as provided in paragraph (d)(1) of this section:

(A) Editorial or similar minor changes;

(B) A change in the information on how the product is supplied that does not involve a change in the dosage strength or dosage form; and

(C) A change in the information specified in § 208.20(b)(8)(iii) and (b)(8)(iv) of this chapter for a Medication Guide.

* * * * *

PART 610—GENERAL BIOLOGICAL PRODUCTS STANDARDS

11. The authority citation for 21 CFR part 610 continues to read as follows:

Authority: 21 U.S.C. 321, 351, 352, 353, 355, 360, 371; 42 U.S.C. 216, 262, 263, 263a, 264.

12. Section 610.60 is amended by adding paragraph (a)(7) to read as follows:

§ 610.60 Container label.

(a) * * *

(7) If a Medication Guide is required under part 208 of this chapter, the statement required under § 208.24(d) of this chapter instructing the authorized dispenser to provide a Medication Guide to each patient to whom the drug is dispensed and stating how the Medication Guide is provided, except where the container label is too small, the required statement may be placed on the package label.

* * * * *

Dated: April 21, 1998.

Michael A. Friedman,

Lead Deputy Commissioner for the Food and Drug Administration.

Donna E. Shalala,

Secretary of Health and Human Services.

[FR Doc. 98–31627 Filed 11–25–98; 11:08 am]

BILLING CODE 4160–01–P

federal register

Tuesday
December 1, 1998

Part VI

Department of Education

List of Approved ''Ability-to-Benefit'' Tests and Passing Scores; Notice

DEPARTMENT OF EDUCATION

List of Approved ''Ability-to-Benefit'' Tests and Passing Scores

AGENCY: The Department of Education.

ACTION: Notice: Correction.

SUMMARY: This document corrects the passing scores for the Test of Adult Basic Education (TABE)—Forms 5 and 6, Level A for both the Survey and Complete Battery Versions; and Test of Adult Basic Education (TABE)—Forms 7 and 8, Level A, for both Survey and Complete Battery Versions. Only the paper and pencil formats for these tests were approved. These tests and their incorrect passing scores were included in the Update Notice of the List of Approved ''Ability-to-Benefit'' Tests and Passing Scores that was published in the **Federal Register** on October 27, 1998 (63 FR 57540).

FOR FURTHER INFORMATION CONTACT: Lorraine Kennedy, U.S. Department of Education, 600 Independence Avenue, SW, Regional Office Building 3, Room 3045, Washington, DC 20202–5451. Telephone: (202) 708–8242. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

Individuals with disabilities may obtain this document in an alternate format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed in the preceding paragraph.

SUPPLEMENTARY INFORMATION: On October 27, 1998, the Secretary published a notice that provided a list of ''ability-to-benefit'' tests and passing scores that the Secretary has approved under section 484(d)) of the Higher Education Act of 1965, as amended (HEA), and the regulations that the Secretary promulgated to implement that section in 34 CFR Part 668, Subpart J. The notice also included approved passing scores for the approved tests. These passing scores for the listed TABE tests were incorrect. This notice corrects those scores. Users are referred to the test publisher's technical manual for computing these scores.

If an institution used the scores for the TABE tests listed in the October 27, 1998 notice for an ability-to-benefit determination under section 484(d) of the HEA, and received a notice from the test publisher or an assessment center that a student achieved at least a passing score on that test, the institution may rely on that notice. The student does not have to retake that test.

However, if the institution was notified by the test publisher or an assessment center between October 27, 1998 and December 1, 1998, that the student failed to qualify for the ATB program, the institution may have the student's TABE test rescored by the test publisher or the assessment center with the composite scores listed in this notice.

For the convenience of institutions participating in the title IV, HEA programs and other parties, the following is a listing of the nine approved ATB tests and their passing scores.

List of Approved ''Ability-to-Benefit'' Tests and Passing Scores

1. *American College Testing (ACT): (English and Math) Passing Scores:* The approved passing scores on this test are as follows: English (14) and Math (15).

Publisher: The test publisher and the address, contact person, telephone, and fax number of the test publisher are: American College Testing (ACT), Placement Assessment Programs, 2201 North Dodge Street, P.O. Box 168, Iowa City, Iowa 52243, Contact: Dr. James Maxey, Telephone: (319) 337–1100, Fax: (319) 337–1790.

2. *ASSET Program: Basic Skills Tests (Reading, Writing, and Numerical)—Forms B2 and C2.*

Passing Scores: The approved passing scores on this test are as follows: Reading (34), Writing (34), and Numerical (33).

Publisher: The test publisher and the address, contact person, telephone, and fax number of the test publisher are: American College Testing (ACT), Placement Assessment Programs, 2201 North Dodge Street, P.O. Box 168, Iowa City, Iowa 52243, Contact: Dr. John D. Roth, Telephone: (319) 337–1030, Fax: (319) 337–1790.

3. *Career Programs Assessment (CPAT) Basic Skills Subtests Language Usage, Reading and Numerical)—Forms A, B, and C.*

Passing Scores: The approved passing scores on this test are as follows: Language Usage (43), Reading (44), and Numerical (42).

Publisher: The test publisher and the address, contact person, telephone, and fax number of the test publisher are: American College Testing (ACT), Placement Assessment Programs, 2201 North Dodge Street, P.O. Box 168, Iowa City, Iowa 52243, Contact: Dr. John D. Roth, Telephone: (319) 337–1030, Fax: (319) 337–1790.

4. *COMPASS Subtests: Prealgebra/Numerical Skills Placement, Reading Placement, and Writing Placement.*

Passing Scores: The approved passing scores on this test are as follows: Prealgebra/Numerical (21), Reading (60), and Writing (31).

Publisher: The test publisher and the address, contact person, telephone, and fax number of the test publisher are: American College Testing (ACT), Placement Assessment Programs, 2201 North Dodge Street, P.O. Box 168, Iowa City, Iowa 52243, Contact: Dr. John D. Roth, Telephone: (319) 337–1030, Fax: (319) 337–1790.

5. *Computerized Placement Tests (CPTs)/Accuplacer (Reading Comprehension, Sentence Skills, and Arithmetic).*

Passing Scores: The approved passing scores on this test are as follows: Reading Comprehension (52), Sentence Skills (60), and Arithmetic (36).

Publisher: The test publisher and the address, contact person, telephone, and fax number of the test publisher are: The College Board, 45 Columbus Avenue, New York, New York 10023–6992, Contact: Ms. Loretta M. Church, Telephone: (212) 713–8000, Fax: (212) 713–8063.

6. *Descriptive Tests: Descriptive Tests of Language Skills (DTLS) (Reading Comprehension, Sentence Structure and Conventions of Written English)—Forms M–K–3KDT and M–K–3LDT; and Descriptive Tests of Mathematical Skills (DTMS) (Arithmetic)—Forms M–K–3KDT and M–K–3LDT.*

Passing Scores: The approved passing scores on this test are as follows: Reading Comprehension (108), Sentence Structure (9), Conventions of Written English (309), and Arithmetic (506).

Publisher: The test publisher and the address, contact person, telephone, and fax number of the test publisher are: The College Board, 45 Columbus Avenue, New York, New York 10023–6992, Contact: Ms. Loretta M. Church, Telephone: (212) 713–8000, Fax: (212) 713–8063.

7. Test of Adult Basic Education (TABE): (Reading Total, Total Mathematics, Total Language)—Forms 5 and 6, Level A, Complete Battery and Survey Versions.

Passing Scores: The approved passing scores on this test are as follows: Reading Total (768), Total Mathematics (783), Total Language (714).

Publisher: The test publisher and the address, contact person, telephone, and fax number of the test publisher are: CTB/McGraw-Hill, 20 Ryan Ranch Road, Monterey, California 93940–5703, Contact: Ms. Tina Gwaltney, Telephone: (831) 393–7749, Fax: (831) 393–7142.

8. Test of Adult Basic Education (TABE): (Reading, Total Mathematics,

Language)—Forms 7 and 8, Level A, Complete Battery and Survey Versions.

Passing Scores: The approved passing scores on this test are as follows: Reading (559), Total Mathematics (562), Language (545).

Publisher: The test publisher and the address, contact person, telephone, and fax number of the test publisher are: CTB/McGraw-Hill, 20 Ryan Ranch Road, Monterey, California 93940–5703, Contact: Ms. Tina Gwaltney, Telephone: (831) 393–7749, Fax: (831) 393–7142.

9. *Wonderlic Basic Skills Test (WBST)—Verbal Forms VS–1 & VS–2, Quantitative Forms QS–1 & QS–2.*

Passing scores: The approved passing scores on this test are as follows: Verbal (200) and Quantitative (210).

Publisher: The test publisher and the address, contact person, telephone, and fax number of the test publisher are: Wonderlic Personnel Test, Inc., 1509 N. Milwaukee Ave., Libertyville, IL 60048–1380, Contact: Mr. Victor S. Artese, Telephone: (800) 323–374, Fax: (847) 680–9492.

Electronic Access to This Document

Anyone may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or portable document format (pdf) via the Internet at either of the following sites: http://ocfo.ed.gov/fedreg.htm http://www.ed.gov/news.html

To use the pdf you must have the Adobe Acrobat Reader Program with Search, which is available free at either of the previous sites. If you have questions about using the pdf, call the U.S. Government Printing Office at (202) 512–1530, or, toll free, at 1–888–293–6498.

Anyone may also view these documents in text copy only on an electronic bulletin board of the Department. Telephone: (202) 219–1511 or, toll free, 1–800–222–4922. The documents are located under Option G—Files/Announcements, Bulletins and Press Releases.

Note: The official version of this document is the document published in the **Federal Register**.

Dated: November 24, 1998.

Diane E. Rogers,

Acting Chief Operating Officer, Student Financial Assistance Programs.

[FR Doc. 98–31999 Filed 11–30–98; 8:45 am]

BILLING CODE 4000–01–P

Reader Aids

Federal Register

Vol. 63, No. 230

Tuesday, December 1, 1998

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations

General Information, indexes and other finding aids	**202–523–5227**
Laws	**523–5227**

Presidential Documents

Executive orders and proclamations	**523–5227**
The United States Government Manual	**523–5227**

Other Services

Electronic and on-line services (voice)	**523–4534**
Privacy Act Compilation	**523–3187**
Public Laws Update Service (numbers, dates, etc.)	**523–6641**
TTY for the deaf-and-hard-of-hearing	**523–5229**

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications:

http://www.access.gpo.gov/nara

Federal Register information and research tools, including Public Inspection List, indexes, and links to GPO Access:

http://www.nara.gov/fedreg

E-mail

PENS (Public Law Electronic Notification Service) is an E-mail service that delivers information about recently enacted Public Laws. To subscribe, send E-mail to

listproc@lucky.fed.gov

with the text message:

subscribe publaws-l <firstname> <lastname>

Use listproc@lucky.fed.gov only to subscribe or unsubscribe to PENS. We cannot respond to specific inquiries at that address.

Reference questions. Send questions and comments about the Federal Register system to:

info@fedreg.nara.gov

The Federal Register staff cannot interpret specific documents or regulations.

FEDERAL REGISTER PAGES AND DATES, DECEMBER

65995–66404..... 1

CFR PARTS AFFECTED DURING DECEMBER

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

RULES GOING INTO EFFECT DECEMBER 1, 1998

AGRICULTURE DEPARTMENT

Agricultural Marketing Service

Perishable Agricultural Commodities Act; implementation:

Retailers, grocery wholesalers, and other licensees; license renewal periods; published 11-19-98

COMMERCE DEPARTMENT

Patent and Trademark Office

Patent cases:

Patent Cooperation Treaty application procedures; revisions; published 12-1-98

CONSUMER PRODUCT SAFETY COMMISSION

Poison prevention packaging:

Sucraid; exemption; published 12-1-98

FEDERAL COMMUNICATIONS COMMISSION

Radio stations; table of assignments:

Iowa; published 10-28-98

FEDERAL RESERVE SYSTEM

Depository institutions; reserve requirements (Regulation D):

Low reserve tranche adjustment; published 11-30-98

GENERAL SERVICES ADMINISTRATION

Federal property management:

Utilization and disposal—

Excess personal property reporting requirements; published 7-27-98

HEALTH AND HUMAN SERVICES DEPARTMENT

Food and Drug Administration

Animal drugs, feeds, and related products:

New drug applications—

Melengestrol acetate and lasalocid; published 12-1-98

Food additives:

White Mineral Oil, USP; published 12-1-98

Food for human consumption:

Natamycin (Pimaricin); published 12-1-98

INTERIOR DEPARTMENT

Surface Mining Reclamation and Enforcement Office

Permanent program and abandoned mine land reclamation plan submissions:

Illinois; published 11-16-98

JUSTICE DEPARTMENT

Immigration and Naturalization Service

Nonimmigrant classes:

Nonimmigrant workers (H-1B category); petitioning requirements—

Fee schedule and filing requirements; published 11-30-98

LABOR DEPARTMENT

Privacy Act; implementation; published 10-22-98

LIBRARY OF CONGRESS

Copyright Office, Library of Congress

Copyright office and procedure:

Supplementary registration applications; corrections and amplifications

Correction; published 12-1-98

PENSION BENEFIT GUARANTY CORPORATION

Single-employer plans:

Allocation of assets—

Interest assumptions for valuing benefits; published 11-13-98

POSTAL SERVICE

Practice and procedure:

Rules of procedure before judicial officer; address, titles and references, and technical and grammatical changes; published 12-1-98

TRANSPORTATION DEPARTMENT

Workplace drug and alcohol testing programs:

Opiate threshold levels; changes; published 11-25-98

COMMENTS DUE NEXT WEEK

AGRICULTURE DEPARTMENT

Agricultural Marketing Service

Cherries (tart) grown in—

Michigan; comments due by 12-1-98; published 11-17-98

Michigan et al.; comments due by 12-3-98; published 11-18-98

AGRICULTURE DEPARTMENT

Animal and Plant Health Inspection Service

Plant-related quarantine, foreign:

Orchids in growing media; importation; comments due by 12-2-98; published 10-29-98

AGRICULTURE DEPARTMENT

Grain Inspection, Packers and Stockyards Administration

Fees:

Official inspection and weighing services; comments due by 12-1-98; published 10-2-98

AGRICULTURE DEPARTMENT

Rural Utilities Service

Electric loans:

Year 2000 compliant electric systems; comments due by 11-30-98; published 9-29-98

COMMERCE DEPARTMENT

National Oceanic and Atmospheric Administration

Fishery conservation and management:

West Coast States and Western Pacific fisheries—

Northern anchovy; comments due by 11-30-98; published 10-30-98

COMMERCE DEPARTMENT

Patent and Trademark Office

Patent cases:

Patent business goals; implementation; comments due by 12-4-98; published 10-5-98

DEFENSE DEPARTMENT

Freedom of Information; implementation

National Security Agency/ Central Security Service; comments due by 11-30-98; published 9-30-98

EDUCATION DEPARTMENT

Special education and rehabilitative services:

State vocational rehabilitation services program; comments due by 11-30-98; published 10-14-98

ENERGY DEPARTMENT

Energy Efficiency and Renewable Energy Office

Consumer products; energy conservation program:

Fluorescent lamp ballasts; energy conservation standards; comments due by 11-30-98; published 10-30-98

ENERGY DEPARTMENT

Federal Energy Regulatory Commission

Natural gas companies (Natural Gas Act):

Facilities construction and operation, etc.; filing of applications; comments due by 12-1-98; published 10-16-98

ENVIRONMENTAL PROTECTION AGENCY

Air pollutants, hazardous; national emission standards:

Petroleum refineries—

Catalytic cracking (fluid and other) units, catalytic reforming units, and sulfur plant units; comments due by 12-1-98; published 11-30-98

Air quality implementation plans; √A√approval and promulgation; various States; air quality planning purposes; designation of areas:

Connecticut; comments due by 12-2-98; published 11-2-98

Clean Air Act:

Interstate ozone transport reduction—

Section 126 petitions, findings of significant contribution and rulemaking; comments due by 11-30-98; published 10-21-98

Interstate ozone transport reduction; Section 126 petitions and Federal implementation plans; comments due by 11-30-98; published 9-30-98

Regional transport of ozone, Eastern States; Federal implementation plans; comments due by 11-30-98; published 10-21-98

Hazardous waste program authorizations:

Michigan; comments due by 11-30-98; published 10-29-98

Pesticides; tolerances in food, animal feeds, and raw agricultural commodities:

Pyridaben; comments due by 12-4-98; published 10-5-98

Superfund program:

National oil and hazardous substances contingency plan—

National priorities list update; comments due

by 11-30-98; published 9-29-98
Toxic substances:
Lead-based paint; identification of dangerous levels of lead; comments due by 11-30-98; published 10-1-98
Water pollution control:
Underground injection control program—
Class V wells; requirements for motor vehicle waste and industrial waste disposal wells and cesspools in ground water-based source protection areas; comments due by 11-30-98; published 9-29-98

FEDERAL COMMUNICATIONS COMMISSION
Common carrier services:
Interstate services of local exchange carriers; authorized unitary rate of return; comments due by 12-3-98; published 10-20-98
Radio services, special:
Amateur services—
Novice class and technician plus operator licenses phaseout, etc.; comments due by 12-1-98; published 9-14-98
Radio stations; table of assignments:
Nevada; comments due by 11-30-98; published 10-19-98
Texas; comments due by 11-30-98; published 10-19-98

HEALTH AND HUMAN SERVICES DEPARTMENT
Food and Drug Administration
Food additives:
Adjuvants, production aids, and sanitizers—
2,9-dichloro-5,12-dihydroquinone[2,3-b]acridine-7,14-dione (C.I. Pigment Red 202); comments due by 12-3-98; published 11-3-98

HEALTH AND HUMAN SERVICES DEPARTMENT
Health Care Financing Administration
Medicaid:
Managed care programs; comments due by 11-30-98; published 9-29-98

HEALTH AND HUMAN SERVICES DEPARTMENT
Health care programs; fraud and abuse:
Health Insurance Portability and Accountability Act—
Data collection program; final adverse actions reporting; comments due by 11-30-98; published 10-30-98

HEALTH AND HUMAN SERVICES DEPARTMENT
Inspector General Office, Health and Human Services Department
Health care programs; fraud and abuse:
Health Insurance Portability and Accountability Act—
Data collection program; final adverse actions reporting; comments due by 11-30-98; published 10-30-98

JUSTICE DEPARTMENT
Immigration and Naturalization Service
Immigration:
Aliens—
Deportation suspension, removal cancellation, and status adjustment cases; comments due by 11-30-98; published 9-30-98

JUSTICE DEPARTMENT
Parole Commission
Federal prisoners; paroling and releasing, etc.:
District of Columbia Code; incorporation into Parole Commission regulations; comments due by 12-1-98; published 7-21-98
District of Columbia Code; prisoners serving sentences; comments due by 12-1-98; published 10-26-98

LABOR DEPARTMENT
Employment and Training Administration
Aliens:
Nonimmigrant agricultural workers; temporary employment; labor certification process; administrative measures to improve program performance; comments due by 12-1-98; published 10-2-98

NATIONAL CREDIT UNION ADMINISTRATION
Credit unions:
Member business loans and appraisals; comments due by 11-30-98; published 9-29-98

NUCLEAR REGULATORY COMMISSION
Independent storage of spent nuclear fuel and high-level radioactive waste; licensing requirements:
30-day hold in loading spent fuel after preoperational testing of independent spent fuel or monitored retrievable storage installations; reporting requireme
nt eliminated; comments due by 11-30-98; published 9-14-98
Rulemaking petitions:
American National Standards Institute; comments due by 11-30-98; published 9-15-98

PANAMA CANAL COMMISSION
Shipping and navigation:
Marine accidents; investigations, control, responsibility; comments due by 11-30-98; published 10-22-98

TRANSPORTATION DEPARTMENT
Federal Aviation Administration
Air carrier certification and operations:
Major repair data development (SFAR No. 36); comments due by 12-2-98; published 11-2-98
Airworthiness directives:
Boeing; comments due by 11-30-98; published 9-30-98
Mooney Aircraft Corp.; comments due by 12-4-98; published 10-9-98
Pratt & Whitney; comments due by 11-30-98; published 8-31-98
Twin Commander Aircraft Corp.; comments due by 12-2-98; published 10-9-98
Airworthiness standards:
Special conditions—
Raytheon model 390 airplane; comments due by 12-2-98; published 11-2-98
Class E airspace; comments due by 11-30-98; published 10-16-98

TRANSPORTATION DEPARTMENT
Federal Highway Administration
Transportation Equity Act for 21st Century; implementation:
Open container laws; comments due by 12-4-98; published 10-6-98

TRANSPORTATION DEPARTMENT
National Highway Traffic Safety Administration
Anthropomorphic test devices:
Occupant crash protection—
Hybrid III test dummies; fifth percentile female adult dummy design and performance specifications; comments due by 12-2-98; published 9-3-98
Motor vehicle safety standards:
Occupant crash protection—
Occupant protection incentive grants criteria; comments due by 11-30-98; published 10-1-98
Transportation Equity Act for 21st Century; implementation:
Open container laws; comments due by 12-4-98; published 10-6-98

TRANSPORTATION DEPARTMENT
Research and Special Programs Administration
Hazardous materials:
Infectious substances and genetically modified micro-organisms standards; requirements and exceptions clarification and public meeting; comments due by 12-1-98; published 9-2-98

TRANSPORTATION DEPARTMENT
Transportation Statistics Bureau
ICC Termination Act; implementation:
Motor carriers of property; reporting requirements; comments due by 12-3-98; published 11-3-98

TREASURY DEPARTMENT
Customs Service
Drawback:
False drawback claims; penalties; comments due by 11-30-98; published 9-29-98

TREASURY DEPARTMENT
Internal Revenue Service
Income taxes:
Taxpayer Relief Act—
Qualified retirement plan benefits; section 411(d)(6) protected benefits; comments due by 12-3-98; published 9-4-98
Roth IRAs; comments due by 12-2-98; published 9-3-98
Procedure and administration:
Tax refund offset program; revisions; comments due by 11-30-98; published 8-31-98

LIST OF PUBLIC LAWS

Note: The list of Public Laws for the second session of the 105th Congress has been completed and will resume when bills are enacted into law during the first session of the 106th Congress, which convenes on January 6, 1999.

A cumulative list of Public Laws for the second session of the 105th Congress is in Part II of this issue of the **Federal Register**.

TABLE OF EFFECTIVE DATES AND TIME PERIODS—DECEMBER 1998

This table is used by the Office of the Federal Register to compute certain dates, such as effective dates and comment deadlines, which appear in agency documents. In computing these dates, the day after publication is counted as the first day.

When a date falls on a weekend or holiday, the next Federal business day is used. (See 1 CFR 18.17)

A new table will be published in the first issue of each month.

DATE OF FR PUBLICATION	15 DAYS AFTER PUBLICATION	30 DAYS AFTER PUBLICATION	45 DAYS AFTER PUBLICATION	60 DAYS AFTER PUBLICATION	90 DAYS AFTER PUBLICATION
December 1	December 16	December 31	January 15	February 1	March 1
December 2	December 17	January 4	January 16	February 1	March 2
December 3	December 18	January 4	January 19	February 1	March 3
December 4	December 21	January 4	January 19	February 2	March 4
December 7	December 22	January 6	January 21	February 5	March 8
December 8	December 23	January 7	January 22	February 8	March 8
December 9	December 24	January 8	January 25	February 8	March 9
December 10	December 28	January 11	January 25	February 8	March 10
December 11	December 28	January 11	January 25	February 9	March 11
December 14	December 29	January 13	January 28	February 12	March 15
December 15	December 30	January 14	January 29	February 16	March 15
December 16	December 31	January 15	February 1	February 16	March 16
December 17	January 4	January 16	February 1	February 16	March 17
December 18	January 4	January 19	February 1	February 16	March 18
December 21	January 5	January 20	February 4	February 19	March 22
December 22	January 6	January 21	February 5	February 22	March 22
December 23	January 7	January 22	February 8	February 22	March 23
December 24	January 8	January 25	February 8	February 22	March 24
December 28	January 12	January 27	February 11	February 26	March 29
December 29	January 13	January 28	February 12	March 1	March 29
December 30	January 14	January 29	February 16	March 1	March 30
December 31	January 15	February 1	February 16	March 1	March 31