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Rules and Regulations

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

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

DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Part 400

General Administrative Regulations; Reinsurance Agreement—Standards for Approval; Regulations for the 1997 and Subsequent Reinsurance Years

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) is revising the General Administrative Regulations, Subpart-L Reinsurance Agreement—Standards for Approval; Regulations for the 1997 and Subsequent Reinsurance Years. The intended effect of this rule is to clarify the time frame in which all requests for a final agency determination must be submitted.

EFFECTIVE DATES: This rule is effective January 25, 2000.

FOR FURTHER INFORMATION CONTACT: Heyward Baker, Director, Reinsurance Services Division, telephone (202) 720–4232.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This rule has been determined to be exempt for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget (OMB).

Paperwork Reduction Act of 1995

It has been determined by OMB that this rule is exempt from the information collection requirement contained under the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35).

Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. This rule contains no Federal mandates (under the regulatory provisions of title II of UMRA) for State, local, and tribal governments or the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

Executive Order 13132

The policies contained in this rule do not have any substantial direct effect on 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. Nor does this rule impose substantial direct compliance costs on state and local governments. Therefore, consultation with the states is not required.

Regulatory Flexibility Act

This regulation will not have a significant economic impact on a substantial number of small entities. The regulation does not require any more action on the part of the small entities than is required on the part of large entities. Therefore, this action is determined to be exempt from the provisions of the Regulatory Flexibility Act (5 U.S.C. 605), and no Regulatory Flexibility Analysis was prepared.

Federal Assistance Program

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

Executive Order 12372

This program is not subject to the provisions of Executive Order 12372 which require intergovernmental consultation with State and local officials. See the Notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115, June 24, 1983.

Executive Order 12988

This rule has been reviewed in accordance with Executive Order 12988 on civil justice reform. The provisions of this rule will not have a retroactive effect. The provisions of this rule will preempt State and local laws to the extent such State and local laws are inconsistent herewith. The administrative appeal provisions must be exhausted before any action for judicial review of any determination made by FCIC may be brought.

Environmental Evaluation

This action is not expected to have a significant economic impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

Background

On August 22, 1988, FCIC has implemented a process in cases when it suspects a violation of the provisions of the Standard Reinsurance Agreement where it provides the applicable reinsured company with a copy of initial findings, allowed the reinsured company to respond, and then issued a final determination. If the reinsured company disputed the final determination, the reinsured company was required to appeal within 45 days of receipt of the determination to the Deputy Manager of FCIC.

On May 1, 1995, FCIC revised this appeals process and now when a reinsured company disputed the final determination it was required to request a final agency determination from the Director of Compliance. The process also stated that the reinsured company ''may'' request the final agency determination within 45 days. A controversy has arisen with respect to whether the 45 day time frame is mandatory or permissive. Although FCIC has always treated the 45 day time frame as mandatory under both the old and new process, and the reinsured companies have routinely complied with this requirement, FCIC is revising the language to make it clear that the 45 day time frame is a mandatory requirement.

FCIC is also revising the section to have all requests for a final agency determination be submitted to the Deputy Administrator for Insurance Services or the Deputy Administrator for Compliance to be in conformance with the renaming of titles in the recent reorganization.

The changes in this rule do not change current requirements as understood by the reinsured companies and FCIC. This rule is merely interpretative and, therefore, exempt from the requirements for notice and comment and the 30 day delay in the effectiveness of this rule.

List of Subjects in 7 CFR Part 400

Administrative practice and procedures, Claims, Crop insurance, Penalties.

Final Rule

Accordingly, as set forth in the preamble, the Federal Crop Insurance Corporation hereby amends 7 CFR part 400 as follows:

PART 400—GENERAL ADMINISTRATIVE REGULATIONS

1. The authority citation for 7 CFR part 400 continues to read as follows:

Authority: 7 U.S.C. 1506(1), 1506(p).

2. Section 400.169 is revised to read as follows:

§ 400.169 Disputes.

(a) If the company believes that the Corporation has taken an action that is not in accordance with the provisions of the Standard Reinsurance Agreement or any reinsurance agreement with FCIC, except compliance issues, it may request the Deputy Administrator of Insurance Services to make a final administrative determination addressing the disputed action. The Deputy Administrator of Insurance Services will render the final administrative determination of the Corporation with respect to the applicable actions. All requests for a final administrative determination must be in writing and submitted within 45 days after receipt after the disputed action.

(b) With respect to compliance matters, the Compliance Field Office renders an initial finding, permits the company to respond, and then issues a final finding. If the company believes that the Compliance Field Office's final finding is not in accordance with the applicable laws, regulations, custom or practice of the insurance industry, or FCIC approved policy and procedure, it may request, the Deputy Administrator of Compliance to make a final administrative determination addressing the disputed final finding. The Deputy Administrator of Compliance will render the final administrative determination of the Corporation with respect to these issues. All requests for a final administrative determination must be in writing and submitted within 45 days after receipt of the final finding.

(c) A company may also request reconsideration by the Deputy Administrator of Insurance Services of a decision of the Corporation rendered under any Corporation bulletin or directive which bulletin or directive does not interpret, explain, or restrict the terms of the reinsurance agreement. The company, if it disputes the Corporation's determination, must request a reconsideration of that determination in writing, within 45 days of the receipt of the determination. The determinations of the Deputy Administrator will be final and binding on the company. Such determinations will not be appealable to the Board of Contract Appeals.

(d) Appealable final administrative determinations of the Corporation under paragraph (a) or (b) of this section may be appealed to the Board of Contract Appeals in accordance with the provisions of subtitle A, part 24 of title 7 of the Code of Federal Regulations.

Signed in Washington, D.C., on January 18, 2000.

Kenneth D. Ackerman,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 00–1702 Filed 1–24–00; 8:45am]

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DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Part 457

Common Crop Insurance Regulations; Forage Production Crop Provisions; and Forage Seeding Crop Provisions

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) finalizes specific crop provisions for the insurance of forage production and forage seeding. The intended effect of this action is to provide policy changes to better meet the needs of the insured. The changes will be effective for the 2001 and subsequent crop years.

EFFECTIVE DATE: This rule is effective February 24, 2000.

FOR FURTHER INFORMATION CONTACT: Richard Brayton, Insurance Management Specialist, Product Development Division, Federal Crop Insurance Corporation, United States Department of Agriculture, 9435 Holmes Road, Kansas City, MO, 64131, telephone (816) 926–7730.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This rule has been determined to be exempt for the purpose of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget (OMB).

Paperwork Reduction Act of 1995

Pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the collections of information in this rule have been approved by the Office of Management and Budget (OMB) under control number 0563–0053 through April 30, 2001.

Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. This rule contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for State, local, and tribal governments or the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 13132

The policies contained in this rule do not have any substantial direct effect on 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. Nor does this rule impose substantial direct compliance costs on state and local governments. Therefore, consultation with the states is not required.

Regulatory Flexibility Act

This regulation will not have a significant economic impact on a substantial number of small entities. Additionally, the regulation does not require any action on the part of small entities than is required on the part of large entities. The amount of work required of the insurance companies will not increase because the information used to determine eligibility must already be collected under the present policy. No additional work is required as a result of this action on the part of either the insured or the insurance companies. Therefore, this action is determined to be exempt from the provisions of the Regulatory Flexibility Act (5 U.S.C. 605), and no Regulatory Flexibility Analysis was prepared.

Federal Assistance Program

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

Executive Order 12372

This program is not subject to the provisions of Executive Order 12372 which require intergovernmental consultation with State and local

officials. See the Notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115, June 24, 1983.

Executive Order 12988

This rule has been reviewed in accordance with Executive Order 12988 on civil justice reform. The provisions of this rule will not have a retroactive effect. The provisions of this rule will preempt State and local laws to the extent such State and local laws are inconsistent herewith. The administrative appeal provisions published at 7 CFR part 11 must be exhausted before any action for judicial review of any determination made by FCIC may be brought.

Environmental Evaluation

This action is not expected to have a significant economic impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

National Performance Review

This regulatory action is being taken as part of the National Performance Review Initiative to eliminate unnecessary or duplicate regulations and improve those that remain in force.

Background

On Thursday, August 26, 1999, FCIC published a notice of proposed rulemaking in the **Federal Register** at 64 FR 46599–46603 to revise 7 CFR 457.117, Forage Production Crop Insurance Provisions, 457.151 Forage Seeding Crop Insurance Provisions, and to delete 457.127 Forage Production Winter Coverage Endorsement, effective for the 2001 and succeeding crop years.

Following publication of the proposed rule on August 26, 1999, the public was afforded 30 days to submit written comments and opinions. A total of 8 comments were received from 2 reinsured companies, a Pennsylvania consulting firm, and the Pennsylvania State Secretary of Agriculture. The forage production comments received and FCIC's responses are as follows:

Comment: A reinsured company stated the provisions still contains a reference to the Winter Coverage Endorsement in section 7(c).

Response: FCIC has deleted the references.

Comment: A reinsured company recommended that optional units should not be available for forage producers because production records will need to be kept separate and, with multiple cuttings throughout the season, the insured would have to store or keep production records by optional units if a loss occurs.

Response: Producers are not required to obtain optional units. Offering optional units to forage producers will likely increase participation in the crop insurance program because there are some producers that feel it is worth the effort to maintain separate records, to get the additional benefit of optional units. Therefore, no change has been made.

Comment: A reinsured company asked whether the underwriting report is still required?

Response: The farmer certification and underwriting report is still required.

Comment: Reinsured companies, a Pennsylvania consulting firm, and the Pennsylvania Secretary of Agriculture expressed concern that forage production coverage should be raised to the level of other crop programs by providing quality adjustment provisions as in other crop insurance programs.

Response: It is important to provide quality protection to forage producers. However, at this time, FCIC has not been able to obtain the necessary data to offer coverage nor have the rates been established to cover the additional risks that may affect the quality of the forage. This would be a significant change that will likely result in higher premiums. FCIC will continue its effort to provide quality adjustment. Therefore, no change has been made.

Forage seeding comments and FCIC's responses are as follows:

Comment: A reinsured company stated that Wisconsin was omitted from the cancellation and termination dates list in section 5 of the proposed rule.

Response: FCIC has added Wisconsin.

Comment: A reinsured company recommended extending the forge seeding deadline in Wisconsin. They stated that a number of producers are seeding forage later than May and obtaining a successful stand. The Special Provisions lists May as deadline for seeding forage.

Response: FCIC welcomes producer data that helps to establish the appropriate seeding deadline for the various areas. However, it is too late to consider this information for the 2001 crop year. FCIC will consider this information for future changes in the deadlines. Therefore, no change has been made.

In addition to the changes described above, FCIC has made the following changes to the Forage Production Crop Provisions:

1. Section 1—Removed the definition of ''crop year'' from the final rule. The current regulation contains a more accurate definition of ''crop year.''

2. Section 7(a)(4) and (5)—Removed these provisions from the final rule because section 7(a)(5) was duplicative with section 7(a)(1) and section 7(a)(4) was inconsistent with section 7(a)(2) which stated that the insurance attaches for Lassen, Modoc, Mono, Shasta and Siskiyou Counties on April 15.

List of Subjects in 7 CFR Part 457

Crop insurance, Forage production, Forage seeding, Reporting and recordkeeping requirements.

Final Rule

Accordingly, as set forth in the preamble, the Federal Crop Insurance Corporation amends the Common Crop Insurance Regulations (7 CFR part 457) by amending 7 CFR 457.117, for the 2001 and succeeding crop years, to read as follows:

PART 457–COMMON CROP INSURANCE REGULATIONS

1. The authority citation for 7 CFR part 457 continues to read as follows:

Authority: 7 U.S.C. 1506(1), 1506(p).

2. Amend 457.117 as follows:

Revise the heading and introductory text;

b. In section 1 of the crop insurance provisions delete the definitions of ''fall planted'' and ''spring planted,'' add definitions of ''direct marketing'' and ''windrow'' and revise the definition of ''cutting;''

c. In the crop insurance provisions delete section 2 and redesignate sections 3 through 12 as 2 through 11;

d. In the crop insurance provisions revise newly designated sections 4, 5, 6(a), 7(a), 7(b) introductory text and 7(b)(6), 8(b), 9, and 10(a); and

e. In the crop insurance provisions add examples (1) and (2) in section 10(b); all to read as follows:

§ 457.117 Forage production crop insurance provisions.

The Forage Production Crop Insurance Provisions for the 2001 and succeeding crop years are as follows:

* * * * *

1. Definitions.

* * * * *

Cutting. The severance of the forage plant from its roots.

Direct marketing. Sale of the forage crop directly to consumers without the intervention of an intermediary such as a wholesaler, shipper, buyer, or broker. An example of direct marketing is selling directly to other producers.

* * * * *

Windrow. Forage that is cut and placed in a row.

* * * * *

4. *Cancellation and Termination Dates.*

In accordance with section 2 of the Basic Provisions, the cancellation and termination dates are:

State	Cancellation/ termination date
California, Nevada and Utah	October 31;
All other states	September 30.

5. Report of Acreage.

In lieu of the provisions of section 6(a) of the Basic Provisions, a report of all insured acreage of forage production must be submitted on or before each forage production acreage reporting date specified in the Special Provisions.

6. *Insured Crop.*

(a) In accordance with section 8 of the Basic Provisions, the crop insured will be all the forage in the county for which a premium rate is provided by the actuarial documents:

(1) In which you have a share; and

(2) That is grown during one or more years after the year of establishment.

* * * * *

7. *Insurance Period.*

In lieu of the provisions of section 11 of the Basic Provisions:

(a) Insurance attaches on acreage with an adequate stand for the calendar year following the year of establishment for:

(1) All California counties accept Lassen, Modoc, Mono, Shasta and Siskiyou—December 1;

(2) Lassen, Modoc, Mono, Shasta and Siskiyou Counties California, Colorado, Idaho, Nebraska, Nevada, Oregon, Utah and Washington—April 15;

(3) Iowa, Minnesota, Montana, New Hampshire, New York, North Dakota, Pennsylvania, Wisconsin, Wyoming, and all other states—May 22;

(b) Insurance ends at the earliest of:

* * * * *

(6) The following dates of the crop year:

(i) California counties of Lassen, Modoc, Mono, Shasta and Siskiyou, and all other states—October 15;

(ii) The last day of the 12th month after the insured crop initially planted in all California counties except Lassen, Modoc, Mono, Shasta and Siskiyou.

* * * * *

8. *Causes of Loss.*

* * * * *

(b) In addition to the causes of loss specifically excluded in section 12 of the Basic Provisions, we will not insure against damage of loss of production that occurs after removal from the windrow.

9. *Duties in the event of Damage or Loss.*

In addition to the requirements of section 14 of the Basic Provisions, the following will apply:

(a) You must notify us within 3 days of the date harvest should have started if the insured crop will not be harvested;

(b) You must notify us at least 15 days before any production from any unit will be sold by direct marketing unless you have records verifying that the forage was direct marketed. Failure to give timely notice that production will be sold by direct marketing will result in an appraised amount of production to count of not less than the production guarantee per acre if such failure results in our inability to make the required appraisal;

(c) If you intend to claim an indemnity on any unit, you must notify us at least 15 days prior to the beginning of harvest if you previously gave notice in accordance with section 14 of the Basic Provisions so that we may inspect the damaged production. You must not destroy the damaged crop until after we have given you written consent to do so. If you fail to meet the requirements of this section, and such failure results in our inability to inspect the damaged production, all such production will be considered undamaged and will be included as production to count; and

(d) You must notify us at least 5 days before grazing of insured forage begins so we can conduct an appraisal to determine production to count. Failure to give timely notice that the acreage will be grazed will result in an appraised amount of production to count of not less than the production guarantee per acre.

10. *Settlement of Claim.*

(a) We will determine your loss on a unit basis. In the event you are unable to provide separate acceptable production records:

(1) For any optional units, we will combine all optional units for which such production records were not provided; or

(2) For any basic units, we will allocate any commingled production to such units in proportion to our liability on the harvested acreage for the units.

(b) * * *

(7) * * *

Example 1

Assume you have a 100 percent share in 100 acres of type A forage in the unit, with a guarantee of 3.0 tons per acre and a price election of $65.00 per ton. Due to adverse weather you were only able to harvest 50.0 tons. Your indemnity would be calculated as follows:

1. 100 acres type A × 3 tons = 300 ton guarantee;

2 & 3. 300 tons × $65 price election = $19,500 total value guarantee;

4 & 5. 50 tons production to count × $65 price election = $3,250 total value of production to count;

6. $19,500 value guarantee—$3,250 = $16,250 loss; and

7. $16,250 × 100 percent share = $16,250 indemnity payment.

Example 2

Assume you also have a 100 percent share in 100 acres of type B forage in the same unit, with a guarantee of 1.0 ton per acre and a price election of $50.00 per ton. Due to adverse weather you were only able to harvest 5.0 tons. Your total indemnity for forage production for both types A and B in the same unit would be calculated as follows:

1. 100 acres × 3 tons = 300 ton guarantee for type A; and 100 acres × 1 ton = 100 ton guarantee for type B;

2. 300 ton guarantee × $65 price election = $19,500 total value of the guarantee for type A; and 100 ton guarantee × $50 price election = $5,000 total value of the guarantee for type B;

3. $19,500 + $5,000 = $24,500 total value of the guarantee;

4. 50 tons × $65 price election = $3,250 total value of production to count for type A; and 5 tons × $50 price election = $250 total value of production to count for type B;

5. $3,250 + $250 = $ 3,500 total value of production to count for types A and B;

6. $24,500—$3,500 = $21,000 loss; and

7. $21,000 loss × 100 percent share = $21,000 indemnity payment.

* * * * *

3. Section 457.127 is removed and reserved.

4. Amend 457.151 as follows:

a. Revise the introductory text;

b. In the crop insurance provisions revise the definition in section 1 of ''harvest';

c. In the crop insurance provisions redesignate sections 6 through 13 as 7 through 14;

d. In the crop insurance provisions revise section 5 and redesignated sections 7(b), 8, 11 introductory text, 11(a), 11(b), 13(a)(3);

e. In the crop insurance provisions add a new section 6 and an example to redesignated section 13(a)(3); all to read as follows:

§ 457.151 Forage seeding crop insurance provisions.

The Forage Seeding Crop Insurance Provisions for the 2001 and succeeding crop years are as follows:

* * * * *

1. *Definitions.*

* * * * *

Harvest. Severance of the forage plant from its roots. Acreage that is only grazed will not be considered harvested.

* * * * *

5. *Cancellation and Termination Dates.*

In accordance with section 2 of the Basic Provisions, the cancellation and termination dates are:

State and county	Cancellation/termination dates
California, Nevada, New Hampshire, New York, Pennsylvania and Vermont.	July 31.
Montana, Minnesota, North Dakota, South Dakota, Wisconsin and Wyoming.	March 15.

6. *Report of Acreage.*

In lieu of the provisions of section 6(a) of the Basic Provisions, a report of all insured acreage of forage seeding must be submitted on or before each forage seeding acreage report date specified in the Special Provisions.

7. *Insured Crop.*

* * * * *

(b) That is planted during the current crop year, or replanted during the calendar year following planting, to establish a normal stand of forage;

* * * * *

8. *Insurable Acreage.*

In addition to the provisions of section 9 of the Basic Provisions:

(a) In California counties Lassen, Modoc, Mono, Shasta, Siskiyou and all other states, any acreage of the insured crop damaged before the final planting date, to the extent that such acreage has less than 75 percent of a normal stand, must be replanted unless we agree that it is not practical to replant; and

(b) In California, unless otherwise specified in the Special Provisions, any acreage of the insured crop damaged anytime during the crop year to the extent that such acreage has less than 75 percent of a normal stand must be replanted unless it cannot be replanted and reach a normal stand within the insurance period.

* * * * *

11. *Replanting Payment.*

In lieu of the provisions contained in section 13 of the Basic Provisions:

(a) A replanting payment is allowed if:

(1) In California, unless specified otherwise in the Special Provisions, acreage planted to the insured crop is damaged by an insurable cause of loss occurring within the insurance period to the extent that less than 75 percent of a normal stand remains and the crop can reach maturity before the end of the insurance period;

(2) In Lassen, Modoc, Mono, Shasta, Siskiyou Counties, California, and all other states:

(i) A replanting payment is allowed only whenever the Special Provisions designate both fall and spring final planting dates;

(ii) The insured fall planted acreage is damaged by an insurable cause of loss to the extent that less than 75 percent of a normal stand remains;

(iii) It is practical to replant;

(iv) We give written consent to replant; and

(v) Such acreage is replanted the following spring by the spring planting date.

(b) The amount of the replanting payment will be equal to 50 percent of the amount of indemnity determined in accordance with section 13 unless otherwise specified in the Special Provisions.

* * * * *

13. *Settlement of Claim.*

(a) * * *

(3) Multiplying the total acres with an established stand for the insured acreage of each type and practice in the unit by the amount of insurance for the applicable type and practice;

Example

Assume you have 100 percent share in 30 acres of type A forage in the unit, with an amount of insurance of $100.00 per acre. At the time of loss, the following findings are established: 10 acres had a remaining stand of 75 percent or greater. You also have 20 acres of type B forage in the unit, with an amount of insurance of $90.00 per acre. 10 acres had with a remaining stand of 75 percent or greater. Your indemnity would be calculated as follows:

1. 30 acres × $100.00 = $3,000 amount of insurance for type A;

20 acres × $90.00 = $1,800 amount of insurance for type B;

2. $3,000 + $1,800 = $4,800 total amount of insurance;

3. 10 acres with 75% stand or greater × $100 = $1,000 production to count for type A;

10 acres with 75% stand or greater × $90 = $900 production to count for type B;

4. $1,000+$900 = $1,900 total production to count;

5. $4,800 − $1,900 = $2,900 loss;

6. $2,900×100 percent share = $2,900 indemnity payment.

* * * * *

Signed in Washington, DC, on January 18, 2000.

Kenneth D. Ackerman,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 00–1703 Filed 1–24–00; 8:45 am]

BILLING CODE 3410–08–P

FEDERAL RESERVE SYSTEM

12 CFR Part 225

[Regulation Y; Docket No. R–1057]

Bank Holding Companies and Change in Bank Control

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Interim rule with request for public comments.

SUMMARY: The Board of Governors of the Federal Reserve System is adopting on an interim basis effective March 11, 2000, and soliciting comment on a rule that establishes procedures for bank holding companies as well as foreign banks that operate a branch, agency, or commercial lending company in the United States to elect to become financial holding companies. The interim rule includes amended definitions of terms in existing Subpart A that are applicable to the new Subpart. The Board is promulgating this rule to implement provisions of the recently enacted Gramm-Leach-Bliley Act that enable bank holding companies and foreign banks that meet applicable statutory requirements to become financial holding companies and thereby engage in a broader range of financial and other activities than are permissible for bank holding companies.

The new Subpart sets forth the procedures by which bank holding companies and foreign banks may submit to the Board an election to become a financial holding company and describes the period in which the Board will act on financial holding company elections. This Subpart also enumerates the criteria that bank holding companies and foreign banks must meet in order to qualify as a financial holding company. In addition, the newly added sections set forth the limitations that the Board will apply to financial holding companies that fail to maintain compliance with applicable capital, management, and CRA criteria.

The Board has promulgated this Subpart on an interim basis, effective on March 11, 2000, in order to allow bank holding companies and foreign banks that meet applicable qualifications to become financial holding companies as soon as possible following the effective date of the relevant provisions of the Gramm-Leach-Bliley Act. The Board will allow bank holding companies and foreign banks to file elections in anticipation of the effective date of the Act and the interim rule and will review elections as promptly as possible after the effective date. The Board anticipates that as soon as March 13, 2000, the Board will begin notifying qualifying companies that elections filed in accordance with the interim rule are effective. This will enable companies that the Board determines qualify as financial holding companies to take advantage of the new powers granted by the Gramm-Leach-Bliley Act as early as March 13, 2000, which is the first business day following the effective date of the financial holding company provisions of the Act.

The Board solicits comments on all aspects of the interim rule and will amend the rule as appropriate in response to comments received.

DATES: This interim rule is effective on March 11, 2000. Comments must be received by March 27, 2000.

ADDRESSES: Comments should refer to docket number R–1057 and should be sent to Ms. Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, D.C. 20551. Comments addressed to Ms. Johnson also may be delivered to the Board's mail room between the hours of 8:45 a.m. and 5:15 p.m. and, outside of those hours, to the Board's security control room. Both the mail room and the security control room are accessible from the Eccles Building courtyard entrance, located on 20th Street between Constitution Avenue and C Street, N.W. Members of the public may inspect comments in Room MP–500 of the Martin Building between 9:00 a.m. and 5:00 on weekdays.

FOR FURTHER INFORMATION CONTACT: Thomas M. Corsi, Managing Senior Counsel (202/452–3275), Ann E. Misback, Managing Senior Counsel (202/452–3788), Christopher W. Clubb, Counsel (202/452–3904), or Adrianne G. Threatt, Attorney (202/452–3554), Legal Division; Betsy Cross, Assistant Director (202/452–2574) or Melissa W. Clark, Manager, Global/International Applications (202/452–2277), Division of Banking Supervision and Regulation; Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, D.C. 20551.

SUPPLEMENTARY INFORMATION:

Background

Title I of the Gramm-Leach-Bliley Act (Pub. L. No. 106–102, 113 Stat. 1338 (1999)) repeals sections 20 and 32 of the Glass-Steagall Act (12 U.S.C. §§ 377 and 78, respectively) and is intended to facilitate affiliations among banks, securities firms, insurance firms, and other financial companies. To further this goal, the Gramm-Leach-Bliley Act amends section 4 of the Bank Holding Company Act (12 U.S.C. § 1843) (''BHC Act'') to authorize bank holding companies and foreign banks that qualify as ''financial holding companies'' to engage in securities, insurance and other activities that are financial in nature or incidental to a financial activity. The activities of bank holding companies and foreign banks that are not financial holding companies would continue to be limited to activities authorized currently under the BHC Act, such as activities that the Board previously has determined in regulations and orders issued under section 4(c)(8) of the BHC Act to be closely related to banking and permissible for bank holding companies.

The Gramm-Leach-Bliley Act defines a financial holding company as a bank holding company that meets certain eligibility requirements. In order for a bank holding company to become a financial holding company and be eligible to engage in the new activities authorized under the Gramm-Leach-Bliley Act, the Act requires that all depository institutions controlled by the bank holding company be well capitalized and well managed. With regard to a foreign bank that operates a branch or agency or owns or controls a commercial lending company in the United States, the Act requires the Board to apply comparable capital and management standards that give due regard to the principle of national treatment and equality of competitive opportunity.

To become a financial holding company, the Gramm-Leach-Bliley Act requires a bank holding company to submit to the Board a declaration that the company elects to be a financial holding company and a certification that all of the depository institutions controlled by the company are well capitalized and well managed. The Act also provides that a bank holding company's election to become a financial holding company will not be effective if the Board finds that, as of the date the company submits its election to the Board, not all of the insured depository institutions controlled by the company have achieved at least a ''satisfactory'' rating at the most recent examination of the institution under the Community Reinvestment Act (12 U.S.C. § 2903 *et seq.*) (''CRA'').

The Gramm-Leach-Bliley Act grants the Board discretion to impose limitations on the conduct or activities of any financial holding company that controls a depository institution that does not remain both well capitalized and well managed following the company's election to be a financial holding company. The Act also requires the Board to prohibit a financial holding company from commencing additional activities under new subsection 4(k) or 4(n) of the BHC Act, or from acquiring control of companies engaged in such activities, if any insured depository institution controlled by the company fails to maintain at least a satisfactory CRA rating.

Interim Rule

In order to implement the provisions of the Gramm-Leach-Bliley Act governing the creation and conduct of financial holding companies, the Board is amending its Regulation Y by adding a Subpart I that (a) defines the term ''financial holding company'' and establishes procedures by which a bank holding company may become a financial holding company; (b) enumerates the criteria a bank holding company must meet in order for the Board to determine that an election is effective and describes the period within which the Board will act on an election; (c) sets forth the consequences if any depository institution controlled by a financial holding company fails to remain well capitalized and well managed, or if any insured depository institution controlled by the financial holding company fails to maintain at least a satisfactory CRA rating; and (d) specifically addresses procedures and requirements applicable to foreign banking organizations that seek to be treated as financial holding companies.

The Board welcomes comment on all parts of the interim rule.

Section 225.81 What is a Financial Holding Company?

The Gramm-Leach-Bliley Act defines a financial holding company as a bank holding company that meets certain specific requirements. In accordance with the Act, section 225.81 provides that, in order to qualify as a financial holding company, all depository institutions controlled by the company at the time of the election must be and

remain well capitalized and well managed, and the company must have made an effective election to become a financial holding company as described in section 225.82. The definition of the terms ''well capitalized'' and ''well managed'' are described below and are based on specific capital levels and examination ratings.

Section 225.82 How Does a Company Elect to Become a Financial Holding Company?

Subsection (a) provides that a bank holding company wishing to become a financial holding company must file a written declaration with the Board stating that the bank holding company elects to be a financial holding company. The Board envisions that a company's election to become a financial holding company could be a short and simple document signed by an official or representative with authority to bind the company. Subsection (b) sets forth the information required as part of a declaration, which is limited to information about the location and capital position of each of the depository institutions controlled by the company, and a certification that each such institution is both well capitalized and well managed as of the date the election is filed.

The Gramm-Leach-Bliley Act provides that an election to be a financial holding company is ineffective if the Board finds, within a specified period, that any insured depository institution controlled by the bank holding company (other than a recently acquired institution) does not have at least a satisfactory CRA performance rating. Subsection (c) implements this provision. The interim rule also provides that an election is ineffective if the Board finds during this period that any depository institution controlled by the bank holding company is not well managed and well capitalized, as these terms are objectively defined, as of the date of the election.

The Board recognizes that there may be instances in which a bank holding company meets the statutory requirements to be a financial holding company but on a consolidated basis is not well capitalized and well managed or does not have adequate financial or managerial resources to conduct financial activities in a safe and sound manner. Under these circumstances, the Board may have significant supervisory concerns about the ability of the company to conduct additional activities or make additional acquisitions. Subsection (d) reserves the general supervisory authority of the Board to restrict or limit the commencement or conduct of activities or acquisitions of a financial holding company if the Board finds that the financial holding company lacks the financial or managerial strength to engage in new activities, make new acquisitions, or retain ownership of companies engaged in financial activities.

Subsection (e) describes circumstances under which the Gramm-Leach-Bliley Act allows the Board to exclude an insured depository institution when reviewing whether a bank holding company meets the applicable CRA requirement for financial holding companies. As provided in the Act, the Board will not consider institutions acquired by the company within the 12-month period preceding an election to be a financial holding company for purposes of the CRA criteria provided that (i) the bank holding company has submitted a plan to the appropriate Federal banking agency for the institution to take actions necessary to achieve at least a ''satisfactory'' rating at the next CRA examination, and (ii) the appropriate Federal banking agency has accepted that plan.

Subsection (f) provides that, as a general matter, an election by a bank holding company to become a financial holding company will be effective on the 31st day after the election was received by the appropriate Federal Reserve Bank, unless the Board has notified the bank holding company prior to that date that its election is ineffective because an institution controlled by the company fails to meet an applicable requirement. The interim rule provides that the Board or the appropriate Federal Reserve Bank may affirmatively notify a bank holding company that an election is effective at any time during that 30-day period.

As noted above, the Board proposes to adopt the proposed rule on an interim basis, effective March 11, 2000 (which is the effective date of the financial holding company provisions of the Gramm-Leach-Bliley Act). This will allow bank holding companies and foreign banks that meet the qualifications to be financial holding companies to take advantage of the new authority granted by the Gramm-Leach-Bliley Act as soon as possible following the effective date of the relevant provisions of the Act.

The Board also proposes to allow bank holding companies and foreign banks to file elections to become financial holding companies immediately in anticipation of the effective date of the Act and interim rule. These elections will be considered to be made as of March 11, 2000, and must certify compliance with all applicable capital and management criteria as of March 11, 2000. While the 30-day period for ineligibility decisions does not begin on any election until the effective date of the Act, the Board will endeavor on March 13, 2000, which is the first business day following the effective date of the financial holding company provisions of the Act, to act on elections filed prior to February 15, 2000. The Board will act on all other elections as soon as practicable. Prior to the date that its election to become a financial holding company becomes effective, a bank holding company may not engage in the newly authorized activities described in new sections 4(k), 4(n), and 4(o) of the BHC Act.

Companies that are not now bank holding companies and seek to acquire a depository institution must still apply to the Board to become a bank holding company under section 3 of the BHC Act. A company may file a bank holding company application and a declaration to be a financial holding company at the same time. In that case, it is expected that the System would act to make the financial holding company election effective at the time the System acts on the underlying bank holding company application. Consequently, the company could become a financial holding company without filing a separate election after the company becomes a bank holding company.

Section 225.83 What Are the Consequences of Ceasing to Meet Applicable Capital and Management Requirements?

This section implements the provisions of the Gramm-Leach-Bliley Act that apply when a depository institution controlled by an existing financial holding company ceases to be both well capitalized and well managed. Subsection (a) states that the Board will notify a company in writing if the Board finds that not all depository institutions controlled by the company are well capitalized and well managed. In recognition of the fact that a company may know that one of its subsidiary depository institutions has ceased to be well capitalized or well managed before the Board will have access to such data, subsection (b) requires companies to notify the Board of the institutions involved and the areas of noncompliance promptly upon becoming aware of that the institution no longer meets applicable capital or management criteria.

Subsection (c) provides that, within 45 days (plus any additional time that the Board may grant) after receiving a

notice of noncompliance from the Board, the company must execute an agreement with the Board to comply with applicable capital and management requirements. An agreement required by this subsection to correct a capital or management deficiency must explain the actions that the company will take to correct each deficiency, provide a schedule within which each action will be taken, provide any other information required by the Board, and be acceptable to the Board.

Until a company has corrected the conditions described in a notice provided by the Board under subsection (a), the Gramm-Leach-Bliley Act allows the Board to impose any limitations on the conduct or activities of the company or any of its affiliates as the Board deems to be appropriate and consistent with the purposes of the BHC Act. In particular, subsection (d) states that, until the Board determines that all deficiencies have been corrected, a company may not engage in any additional activity or acquire control or shares of any company under section 4(k) of the BHC Act without prior approval from the Board.

Subsection (e) provides that, if the conditions giving rise to a notice of noncompliance are not corrected within 180 days (or such longer period permitted by the Board), the Board may order the company to divest its subsidiary depository institutions. A company may comply with an order to divest by instead ceasing to engage in activities that are permissible only for financial holding companies. The Board's ability to require divestitures and impose limitations on financial holding companies that fail to meet the capital and management requirements is in addition to, not in lieu of, the Board's ability to take supervisory actions and enforce compliance with applicable provisions of law under section 8 of the BHC Act and section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818).

Section 225.84 What Are the Consequences of Ceasing to Maintain a Satisfactory or Better Rating Under the Community Reinvestment Act at All Insured Depository Institution Subsidiaries?

The Gramm-Leach-Bliley Act requires the Board to prohibit a financial holding company from commencing any additional activity under sections 4(k) or 4(n) of the BHC Act, or from acquiring control of a company engaged in activities under those sections, if any insured depository institution controlled by the company receives a rating of less than ''satisfactory'' under the CRA. Subsection (a) provides that a financial holding company is deemed to have received notice that these prohibitions are in effect at the time the appropriate Federal banking agency for any insured depository institution controlled by the company or the Board notifies the institution or company that the institution has received a rating of ''needs to improve'' or ''substantial noncompliance'' under the CRA. The prohibitions will continue to apply until such time as each insured depository institution controlled by the company has received at least a ''satisfactory'' rating at its most recent examinations under the CRA.

This prohibition does not prevent a financial holding company from making additional investments as part of merchant banking, investment banking, or insurance company investment activities pursuant to section 4(k)(4)(H) or 4(k)(4)(I) of the BHC Act, provided that the company was lawfully engaged in the merchant banking, investment banking, or insurance company investment activity prior to the time that one of its insured depository institutions received less than a ''satisfactory'' rating under the CRA and the Board has not prohibited or limited these activities.

Under the Gramm-Leach-Bliley Act, financial holding companies that do not comply with the CRA requirement are not prohibited from making acquisitions or engaging in activities that meet the more narrow ''closely related to banking'' standard pursuant to 4(c)(8). Financial holding companies that seek to engage in activities or make acquisitions pursuant to section 4(c)(8) of the BHC Act must, however, comply with the requirements of that section as well as the notice and approval requirements of section 4(j).

Section 225.90 What are the Requirements for a Foreign Bank to be Treated as a Financial Holding Company?

A foreign bank that is a bank holding company because it owns a subsidiary bank in the United States must comply with the same requirements as any other bank holding company that elects to be a financial holding company. Most foreign banks, however, do not own subsidiary banks in the United States; instead, they operate through branches that are part of the foreign bank itself. [1] If a foreign bank operates a U.S. branch, the foreign bank (and any company that controls the foreign bank) is subject to the BHC Act as if the foreign bank or company were a bank holding company. Such foreign banks may, like U.S. bank holding companies, also elect to be treated as financial holding companies and thereby be able to engage in the new financial activities.

Under the Gramm-Leach-Bliley Act, a company qualifies to be a financial holding company only if its insured bank and thrift subsidiaries are well capitalized and well managed. These standards are not by their terms applicable to the branches of a foreign bank. Consequently, the Act provides that ''the Board shall apply comparable capital and management standards to a foreign bank that operates a branch * * * in the United States giving due regard to the principle of national treatment and equality of competitive opportunity.'' The provision is necessary because it would be competitively harmful if a foreign bank that conducts a banking business in the United States in direct competition with U.S. banks could be treated as a financial holding company without meeting standards comparable to those applicable to U.S. banks. Without such a provision, a foreign bank could make securities and insurance acquisitions without meeting standards comparable to those applicable to U.S. banks, simply because the foreign bank conducts its U.S. banking business through a branch rather than through a subsidiary bank.

As described below, the Board is proposing to adopt standards and procedures that establish a flexible approach to carry out the statutory requirement for comparability of capital and management standards while, at the same time, assuring national treatment and equality of competitive opportunity for foreign banks operating in the United States.

Section 225.90 of the new Subpart sets forth the capital and management standards that foreign banks that maintain a branch, agency, or commercial lending company in the United States must meet in order to be considered to be ''well capitalized'' and ''well managed'' for purposes of being treated as financial holding companies. Under section 225.90, in order for a foreign bank or company to be treated as a financial holding company, the foreign bank must be well capitalized and well managed in accordance with standards comparable to those required of U.S. banks as determined by the Board, taking into account certain financial factors that may affect the analysis of capital and management.

[1] A foreign bank that operates a branch, agency or commercial lending company subsidiary in the United States is subject to the BHC Act as if it were a bank holding company. In this notice, the term ''branch'' is used to include all three forms of operation.

Section 225.90 provides two methods under which a foreign bank may be considered well capitalized. The first method is applicable to foreign banks whose home country supervisors have adopted risk-based capital standards consistent with the Capital Accord of the Basel Committee on Banking Supervision (Basel Accord). Under this method, the foreign bank's total and Tier 1 risk-based capital ratios, as calculated under its home country standard, must be at least 6 percent for Tier 1 capital to total risk-based assets and 10 percent for total capital to risk-based assets.

In addition, section 225.90 requires that the foreign bank's ratio of Tier 1 capital to total assets must be at least 3 percent. The Board solicits comment on this requirement. The Board believes that the imposition of a leverage ratio requirement on a foreign bank maintaining a branch, agency, or commercial lending company in the United States and that elects to be treated as a financial holding company is appropriate in order to ensure that the capital standards applicable to foreign banking organizations are comparable to those for domestic depository institutions. In addition, the Board believes that imposing a 3 percent leverage ratio requirement, rather than the 5 percent required for domestic depository institutions, is appropriate in recognition of the fact that foreign banks hold both banking and nonbanking operations under the foreign bank. Domestic bank holding companies, which also hold banking and nonbanking operations, are subject under Regulation Y to a minimum leverage ratio of 4 percent, or 3 percent if they have implemented the market risk amendment to the risk-based capital guidelines or have a composite supervisory rating of ''1.'' Most internationally active foreign banks also follow the market risk guidelines.

The Board recognizes that many countries do not impose a leverage ratio or similar requirements. U.S. banks are, however, subject to a leverage ratio requirement and in order to assure comparability of capital standards, a leverage ratio requirement for foreign banks is being proposed.

The second method for a foreign banking organization to be considered well capitalized in section 225.90 applies to foreign banks whose home country supervisors have not adopted the Basel Accord standards and to any other foreign banking organizations that otherwise do not meet the standards set out under the first method. Any such institution may be considered ''well capitalized'' only by obtaining from the Board a prior determination that its capital is otherwise comparable to the capital that would be required of a U.S. bank.

In order to qualify as well managed under section 225.90, each U.S. branch, agency, and commercial lending company of a foreign banking organization must have received at least a satisfactory composite rating at the most recent assessment. In addition, the home country supervisor of the foreign bank must consider the overall operations of the foreign bank to be satisfactory.

In determining whether a foreign bank is well capitalized and well managed, the Board may take into account the foreign bank's composition of capital, accounting standards, long-term debt ratings, reliance on government support to meet capital standards, the extent to which the foreign bank is subject to comprehensive consolidated supervision, and other factors that may affect the analysis of capital and management. The Board will consult with the home country supervisor for the foreign bank as appropriate. The information gathered under these factors will assist the Board in determining whether the foreign bank operates under capital and managerial standards that are comparable to those applied to U.S. banks. The Board expects that most foreign banks that elect to be treated as financial holding companies will be subject to comprehensive consolidated supervision. An election by a foreign bank that is not subject to comprehensive consolidated supervision will receive a more detailed review.

Section 225.91 How May a Foreign Bank Elect To be Treated as a Financial Holding Company?

The procedures applicable to a foreign bank, or company that owns or controls the foreign bank, electing to become a financial holding company are similar to the procedures discussed above for domestic bank holding companies. The foreign bank or company must file a written declaration with the appropriate Reserve Bank that it elects to be treated as a financial holding company. The declaration must be accompanied by the risk-based and leverage capital ratios of the foreign bank as of the close of the most recent quarter and as of the close of the most recent audited reporting period, a certification that the foreign bank is well capitalized as of the date the foreign bank or company files its election, and a certification that the foreign bank is well managed as of the date the foreign bank or company files its election.

Section 225.92 How Does an Election by a Foreign Bank Become Effective?

An election filed by a foreign bank or company to become a financial holding company under section 225.91 will not become effective until the Board notifies the foreign bank or company that the foreign bank meets the standards set out above. The Board will notify the foreign bank or company of its finding within 30 days of the filing of the written declaration, unless the Board determines that it does not have sufficient information on which to base a determination. Before filing an election to be treated as a financial holding company, a foreign bank or company may file with the Board a request for review of its qualifications to be treated as a financial holding company. The Board will endeavor to make a determination on such requests within 30 days of receipt.

An election filed by a foreign bank or company under this section will be effective only if the Board finds that the foreign bank is well capitalized and well managed in accordance with capital and management standards comparable to those required of U.S. banks owned by financial holding companies, and, in the case of a foreign bank that operates a branch in the United States that is federally insured, the branch received a rating of at least ''satisfactory'' under the CRA at its most recent examination.

Section 225.93 What are the Consequences of a Foreign Bank Failing to Continue to Meet Applicable Capital and Management Requirements?

This section parallels section 225.83, with appropriate modifications. It sets forth the procedures to be followed in the event that a foreign bank that is treated as a financial holding company ceases to meet the applicable capital and management requirements. It provides for the execution of an agreement designed to bring the foreign bank back into compliance with the requirements of the regulation and permits the Board to impose certain limitations on the U.S. activities of such a foreign bank during any period of noncompliance. Finally, the section sets forth the consequences of a failure to correct the noncompliance within a period of 180 days. Such consequences could include termination of the foreign bank's U.S. branches and agencies and divestiture of its commercial lending company subsidiaries or ceasing to engage in the expanded activities permitted for financial holding companies.

Section 225.94 What are the Consequences of an Insured Branch Failing to Maintain a Satisfactory or Better Rating Under the Community Reinvestment Act?

This section provides that the provisions of section 225.84, with appropriate modifications, apply to a foreign bank that operates an insured branch, and its parent, and that is treated as a financial holding. For these purposes, the insured branch is treated as an ''insured depository institution.''

Subpart A General Provisions; Section 225.2—Definitions

The Board also is amending the definitions of ''well capitalized'' and ''well managed'' at sections 225.2(r)(2) and 225.2(s) to take account of the broader applicability of these definitions under the Gramm-Leach-Bliley Act. The definition of well capitalized has been amended to apply to all depository institutions, rather than insured depository institutions. The rule applies the same capital requirements to depository institutions that are not FDIC-insured for purposes of determining whether the institution is well capitalized as apply to insured depository institutions.

The definition of well managed has, in the case of depository institutions that have not received an examination rating, been amended in subparagraph (1)(ii) to allow the Board to determine that an institution is well managed after consulting with the appropriate Federal banking agency for the institution. In addition, the rule provides that a depository institution resulting from the merger of two or more institutions that are well managed would be considered to be well managed unless the Board determined otherwise after consulting with the appropriate Federal banking agency.

Regulatory Flexibility Act Analysis

In accordance with section 3(a) of the Regulatory Flexibility Act (5 U.S.C. 603(a)), the Board must publish an initial regulatory flexibility analysis with this interim regulation. This rule implements provisions of Title I of the Gramm-Leach-Bliley Act that allow entities that qualify as financial holding companies to engage in a broad range of securities, insurance, and other financial activities by providing the Board with a simple, post-commencement notice. The interim rule will enable bank holding companies and foreign banks that qualify as financial holding companies to engage in an expanded range of activities using a streamlined notification procedure.

The financial holding company election procedure described in this rule is voluntary, and the criteria set forth in the rule for an effective election filing are those required by the Gramm-Leach-Bliley Act. The Board has established a simple, one-time procedure involving minimum paperwork to fulfill the statutory election requirement. In addition, the new powers described in the Act and implemented by this regulation should enhance the overall efficiency of bank holding companies and the other financial companies that seek to affiliate with them. The rule applies to all companies that attempt to qualify as financial holding companies, regardless of their size, and allows small organizations to take advantage of the broad new powers conferred by the Gramm-Leach-Bliley Act with minimal additional burden. Finally, the Board specifically seeks comment on the likely burden this interim rule will impose on entities that elect to become financial holding companies.

Administrative Procedure Act

The Board will make this interim rule effective on March 11, 2000 without first reviewing public comments. Pursuant to 5 U.S.C. § 553, the Board finds that it is impracticable to review public comments prior to the effective date of the interim rule, and that there is good cause to make the interim rule effective on March 11, 2000, due to the fact that the rule sets forth procedures to implement statutory changes that will become effective on March 11, 2000. The Board is seeking public comment on the interim rule and will amend the rule as appropriate after reviewing the comments.

Paperwork Reduction Act

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

The collection of information requirements in this proposed rulemaking are found in 12 CFR 225.82 (a) and (b). This information is required to evidence compliance with the requirements of Title I of the Gramm-Leach-Bliley Act (Pub. L. No. 106–103, 113 Stat. 1338 (1999)) which amends section 4 of the Bank Holding Company Act (12 U.S.C. 1843). The respondents are current and future bank holding companies and foreign banking organizations.

The notice cited in 12 CFR 225.82(b) provides that a bank holding company may elect to become a financial holding company by filing a simple written declaration with the Federal Reserve. The declaration must include information identifying the company's subsidiary depository institutions and their capital ratios, and a certification that each depository institution is well capitalized and well managed (for specific details, see 12 CFR 225.82(b)). There will be no reporting form for this information collection. The agency form number for this declaration will be the FR 4010. The Board estimates that approximately half of all bank holding companies will file this declaration during the first year and that it will take on average approximately 15 minutes to complete this information. This would result in estimated annual burden of 625 hours. Based on a rate of $20 per hour, the annual cost to the public for this information collection is estimated to be $12,500.

The OMB control number for this interim rule is 7100–0292. The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to this information collection unless the Board has displayed a valid OMB control number.

A bank holding company may request confidentiality for the information contained in these information collections pursuant to section (b)(4) and (b)(6) of the Freedom of Information Act (5 U.S.C. 552(b)(4) and (b)(6)).

Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the Federal Reserve's functions; including whether the information has practical utility; (b) the accuracy of the Federal Reserve's estimate of the burden of the proposed information collection, including the cost of compliance; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology. Comments on the collection of information should be sent to the Office of Management and Budget, Paperwork Reduction Project, Washington, DC 20503, with copies of such comments to be sent to Mary M. West, Federal Reserve Board Clearance Officer, Division of Research and Statistics, Mail Stop 97, Board of Governors of the Federal Reserve System, Washington, DC 20551.

List of Subjects in 12 CFR Part 225

Administrative practice and procedure, Banks, Banking, Federal Reserve System, Holding companies, Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, the Board amends 12 CFR part 225 as follows:

PART 225—BANK HOLDING COMPANY AND CHANGE IN BANK CONTROL (REGULATION Y)

1. The authority citation for part 225 continues to read as follows:

Authority: 12 U.S.C. 1817(j)(13), 1818, 1828(o), 1831(i), 1831p–1, 1843(c)(8), 1844(b), 1972(l), 3106, 3108, 3310, 3331–3351, 3907, and 3909.

2. Section 225.2(r)(2) and (s) are revised to read as follows:

§ 225.2 Definitions.

* * * * *

(r) * * *

(2) *Insured and uninsured depository institutions*— (i) *Insured depository institution.* In the case of an insured depository institution, ''well capitalized'' means that the institution has and maintains at least the capital levels required to be well capitalized under the capital adequacy regulations or guidelines applicable to the institution that have been adopted by the appropriate Federal banking agency for the institution under section 38 of the Federal Deposit Insurance Act (12 U.S.C. 1831o).

(ii) *Uninsured depository institution.* In the case of a depository institution the deposits of which are not insured by the Federal Deposit Insurance Corporation, ''well capitalized'' means that the institution has and maintains at least the capital levels required for an insured depository institution to be well capitalized.

* * * * *

(s) *Well managed*—(1) *In general.* A company or depository institution is well managed if:

(i) At its most recent inspection or examination or subsequent review by the appropriate Federal banking agency for the company or institution, the company or institution received:

(A) At least a satisfactory composite rating; and

(B) At least a satisfactory rating for management and for compliance, if such a rating is given; or

(ii) In the case of a company or depository institution that has not received an examination rating, the Board has determined, after a review of managerial and other resources of the company or depository institution and after consulting the appropriate Federal banking agency for the institution, that the company or institution is well managed.

(2) *Merged institutions.* A depository institution that results from the merger of two or more depository institutions that are well managed shall be considered to be well managed unless the Board determines otherwise after consulting with the appropriate Federal banking agency for each depository institution involved in the merger.

(3) *Foreign banking organizations.* Except as otherwise provided in this part, a foreign banking organization shall qualify under this paragraph(s) if the combined operations of the foreign banking organization in the United States have received at least a satisfactory composite rating at the most recent annual assessment.

3. A new Subpart I is added after Subpart H to read as follows:

Subpart I—Financial Holding Companies

225.81 What is a financial holding company?
225.82 How does a company elect to become a financial holding company?
225.83 What are the consequences of failing to continue to meet applicable capital and management requirements?
225.84 What are the consequences of failing to maintain a satisfactory or better rating under the Community Reinvestment Act at all insured depository institution subsidiaries?
225.90 What are the requirements for a foreign bank to be treated as a financial holding company?
225.91 How may a foreign bank elect to be treated as a financial holding company?
225.92 How does an election by a foreign bank become effective?
225.93 What are the consequences of a foreign bank failing to continue to meet applicable capital and management requirements?
225.94 What are the consequences of an insured branch failing to maintain a satisfactory or better rating under the Community Reinvestment Act?

Subpart I—Financial Holding Companies

§ 225.81 What is a financial holding company?

(a) *Definition.* A financial holding company is a bank holding company that meets the requirements of this section.

(b) *Requirements to be a financial holding company.* In order to be a financial holding company:

(1) All depository institutions controlled by the bank holding company must be and remain well capitalized;

(2) All depository institutions controlled by the bank holding company must be and remain well managed; and

(3) The bank holding company must have made an effective election to become a financial holding company.

(c) *Requirements for foreign banks that are or are owned by bank holding companies*—(1) *Foreign banks with U.S. branches or agencies.* A foreign bank that is a bank holding company and that operates a branch or agency or owns or controls a commercial lending company in the United States must comply with the requirements of this section, § 225.82 and §§ 225.90 through 225.93 in order to be a financial holding company.

(2) *Bank holding companies that own foreign banks with U.S. branches or agencies.* A bank holding company that owns a foreign bank that operates a branch or agency or owns or controls a commercial lending company in the United States must comply with the requirements of this section and § 225.82, and the foreign bank must comply with §§ 225.90 through 225.93 in order for the company to be a financial holding company.

§ 225.82 How does a company elect to become a financial holding company?

(a) *Filing requirement.* A bank holding company may elect to become a financial holding company by filing a written declaration with the appropriate Federal Reserve Bank.

(b) *Contents of declaration.* The declaration must:

(1) State that the bank holding company elects to be a financial holding company;

(2) Provide the name and head office address of the company and of each depository institution controlled by the company;

(3) Certify that all depository institutions controlled by the company are well capitalized as of the date the company files its election;

(4) Provide the capital ratios for all relevant capital measures (as defined in section 38 of the Federal Deposit Insurance Act) as of the close of the previous quarter for each depository institution controlled by the company on the date the company files its election; and

(5) Certify that all depository institutions controlled by the company are well managed as of the date the company files its election.

(c) *Under what circumstances will the Board find an election to be ineffective?* An election to become a financial holding company shall not be effective if, during the period provided in paragraph (f) of this section, the Board

finds that as of the date the election is received by the appropriate Federal Reserve Bank:

(1) Any insured depository institution controlled by the bank holding company (except an institution excluded under paragraph (e) of this section) has not achieved at least a rating of ''satisfactory record of meeting community credit needs'' under the Community Reinvestment Act at the institution's most recent examination; or

(2) Any depository institution controlled by the bank holding company is not both well capitalized and well managed.

(d) *May the Board impose supervisory limits on financial holding companies?* The Board may, in the exercise of its supervisory authority, restrict or limit the commencement or conduct of additional activities or acquisitions of a financial holding company, or take other appropriate action, if the Board finds that the financial holding company does not have the financial resources, including capital resources, or managerial resources to engage in activities, make acquisitions, or retain ownership of companies permitted for financial holding companies.

(e) *How is CRA performance of recently acquired insured depository institutions considered?* An insured depository institution will be excluded for purposes of the review of CRA ratings described in paragraph (c)(1) of this section if:

(1) The bank holding company acquired the insured depository institution during the 12-month period preceding the filing of an election under paragraph (a) of this section;

(2) The bank holding company has submitted an affirmative plan to the appropriate Federal banking agency for the institution to take actions necessary for the institution to achieve at least a rating of ''satisfactory record of meeting community credit needs'' under the Community Reinvestment Act at the next examination of the institution; and

(3) The appropriate Federal banking agency for the institution has accepted that plan.

(f) *When is an election effective?* (1) *In general.* An election described in paragraph (a) of this section is effective on the 31st day after the date that the election was received by the appropriate Federal Reserve Bank, unless the Board notifies the bank holding company prior to that time that the election is ineffective.

(2) *Earlier notification that an election is effective.* The Board or the appropriate Federal Reserve Bank may notify a bank holding company that its election to become a financial holding company is effective prior to the 31st day after the election was filed with the appropriate Federal Reserve Bank. Such a notification must be in writing.

§ 225.83 What are the consequences of failing to continue to meet applicable capital and management requirements?

(a) *Notice by the Board.* If the Board finds that any depository institution controlled by a financial holding company ceases to be well capitalized or well managed, the Board will notify the company in writing that it is not in compliance with the applicable requirement(s) for a financial holding company and identify the areas of noncompliance.

(b) *Notification by a financial holding company required.* Promptly upon becoming aware that any depository institution controlled by the financial holding company has ceased to be well capitalized or well managed, the company must notify the Board and identify the depository institution involved and the area of noncompliance.

(c) *Execution of agreement acceptable to the Board*—(1) *Agreement required; time period.* Within 45 days after receiving a notice under paragraph (a) of this section, the company must execute an agreement acceptable to the Board to comply with all applicable capital and management requirements.

(2) *Extension of time for executing agreement.* Upon request by a company, the Board may extend the 45-day period under paragraph (c)(1) of this section if the Board determines that granting additional time is appropriate under the circumstances. A request by a company for additional time must include an explanation of why an extension is necessary.

(3) *Agreement requirements.* An agreement required by paragraph (c)(1) of this section to correct a capital or management deficiency must:

(i) Explain the specific actions that the company will take to correct all areas of noncompliance;

(ii) Provide a schedule within which each action will be taken;

(iii) Provide any other information that the Board may require; and

(iv) Be acceptable to the Board.

(d) *Limitations during period of noncompliance.* Until the Board determines that a company has corrected the conditions described in a notice under paragraph (a) of this section:

(1) The Board may impose any limitations or conditions on the conduct or activities of the company or any of its affiliates as the Board finds to be appropriate and consistent with the purposes of the Bank Holding Company Act; and

(2) The company and its affiliates may not engage in any additional activity or acquire control or shares of any company under section 4(k) of the Bank Holding Company Act without prior approval from the Board.

(e) *Consequences of failure to correct conditions within 180 days*—(1) *Divestiture of depository institutions.* If a company does not correct the conditions described in a notice under paragraph (a) of this section within 180 days of receipt of the notice or such additional time as the Board may permit, the Board may order the company to divest ownership or control of any depository institution owned or controlled by the company. Such divestiture must be done in accordance with the terms and conditions established by the Board.

(2) *Alternative method of complying with a divestiture order.* A company may comply with an order issued under paragraph (e)(1) of this section by ceasing to engage (both directly and through any subsidiary that is not a depository institution or a subsidiary of a depository institution) in all activities that are not permissible for a bank holding company to conduct under section 4(c)(8) of the Bank Holding Company Act. The termination of activities must be done within the time period referred to in paragraph (e)(1) of this section and subject to terms and conditions acceptable to the Board.

(f) *Consultation with other agencies.* In taking any action under this section, the Board will consult with the relevant Federal and state regulatory authorities.

§ 225.84 What are the consequences of failing to maintain a satisfactory or better rating under the Community Reinvestment Act at all insured depository institution subsidiaries?

(a) *Limitations on activities*—(1) *In general.* Upon receiving a notice regarding performance under the Community Reinvestment Act in accordance with paragraph (a)(2) of this section, a financial holding company may not:

(i) Commence any additional activity under subsection 4(k) or 4(n) of the Bank Holding Company Act; or

(ii) Directly or indirectly acquire control of a company engaged in any activity under subsections 4(k) or 4(n) of the Bank Holding Company Act.

(2) *Notification.* A financial holding company receives notice for purposes of this paragraph at the time that the appropriate Federal banking agency for any insured depository institution controlled by the company or the Board

provides notice to the institution or company that the institution has received a rating of ''needs to improve record of meeting community credit needs'' or ''substantial noncompliance in meeting community credit needs'' in the institution's most recent examination under the Community Reinvestment Act.

(b) *Exception for certain activities*—(1) *Continuation of investment activities.* The prohibition in paragraph (a) of this section does not prevent a financial holding company from continuing to make investments in the ordinary course of conducting investment activities under section 4(k)(4)(H) or insurance company investment activities under section 4(k)(4)(I) of the Bank Holding Company Act if:

(i) The financial holding company lawfully was a financial holding company and commenced the investment activity under section 4(k)(4)(H) or the insurance company investment activities under section 4(k)(4)(I) prior to the time that an insured depository institution controlled by the financial holding company received a rating below ''satisfactory record of meeting community credit needs'' under the Community Reinvestment Act; and (ii) The Board has not, in the exercise of its supervisory authority, advised the financial holding company that these activities must be restricted.

(2) *Activities that are closely related to banking.* The prohibition in paragraph (a) of this section does not prevent a financial holding company from commencing any additional activity or acquiring control of a company engaged in any activity under section 4(c) of the Bank Holding Company Act, if the company complies with the notice, approval, and other requirements under that section and section 4(j).

(c) *Duration of prohibitions.* The prohibitions described in paragraph (a) of this section shall continue in effect until such time as each insured depository institution controlled by the financial holding company has achieved at least a rating of ''satisfactory record of meeting community credit needs'' under the Community Reinvestment Act at the most recent examination of the institution.

§ 225.90 What are the requirements for a foreign bank to be treated as a financial holding company?

(a) *Foreign banks as financial holding companies.* A foreign bank that operates a branch or agency or owns or controls a commercial lending company in the United States, and any company that owns or controls such a foreign bank, will be treated as a financial holding company if:

(1) The foreign bank is and remains well capitalized and well managed; and (2) The foreign bank, or the company that owns the foreign bank, has made an effective election to be treated as a financial holding company under this subpart.

(b) *Standards for ''well capitalized.''* A foreign bank will be considered ''well capitalized'' if either:

(1)(i) Its home country supervisor, as defined in § 211.21 of the Board's Regulation K (12 CFR 211.21), has adopted risk-based capital standards consistent with the Capital Accord of the Basel Committee on Banking Supervision (Basel Accord);

(ii) The foreign bank maintains a Tier 1 capital to total risk-based assets ratio of 6 percent and a total capital to total risk-based assets ratio of 10 percent, as calculated under its home country standard;

(iii) The foreign bank maintains a Tier 1 capital to total assets leverage ratio of at least 3 percent; and

(iv) The Board determines that the foreign bank's capital is comparable to the capital required for a U.S. bank owned by a financial holding company; or

(2) The foreign bank has obtained a determination from the Board under § 225.91(c) that the foreign bank's capital is otherwise comparable to the capital that would be required of a U.S. bank owned by a financial holding company.

(c) *Standards for ''well managed.''* A foreign bank will be considered ''well managed'' if:

(1) Each of the U.S. branches, agencies, and commercial lending subsidiaries of the foreign bank has received at least a satisfactory composite rating at its most recent assessment;

(2) The home country supervisor of the foreign bank considers the overall operations of the foreign bank to be satisfactory or better; and

(3) The Board determines that the management of the foreign bank meets standards comparable to those required of a U.S. bank owned by a financial holding company.

§ 225.91 How may a foreign bank elect to be treated as a financial holding company?

(a) *Filing requirement.* A foreign bank that operates a branch or agency or owns or controls a commercial lending company in the United States, or a company that owns or controls such a foreign bank, may elect to be treated as a financial holding company by filing a written declaration with the appropriate Reserve Bank.

(b) *Contents of declaration.* The declaration must:

(1) State that the foreign bank or the company elects to be treated as a financial holding company;

(2) Provide the risk-based and leverage capital ratios of the foreign bank as of the close of the most recent quarter and as of the close of the most recent audited reporting period;

(3) Certify that the foreign bank meets the standards of well capitalized set out in § 225.90(b)(1)(i),(ii) and (iii) or § 225.90(b)(2) as of the date the foreign bank or company files its election; and

(4) Certify that the foreign bank is well managed as defined in § 225.90(c)(1) and (2) as of the date the foreign bank or company files its election.

(c) *Pre-clearance process.* Before filing an election to be treated as a financial holding company, a foreign bank or company may file a request for review of its qualifications to be treated as a financial holding company. The Board will endeavor to make a determination on such requests within 30 days of receipt.

§ 225.92 How does an election by a foreign bank become effective?

(a) *In general.* An election filed by a foreign bank or company under § 225.91 will not be effective unless the Board determines that—

(1) The foreign bank is well capitalized and well managed; and

(2) In the case of a foreign bank that operates a branch in the United States that is insured by the Federal Deposit Insurance Corporation, the branch has received at its most recent examination a rating of ''satisfactory record of meeting community credit needs'' or better under the Community Reinvestment Act.

(b) *Factors used in the Board's determination regarding comparability of capital and management.* In determining whether a foreign bank is well capitalized and well managed in accordance with comparable capital and management standards, the Board will give due regard to national treatment and equality of competitive opportunity. In this regard, the Board may take into account the foreign bank's composition of capital, accounting standards, long-term debt ratings, reliance on government support to meet capital requirements, the extent to which the foreign bank is subject to comprehensive consolidated supervision, and other factors that may affect analysis of capital and management. The Board will consult

with the home country supervisor for the foreign bank as appropriate.

(c) *Timing.* The Board will notify a foreign bank or company of its determination under this section within 30 days of the filing of the election unless the Board determines that it does not have sufficient information on which to base a finding.

§ 225.93 What are the consequences of a foreign bank failing to continue to meet applicable capital and management requirements?

(a) *Notice by the Board.* If a foreign bank or company has made an effective election to be treated as a financial holding company under this subpart and the Board finds that the foreign bank ceases to be well capitalized or well managed, the Board will notify the foreign bank or company in writing that it is not in compliance with the applicable requirement(s) for a financial holding company and identify the areas of noncompliance.

(b) *Notification by a financial holding company required.* Promptly upon becoming aware that it has ceased to be well capitalized or well managed, the foreign bank, or any company that controls such foreign bank, must notify the Board and identify the area of noncompliance.

(c) *Execution of agreement acceptable to the Board*— (1) *Agreement required; time period.* Within 45 days after receiving a notice under paragraph (a) of this section, the foreign bank or company must execute an agreement acceptable to the Board to comply with all applicable capital and management requirements.

(2) *Extension of time for executing agreement.* Upon request by a company, the Board may extend the 45-day period under paragraph (c)(1) of this section if the Board determines that granting additional time is appropriate under the circumstances. A request by a company for additional time must include an explanation of why an extension is necessary.

(3) *Agreement requirements.* An agreement required by paragraph (c)(1) of this section to correct a capital or management deficiency must:

(i) Explain the specific actions that the foreign bank or company will take to correct all areas of noncompliance;

(ii) Provide a schedule within which each action will be taken;

(iii) Provide any other information that the Board may require; and

(iv) Be acceptable to the Board.

(d) *Limitations during period of noncompliance.* Until the Board determines that a company has corrected the conditions described in a notice under paragraph (a) of this section:

(1) The Board may impose any limitations or conditions on the conduct or the U.S. activities of the foreign bank or company or any of its affiliates as the Board finds to be appropriate and consistent with the purposes of the Bank Holding Company Act; and

(2) The company and its affiliates may not engage in any new activity in the United States or acquire control or shares of any company under section 4(k) of the Bank Holding Company Act without prior approval from the Board.

(e) *Consequences of failure to correct conditions within 180 days*—(1) *Termination of offices and divestiture.* If a foreign bank or company does not correct the conditions described in a notice under paragraph (a) of this section within 180 days of receipt of the notice or such additional time as the Board may permit, the Board may order the foreign bank or company to terminate the foreign bank's U.S. branches and agencies and divest any commercial lending companies owned or controlled by the foreign bank or company. Such divestiture must be done in accordance with the terms and conditions established by the Board.

(2) *Alternative method of complying with a divestiture order.* A foreign bank or company may comply with an order issued under paragraph (e)(1) of this section by ceasing to engage (both directly and through any subsidiary) in all activities that are not permissible for a foreign bank to conduct under sections 2(h) and 4(c) of the Bank Holding Company Act. The termination of activities must be done within the time period referred to in paragraph (e)(1) of this section and subject to terms and conditions acceptable to the Board.

(f) *Consultation with other agencies.* In taking any action under this section, the Board will consult with the relevant Federal and state regulatory authorities.

§ 225.94 What are the consequences of an insured branch failing to maintain a satisfactory or better rating under the Community Reinvestment Act?

(a) *Insured branch as an ''insured depository institution.''* A U.S. branch of a foreign bank that is insured by the Federal Deposit Insurance Corporation shall be treated as an ''insured depository institution'' for purposes of § 225.84.

(b) *Applicability.* The provisions of § 225.84, with the modifications contained in this section, shall apply to a foreign bank that operates an insured branch referred to in paragraph (a) of this section, and any company that owns or controls such a foreign bank, that has made an effective election under § 225.92 in the same manner and to the same extent as they apply to a financial holding company.

By order of the Board of Governors of the Federal Reserve System, January 18, 2000.

Jennifer J. Johnson,

Secretary of the Board.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–NM–309–AD; Amendment 39–11518; AD 2000–02–01]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model DC–8 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain McDonnell Douglas Model DC–8 series airplanes, that requires detailed visual and eddy current inspections of the lower wing skin at the 3 outboard fasteners of the stringer 64 end fitting to detect cracks; and corrective actions, if necessary. This amendment is prompted by reports of fatigue cracks found in the lower wing skin initiating from the outboard fasteners of the stringer 64 end fitting. The actions specified by this AD are intended to prevent such fatigue cracking, which could reduce structural integrity and loss of fail-safe capability of the airplane.

DATES: Effective February 29, 2000.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of February 29, 2000.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Aircraft Group, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Technical Publications Business Administration, Dept. C1–L51 (2–60). This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office,

3960 Paramount Boulevard, Lakewood, California; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Greg DiLibero, Aerospace Engineer, Airframe Branch, ANM–120L, FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5231; fax (562) 627–5210.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain McDonnell Douglas Model DC–8 series airplanes was published in the **Federal Register** on October 27, 1999 (64 FR 57806). That action proposed to require detailed visual and eddy current inspections of the lower wing skin at the 3 outboard fasteners of the stringer 64 end fitting to detect cracks; and corrective actions, if necessary.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the single comment received.

The commenter supports the proposed rule.

Conclusion

After careful review of the available data, including the comment noted above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Cost Impact

There are approximately 294 airplanes of the affected design in the worldwide fleet. The FAA estimates that 251 airplanes of U.S. registry will be affected by this AD, that it will take approximately 4 work hours per airplane to accomplish the required inspection, and that the average labor rate is $60 per work hour. Based on these figures, the cost impact of the inspection required by this AD on U.S. operators is estimated to be $60,240, or $240 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted.

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect 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, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

2000–02–01 McDonnell Douglas: Amendment 39–11518. Docket 98-NM–309–AD.

Applicability: Model DC–8 series airplanes, as listed in McDonnell Douglas Service Bulletin DC8–57–100, Revision 01, dated August 26, 1998; certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (b) 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 fatigue cracking of the lower wing skin, which could reduce structural integrity and loss of fail-safe capability of the airplane, accomplish the following:

Note 2: This AD will affect Principal Structural Elements (PSE) 57.08.037, 57.08.038, 57.08.021, and 57.08.022 of the DC–8 Supplemental Inspection Document (SID).

Inspection, Repair, and Modification

(a) Within 24 months after the effective date of this AD, perform detailed visual and eddy current inspections to detect cracks in the lower wing skin fastener holes in the area surrounding 3 outboard fasteners of the stringer 64 end fitting, in accordance with McDonnell Douglas Service Bulletin DC8–57–100, Revision 01, dated August 26, 1998.

Note 3: For the purposes of this AD, a detailed inspection is defined as: ''An intensive visual examination of a specific structural area, system, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at intensity deemed appropriate by the inspector. Inspection aids such as mirror, magnifying lenses, etc., may be used. Surface cleaning and elaborate access procedures may be required.''

(1) If any crack is detected in the skin fastener holes and it is less than 3.1 inches long, prior to further flight, repair in accordance with the service bulletin. Within 14,100 landings after accomplishment of the repair, inspect the lower wing skin to detect cracks, in accordance with a method approved by the Manager, Los Angeles Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate.

(2) If any crack is detected in the skin fastener holes and it is greater than or equal to 3.1 inches long, prior to further flight, repair in accordance with a method approved by the Manager, Los Angeles ACO.

(3) If no crack is found, within 24 months after the effective date of this AD, accomplish the preventative modification (including stress or split sleeve coining the three fastener holes in the skin, and installing new pins), in accordance with the service bulletin. Accomplishment of this action constitutes terminating action for the requirements of this AD.

Note 4: This AD does not terminate the inspection requirements for PSE's 57.08.037, 57.08.038, 57.08.021, and 57.08.022 of the DC–8 SID in accordance with AD 93–01–15, amendment 39–6330.

Alternative Methods of Compliance

(b) 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, Los Angeles ACO. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Los Angeles ACO.

Note 5: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Los Angeles ACO.

Special Flight Permits

(c) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Incorporation by Reference

(d) Except as provided by paragraphs (a)(1) and (a)(2) of this AD, the actions shall be done in accordance with McDonnell Douglas Service Bulletin DC8–57–100, Revision 01, dated August 26, 1998. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Aircraft Group, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Technical Publications Business Administration, Dept. C1–L51 (2–60). Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(e) This amendment becomes effective on February 29, 2000.

Issued in Renton, Washington, on January 13, 2000.

Donald L. Riggin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 00–1368 Filed 1–24–00; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 99–SW–74–AD; Amendment 39–11517; AD 2000–01–19]

RIN 2120–AA64

Airworthiness Directives; Eurocopter Deutschland GMBH Model EC 135 P1 and EC 135 T1 Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) applicable to Eurocopter Deutschland GMBH (ECD) Model EC 135 P1 and EC 135 T1 helicopters. This action requires inspecting main rotor expansion bolt safety wires, bolt heads, and bolt nuts; replacing any unairworthy expansion bolt with a hexagon bolt; and, as necessary, replacing any bolt nut before further flight. This AD also requires replacing each expansion bolt, regardless of condition, no later than January 31, 2000. This amendment is prompted by reports of main rotor blade expansion bolt nuts becoming loose. This condition, if not corrected, could result in severe vibration during flight and subsequent loss of control of the helicopter.

DATES: Effective February 4, 2000.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of February 4, 2000.

Comments for inclusion in the Rules Docket must be received on or before March 27, 2000.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 99–SW–74–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas.

The service information referenced in this AD may be obtained from American Eurocopter Corporation, 2701 Forum Drive, Grand Prairie, Texas 75053–4005, telephone (972) 641–3460, fax (972) 641–3527. This information may be examined at the FAA, Office of the Regional Counsel, Southwest Region, Room 663, Fort Worth, Texas.

FOR FURTHER INFORMATION CONTACT: Richard A. Monschke, Aerospace Engineer, FAA, Rotorcraft Directorate, Rotorcraft Standards Staff, Fort Worth, Texas 76193–0110, telephone (817) 222–5116, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION: Luftfahrt-Bundesamt (LBA), the airworthiness authority for the Federal Republic of Germany, notified the FAA that an unsafe condition may exist on Model EC 135 P1 and EC 135 T1 helicopters. The LBA advises that severe vibrations occurred during a helicopter flight due to an expansion bolt nut becoming loose.

ECD has issued Alert Service Bulletin EC135–62A–005, Revision 1, dated November 16, 1999 (ASB). The ASB specifies inspecting the safety wire, bolt head, and bolt nut for the extent of thread protrusion of the expansion bolt through the end of the nut; replacing the expansion bolt by a hexagon bolt as necessary; and replacing the nut as necessary. In addition, all hexagon bolts must replace all expansion bolts no later than January 31, 2000. The LBA classified this ASB as mandatory and issued AD 1999–264, dated July 2, 1999, to ensure the continued airworthiness of these helicopters in the Federal Republic of Germany.

These helicopter models are manufactured in the Federal Republic of Germany and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the LBA has kept the FAA informed of the situation described above. The FAA has examined the findings of the LBA, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Since an unsafe condition has been identified that is likely to exist or develop on other ECD Model EC 135 P1 and EC 135 T1 helicopters of the same type designs registered in the United States, this AD is being issued to prevent a main rotor blade expansion bolt from becoming loose, severe vibration during flight, and subsequent loss of control of the helicopter. This AD requires, before further flight and at intervals not to exceed 15 hours time-in-service (TIS), inspecting the main rotor blade expansion bolt safety wire, bolt head, and bolt nut for the extent of thread protrusion of the expansion bolt through the end of the nut; replacing any unairworthy expansion bolt with a hexagon bolt; and replacing the nut as necessary. The AD also requires replacing all expansion bolts, part number (P/N) L621M1010 223, with hexagon bolts, P/N L621M1010 222, before further flight after January 31, 2000. The actions are required to be accomplished in accordance with the ASB described previously. The short compliance time involved is required because the previously described critical unsafe condition can adversely affect the structural integrity of the helicopter. Therefore, inspecting the main rotor blade expansion bolt safety wire, bolt head, and bolt nut; replacing any unairworthy expansion bolt with a hexagon bolt; and replacing the nut as necessary is required before further flight and this AD must be issued immediately.

Since a situation exists that requires the immediate adoption of this regulation, it is found that notice and opportunity for prior public comment hereon are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

The FAA estimates that 14 helicopters will be affected by this AD, that it will take approximately 10 work hours to

accomplish inspecting and replacing the parts, and that the average labor rate is $60 per work hour. The ECD ASB states that the replacement parts kit, P/N EC 135–62A–005–2.C, will be provided on request to ECD at no cost. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $8,400.

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this 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 under the caption **ADDRESSES.** All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this AD will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 99–SW–74–AD.'' The postcard will be date stamped and returned to the commenter.

The regulations adopted herein will not have a substantial direct effect 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, it is determined that this proposal does not have federalism implications under Executive Order 13132.

The FAA has determined that this regulation is an emergency regulation that must be issued immediately to correct an unsafe condition in aircraft, and that it is not a ''significant regulatory action'' under Executive Order 12866. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket. A copy of it, if filed, may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

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

AD 2000–01–19 Eurocopter Deutschland GMBH: Amendment 39–11517. Docket No. 99–SW–74–AD.

Applicability: Model EC 135 P1 and EC 135 T1 helicopters, with main rotor blades up to and including serial number 834, installed, certificated in any category.

Note 1: This AD applies to each helicopter identified in the preceding applicability provision, regardless of whether it has been otherwise modified, altered, or repaired in the area subject to the requirements of this AD. For helicopters 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 (d) 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 a main rotor blade expansion bolt nut becoming loose, causing severe vibration during flight, and subsequent loss of control of the helicopter, accomplish the following:

(a) Before further flight and thereafter at intervals not to exceed 15 hours time-in-service, visually inspect the main rotor blade expansion bolt safety wire, bolt head, and bolt nut in accordance with the Accomplishment Instructions, paragraph 3.A., steps (1), (2), (3), (4), and (6) of Eurocopter Deutschland GMBH (ECD) Alert Service Bulletin EC 135–62A–005, Revision 1, dated November 16, 1999 (ASB). If the safety wire is improperly fitted, the bolt head is worn, the expansion bolt thread does not protrude through the end of the nut, the bolt head has metallic abrasions, the nut is loose, or the nut has metallic abrasions, before further flight, replace the expansion bolt, part number (P/N) L621M1010 223, with a hexagon bolt, P/N L621M1010 222, and, as necessary, replace the nut in accordance with paragraph 3.B. of the ASB.

(b) Replace all expansion bolts, P/N L621M1010 223, with hexagon bolts, P/N L621M1010 222, and, as necessary, replace the nuts before flight after January 31, 2000.

(c) Replacing the expansion bolts with hexagon bolts and replacing the nuts, as necessary, constitutes terminating action for the requirements of this AD.

(d) 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, Regulations Group, Rotorcraft Directorate, FAA. Operators shall submit their requests through an FAA Principal Maintenance Inspector, who may concur or comment and then send it to the Manager, Regulations Group.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Regulations Group.

(e) Special flight permits will not be issued.

(f) The inspection and replacement of the main rotor blade bolts shall be done in accordance with the Accomplishment Instructions, paragraph 3.A., Eurocopter Deutschland GMBH Alert Service Bulletin EC 135–62A–005, Revision 1, dated November 16, 1999. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from American Eurocopter Corporation, 2701 Forum Drive, Grand Prairie, Texas 75053–4005, telephone (972) 641–3460, fax (972) 641–3527. Copies may be inspected at the FAA, Office of the Regional Counsel, Southwest Region, Room 663, Fort Worth, Texas; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(g) This amendment becomes effective on February 4, 2000.

Note 3: The subject of this AD is addressed in Luftfahrt-Bundesamt (the Federal Republic of Germany) AD 1999–264, dated July 2, 1999.

Issued in Fort Worth, Texas, on January 11, 2000.

Eric Bries,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 00–1369 Filed 1–24–00; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 99–NM–223–AD; Amendment 39–11520; AD 2000–02–02]

RIN 2120–AA64

Airworthiness Directives; Short Brothers Model SD3–60 SHERPA, SD3–SHERPA, and SD3–30 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to all Short Brothers Model SD3–60 SHERPA and SD3–SHERPA series airplanes, and certain Model SD3–30 series airplanes, that requires replacement of existing oxygen system ''O'' rings with improved wear-resistant ''O'' rings. This amendment is prompted by issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. The actions specified by this AD are intended to prevent the loss of oxygen from the aircraft oxygen system, which could result in an insufficient supply of oxygen being provided to the airplane flight crew and passengers in the event of an emergency.

DATES: Effective February 29, 2000.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of February 29, 2000.

ADDRESSES: The service information referenced in this AD may be obtained from Short Brothers, Airworthiness & Engineering Quality, P.O. Box 241, Airport Road, Belfast BT3 9DZ, Northern Ireland. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Norman B. Martenson, Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2110; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to all Short Brothers Model SD3–60 SHERPA, SD3–SHERPA, and SD3–30 series airplanes was published in the **Federal Register** on October 6, 1999 (64 FR 54237). That action proposed to require replacement of existing oxygen system ''O'' rings with improved wear-resistant ''O'' rings.

Comment Received

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comment received.

One commenter requests that the applicability of the proposed AD be revised to include only those Model SD3–30 series airplanes on which an oxygen system is installed. The commenter states that only one variant of these airplanes was delivered in this configuration, and provides a list of the applicable serial numbers. The commenter notes that these serial numbers are also listed in Shorts Service Bulletin SD330–35–1, dated February 25, 1999, which is referenced as the appropriate source of service information in the proposed AD.

The FAA concurs that the requirements of the AD are applicable only to those airplanes on which an oxygen system is installed. The FAA has limited the applicability for Model SD3–30 series airplanes to those listed in Shorts Service Bulletin SD330–35–1, dated February 25, 1999, and has revised the Summary section of the AD to refer to ''certain,'' rather than ''all,'' Model SD3–30 series airplanes.

Conclusion

After careful review of the available data, including the comment noted above, the FAA has determined that air safety and the public interest require the adoption of the rule with the change described previously. The FAA has determined that this change will neither increase the economic burden on any operator nor increase the scope of the AD.

Cost Impact

The FAA estimates that 62 airplanes of U.S. registry will be affected by this AD, that it will take approximately 50 work hours per airplane to accomplish the required actions, and that the average labor rate is $60 per work hour. Required parts will be provided by the manufacturer at no cost to operators. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $186,000, or $3,000 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted.

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect 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, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

2000–02–02 Short Brothers PLC: Amendment 39–11520. Docket 99–NM–223–AD.

Applicability: All Model SD3–60 SHERPA and SD3–SHERPA series airplanes; and Model SD3–30 series airplanes as listed in Shorts Service Bulletin SD330–35–1, dated February 25, 1999; certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (c) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent the loss of oxygen from the aircraft oxygen system, accomplish the following:

Replacement

(a) Within 24 months after the effective date of this AD, replace oxygen system ''O'' rings, part number (P/N) MS28778, with improved wear-resistant ''O'' rings, P/N MS9068, in accordance with Shorts Service Bulletins SD360 Sherpa–35–2, dated February 25, 1999 (for Model SD3–60 Sherpa series airplanes); SD3 Sherpa–35–3, Revision 1, dated May 5, 1999 (for Model SD3 Sherpa series airplanes); and SD330–35–1, dated February 25, 1999 (for Model SD3–30 series airplanes); as applicable.

Spares

(b) As of the effective date of this AD, no person shall install an oxygen system ''O'' ring, P/N MS28778, on any airplane.

Alternative Methods of Compliance

(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, International Branch, ANM–116, FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, International Branch, ANM–116.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the International Branch, ANM–116.

Special Flight Permits

(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 airplane to a location where the requirements of this AD can be accomplished.

Incorporation by Reference

(e) The actions shall be done in accordance with Shorts Service Bulletin SD3–60 Sherpa-35-2, dated February 25, 1999; Shorts Service Bulletin SD3 Sherpa-35-3, Revision 1, dated May 5, 1999; or Shorts Service Bulletin SD330–35–1, dated February 25, 1999; as applicable. Shorts Service Bulletin SD3 Sherpa-35-3, Revision 1, dated May 5, 1999, contains the following list of effective pages:

Page No.	Revision level shown on page	Date shown on page
1, 4, 9, 10	1	May 5, 1999.
2, 3, 5–8, 11–14	Original	February 25, 1999.

This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Short Brothers, Airworthiness & Engineering Quality, P.O. Box 241, Airport Road, Belfast BT3 9DZ, Northern Ireland. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Note 3: The subject of this AD is addressed in British airworthiness directives 007–02–99 (for Model SD3–60 Sherpa series airplanes), 006–02–99 (for Model SD3 Sherpa series airplanes), and 008–02–99 (for Model SD3–30 series airplanes).

(f) This amendment becomes effective on February 29, 2000.

Issued in Renton, Washington, on January 14, 2000.

Donald L. Riggin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 00–1502 Filed 1–24–00; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–NM–09–AD; Amendment 39–11522; AD 2000–02–04]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A300, A300–600, and A310 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to certain Airbus Model A300 and all Model A300–600 and A310 series airplanes. This action requires performing a pitch trim system test to detect any continuity defect in the autotrim function, and follow-on corrective actions, if necessary. This amendment is prompted by issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. The actions specified in this AD are intended to prevent a sudden change in pitch due to an out-of-trim condition combined with an autopilot disconnect, which could result in reduced controllability of the airplane.

DATES: Effective February 9, 2000.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of February 9, 2000.

Comments for inclusion in the Rules Docket must be received on or before February 24, 2000.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2000–NM–09–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

The service information referenced in this AD may be obtained from Airbus Industrie, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Norman B. Martenson, Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2110; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: The Direction Generale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, recently notified the FAA that an unsafe condition may exist on certain Airbus Model A300 and all Model A300–600 and A310 series airplanes. The DGAC advises that an Airbus Model A300–600 series airplane flew with autopilot 1 (AP 1), pitch trim 1 (PT 1), and pitch trim 2 (PT 2) engaged. When the flight crew engaged the vertical speed mode and selected a new vertical speed in order to change the flight level, the vertical speed of the airplane changed but did not remain at the speed that had been selected by the flight crew.

After landing, the maintenance team performed a test with the autopilot engaged in vertical speed mode. When the team selected a vertical speed, the flight director pitch bars and control columns moved, but the pitch trim wheels did not move. An open circuit was found in the connection between flight control computer 1 (FCC 1) and flight augmentation computer 1 (FAC 1). That connection is necessary to generate the autotrim function.

With the autopilot engaged in command (CMD), the FCC command (COM) and monitor (MON) lanes send signals to the FAC in order to ensure the autotrim function. When the FAC does not receive the FCC COM signal or the FCC MON signal, the autotrim function is inhibited, which results in an out-of-trim condition. If an autopilot disconnect occurs when the airplane is in an out-of-trim condition, this condition, if not corrected, could result in a sudden change in pitch and consequent reduced controllability of the airplane.

Explanation of Relevant Service Information

Airbus has issued All Operators Telexes (AOT) A300–22A0115 (for Model A300 series airplanes), A300–600–22A6042 (for Model A300–600 series airplanes), and A310–22A2053 (for Model A310 series airplanes), all dated December 23, 1999, which describe procedures for a pitch trim system test to detect any continuity defect, and follow-on corrective actions, if necessary. Corrective actions include repairing any discrepant wiring found in the pitch trim system. (The AOT's reference Aircraft Schematic Manual 22–27–00 as an additional source of service information for accomplishment of the repair.) The DGAC has classified these AOT's as mandatory and issued French airworthiness directive T2000–007–301(B), dated January 4, 2000, in order to assure the continued airworthiness of these airplanes in France.

FAA's Conclusions

These airplane models are manufactured in France and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. The FAA has examined the findings of the DGAC, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, this AD is being issued to prevent a sudden change in pitch due to an out-of-trim condition combined with an autopilot disconnect, which could result in reduced controllability of the airplane. This AD requires performing a pitch trim system test to detect any continuity defect in the autotrim function, and follow-on corrective actions, if necessary. The actions are required to be accomplished in accordance with the AOT's described previously.

Interim Action

This is considered to be interim action. The manufacturer has advised that it currently is developing additional actions that will positively address the unsafe condition addressed by this AD. Once these actions are developed, approved, and available, the FAA may consider additional rulemaking.

Determination of Rule's Effective Date

Since a situation exists that requires the immediate adoption of this regulation, it is found that notice and opportunity for prior public comment hereon are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire.

Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES**. All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this AD will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 2000–NM–09–AD.'' The postcard will be date stamped and returned to the commenter.

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect 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, it is determined that this final rule does not have federalism implications under Executive Order 13132.

The FAA has determined that this regulation is an emergency regulation that must be issued immediately to correct an unsafe condition in aircraft, and that it is not a ''significant regulatory action'' under Executive Order 12866. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket. A copy of it, if filed, may be obtained from the

Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

2000–02–04 Airbus Industrie: Amendment 39–11522. Docket 2000–NM–09-AD.

Applicability: Airbus Model A300 series airplanes, having manufacturer's serial number 159, 168, 188, 202, 205, 213, 299, or 302; and all Model A300–600 and A310 series airplanes; certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (c) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent a sudden change in pitch due to an out-of-trim condition combined with an autopilot disconnect, which could result in reduced controllability of the airplane, accomplish the following:

Pitch Trim System Test

(a) Within 20 days after the effective date of this AD: Perform a pitch trim system test to detect any continuity defect in the autotrim function, in accordance with All Operators Telex (AOT) A300–22A0115 (for Model A300 series airplanes), A300–600–22A6042 (for Model A300–600 series airplanes), or A310–22A2053 (for Model A310 series airplanes), all dated December 23, 1999, as applicable.

(1) If no continuity defect is found, no further action is required by this paragraph.

Corrective Actions

(2) If any continuity defect is found, prior to further flight, accomplish the actions required by paragraphs (a)(2)(i) and (a)(2)(ii) of this AD, in accordance with the applicable AOT.

(i) Repair any discrepant wiring found in the pitch trim system.

(ii) Repeat the initial pitch trim system test required by paragraph (a) of this AD.

Note 2: All Operators Telexes (AOT) A300–22A0115, A300–600–22A6042, and A310–22A2053, all dated December 23, 1999, reference Aircraft Schematic Manual (ASM) 22–27–00 as an additional source of service information to accomplish the repair.

Reporting Requirement

(b) Within 10 days after accomplishing the pitch trim system test required by this AD, or within 10 days after the effective date of this AD, whichever occurs later: Submit a report of the inspection results (both positive and negative findings) to Airbus Customer Services, Engineering and Technical Support, Attention Mr. Vincent Frayssinet, AI/SE–E43; phone number 33 (0)5.62.11.04.96; Sita Code TLSBQ7X.

Alternative Methods of Compliance

(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, International Branch, ANM–116, FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, International Branch, ANM–116.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the International Branch, ANM–116.

Special Flight Permits

(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 airplane to a location where the requirements of this AD can be accomplished.

Incorporation by Reference

(e) The actions shall be done in accordance with Airbus All Operators Telex A300–22A0115, dated December 23, 1999; Airbus All Operators Telex A300–600–22A6042, dated December 23, 1999; or Airbus All Operators Telex A310–22A2053, dated December 23, 1999; as applicable. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Airbus Industrie, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Note 4: The subject of this AD is addressed in French airworthiness directive T2000–007–301(B), dated January 4, 2000.

(f) This amendment becomes effective on February 9, 2000.

Issued in Renton, Washington, on January 18, 2000.

Donald L. Riggin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 00–1595 Filed 1–24–00; 8:45 am]

BILLING CODE 4913–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–NM–351–AD; Amendment 39–11521; AD 2000–02–03]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 737–300, –400, and –500 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Boeing Model 737–300, –400 and –500 series airplanes, that requires replacement, with new parts, of the existing actuators or the rod ends on the existing actuators at wing leading edge slat positions 1, 2, 5, and 6. This amendment is prompted by reports indicating that the rod ends on several leading edge slat actuators have fractured. The actions specified by this AD are intended to prevent fatigue cracking of the rod ends of the leading edge slat actuators, which could result in uncommanded deployment of the wing leading edge slat and consequent reduced controllability of the airplane.

DATES: Effective February 29, 2000.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of February 29, 2000.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Robert C. Jones, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Transport Airplane Directorate, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98055–4056; telephone (425) 227–1118; fax (425) 227–1181.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to all Boeing Model 737–300, –400 and –500 series airplanes was published in the **Federal Register** on August 19, 1999 (64 FR 45211). That action proposed to require replacement, with new parts, of the existing actuators or the rod ends on the existing actuators at wing leading edge slat positions 1, 2, 5, and 6.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

Support for the Proposal

One commenter supports the proposed rule.

Request To Reference New Revision of Alert Service Bulletin

One commenter requests that the FAA revise the proposed rule to reference Boeing Alert Service Bulletin 737–27A1211, Revision 1, dated December 9, 1999, as an appropriate source of service information for accomplishment of the actions specified by the proposal. The proposed AD referenced the original issue of the alert service bulletin, dated November 19, 1998. The commenter states that referencing the revised alert service bulletin will minimize the amount of rework and parts necessary for airplanes that have received a certain other modification.

The FAA concurs with the commenter's request. The FAA has reviewed and approved Boeing Alert Service Bulletin 737–27A1211, Revision 1. The instructions contained in Revision 1 of the alert service bulletin are substantially similar to those in the original issue of the alert service bulletin, but Revision 1 adds references to new part numbers and kits that will provide new alternatives for compliance with this AD. In addition, as the commenter states, Revision 1 of the alert service bulletin provides alternative procedures for accomplishing the replacement on airplanes that have received a certain other modification. Therefore, paragraph (a) of this final rule has been revised to state that replacement of existing actuators or rod ends with new parts may be accomplished in accordance with either the original issue or Revision 1 of the alert service bulletin.

Explanation of Additional Change

The **SUMMARY** section of the preamble of the proposed rule incorrectly states that the proposed AD would be applicable to *all* Boeing Model 737–300, –400, and –500 series airplanes. However, the applicability statement of the proposal correctly states that the proposed AD would be applicable to Boeing Model 737–300, –400, and –500 series airplanes having line numbers 1001 through 3063 inclusive. Accordingly, the **SUMMARY** section of this final rule has been corrected to state that this AD applies to *certain* Boeing Model 737–300, –400 and –500 series airplanes.

Conclusion

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule with the changes previously described. The FAA has determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

Cost Impact

There are approximately 1,897 Model 737–300, –400, and –500 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 720 airplanes of U.S. registry will be affected by this AD.

Replacement of the leading edge slat actuator with an actuator that has a new rod end is one option for compliance with this AD. Replacement of the actuators on slat positions 1, 2, 5, and 6 will take approximately 3 hours per airplane to accomplish, at an average labor rate of $60 per work hour. Required parts will cost approximately $32,252 per airplane. Based on these figures, the cost impact of the installation of actuators with new rod ends, as provided as one option by this AD, on U.S. operators is estimated to be $32,432 per airplane.

In lieu of installation of an actuator with a new rod end, this AD provides an option for replacement of the rod ends on the existing actuators. This action will take approximately 4 work hours per airplane, at an average labor rate of $60 per work hour. Required parts will cost between approximately $5,928 and $21,544 per airplane. Based on these figures, the cost impact of the replacement of the rod ends, as provided as one option by this AD, on U.S. operators is estimated to be between $6,168 and $21,784 per airplane.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted.

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect 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, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

2000–02–03 Boeing: Amendment 39–11521. Docket 98–NM–351–AD.

Applicability: Model 737–300, –400, and –500 series airplanes; line numbers 1001

through 3063 inclusive; certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (c) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent fatigue cracking of the rod ends on the leading edge slat actuators, which could result in uncommanded deployment of the wing leading edge slat and consequent reduced controllability of the airplane, accomplish the following:

Replacement

(a) Within 24 months after the effective date of this AD: Replace the leading edge slat actuator with an actuator that has a new rod end, or replace the rod end on the existing slat actuator with a new rod end, at slat positions 1, 2, 5, and 6; in accordance with the Accomplishment Instructions in Boeing Alert Service Bulletin 737–27A1211, dated November 19, 1998, or Revision 1, dated December 9, 1999.

Spares

(b) As of the effective date of this AD, no person shall install any part having a part number identified in the ''Existing Part Number'' column of Section 2.E. of Boeing Alert Service Bulletin 737–27A1211, dated November 19, 1998, on any airplane.

Alternative Methods of Compliance

(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, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

Special Flight Permits

(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 airplane to a location where the requirements of this AD can be accomplished.

Incorporation by Reference

(e) The actions shall be done in accordance with Boeing Alert Service Bulletin 737–27A1211, dated November 19, 1998; or Boeing Alert Service Bulletin 737–27A1211, Revision 1, dated December 9, 1999. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(f) This amendment becomes effective on February 29, 2000.

Issued in Renton, Washington, on January 18, 2000.

Donald L. Riggin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 00–1596 Filed 1–24–00; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Parts 162, 171 and 191

[T.D. 00–5]

RIN 1515–AC21

Penalties for False Drawback Claims

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule, with some changes, proposed amendments to the Customs Regulations that implement section 622 of the Customs Modernization provisions of the North American Free Trade Agreement Implementation Act concerning penalties for false drawback claims. The document sets forth: procedures that apply when false drawback claims are filed and penalties are thereby incurred; mitigation guidelines that Customs would follow in arriving at a just and reasonable assessment and disposition of liabilities when false drawback claims are filed and penalties are incurred; and more specific grounds and procedures for removing a participant from the drawback compliance program.

EFFECTIVE DATE: February 24, 2000.

FOR FURTHER INFORMATION CONTACT: Wende Schuster, Penalties Branch, Office of Regulations and Rulings, 202–927–1537.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, the President signed into law the North American Free Trade Agreement Implementation Act (Public Law 103–182, 107 Stat. 2057). Title VI of that Act contained provisions pertaining to Customs Modernization and thus is commonly referred to as the Customs Modernization Act or ''Mod Act.'' Paragraph (a) of section 622 of the Mod Act amended the Tariff Act of 1930, as amended, by adding section 593A, which prohibits the filing of false (fraudulent or negligent) drawback claims and prescribes the actions that Customs may take, including the assessment of monetary penalties, if such claims are filed. New section 593A was codified as section 1593a of Title 19 of the United States Code (19 U.S.C. 1593a, hereinafter ''the statute'').

As in the case of penalties under section 592 of the Tariff Act of 1930, as amended (19 U.S.C. 1592), specific procedures and other requirements are set forth in the statute for prepenalty notices and penalty claims, the former not being required by the statute if the penalty is $1,000 or less, and provision is made for limited penalty assessment if there is a prior disclosure. The statute further provides for the applicability of section 618 of the Tariff Act of 1930, as amended (19 U.S.C. 1618), which authorizes the administrative remission or mitigation of penalties. Written decisions, setting forth a final determination and findings of fact and conclusions of law upon which that determination was based, are also mandated by the statute.

The statute provides for the assessment of monetary penalties in amounts not to exceed a specific percentage of the actual or potential loss of revenue, with the applicable percentage depending on the level of culpability, whether there have been prior violations involving the same issue, and whether the violator is a participant in the Customs drawback compliance program. (The statute provides for the establishment of a drawback compliance program; regulatory provisions relating to the operation of that program were adopted as part of the amendments to the Customs Regulations regarding drawback published in the **Federal Register** as T.D. 98–16 on March 5, 1998, 63 FR 10970.) The statute also provides for the issuance of a notice of a violation (warning letter) in lieu of a monetary penalty in the case of a drawback compliance program participant who commits a first (that is, nonrepetitive) negligent violation.

On September 29, 1998, Customs published a Notice of Proposed Rulemaking in the **Federal Register** (63 FR 51868) setting forth proposed

amendments to the Customs Regulations to implement the statutory changes made by section 622(a) of the Mod Act. The proposed amendments involved changes to the penalty procedure provisions within Parts 162 and 171 of the Customs Regulations (19 CFR Parts 162 and 171), the addition of a new Appendix D to Part 171 setting forth guidelines for the imposition and mitigation of monetary penalties incurred under the statute, and changes regarding the grounds and procedures for revoking a certification for participation in the drawback compliance program contained in § 191.194 of the Customs Regulations (19 CFR 191.194) which was originally adopted in T.D. 98–16 mentioned above. The Notice of Proposed Rulemaking also stated that, in accordance with paragraph (b) of section 622 of the Mod Act (which provides that the provisions of the statute apply only to drawback claims filed on and after nationwide implementation by Customs of an automated drawback selectivity program and which mandates the publication in the *Customs Bulletin* of the effective date of that selectivity program), the proposed regulatory amendments, if adopted as a final rule, will not be effective until Customs implements an automated drawback selectivity program. Finally, the Notice of Proposed Rulemaking made provision for the submission of public comments on the proposed regulatory changes for consideration before adoption of those changes as a final rule. The prescribed public comment period closed on November 30, 1998.

Discussion of Comments

Seven commenters responded to the solicitation of comments contained in the Notice of Proposed Rulemaking. The comments submitted are summarized and responded to below.

A. Part 162

Section 162.71—Definitions

Comment: Three commenters expressed concern that the meaning of ''revenue,'' as used in the proposed texts, was not sufficiently clear, and they suggested that it should have the meaning of ''drawback'' as defined in § 191.2(i) of the Customs Regulations (19 CFR 191.2(i)). Two of these commenters specifically suggested as a solution the inclusion of a reference to § 191.2(i) in the definition of ''loss of revenue'' in the introductory text of proposed § 162.71(b), in the definition of ''actual loss of revenue'' in proposed § 162.71(b)(1) and in the definition of ''potential loss of revenue'' in proposed § 162.71(b)(2), each of which defines the term at issue with reference to ''the amount of drawback that is claimed * * *.''

Customs response: Customs agrees that the meaning of ''revenue'' should be clarified in the regulatory texts with reference to the meaning of ''drawback'' contained in § 191.2(i) within the drawback regulations. Customs also agrees that the best approach would be to insert a cross-reference to § 191.2(i) after the word ''drawback'' in the definitions of ''loss of revenue'' and ''actual loss of revenue'' and ''potential loss of revenue'' within proposed § 162.71(b) which, as set forth below, has been modified accordingly.

On a related matter, Customs notes that the current § 162.74 prior disclosure provisions adopted in T.D. 98–49 (which was published in the **Federal Register** at 63 FR 29126 on May 28, 1998, and corrected at 63 FR 35798 on July 1, 1998) included appropriate references to 19 U.S.C. 1593a but inadvertently did not include corresponding references to the tender of actual loss of ''revenue'' in paragraphs (a) and (c). Section 162.74 is amended below in order to correct this oversight.

Section 162.73a(b)(2) and Subsection (G)(2) of Appendix D to Part 171—Notice of Violation and Response Thereto

Comment: Four comments were received on proposed § 162.73a(b)(2) and subsection (G)(2) of Appendix D to Part 171, which concern alternatives to penalties for participants in the drawback compliance program. Under these provisions, when a participant commits a violation of section 593A, in the absence of fraud or a repeat violation and in lieu of a monetary penalty, Customs will issue a written notice of the violation (a warning letter). These commenters noted that there is no provision in either case for a person who receives such a warning letter to contest, challenge, or appeal it. The commenters proposed the inclusion of language in § 162.73a(b)(2) and in subsection (G)(2) of Appendix D to Part 171 to allow a person who receives a warning letter to have the opportunity to formally appeal that action within 30 days from issuance. Furthermore, these commenters suggested that the program participant should be entitled to challenge any denial of an appeal with Customs Headquarters within 30 days after the issuance of the applicable drawback office's appeal decision.

Customs response: Pursuant to § 162.73a(b)(2)(ii), within 30 days from the date of mailing of the warning letter under § 162.73a(b)(1)(ii)(A), the person concerned must notify Customs in writing of the steps that have been taken to prevent a recurrence of the violation. In consideration of the fact that the issuance of a warning letter has legal consequences in that it has an effect on the liability for a penalty for a subsequent repetitive violation, Customs agrees with the suggestion of these commenters that during the prescribed 30-day period the alleged violator should have the opportunity to refute the allegations made in the warning letter if he believes that no violation took place (in which case the need to take steps to prevent a recurrence would not exist). Accordingly, § 162.73a(b)(2)(ii) has been modified as set forth below to include a procedure for challenging a warning letter and to provide that if, after considering any arguments made in response to the warning letter, Customs determines that no violation occurred, Customs will in writing notify the person of that determination and rescind the warning letter; however, if Customs affirms the warning letter, the requirement to provide notice of the steps taken to prevent a recurrence would remain applicable and the person would have a minimum of 15 days in which to comply with that requirement. A conforming change has been included in corresponding subsection (G)(2) of Appendix D to Part 171 as set forth below.

While the alleged violator is specifically required under the statute to respond to the warning letter (see 19 U.S.C. 1593a(f)(3)), there is no statutory provision for an additional appeal mechanism at this stage in the penalty process. Customs believes that it would create an unacceptable administrative burden to provide for a further appeal procedure to Headquarters as suggested by these commenters.

Section 162.77a(c)—Exceptions to Prepenalty Notice

Comment: One comment was received on proposed § 162.77a(c) which provides that a prepenalty notice will not be issued for a violation of 19 U.S.C. 1593a if the amount of the proposed monetary penalty is $1,000 or less. The commenter questioned whether a person will have the right to make an oral and written presentation if the amount of the proposed monetary penalty is $1,000 or less and, if so, whether the petitioner will have a 30-day deadline in which to file a petition for remission or mitigation.

Customs response: Even though Customs under the statute may only proceed directly with the issuance of a

penalty claim to the alleged violator (rather than first issue a prepenalty notice) when the penalty claim is $1,000 or less, the alleged violator will be afforded a reasonable opportunity under the provisions of 19 U.S.C. 1618 to make representations, both oral and written, seeking remission or mitigation of the monetary penalty. Unless additional time has been authorized by Customs, under Part 171 the alleged violator will have 60 days from the date of mailing of the notice of penalty incurred in which to file a petition. In addition, under Part 171 the person named in the penalty notice may also request an opportunity to make an oral presentation seeking relief.

B. Appendix D to Part 171

Section (A)—Violations of Section 593A

Comment: Two commenters requested definitions of the terms ''clerical error'' and ''mistake of fact'' as used in proposed Appendix D to Part 171.

Customs response: The terms in question are already defined for purposes of new Appendix D to Part 171. It is noted in this regard that the definitions contained in § 162.71 apply for purposes of Subpart G of Part 162 and include a definition of ''clerical error'' in paragraph (c) (redesignated in this document as paragraph (e)) and a definition of ''mistake of fact'' in paragraph (d) (redesignated in this document as paragraph (f)). Therefore, since new Appendix D to Part 171 relates specifically to the imposition and mitigation of the penalties provided for in new § 162.73a (which, as adopted in this document, will fall within Subpart G of Part 162), those definitions also will apply for purposes of those Appendix D provisions.

Section (D), Paragraph (3)(e)—Exclusivity

Comment: One comment was received concerning proposed paragraph (3)(e) of section D which states that penalty claims under section D shall be the exclusive civil remedy for any drawback-related violation of section 593A. The commenter was of the opinion that Part 162 or Part 171 of the regulations should be revised to include the language of this provision.

Customs response: The language in question reflects the terms of the statute (19 U.S.C. 1593a(c)(5)) and was included in the Appendix for information purposes. Customs does not believe that it is necessary to repeat this statutory language in the Part 162 or Part 171 regulations.

Section (F), Paragraph (4)(a)—Contributory Customs Error

Comment: Two comments were received on proposed paragraph(4)(a) of section F which sets forth ''contributory Customs error'' as a mitigating factor. This provision states, in pertinent part, that if it is determined that the Customs error was the sole cause of the violation, the proposed or assessed penalty is to be canceled. One commenter stated that the text should include examples of Customs errors as the sole cause, the other commenter requested clarification on whether Customs will make the determination, and both commenters were of the opinion that the alleged violator should have an opportunity to appeal a determination that a Customs error was not the sole cause of the violation.

Customs response: One of the factors which may be considered by Customs in mitigation of a proposed or assessed penalty claim or final penalty amount is contributory Customs error. This factor includes misleading or erroneous advice given by a Customs official in writing to the alleged violator, but this factor may be applied in such a case only if it appears that the alleged violator reasonably relied upon the written information and the alleged violator fully and accurately informed Customs of all relevant facts. It is the responsibility of the particular Customs official to determine whether an error made by Customs was the sole cause of the violation. If a party is not satisfied with a decision made by Customs with regard to this factor, a supplemental petition may be filed with the Fines, Penalties, and Forfeitures Officer under Part 171. Finally, Customs does not believe that examples of Customs errors that are the sole cause of a violation should be included in the Appendix text because each case is unique and must be decided on its particular facts.

Section (F), Paragraph (4)(f)—Customs Knowledge

Comment: Two comments were received on proposed paragraph (4)(f) of section (F) which sets forth, as a mitigating factor in non-fraud cases, the fact that Customs had actual knowledge of a violation and failed, without justification, to inform the violator so that it could have taken earlier remedial action. One commenter requested clarification on whether the alleged violator will be expected to demonstrate that Customs did not act and, if so, how the violator can prove that fact. The other commenter stated that specific guidelines should be provided regarding the type of evidence that must be produced to establish that Customs knew of the violation but never informed the violator.

Customs response: An alleged violator is responsible for proving by a preponderance of the evidence that Customs had actual knowledge of a violation and failed, without justification, to inform the violator so that it could have taken earlier remedial action. However, if Customs can show that it was justified in withholding the information, then this factor will not be considered in mitigation of a proposed or assessed penalty. Because each case must be decided on its own unique facts, Customs does not believe that specific examples of types of evidence should be included here.

Section (G), Paragraph (1)—Drawback Compliance Program Participants In General

Comment: One comment was received concerning the separate treatment afforded drawback compliance program participants under section (G). This commenter argued that participants in the drawback compliance program should be subject to the same penalties (if not even more severe penalties) than persons who are not participants in the drawback compliance program. The commenter argued that exporters that are approved for participation in the drawback compliance program should be held to a higher standard of compliance with the drawback regulations than the infrequent exporter.

Customs response: The distinction between participants in the drawback compliance program and nonparticipants for purposes of assessing penalties for false drawback claims must remain in the guidelines because it reflects the terms of the statute (19 U.S.C. 1593a(f)) which specifically provides both for alternatives to penalties and for a lower penalty level when a party has been certified as a participant in the drawback compliance program.

Comment: Four commenters expressed concern that the subject of remission or mitigation of a monetary penalty incurred under 19 U.S.C. 1593a is not found in the proposed regulations themselves but rather appears only in proposed Appendix D to Part 171. The commenters were of the opinion that the status of the Appendix is more closely analogous to ''guidelines'' and does not rise to the level of a regulation. Three of these commenters specifically suggested that the first sentence of Appendix D to Part 171, or a slight variation thereof, should be added to the regulatory text.

Customs response: The commenters are correct that a distinction can be made between the guidelines in Appendix D to Part 171 and the regulatory texts in Parts 162 and 171, because the guidelines serve primarily to inform the general public regarding how Customs officers will carry out their statutory functions rather than to directly control the actions of the general public. However, Customs does not agree that the general language concerning remission or mitigation of a penalty under 19 U.S.C. 1593a at the beginning of Appendix D should be added to the regulatory text. Customs has included similar language involving remission or mitigation of a penalty in Appendix A to Part 171 (guidelines for disposition of violations of 19 U.S.C. 1497) and in Appendix B to Part 171 (revised penalty guidelines under 19 U.S.C. 1592). Customs believes that it is unnecessary to repeat in the regulatory text that which is already clearly and adequately stated in the guidelines and in the applicable statute.

C. Part 191

Section 191.194(e)(1)(ii)—Certification Removal for Noncompliance

Comment: One comment was received on proposed § 191.194(e)(1)(ii) which sets forth, as a ground for removal of a participant from the drawback compliance program, the failure to remain in compliance with the Customs laws and regulations. The commenter requested clarification regarding who within Customs is empowered to remove a program participant from the drawback compliance program. In addition, the commenter asked whether a party will be removed from the drawback compliance program if the party notifies Customs of a violation through a prior disclosure.

Customs response: The initial decision to remove a program participant from the drawback compliance program will be made by the appropriate Customs drawback office, and that decision may be appealed to the Office of Trade Programs at Headquarters. The eight drawback offices are located in Boston, MA; New York, N.Y.; Miami, FL; New Orleans, LA; Houston, TX; Long Beach, CA; Chicago, IL; and San Francisco, CA. It is the position of Customs that a party will not automatically be removed from the drawback compliance program for disclosing the circumstances of a violation by means of a prior disclosure. However, it always remains within the discretion of Customs to determine whether the circumstances of a particular violation warrant removal of a party from the drawback compliance program.

Section 191.194(e)(1)(iv)—Certification Removal for Felony or Misdemeanor

Comment: One comment was received on proposed § 191.194(e)(1)(iv) concerning removal of a participant from the drawback compliance program due to conviction of any felony or where the program participant has committed acts which would constitute a misdemeanor or felony involving theft, smuggling, or any theft-connected crime. The commenter requested that the regulation state which Customs official is empowered to make a determination that a program participant should be removed under this provision. It was the opinion of the commenter that the language of this provision is vague and does not afford the participant any due process. The commenter suggested either deleting the language or changing the language of this provision to read as follows: ''The program participant is convicted of any felony or convicted of any misdemeanor involving theft, smuggling, or any theft-connected crime.''

Customs response: As indicated in the previous comment response, the appropriate drawback office is initially responsible for determining whether a participant should be removed from the drawback compliance program, but Customs does not believe that it is necessary to specify this in the regulatory text. Customs does not believe that the language of this provision should be changed as specifically proposed by this commenter. To require that a participant be convicted of a felony or any misdemeanor involving theft, smuggling, or any theft-connected crime before removal from the drawback compliance program would be inconsistent with sound administrative practice, particularly in cases where there is an impact on the revenue.

Section 191.194(e)(3)—Effect of Removal

Comment: With regard to proposed § 191.194(e)(3) which concerns the effect of removal of certification for participation in the drawback compliance program, one commenter asked whether removal from the drawback compliance program automatically revokes the participant's other drawback privileges (that is, accelerated payment and waiver of prior notice).

Customs response: Pursuant to § 191.195 of the Customs Regulations (19 CFR 191.195), a party may make a combined application for certification in the drawback compliance program and for waiver of prior notice of intent to export and/or approval of accelerated payment of drawback. The basic purpose behind applying for certification for participation in the drawback compliance program is fundamentally different from the purpose served by applying for waiver of prior notice of intent to export and/or approval of accelerated payment of drawback. Accordingly, a party who is removed from the drawback compliance program will not automatically also lose a waiver of prior notice or accelerated payment of drawback privilege. However, the factual basis for removal from the drawback compliance program could also form the basis for a separate action to revoke the waiver of prior notice or accelerated payment privilege.

Comment: One comment was received on that portion of proposed § 191.194(e)(3) that provides that the removal of certification shall be effective immediately in cases of willfulness on the part of the program participant or when required by public health, interest, or safety. The commenter pointed out that there is no definition of ''willfulness'' in Part 191 nor any indication of what party will make that determination. The commenter also suggested removing the language in this provision which refers to the ''public health, interest, or safety.''

Customs response: Customs believes that the language in question should remain unchanged. As stated in the background portion of the Notice of Proposed Rulemaking, the language in question was taken from the provisions of the Administrative Procedure Act (see 5 U.S.C. 558(c)). Customs believes that it would be inappropriate to attempt to define in these regulations terms that are of such general application and not limited to drawback penalty concepts. Customs is responsible for determining whether the particular behavior of a program participant rises to the level of willfulness and whether this behavior warrants removal from the program.

D. Miscellaneous Comments

Comment: One commenter noted that there is no reference to a time limitation for the issuance of penalties or the recovery of the loss of revenue in the proposed regulations. The commenter also suggested that the proposed regulations be amended to include the context of 19 U.S.C. 1621 which covers the time period in which Customs may commence a suit or action in the case of an alleged violation under 19 U.S.C. 1592 or 1593a.

Customs response: Under 19 U.S.C. 1621, Customs is forever barred from recovering a penalty under 19 U.S.C. 1593a unless Customs commences an appropriate suit or action within five years from the date of discovery of the alleged violation if the violation resulted from fraud or within five years from the date the alleged violation was committed if the violation resulted from negligence. Customs does not believe that the regulations should be amended to include the provisions of 19 U.S.C. 1621 because that statute references 19 U.S.C. 1593a and is clear and unambiguous. There is no reason to repeat those statute of limitations provisions in the regulations.

Comment: Three commenters noted that in the Background section of the Notice of Proposed Rulemaking there was a reference to an ''automated drawback selectivity program.'' The commenters stated that there are differences of opinion between the trade and Customs concerning exactly what selectivity is and how it is to be determined and implemented. For purposes of uniformity and certainty of application, the commenters requested that the term ''Drawback Selectivity Program'' be addressed in the regulations.

Customs response: The issue of drawback selectivity as it relates to penalties for false drawback claims was addressed in T.D. 98–88 which was published in the *Customs Bulletin* on November 25, 1998 (32 Cust. Bull. 47), pursuant to section 622(b) of the Mod Act as discussed above. In T.D. 98–88, Customs gave notice to the public that on August 29, 1998, Customs implemented, on a nationwide operational basis, an automated drawback selectivity program. This criteria-based selectivity program automates the previously manual, labor-intensive processing of drawback claims. The automated drawback selectivity program is significant because it will result in more efficient processing of drawback data and will move Customs one step closer to paperless processing of drawback claims. As a consequence of implementation of the drawback selectivity program and publication of T.D. 98–88, any person who files a false drawback claim on and after November 25, 1998, will become potentially liable for a monetary penalty under 19 U.S.C. 1593a. However, T.D. 98–88 further stated that, until such time as final regulations implementing the provisions of 19 U.S.C. 1593a are in effect, Customs does not intend to issue a penalty notice or take any other action authorized by 19 U.S.C. 1593a. With regard to the question of how selectivity will be implemented by Customs, the criteria used in the cargo selectivity process is based upon internal Customs enforcement policy and therefore is not an appropriate subject for this document.

Comment: One commenter requested advice regarding the effective date of the final rule.

Customs response: The regulatory changes adopted in this final rule are effective on the date set forth under the Effective Date caption in the preamble of this document, and that date is the date on which Customs will commence actions authorized by 19 U.S.C. 1593a (see the discussion of T.D. 98–88 in the preceding comment response).

Comment: One commenter requested examples of what would be considered a negligent violation and a fraudulent violation for purposes of assessing a penalty under 19 U.S.C. 1593a.

Customs response: In general, fraudulent and negligent violations are determined on a case-by-case basis depending upon the facts of the particular case. An example of a negligent violation for purposes of 19 U.S.C. 1593a is as follows: An importer makes a claim for drawback under 19 U.S.C. 1313(j)(2) (substitution unused merchandise drawback) for concentrated orange juice. The importer makes no effort to determine if the concentrated orange juice which is exported is commercially interchangeable with the concentrated orange juice that was imported as required by law and, in fact, the exported and imported juices are not commercially interchangeable.

An example of a fraudulent violation for purposes of 19 U.S.C. 1593a is as follows: A person makes a false drawback claim asserting that certain drawback eligible merchandise was exported from the United States. In connection with this claim, the claimant submits fabricated bills of lading or other documents of exportation. In actuality, the claimant knows that the merchandise was never exported from the United States.

Comment: With reference to the use of the term ''a person'' in the proposed drawback penalty regulations, one commenter requested clarification on when that term refers to a drawback claimant, a drawback broker or a drawback consultant, and when the term refers to a combination of these three persons.

Customs response: For purposes of drawback, a ''person'' or ''party'' is considered to include any person or company who is involved in providing data on which a drawback claim may be based or who is the drawback claimant. This would include importers, intermediary parties, drawback claimants, and agents such as drawback brokers and drawback consultants. Therefore, any party that provides information or documentation to one who intends to file a drawback claim may be subject to the drawback penalty provisions.

Comment: One commenter believed that a minimum penalty amount of $100 should be established for all willful and negligent violations under 19 U.S.C. 1593a in order for the amount of the penalty to have any real deterrent effect and in order to be more cost-effective.

Customs response: Rather than setting forth specific penalty amounts, the drawback statute provides for the assessment of monetary penalties in amounts not to exceed a specific percentage of the actual or potential loss of revenue, with the applicable percentage depending on the level of culpability, whether there have been prior violations involving the same issue, and whether the violator is a participant in the drawback compliance program. The guidelines for mitigation of a drawback penalty are general in nature and are intended to give Customs discretion in granting relief from a penalty below the statutory maximum amount in those cases where Customs deems that it is appropriate. Those guidelines were modeled on the 19 U.S.C. 1592 mitigation guidelines, and since the 19 U.S.C. 1592 mitigation guidelines do not provide for a minimum penalty amount for fraud, gross negligence or negligence cases, a minimum penalty amount was not included in the mitigation guidelines for 19 U.S.C. 1593a purposes. Customs would prefer to be able to automate non-serious penalties (penalties less than $1,000) by simply issuing a bill to the violator, so that the imposition and collection of a small penalty amount would be more cost-effective, but Customs does not have authority to take such action under the current statutory framework.

Conclusion

Accordingly, based on the comments received and the analysis of those comments as set forth above, and after further review of this matter, Customs believes that the proposed regulatory amendments should be adopted as a final rule with certain changes thereto as discussed above and as set forth below. In addition, a number of minor changes have been made in the regulatory texts to conform to statutory language and to reflect plain language principles.

Regulatory Flexibility Act and Executive Order 12866

For the reasons set forth above and because the amendments closely follow legislative direction, pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*), it is certified that the amendments will not have a significant economic impact on a substantial number of small entities. Accordingly, the amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604. Further, this document does not meet the criteria for a ''significant regulatory action'' as specified in E.O. 12866.

List of Subjects

19 CFR Part 162

Customs duties and inspection; Law enforcement; Penalties; Seizures and forfeitures.

19 CFR Part 171

Administrative practice and procedure; Customs duties and inspection; Law enforcement; Penalties; Seizures and forfeitures.

19 CFR Part 191

Administrative practice and procedure; Customs duties and inspection; Drawback.

Amendments to the Regulations

For the reasons stated in the preamble, parts 162, 171 and 191 of the Customs Regulations (19 CFR parts 162, 171 and 191) are amended as set forth below:

PART 162—INSPECTION, SEARCH, AND SEIZURE

1. The general authority citation for part 162 is revised to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1592, 1593a, 1624.

* * * * *

2. In § 162.71, paragraphs (b) through (d) are redesignated as paragraphs (d) through (f), the heading for paragraph (a) is revised, and new paragraphs (b) and (c) are added, to read as follows:

§ 162.71 Definitions.

* * * * *

(a) *Loss of duties under section 592.* * * *

(b) *Loss of revenue under section 593A.* When used in § 162.73a, the term ''loss of revenue'' means the amount of drawback (see § 191.2(i) of this chapter) that is claimed and to which the claimant is not entitled and includes both actual and potential loss of revenue.

(1) *Actual loss of revenue.* When used in §§ 162.73a, 162.74, 162.77a and 162.79b, the term ''actual loss of revenue'' means the amount of drawback (see § 191.2(i) of this chapter) that is claimed and has been paid to the claimant and to which the claimant is not entitled.

(2) *Potential loss of revenue.* When used in § 162.77a, the term ''potential loss of revenue'' means the amount of drawback (see § 191.2(i) of this chapter) that is claimed and has not been paid to the claimant and to which the claimant is not entitled.

(c) *Repetitive violation.* When used in § 162.73a to describe a violation, ''repetitive'' has reference to a violation by a person that involves the same issue as a prior violation by that person.

* * * * *

3. A new § 162.73a is added to read as follows:

§ 162.73a Penalties under section 593A, Tariff Act of 1930, as amended.

(a) *Maximum penalty without prior disclosure for a drawback compliance program nonparticipant.* If the person concerned has not made a prior disclosure as provided in § 162.74 and has not been certified as a participant in the drawback compliance program under part 191 of this chapter, the monetary penalty under section 593A, Tariff Act of 1930, as amended (19 U.S.C. 1593a), cannot exceed:

(1) For fraudulent violations, three times the loss of revenue; and

(2) For negligent violations,

(i) 20 percent of the loss of revenue for the first violation,

(ii) 50 percent of the loss of revenue for the first repetitive violation, or

(iii) One times the loss of revenue for the second and each subsequent repetitive violation.

(b) *Maximum penalty without prior disclosure for a drawback compliance program participant*—(1) *General.* If the person concerned has not made a prior disclosure as provided in § 162.74 and has been certified as a participant in, and is generally in compliance with the procedures and requirements of, the drawback compliance program provided for in part 191 of this chapter, the monetary penalty or other sanction under section 593A, Tariff Act of 1930, as amended (19 U.S.C. 1593a), cannot exceed:

(i) For fraudulent violations, three times the loss of revenue; and

(ii) For negligent violations,

(A) Issuance of a written notice of a violation (warning letter) for the first violation and for any other violation that is not repetitive or that is repetitive but does not occur within three years from the date of the violation of which it is repetitive,

(B) 20 percent of the loss of revenue for the first repetitive violation that occurs within three years from the date of the violation of which it is repetitive,

(C) 50 percent of the loss of revenue for the second repetitive violation that occurs within three years from the date of the first of two violations of which it is repetitive, or

(D) One times the loss of revenue for the third and each subsequent repetitive violation that occurs within three years from the date of the first of three or more violations of which it is repetitive.

(2) *Notice of violation and required response to notice*—(i) The notice issued by Customs under paragraph (b)(1)(ii)(A) of this section will:

(A) State that the person concerned has violated section 593A;

(B) Explain the nature of the violation; and

(C) Warn the person concerned that future violations of section 593A may result in the imposition of monetary penalties. The notice will also warn the person concerned that repetitive violations may result in removal of certification under the drawback compliance program provided for in part 191 of this chapter until the person takes corrective action that is satisfactory to Customs.

(ii) Within 30 days from the date of mailing of the notice issued under paragraph (b)(1)(ii)(A) of this section:

(A) The person concerned must notify Customs in writing of the steps that have been taken to prevent a recurrence of the violation; or

(B) If the person concerned believes that no violation took place, he may advise Customs in writing of the basis for that position. If Customs agrees on further review that no violation in fact took place, Customs will in writing advise the person concerned and rescind the notice of violation. If on further review Customs remains of the opinion that the violation took place as alleged in the notice of violation, Customs will issue a written affirmation of the notice of violation advising the person concerned that the notice requirement of paragraph (b)(2)(ii)(A) of this section remains applicable and must be complied with either within the remainder of the prescribed 30-day period or within 15 days after issuance of the written affirmation, whichever period is longer.

(c) *Maximum penalty with prior disclosure.* If the person concerned has made a prior disclosure as provided in § 162.74, whether or not such person has been certified as a participant in the drawback compliance program under

part 191 of this chapter, the monetary penalty under section 593A, Tariff Act of 1930, as amended (19 U.S.C. 1593a), cannot exceed:

(1) For fraudulent violations, one times the loss of revenue; and

(2) For negligent violations, an amount equal to the interest accruing on the actual loss of revenue during the period from the date of overpayment of the claim to the date on which the person concerned tenders the amount of the overpayment based on the prevailing rate of interest under 26 U.S.C. 6621.

4. In § 162.74:

a. In paragraph (a)(1), the first sentence is amended by adding after ''fees'' the words ''or actual loss of revenue'';

b. In paragraph (c), the heading and the first, second, eleventh, and twenlfth sentences are amended by adding after ''and fees'' the words ''or actual loss of revenue''; and

c. Also in paragraph (c), the fourth, seventh, and ninth sentences are amended by removing the words ''or fees'' wherever they appear and adding, in their place, the words ''and fees or actual loss of revenue''.

5. A new § 162.77a is added to read as follows:

§ 162.77a Prepenalty notice for violation of section 593A, Tariff Act of 1930, as amended.

(a) *When required.* If the appropriate Customs field officer has reasonable cause to believe that a violation of section 593A, Tariff Act of 1930, as amended (19 U.S.C. 1593a) has occurred, and determines that further proceedings are warranted, the officer will issue to the person concerned a notice of intent to issue a claim for a monetary penalty.

(b) *Contents*—(1) *Facts of violation.* The prepenalty notice will:

(i) Identify the drawback claim;

(ii) Set forth the details relating to the seeking, inducing, or affecting, or the attempted seeking, inducing, or affecting, or the aiding or procuring of, the drawback claim;

(iii) Specify all laws and regulations allegedly violated;

(iv) Disclose all the material facts which establish the alleged violation;

(v) State whether the alleged violation occurred as a result of fraud or negligence; and

(vi) State the estimated actual or potential loss of revenue due to the drawback claim and, taking into account all circumstances, the amount of the proposed monetary penalty.

(2) *Right to make presentations.* The prepenalty notice also will inform the person of his right to make an oral and a written presentation within 30 days of mailing of the notice (or such shorter period as may be prescribed under § 162.78) as to why a claim for a monetary penalty should not be issued or, if issued, why it should be in a lesser amount than proposed.

(c) *Exceptions.* A prepenalty notice will not be issued for a violation of 19 U.S.C. 1593a if the amount of the proposed monetary penalty is $1,000 or less.

(d) *Prior approval.* If an alleged violation of 19 U.S.C. 1593a occurred as a result of fraud, a prepenalty notice will not be issued without prior approval by Customs Headquarters.

6. Section 162.79a is amended by removing the references ''§ 162.76(b)(1) or § 162.77(b)(1)'' and adding, in their place, ''§ 162.76(b)(1), § 162.77(b)(1) or § 162.77a(b)(1) and (b)(2)''.

7. Section 162.79b is revised to read as follows:

§ 162.79b Recovery of actual loss of duties, taxes and fees or actual loss of revenue.

Whether or not a monetary penalty is assessed under this subpart, the appropriate Customs field officer will require the deposit of any actual loss of duties, taxes and fees resulting from a violation of section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592) or any actual loss of revenue resulting from a violation of section 593A, Tariff Act of 1930, as amended (19 U.S.C. 1593a), notwithstanding that the liquidation of the entry to which the loss is attributable has become final. If a person is liable for the payment of actual loss of duties, taxes and fees or actual loss of revenue in any case in which a monetary penalty is not assessed or a written notification of claim of monetary penalty is not issued, the port director will issue a written notice to the person of the liability for the actual loss of duties, taxes and fees or actual loss of revenue. The notice will identify the merchandise and entries involved, state the loss of duties, taxes and fees or loss of revenue and how it was calculated, and require the person to deposit or arrange for payment of the duties, taxes and fees or revenue within 30 days from the date of the notice. Any determination of actual loss of duties, taxes and fees or actual loss of revenue under this section is subject to review upon written application to the Commissioner of Customs.

PART 171—FINES, PENALTIES, AND FORFEITURES

1. The authority citation for part 171 is revised to read in part as follows:

Authority: 19 U.S.C. 66, 1592, 1593a, 1618, 1624. * * *

2. Section 171.31a is revised to read as follows:

§ 171.31a Written decisions.

If a petition for relief relates to a violation of section 592, 593A or 641, Tariff Act of 1930, as amended (19 U.S.C. 1592, 19 U.S.C. 1593a or 19 U.S.C. 1641), the petitioner will be provided with a written statement setting forth the decision on the matter and the findings of fact and conclusions of law upon which the decision is based.

3. Part 171 is amended by adding a new Appendix D to read as follows:

Appendix D to Part 171—Guidelines for the Imposition and Mitigation of Penalties for Violations of 19 U.S.C. 1593A

A monetary penalty incurred under section 593A, Tariff Act of 1930, as amended (19 U.S.C. 1593a; hereinafter referred to as section 593A), may be remitted or mitigated under section 618, Tariff Act of 1930, as amended (19 U.S.C. 1618; hereinafter referred to as section 618), if it is determined that there exist such mitigating circumstances as to justify remission or mitigation. The guidelines below will be used by Customs in arriving at a just and reasonable assessment and disposition of liabilities arising under section 593A within the stated limitations. It is intended that these guidelines will be applied by Customs officers in prepenalty proceedings, in determining the monetary penalty assessed in the penalty notice, and in arriving at a final penalty disposition. The assessed or mitigated penalty amount set forth in Customs administrative disposition determined in accordance with these guidelines does not limit the penalty amount which the Government may seek in bringing a civil enforcement action pursuant to 19 U.S.C. 1593a(i).

(A) Violations of Section 593A

A violation of section 593A occurs when a person, through fraud or negligence, seeks, induces, or affects, or attempts to seek, induce, or affect, the payment or credit to that person or others of any drawback claim by means of any document, written or oral statement, or electronically transmitted data or information, or act which is material and false, or any omission which is material, or aids or abets any other person in the foregoing violation. There is no violation if the falsity is due solely to clerical error or mistake of fact unless the error or mistake is part of a pattern of negligent conduct. Also, the mere nonintentional repetition by an electronic system of an initial clerical error will not constitute a pattern of negligent

conduct. Nevertheless, if Customs has drawn the person's attention to the nonintentional repetition by an electronic system of an initial clerical error, subsequent failure to correct the error could constitute a violation of section 593A.

(B) Degrees of Culpability

There are two degrees of culpability under section 593A: negligence and fraud.

(1) *Negligence.* A violation is determined to be negligent if it results from an act or acts (of commission or omission) done with actual knowledge of, or wanton disregard for, the relevant facts and with indifference to, or disregard for, the offender's obligations under the statute or done through the failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances in ascertaining the facts or in drawing inferences from those facts, in ascertaining the offender's obligations under the statute, or in communicating information so that it may be understood by the recipient. As a general rule, a violation is determined to be negligent if it results from the offender's failure to exercise reasonable care and competence to ensure that a statement made is correct.

(2) *Fraud.* A violation is determined to be fraudulent if the material false statement, omission or act in connection with the transaction was committed (or omitted) knowingly, i.e., was done voluntarily and intentionally, as established by clear and convincing evidence.

(C) Assessment of Penalties

(1) *Issuance of Prepenalty Notice.* As provided in § 162.77a of the Customs Regulations (19 CFR 162.77a), if Customs has reasonable cause to believe that a violation of section 593A has occurred and determines that further proceedings are warranted, a notice of intent to issue a claim for a monetary penalty will be issued to the person concerned. In issuing such prepenalty notice, the appropriate Customs field officer will make a tentative determination of the degree of culpability and the amount of the proposed claim. A prepenalty notice will not be issued if the claim does not exceed $1,000.

(2) *Issuance of Penalty Notice.* After considering representations, if any, made by the person concerned pursuant to the notice issued under paragraph (C)(1), the appropriate Customs field officer will determine whether any violation described in section (A) has occurred. If a notice was issued under paragraph (C)(1) and the appropriate Customs field officer determines that there was no violation, Customs will promptly issue a written statement of the determination to the person to whom the notice was sent. If the appropriate Customs field officer determines that there was a violation, Customs will issue a written penalty claim to the person concerned. The written penalty claim will specify all changes in the information provided in the prepenalty notice issued under paragraph (C)(1). The person to whom the penalty notice is issued will have a reasonable opportunity under section 618 to make representations, both oral and written, seeking remission or mitigation of the monetary penalty. At the conclusion of any proceeding under section 618, Customs will provide to the person concerned a written statement which sets forth the final determination and the findings of fact and conclusions of law on which such determination is based.

(D) Maximum Penalties

(1) *Fraud.* In the case of a fraudulent violation of section 593A, the monetary penalty will be in an amount not to exceed 3 times the actual or potential loss of revenue.

(2) *Negligence.*

(a) *In General.* In the case of a negligent violation of section 593A, the monetary penalty will be in an amount not to exceed 20 percent of the actual or potential loss of revenue for the first violation.

(b) *Repetitive Violations.* For the first negligent violation that is repetitive (i.e., involves the same issue and the same violator), the penalty will be in an amount not to exceed 50 percent of the actual or potential loss of revenue. The penalty for a second and each subsequent repetitive negligent violation will be in an amount not to exceed the actual or potential loss of revenue.

(3) *Prior Disclosure.*

(a) *In General.* Subject to paragraph (D)(3)(b), if the person concerned discloses the circumstances of a violation of section 593A before, or without knowledge of the commencement of, a formal investigation of such violation, the monetary penalty assessed under this Appendix will not exceed:

(i) In the case of fraud, an amount equal to the actual or potential revenue of which the United States is or may be deprived as a result of overpayment of the claim; or

(ii) If the violation resulted from negligence, an amount equal to the interest computed on the basis of the prevailing rate of interest applied under 26 U.S.C. 6621 on the amount of actual revenue of which the United States is or may be deprived during the period that begins on the date of overpayment of the claim and ends on the date on which the person concerned tenders the amount of the overpayment.

(b) *Condition Affecting Penalty Limitations.* The limitations in paragraph (D)(3)(a) on the amount of the monetary penalty to be assessed apply only if the person concerned tenders the amount of the overpayment made on the claim either at the time of the disclosure or within 30 days (or such longer period as Customs may provide) from the date of notice by Customs of its calculation of the amount of overpayment.

(c) *Burden of Proof.* The person asserting lack of knowledge of the commencement of a formal investigation has the burden of proof in establishing such lack of knowledge.

(d) *Commencement of Investigation.* For purposes of this Appendix, a formal investigation of a violation is considered to be commenced with regard to the disclosing party, and with regard to the disclosed information, on the date recorded in writing by Customs as the date on which facts and circumstances were discovered which caused Customs to believe that a possibility of a violation of section 593A existed.

(e) *Exclusivity.* Penalty claims under section D will be the exclusive civil remedy for any drawback-related violation of section 593A.

(E) Deprivation of Lawful Revenue

Notwithstanding section 514, Tariff Act of 1930, as amended (19 U.S.C. 1514), if the United States has been deprived of lawful duties and taxes resulting from a violation of section 593A, Customs will require that such duties and taxes be restored whether or not a monetary penalty is assessed.

(F) Final Disposition of Penalty Cases When the Drawback Claimant Is Not a Certified Participant in the Drawback Compliance Program

(1) *In General.* Customs will consider all information in the petition and all available evidence, taking into account any mitigating, aggravating, and extraordinary factors, in determining the final assessed penalty. All factors considered should be stated in the decision.

(2) *Penalty Disposition When There Has Been No Prior Disclosure.*

(a) *Nonrepetitive Negligent Violation.* The final penalty disposition will be in an amount ranging from a minimum of 10 percent of the actual or potential loss of revenue to a maximum of 20 percent of the actual or potential loss of revenue.

(b) *Repetitive Negligent Violation.*

(i) *First Repetitive Negligent Violation.* The final penalty disposition will be in an amount ranging from a minimum of 25 percent of the actual or potential loss of revenue to a maximum of 50 percent of the actual or potential loss of revenue.

(ii) *Second and Each Subsequent Repetitive Negligent Violation.* The final penalty disposition will be in an amount ranging from a minimum of 50 percent of the actual or potential loss of revenue to a maximum of 100 percent of the actual or potential loss of revenue.

(c) *Fraudulent Violation.* The final penalty disposition will be in an amount ranging from a minimum of 1.5 times the actual or potential loss of revenue to a maximum of 3 times the actual or potential loss of revenue.

(3) *Penalty Disposition When There Has Been a Prior Disclosure.*

(a) *Negligent Violation.* The final penalty disposition will be in an amount equal to the interest determined in accordance with paragraph (D)(3)(a)(ii).

(b) *Fraudulent Violation.* The final penalty disposition will be in an amount equal to 100 percent of the actual or potential loss of revenue.

(4) *Mitigating Factors.* The following factors will be considered in mitigation of the proposed or assessed penalty claim or final penalty amount, provided that the case record sufficiently establishes their existence. The list is not exclusive.

(a) *Contributory Customs Error.* This factor includes misleading or erroneous advice given by a Customs official in writing to the alleged violator, but this factor may be applied in such a case only if it appears that the alleged violator reasonably relied upon the written information and the alleged violator fully and accurately informed

Customs of all relevant facts. The concept of comparative negligence may be utilized in determining the weight to be assigned to this factor. If the Customs error contributed to the violation, but the alleged violator is also culpable, the Customs error is to be considered as a mitigating factor. If it is determined that the Customs error was the sole cause of the violation, the proposed or assessed penalty is to be cancelled.

(b) *Cooperation With the Investigation.* To obtain the benefits of this factor, the alleged violator must exhibit cooperation beyond that expected from a person under investigation for a Customs violation. An example of the cooperation contemplated includes assisting Customs officers to an unusual degree in auditing the books and records of the alleged violator (e.g., incurring extraordinary expenses in providing computer runs solely for submission to Customs to assist the agency in cases involving an unusually large number of entries and/or complex issues). Another example consists of assisting Customs in obtaining additional information relating to the subject violation or other violations. Merely providing the books and records of the alleged violator may not be considered cooperation justifying mitigation inasmuch as Customs has the right to examine an importer's books and records pursuant to 19 U.S.C. 1508–1509.

(c) *Immediate Remedial Action.* This factor includes the payment of the actual loss of revenue prior to the issuance of a penalty notice and within 30 days after Customs notifies the alleged violator of the actual loss of revenue attributable to the violation. In appropriate cases, where the alleged violator provides evidence that, immediately after learning of the violation, substantial remedial action was taken to correct organizational or procedural defects, immediate remedial action may be granted as a mitigating factor. Customs encourages immediate remedial action to ensure against future incidents of non-compliance.

(d) *Prior Good Record.* Prior good record is a factor only if the alleged violator is able to demonstrate a consistent pattern of filing drawback claims without violation of section 593A, or any other statute prohibiting the making or filing of a false statement or document in connection with a drawback claim. This factor will not be considered in alleged fraudulent violations of section 593A.

(e) *Inability to Pay the Customs Penalty.* The party claiming the existence of this factor must present documentary evidence in support thereof, including copies of income tax returns for the previous 3 years and an audited financial statement for the most recent fiscal quarter. In certain cases, Customs may waive the production of an audited financial statement or may request alternative or additional financial data in order to facilitate an analysis of a claim of inability to pay (e.g., examination of the financial records of a foreign entity related to the U.S. company claiming inability to pay). In addition, the alleged violator must present information reflecting ownership and related domestic and foreign parties and must provide information reflecting its current financial condition, including books and records of account, bank statements, other tax records (for example, sales tax returns) and a list of assets with current values; if the alleged violator is a closely held corporation, similar current financial information must be provided on the shareholders, wherever they are located.

(f) *Customs Knowledge.* This factor may be used in non-fraud cases (which also are not the subject of a criminal investigation) if it is determined that Customs had actual knowledge of a violation and failed, without justification, to inform the violator so that it could have taken earlier remedial action. This factor is not applicable when a substantial delay in the investigation is attributable to the alleged violator.

(5) *Aggravating Factors.* Certain factors may be determined to be aggravating factors in calculating the amount of the proposed or assessed penalty claim or the amount of the final administrative penalty. The presence of one or more aggravating factors may not be used to raise the level of culpability attributable to the alleged violations, but may be used to offset the presence of mitigating factors. The following factors will be considered ''aggravating factors'', provided that the case record sufficiently establishes their existence. The list is not exclusive.

(a) Obstructing an investigation or audit.

(b) Withholding evidence.

(c) Providing misleading information concerning the violation.

(d) Prior substantive violations of section 593A for which a final administrative finding of culpability has been made.

(e) Failure to comply with a Customs summons or lawful demand for records.

(G) Drawback Compliance Program Participants

(1) *In General.* Special alternative procedures and penalty assessment standards apply in the case of negligent violations of section 593A committed by persons who are certified as participants in the Customs drawback compliance program and who are generally in compliance with the procedures and requirements of that program. Provisions regarding the operation of the drawback compliance program are set forth in part 191 of the Customs Regulations (19 CFR part 191).

(2) *Alternatives to Penalties.* When a participant described in paragraph (G)(1) commits a violation of section 593A, in the absence of fraud or repeated violations and in lieu of a monetary penalty, Customs will issue a written notice of the violation (warning letter).

(a) *Contents of Notice.* The notice will:

(i) State that the person has violated section 593A;

(ii) Explain the nature of the violation; and

(iii) Warn the person that future violations of section 593A may result in the imposition of monetary penalties and that repetitive violations may result in removal of certification under the drawback compliance program until the person takes corrective action that is satisfactory to Customs.

(b) *Response to Notice.* Within 30 days from the date of mailing of the written notice, the person must notify Customs in writing of the steps that have been taken to prevent a recurrence of the violation unless the person establishes to the satisfaction of Customs that no violation took place (see § 162.73a(b)(2)(ii) of the Customs Regulations, 19 CFR 162.73a(b)(2)(ii)). If the person fails to provide the required notification in a timely manner, any penalty assessed for a repetitive violation under paragraph (G)(3) will not be subject to mitigation under this Appendix.

(3) *Repetitive Violations.*

(a) *In General.* A person who has been issued a written notice under paragraph (G)(2) and who subsequently commits a negligent violation that is repetitive (i.e., involves the same issue), and any other person who is a participant described in paragraph (G)(1) and who commits a repetitive negligent violation, is subject to one of the following monetary penalties:

(i) An amount not to exceed 20 percent of the loss of revenue for the first repetitive violation that occurs within three years from the date of the violation of which it is repetitive;

(ii) An amount not to exceed 50 percent of the loss of revenue for the second repetitive violation that occurs within three years from the date of the first of two violations of which it is repetitive ; and

(iii) An amount not to exceed 100 percent of the loss of revenue for the third and each subsequent repetitive violation that occurs within three years from the date of the first of three or more violations of which it is repetitive.

(b) *Repetitive Violations Outside 3-Year Period.* If a participant described in paragraph (G)(1) commits a negligent violation that is repetitive but that did not occur within 3 years of the violation of which it is repetitive, the new violation will be treated as a first violation for which a written notice will be issued in accordance with paragraph (G)(2), and each repetitive violation subsequent to that violation that occurs within any 3-year period described in paragraph (G)(3)(a) will result in the assessment of the applicable monetary penalty prescribed in that paragraph.

(4) *Final Penalty Disposition When There Has Been No Prior Disclosure.*

(a) *In General.* Customs will consider all information in the petition and all available evidence, taking into account any mitigating factors (see paragraph (F)(4)), aggravating factors (see paragraph (F)(5)), and extraordinary factors in determining the final assessed penalty. All factors considered should be stated in the decision.

(b) *First Repetitive Negligent Violation Within 3 Years of Violation Handled Under Paragraph (G)(2).* The final penalty disposition will be in an amount ranging from a minimum of 10 percent of the loss of revenue to a maximum of 20 percent of the loss of revenue.

(c) *Second Repetitive Negligent Violation Within 3 Years of Violation Handled Under Paragraph (G)(2) or (G)(3).* The final penalty disposition will be in an amount ranging from a minimum of 25 percent of the loss of revenue to a maximum of 50 percent of the loss of revenue.

(d) *Third and Each Subsequent Repetitive Negligent Violation Within 3 Years of Violation Handled Under Paragraph (G)(2) or*

(G)(3). The final penalty disposition will be in an amount ranging from a minimum of 50 percent of the loss of revenue to a maximum of 100 percent of the loss of revenue.

(e) *Fraudulent Violations.* The final penalty disposition will be determined in the same manner as in the case of fraudulent violations committed by persons who are not participants in the drawback compliance program (see paragraph (F)(2)(c)).

(5) *Final Penalty Disposition When There Has Been A Prior Disclosure.* The final penalty disposition will be determined in the same manner as in the case of persons who are not participants in the drawback compliance program (see paragraph (F)(3)).

(H) Violations by Small Entities

In compliance with the mandate of the Small Business Regulatory Enforcement Fairness Act of 1996, under appropriate circumstances, the issuance of a penalty under section 593A may be waived for businesses qualifying as small business entities. Procedures that were established for small business entities regarding violations of 19 U.S.C. 1592 in Treasury Decision 97–46 published in the **Federal Register** (62 FR 30378) are also applicable for small entities regarding violations of section 593A.

PART 191—DRAWBACK

1. The authority citation for part 191 continues to read in part as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1313, 1624.

* * * * *

§§ 191.191–191.195 also issued under 19 U.S.C. 1593a.

2. In § 191.194, paragraphs (e) and (f) are revised to read as follows:

§ 191.194 Action on application to participate in compliance program.

* * * * *

(e) *Certification removal*—(1) *Grounds for removal.* The certification for participation in the drawback compliance program by a party may be removed when any of the following conditions are discovered:

(i) The certification privilege was obtained through fraud or mistake of fact;

(ii) The program participant is no longer in compliance with the Customs laws and regulations, including the requirements set forth in § 191.192;

(iii) The program participant repeatedly files false drawback claims or false or misleading documentation or other information relating to such claims; or

(iv) The program participant is convicted of any felony or has committed acts which would constitute a misdemeanor or felony involving theft, smuggling, or any theft-connected crime.

(2) *Removal procedure.* If Customs determines that the certification of a program participant should be removed, the applicable drawback office will serve the program participant with written notice of the removal. Such notice will inform the program participant of the grounds for the removal and will advise the program participant of its right to file an appeal of the removal in accordance with paragraph (f) of this section.

(3) *Effect of removal.* The removal of certification will be effective immediately in cases of willfulness on the part of the program participant or when required by public health, interest, or safety. In all other cases, the removal of certification will be effective when the program participant has received notice under paragraph (e)(2) of this section and either no appeal has been filed within the time limit prescribed in paragraph (f)(2) of this section or all appeal procedures have been concluded by a decision that upholds the removal action. Removal of certification may subject the affected person to penalties.

(f) *Appeal of certification denial or removal*—(1) *Appeal of certification denial.* A party may challenge a denial of an application for certification as a participant in the drawback compliance program by filing a written appeal, within 30 days of issuance of the notice of denial, with the applicable drawback office. A denial of an appeal may itself be appealed to Customs Headquarters, Office of Field Operations, Office of Trade Programs, within 30 days after issuance of the applicable drawback office's appeal decision. Customs Headquarters will review the appeal and will respond with a written decision within 30 days after receipt of the appeal unless circumstances require a delay in issuance of the decision. If the decision cannot be issued within the 30-day period, Customs Headquarters will advise the appellant of the reasons for the delay and of any further actions which will be carried out to complete the appeal review and of the anticipated date for issuance of the appeal decision.

(2) *Appeal of certification removal.* A party who has received a Customs notice of removal of certification for participation in the drawback compliance program may challenge the removal by filing a written appeal, within 30 days after issuance of the notice of removal, with the applicable drawback office. A denial of an appeal may itself be appealed to Customs Headquarters, Office of Field Operations, Office of Trade Programs, within 30 days after issuance of the applicable drawback office's appeal decision. Customs Headquarters will consider the allegations upon which the removal was based and the responses made to those allegations by the appellant and will render a written decision on the appeal within 30 days after receipt of the appeal.

Approved: January 19, 2000.

Raymond W. Kelly,

Commissioner of Customs.

John P. Simpson,

Deputy Assistant Secretary of the Treasury.

[FR Doc. 00–1681 Filed 1–24–00; 8:45 am]

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DEPARTMENT OF TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 8866]

RIN 1545–AV48

Equity Options With Flexible Terms; Special Rules and Definitions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations providing guidance on the application of the rules governing qualified covered calls. The new rules address concerns that were created by the introduction of new financial instruments after the enactment of the qualified covered call rules. The final regulations will provide guidance to taxpayers writing qualified covered calls.

EFFECTIVE DATE: These regulations are effective January 25, 2000.

FOR FURTHER INFORMATION CONTACT: Pamela Lew of the Office of Assistant Chief Counsel (Financial Institutions and Products), (202) 622–3950 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On June 25, 1998, the IRS published in the **Federal Register** proposed regulations (REG–104641–97, 63 FR 34616) addressing whether strike prices available for equity options with flexible terms affect the definition of a qualified covered call (QCC) under section 1092(c)(4) for equity options with standardized terms. No requests to speak at a public hearing were received, and no public hearing was held.

Two written comments were received. These comments focused on whether equity options with flexible terms should be eligible for QCC treatment. After considering these comments, the IRS and Treasury have decided to

address the eligibility of equity options with flexible terms and certain other equity options for QCC treatment in other forthcoming guidance.

One of the comments also suggested a clarifying change to the text of the proposed regulations. After revising the regulation to take into account this comment, the proposed regulations are adopted by this Treasury decision.

Explanation of Provisions

Section 1092(c) defines a straddle as offsetting positions with respect to personal property. Under section 1092(d)(3), stock is personal property if the stock is part of a straddle that involves an option on that stock or substantially identical stock or securities. Under section 1092(c)(4), however, writing a QCC option and owning the optioned stock is not treated as a straddle for purposes of section 1092.

In order to be a QCC, a call option must, among other things, be exchange-traded and not be deep in the money. An option is deep in the money if the strike price of the option is lower than the lowest qualified bench mark for the stock. This bench mark is generally the highest available strike price for an option on the stock that is less than the applicable stock price.

At the time the QCC provisions were enacted, exchange-traded options were available only at standardized maturity dates and strike price intervals. This fixed-interval system was a basic assumption of the Congressional plan for QCCs and, more specifically, was the foundation for the definition of a deep-in-the-money option.

Certain options exchanges have begun to trade equity options with flexible terms. Unlike standardized exchange-traded options, these options could have strike prices at other than fixed intervals. For this reason, there is concern that the strike prices established for equity options with flexible terms could impact the bench-mark system for standardized exchange-traded options.

The proposed regulations provide that strike prices established by equity options with flexible terms are not taken into account in determining whether options that are not equity options with flexible terms are deep in the money. Thus, the existence of strike prices established by equity options with flexible terms does not affect the lowest qualified bench mark, as determined under section 1092(c)(4)(D), for an equity option with standardized terms.

One commentator was concerned that usage of the phrase ''existence of strike prices established by equity options without standardized terms'' might be interpreted as requiring actual trading at a particular strike price. The commentator suggested that the regulation be modified to discuss the availability of a strike price for equity options with flexible terms rather than the existence of a strike price established by equity options with flexible terms. This suggestion has been incorporated into the final regulation.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Pamela Lew, Office of Assistant Chief Counsel (Financial Institutions and Products). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding an entry in numerical order to read as follows:

Authority: 26 U.S.C. 7805 * * *. Section 1.1092(c)–1 also issued under 26 U.S.C. 1092(c)(4)(H). * * *

Par. 2. Section 1.1092(c)–1 is added to read as follows:

§ 1.1092(c)–1 Equity options with flexible terms.

(a) *In general.* Section 1092(c)(4) provides an exception to the general rule that a straddle exists if a taxpayer holds stock and writes a call option on that stock. Under section 1092(c)(4), the ownership of stock and the issuance of a call option meeting certain requirements result in a qualified covered call, which is exempted from the general straddle rules of section 1092. This section addresses the consequences of the availability of equity options with flexible terms under the qualified covered call rules.

(b) *No effect on lowest qualified bench mark for standardized options.* The availability of strike prices for equity options with flexible terms does not affect the determination of the lowest qualified bench mark, as defined in section 1092(c)(4)(D), for an option that is not an equity option with flexible terms.

(c) [Reserved].

(d) *Definitions.* For purposes of this section

(1) *Equity option with flexible terms* means an equity option—

(i) That is described in any of the following Securities

Exchange Act Releases—

(A) Self-Regulatory Organizations; Order Approving Proposed Rule Changes and Notice of Filing and Order Granting Accelerated Approval of Amendments by the Chicago Board Options Exchange, Inc. and the Pacific Stock Exchange, Inc., Relating to the Listing of Flexible Equity Options on Specified Equity Securities, Securities Exchange Act Release No. 34–36841 (Feb. 21, 1996); or

(B) Self-Regulatory Organizations; Order Approving Proposed Rule Changes and Notice of Filing and Order Granting Accelerated Approval of Amendment Nos. 2 and 3 to the Proposed Rule Change by the American Stock Exchange, Inc., Relating to the Listing of Flexible Equity Options on Specified Equity Securities, Securities Exchange Act Release No. 34–37336 (June 27, 1996); or

(C) Self-Regulatory Organizations; Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Amendment Nos. 2, 4 and 5 to the Proposed Rule Change by the Philadelphia Stock Exchange, Inc., Relating to the Listing of Flexible Exchange Traded Equity and Index Options, Securities Exchange Act Release No. 34–39549 (Jan. 23, 1998); or

(D) Any changes to the SEC releases described in paragraphs (d)(1)(i)(A) through (C) of this section that are approved by the Securities and Exchange Commission; or

(ii) That is traded on any national securities exchange which is registered with the Securities and Exchange Commission (other than those described in the SEC Releases set forth in paragraph (d)(1)(i) of this section) or

other market which the Secretary determines has rules adequate to carry out the purposes of section 1092 and is—

(A) Substantially identical to the equity options described in paragraph (d)(1)(i) of this section; and

(B) Approved by the Securities and Exchange Commission in a Securities Exchange Act Release.

(2) *Securities Exchange Act Release* means a release issued by the Securities and Exchange Commission. To determine identifying information for releases referenced in paragraph (d)(1) of this section, including release titles, identification numbers, and issue dates, contact the Office of the Secretary, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549. To obtain a copy of a Securities Exchange Act Release, submit a written request, including the specific release identification number, title, and issue date, to Securities and Exchange Commission, Attention Public Reference, 450 5th Street, NW., Washington, DC 20549.

(e) *Effective date.* These regulations apply to equity options with flexible terms entered into on or after January 25, 2000.

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

Approved: January 17, 2000.

Jonathan Talisman,

Acting Assistant Secretary of the Treasury.

[FR Doc. 00–1527 Filed 1–21–00; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 8868]

RIN 1545–AV68

Termination of Puerto Rico and Possession Tax Credit; New Lines of Business Prohibited

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and Temporary regulations.

SUMMARY: This document amends the Income Tax Regulations by removing temporary regulations that provide guidance regarding the addition of a substantial new line of business by a possessions corporation that is an existing credit claimant and adding final regulations. These regulations are necessary to implement changes made by the Small Business Job Protection Act of 1996.

DATES: *Effective Date.* These regulations are effective January 25, 2000.

FOR FURTHER INFORMATION CONTACT: Daniel S. Karen, (202) 874–1490, or Jacob Feldman, (202) 622–3830 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Section 1601(a) of the Small Business Job Protection Act of 1996, Public Law 104–188, 110 Stat. 1755 (1996), amended the Internal Revenue Code by adding section 936(j). Section 936(j) generally repeals the Puerto Rico and possession tax credit for taxable years beginning after December 31, 1995. However, the section provides grandfather rules under which a corporation that is an existing credit claimant would be eligible to claim credits for a transition period. The Puerto Rico and possession tax credit and the Puerto Rico economic activity credit phase out for these existing credit claimants ending with the last taxable year beginning before January 1, 2006.

For taxable years beginning after December 31, 1995 and before January 1, 2006, the Puerto Rico and possession tax credit and the Puerto Rico economic activity credit apply only to a corporation that qualifies as an existing credit claimant (as defined in section 936(j)(9)(A)). The determination of whether a corporation is an existing credit claimant is made separately for each possession. A possessions corporation that adds a substantial new line of business (other than in a qualifying acquisition of all the assets of a trade or business of an existing credit claimant) after October 13, 1995, ceases to be an existing credit claimant as of the beginning of the taxable year during which such new line of business is added. Therefore, a possessions corporation that ceases to be an existing credit claimant either because it has added a substantial new line of business, or because a new line of business becomes substantial, during a taxable year may not claim the Puerto Rico and possession tax credit or the Puerto Rico economic activity credit for that taxable year or any subsequent taxable year.

On August 19, 1998, temporary regulations were published in the **Federal Register** (63 FR 44387). A cross referenced Notice of Proposed Rulemaking was also published in the **Federal Register** (63 FR 44416) on the same date. Three comments were received with respect to the Notice. No hearing was requested and none was held. The temporary regulations are, therefore, adopted as proposed with the following changes, as explained, below.

Explanation of Revisions and Summary of Comments

Minor and conforming changes were made in these final regulations. Several changes were also made in the final regulations with regard to the three comments that were received on the Notice of Proposed Rulemaking.

The first comment received addressed the issue as to whether the leasing of some of the assets of an existing credit claimant would result in a new line of business under section 936(j)(9)(B) with respect to the leasing activity. In response to the comment, the final regulations provide that the leasing out of assets by an existing credit claimant (and the employees necessary to operate the leased assets) will not be treated as a new line of business provided that: (1) The existing credit claimant used the leased assets in an active trade or business for at least five years; (2) the existing credit claimant does not through its own officers or staff of employees perform management or operational functions (but not including operational functions performed through leased employees) with respect to the leased assets; and (3) the existing credit claimant does not perform marketing functions with respect to the leasing of the assets. The income from the leasing of assets will not be income from the active conduct of a trade or business, and therefore, the existing credit claimant may not receive a possession tax credit with respect to such income.

A second comment asked for clarification as to whether a taxpayer seeking to be treated as an existing credit claimant through the acquisition of the assets of an existing credit claimant pursuant to section 936(j)(9)(A)(ii) must acquire all the assets of the acquired corporation even in cases in which the existing credit claimant has more than one trade or business. The final regulations have been clarified to conform to the language of section 936(j)(9)(A)(ii) and provide that an acquiring corporation need only acquire all the assets of a single trade or business to be treated as an existing credit claimant.

The third comment asked for clarification as to when the assets of a trade or business are measured for purposes of satisfying the requirement that all the assets of a trade or business must be acquired from an existing credit claimant in order to satisfy section 936(j)(9)(A)(ii). Specifically, the comment expressed concern that assets

of an existing credit claimant may be sold or otherwise disposed of between October 13, 1995, the date on which existing credit claimant status is established, and the date of acquisition. In response to the comment, the final regulations provide that the assets of a trade or business of an existing credit claimant are determined on the date of acquisition provided that the transferee actively conducts a trade or business in the possession with the acquired assets.

Special Analyses

It has been determined that this final regulation is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the preceding notice of proposed rulemaking was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its effect on small business.

Drafting Information

The principal author of this regulation is Daniel S. Karen of the Office of the Associate Chief Counsel (International), within the office of Chief Counsel, IRS. However, other personnel from the IRS and the Department of the Treasury participated in the development of this regulation.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by removing the entry for 1.936–11T and by adding an entry in numerical order to read as follows:

Authority: 26 U.S.C. 7805 * * *. Section 1.936–11 also issued under 26 U.S.C. 936(j). * * *

§ 1.936–11T

[Removed]

Par. 2. Section 1.936–11T is removed.

Par. 3. Section 1.936–11 is added to read as follows:

§ 1.936–11 New lines of business prohibited.

(a) *In general.* A possessions corporation that is an existing credit claimant, as defined in section 936(j)(9)(A) and this section, that adds a substantial new line of business during a taxable year, or that has a new line of business that becomes substantial during the taxable year, loses its status as an existing credit claimant for that year and all years subsequent.

(b) *New line of business*—(1) *In general.* A new line of business is any business activity of the possessions corporation that is not closely related to a pre-existing business of the possessions corporation. The term *closely related* is defined in paragraph (b)(2) of this section. The term *pre-existing business* is defined in paragraph (b)(3) of this section.

(2) *Closely related.* To determine whether a new activity is closely related to a pre-existing business of the possessions corporation all the facts and circumstances must be considered, including those set forth in paragraphs (b)(2)(i)(A) through (G) of this section.

(i) *Factors.* The following factors will help to establish that a new activity is closely related to a pre-existing business activity of the possessions corporation—

(A) The new activity provides products or services very similar to the products or services provided by the pre-existing business;

(B) The new activity markets products and services to the same class of customers;

(C) The new activity is of a type that is normally conducted in the same business location;

(D) The new activity requires the use of similar operating assets;

(E) The new activity's economic success depends on the success of the pre-existing business;

(F) The new activity is of a type that would normally be treated as a unit with the pre-existing business' in the business accounting records; and

(G) The new activity and the pre-existing business are regulated or licensed by the same or similar governmental authority.

(ii) *Safe harbors.* An activity is not a new line of business if—

(A) If the activity is within the same six-digit North American Industry Classification System (NAICS) code (or four-digit Standard Industrial Classification (SIC) code). The similarity of the NAICS or SIC codes may not be relied upon to determine whether the activity is closely related to a pre-existing business where the code indicates a miscellaneous category;

(B) If the new activity is within the same five-digit NAICS code (or three-digit SIC code) and the facts relating to the new activity also satisfy at least three of the factors listed in paragraphs (b)(2)(i)(A) through (G) of this section; or

(C) If the pre-existing business is making a component product or end-product form, as defined in § 1.936–5(a)(1),Q&A1, and the new business activity is making an integrated product, or an end-product form with fewer excluded components, that is not within the same six-digit NAICS code (or four-digit SIC code) as the pre-existing business solely because the component product and the integrated product (or two end-product forms) have different end-uses.

(3) *Pre-existing business*—(i) *In general.* Except as provided in paragraph (b)(3)(ii) of this section, a business activity is a pre-existing business of the existing credit claimant if—

(A) The existing credit claimant was actively engaged in the activity within the possession on or before October 13, 1995; and

(B) The existing credit claimant had elected the benefits of the Puerto Rico and possession tax credit pursuant to an election which was in effect for the taxable year that included October 13, 1995.

(ii) *Acquisition of an existing credit claimant.* (A) If all the assets of one or more trades or businesses of a corporation of an existing credit claimant are acquired by an affiliated or non-affiliated existing credit claimant which carries on the business activity of the predecessor existing credit claimant, the acquired business activity will be treated as a pre-existing business of the acquiring corporation. A non-affiliated acquiring corporation will not be bound by any section 936(h) election made by the predecessor existing credit claimant with respect to that business activity.

(B) Where all of the assets of one or more trades or businesses of a corporation of an existing credit claimant are acquired by a corporation that is not an existing credit claimant, the acquiring corporation may make a section 936(e) election for the taxable year in which the assets are acquired with the following effects—

(*1*) The acquiring corporation will be treated as an existing credit claimant for the year of acquisition;

(*2*) The activity will be considered a pre-existing business of the acquiring corporation;

(*3*) The acquiring corporation will be deemed to satisfy the rules of section 936(a)(2) for the year of acquisition; and

(*4*) After making an election under section 936(e), a non-affiliated acquiring corporation will not be bound by elections under sections 936(a)(4) and (h) made by the predecessor existing credit claimant.

(C) For purposes of this section the assets of a trade or business are determined at the time of acquisition provided that the transferee actively conducts the trade or business acquired.

(D) A mere change in the stock ownership of a possessions corporation will not affect its status as an existing credit claimant for purposes of this section.

(4) *Leasing of Assets.*—(i) The leasing of assets (and employees to operate leased assets) will not, for purposes of this section, be considered a new line of business of the existing credit claimant if—

(A) the existing credit claimant used the leased assets in an active trade or business for at least five years;

(B) the existing credit claimant does not through its own officers or staff of employees perform management or operational functions (but not including operational functions performed through leased employees) with respect to the leased assets; and

(C) the existing credit claimant does not perform marketing functions with respect to the leasing of the assets.

(ii) Any income from the leasing of assets not considered a new line of business pursuant to paragraph (b)(4)(i) of this section will not be income from the active conduct of a trade or business (and, therefore, the existing credit claimant may not receive a possession tax credit with respect to such income).

(5) *Timing rule.* The tests for a new line of business in this paragraph (whether the new activity is closely related to a pre-existing business) are applied only at the end of the taxable year during which the new activity is added.

(c) *Substantial*—(1) *In general.* A new line of business is considered to be substantial as of the earlier of—

(i) The taxable year in which the possessions corporation derives more than 15 percent of its gross income from that new line of business (gross income test); or

(ii) The taxable year in which the possessions corporation directly uses in that new line of business more than 15 percent of its assets (assets test).

(2) *Gross income test.* The denominator in the gross income test is the amount that is the gross income of the possessions corporation for the current taxable year, while the numerator is the amount that is the gross income of the new line of business for the current taxable year. The gross income test is applied at the end of each taxable year. For purposes of this test, if a new line of business is added late in the taxable year, the income is not to be annualized in that year. In the case of a new line of business acquired through the purchase of assets, the gross income of such new line of business for the taxable year of the acquiring corporation that includes the date of acquisition is determined from the date of acquisition through the end of the taxable year. In the case of a consolidated group election made pursuant to section 936(i)(5), the test applies on a company by company basis and not on a consolidated basis.

(3) *Assets test*—(i) *Computation.* The denominator is the adjusted tax basis of the total assets of the possessions corporation for the current taxable year. The numerator is the adjusted tax basis of the total assets utilized in the new line of business for the current taxable year. The assets test is computed annually using all assets including cash and receivables.

(ii) *Exception.* A new line of business of a possessions corporation will not be treated as substantial as a result of meeting the assets test if an event that is not reasonably anticipated causes assets used in the new line of business of the possessions corporation to exceed 15 percent of the adjusted tax basis of the possessions corporation's total assets. For example, an event that is not reasonably anticipated would include the destruction of plant and equipment of the pre-existing business due to a hurricane or other natural disaster, or other similar circumstances beyond the control of the possessions corporation. The expiration of a patent is not such an event and will not permit use of this exception.

(d) *Examples.* The following examples illustrate the rules described in paragraphs (a), (b), and (c) of this section. In the following examples, X Corp. is an existing credit claimant unless otherwise indicated:

Example 1. X Corp. is a pharmaceutical corporation which manufactured bulk chemicals (a component product). In March 1997, X Corp. began to also manufacture pills (e.g., finished dosages or an integrated product). The new activity provides products very similar to the products provided by the pre-existing business. The new activity is of a type that is normally conducted in the same business location as the pre-existing business. The activity's economic success depends on the success of the pre-existing business. The manufacture of bulk chemicals is in NAICS code 325411, Medicinal and Botanical Manufacturing, while the manufacture of the pills is in NAICS code 325412, Pharmaceutical Preparation Manufacturing. Although the products have a different end-use, may be marketed to a different class of customers, and may not use similar operating assets, they are within the same five-digit NAICS code and the activity also satisfies paragraphs (b)(2)(i)(A), (C), and (E) of this section. The manufacture of the pills by X Corp. will be considered closely related to the manufacture of the bulk chemicals. Therefore, X Corp. will not be considered to have added a new line of business for purposes of paragraph (b) of this section because it falls within the safe harbor rule of (b)(2)(ii)(B).

Example 2. X Corp. currently manufactures printed circuit boards in a possession. As a result of a technological breakthrough, X Corp. could produce the printed circuit boards more efficiently if it modified its existing production methods. Because demand for its products was high, X Corp. expanded when it modified its production methods. After these modifications to the facilities and production methods, the products produced through the new technology were in the same six-digit NAICS code as products produced previously by X Corp. See paragraph (b)(2)(ii)(A) of this section. Therefore, X Corp. will not be considered to have added a new line of business for purposes of paragraph (b) of this section because it falls within the safe harbor rule of (b)(2)(ii)(A).

Example 3. X Corp. has manufactured Device A in Puerto Rico for a number of years and began to manufacture Device B in Puerto Rico in 1997. Device A and Device B are both used to conduct electrical current to the heart and are both sold to cardiologists. There is no significant change in the type of activity conducted in Puerto Rico after the transfer of the manufacturing of Device B to Puerto Rico. Similar manufacturing equipment, manufacturing processes and skills are used in the manufacture of both devices. Both are regulated and licensed by the Food and Drug Administration. The economic success of Device B is dependent upon the success of Device A only to the extent that the liability and manufacturing prowess with respect to one reflects favorably on the other. Depending upon the heart abnormality, the cardiologist may choose to use Device A, Device B or both on a patient. The manufacture of Device B is treated as a unit with the manufacture of Device A in X Corp.'s accounting records. The manufacture of Device A is in the six-digit NAICS code 339112, Surgical and Medical Instrument Manufacturing. The manufacture of Device B is in the six-digit NAICS code 334510, Electromedical and Electrotherapeutic Apparatus Manufacturing. (The manufacture of Device A is in the four-digit SIC code 3845, Electromedical and Electrotherapeutic Apparatus. The manufacture of Device B is in the four-digit SIC code 3841, Surgical and Medical Instruments and Apparatus.) The safe harbor of paragraph (b)(2)(ii)(B) of this section applies because the two activities are within the same three-digit SIC code and Corp. X satisfies paragraphs (b)(2)(i)(A), (B), (C), (D), (F), and (G) of this section.

Example 4. X Corp. has been manufacturing house slippers in Puerto Rico since 1990. Y Corp. is a U.S. corporation that

is not affiliated with X Corp. and is not an existing credit claimant. Y Corp. has been manufacturing snack food in the United States. In 1997, X Corp. purchased the assets of Y Corp. and began to manufacture snack food in Puerto Rico. House slipper manufacturing is in the six-digit NAICS code 316212 (Four-digit SIC code 3142, House Slippers). The manufacture of snack foods falls under the six-digit NAICS code 311919, Other Snack Food Manufacturing (four-digit SIC code 2052, Cookies and Crackers (pretzels)). Because these activities are not within the same five or six digit NAICS code (or the same three or four-digit SIC code), and because snack food is not an integrated product that contains house slippers, the safe harbor of paragraph (b)(2)(ii) of this section cannot apply. Considering all the facts and circumstances, including the seven factors of paragraph (b)(2)(i) of this section, the snack food manufacturing activity is not closely related to the manufacture of house slippers, and is a new line of business, within the meaning of paragraph (b) of this section.

Example 5. X Corp., a calendar year taxpayer, is an existing credit claimant that has elected the profit-split method for computing taxable income. P Corp. was not an existing credit claimant and manufactured a product in a different five-digit NAICS code than the product manufactured by X Corp. In 1997, X Corp. acquired the stock of P Corp. and liquidated P Corp. in a tax-free liquidation under section 332, but continued the business activity of P Corp. as a new business segment. Assume that this new business segment is a new line of business within the meaning of paragraph (c) of this section. In 1997, X Corp. has gross income from the active conduct of a trade or business in a possession computed under section 936(a)(2) of $500 million and the adjusted tax basis of its assets is $200 million. The new business segment had gross income of $60 million, or 12 percent of the X Corp. gross income, and the adjusted basis of the new segment's assets was $20 million, or 10 percent of the X Corp. total assets. In 1997, X Corp. does not derive more than 15 percent of its gross income, or directly use more that 15 percent of its total assets, from the new business segment. Thus, the new line of business acquired from P Corp. is not a *substantial* new line of business within the meaning of paragraph (c) of this section, and the new activity will not cause X Corp. to lose its status as an existing credit claimant during 1997. In 1998, however, the gross income of X Corp. grew to $750 million while the gross income of the new line of business grew to $150 million, or 20% of the X Corp. 1998 gross income. Thus, in 1998, the new line of business is substantial within the meaning of paragraph (c) of this section, and X Corp. loses its status as an existing credit claimant for 1998 and all years subsequent.

(e) *Loss of status as existing credit claimant.* An existing credit claimant that adds a substantial new line of business in a taxable year, or that has a new line of business that becomes substantial in a taxable year, loses its status as an existing credit claimant for that year and all years subsequent.

(f) *Effective date*—(1) *General rule.* This section applies to taxable years of a possessions corporation beginning on or after January 25, 2000.

(2) *Election for retroactive application.* Taxpayers may elect to apply retroactively all the provisions of this section for any open taxable year beginning after December 31, 1995. Such election will be effective for the year of the election and all subsequent taxable years. This section will not apply to activities of pre-existing businesses for taxable years beginning before January 1, 1996.

David Mader,

Acting Deputy Commissioner of Internal Revenue.

Approved: January 12, 2000.

Jonathan Talisman,

Acting Assistant Secretary of the Treasury.

[FR Doc. 00–1528 Filed 1–21–00; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 8867]

RIN 1545–AW69

Passive Foreign Investment Companies; Definition of Marketable Stock

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations under section 1296 relating to the new mark-to-market election for stock of a passive foreign investment company (PFIC). The final regulations interpret changes made by the Taxpayer Relief Act of 1997. The final regulations affect persons holding PFIC stock that is regularly traded on certain U.S. or foreign exchanges or markets or holding stock in certain PFICs comparable to U.S. regulated investment companies (RICs).

DATES: *Effective Date:* January 25, 2000.

Applicability Dates: For dates of applicability see section 1.1296(e)–1(g) of these regulations.

FOR FURTHER INFORMATION CONTACT: Robert Laudeman, (202) 622–3840 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On February 2, 1999, the IRS published in the **FEDERAL REGISTER** proposed regulations (REG–113744–98, 64 FR 5014) regarding the taxation of U.S. holders of PFIC stock. Three written comments regarding the proposed regulations were received. Because no one requested to speak at a public hearing, no hearing was held. After consideration of all of the comments received, the proposed regulations under section 1296 are adopted as final regulations with some changes. The changes are discussed below.

The preamble to the proposed regulations (64 FR 5014) provides a detailed discussion of the mark-to-market election for shareholders of PFIC stock and the proposed regulations.

Summary of Public Comments and Changes

Exchange or Other Market

The proposed regulations require that a foreign exchange or market be regulated or supervised by a governmental authority of the country in which the market is located. The proposed regulations also list additional characteristics that the foreign exchange or market must have for stock that is regularly traded on the exchange or market to be marketable stock for purposes of section 1296. Specifically, the proposed regulations require that the exchange have trading volume, listing, financial disclosure and other requirements designed to prevent fraud, perfect the mechanism of a free and open market, and protect investors.

The final regulations add a surveillance requirement and add the concept of perfecting a fair and orderly market to the requirements for exchanges. These changes are intended to clarify the characteristics that an exchange or other market must have in order to be a qualified exchange or market for purposes of section 1296 and to more closely represent common characteristics of foreign markets. See International Federation of Stock Exchanges (FIBV), *1998 Market Principles,* available by request from secretariat@fibv.com, and International Organization of Securities Commissions (IOSCO), *Supervisory Framework for Markets, Report by the Technical Committee,* May 1999 (visited Oct. 5, 1999) <http://www.iosco.org/iosco.html>.

Stock in Certain PFICs

The proposed regulations provide that stock in certain PFICs is *marketable stock* if the PFIC both is a corporation described in section 1296(e)(1)(B) (foreign corporations comparable to RICs) and offers for sale or has outstanding stock of which it is the

issuer and which is redeemable at its net asset value. The proposed regulations further provide that a PFIC is a corporation described in section 1296(e)(1)(B) only if the PFIC satisfies eight conditions listed in the proposed regulations with respect to the class of shares held by the electing taxpayer. The conditions are intended to describe PFICs that are comparable to RICs in relevant respects and to implement the intent of the statute by ensuring that the net asset valuations of such companies represent legitimate and sound fair market values for the companies' stock.

Two commentators asserted that the statute and legislative history indicate that Congress was only concerned that PFICs redeem stock at net asset values and that such values represent sound and legitimate fair market values and, therefore, it is not necessary that the PFIC resemble a RIC. The commentators suggest that the regulations be modified to include PFICs that redeem their stock at its net asset value but do not otherwise resemble RICs. Because the plain language of the statute clearly requires that the stock in any foreign corporation be comparable to a RIC, the final regulations retain the approach of requiring PFICs to be comparable to RICs in order for their stock to be marketable stock for purposes of section 1296(e)(1)(B).

The proposed regulations provide that a foreign corporation must have one hundred or more unrelated shareholders. One commentator recommended that the number be reduced to ten unrelated shareholders, arguing that a corporation with ten unrelated shareholders as opposed to one hundred unrelated shareholders has the same susceptibility to legal liabilities if valuations are inaccurate. Requiring that a PFIC have one hundred or more unrelated shareholders is comparable to the requirement imposed on RICs by section 851(a). In addition, the IRS and the Treasury Department believe that there will be less likelihood of share price manipulation with corporations that have one hundred or more unrelated shareholders. Consequently, the above described rule in the proposed regulations is not changed except that ''one hundred or more'' is corrected to read ''more than one hundred'' unrelated shareholders.

The proposed regulations require that the class of shares of the foreign corporation be readily available for purchase by the general public at its net asset value by new investors in initial amounts not greater than $10,000 (U.S.). One commentator recommended that this condition not be included in the final regulations because an investment ceiling will not make the valuation easier or less likely to be manipulated.

The condition in the proposed regulations regarding initial investments is not an investment ceiling. Rather, the condition specifies that the foreign corporation not require a minimum initial investment of greater than $10,000 (U.S.) and that shares of the foreign corporation be readily available for purchase by the general public at net asset values. For example, a foreign corporation that requires new investors to purchase shares for a minimum initial investment of $5,000 (U.S.) satisfies the condition. However, a foreign corporation that requires new investors to purchase shares for a minimum initial investment of $20,000 (U.S.) does not satisfy the condition. There is not any limit, however, on the total amount that a shareholder can invest. The final regulations clarify that this condition is not an investment ceiling.

Two additional requirements in the proposed regulations are that shares be available for purchase by the general public and that, no less frequently than annually, financial statements prepared by independent auditors be available to the public. One commentator asserted that availability to the general public of the shares of the foreign corporation and of the financial statements is not necessary and should not be required because it will not necessarily ensure a legitimate and sound fair market value for the foreign corporation's stock.

Availability of shares for purchase by the general public is comparable to the requirement of availability of shares of RICs for purchase by the general public. In addition, availability of shares for purchase by the the general public for net asset value (in addition to current investors being able to redeem shares for the same net asset value), will ensure that the net asset values are legitimate and sound. However, shares will not be considered available for purchase by the general public if the shares are only available to individuals with high annual incomes or high net worth. For example, limiting investors to individuals with annual incomes in excess of $200,000 or net worth in excess of $1 million will not be considered available for purchase by the general public.

Similarly, availability to the general public of audited financial statements is comparable to conditions imposed on RICs and will help to ensure that the foreign corporation's financial information is readily available to potential and current investors, which, in turn, will help ensure that the net asset values are legitimate and sound. Availability of financial statements to the general public requires no more than that the statements be available upon request to potential and current investors.

The proposed regulations require that quotations for the shares of the foreign corporation be determined and published on a daily basis in a widely-available medium, such as a newspaper of general circulation. One commentator asserted that the condition is not necessary because the mark-to-market election is made on an annual basis at the close of the taxpayer's taxable year. The commentator recommended that the condition be changed to require that values be communicated to shareholders, on at least an annual basis, in written form that serves as support for such valuation.

The final regulations do not adopt the commentator's recommendation. The publication of quotations for the shares is not intended to serve solely as a means for a current shareholder of the PFIC to determine the value of the PFIC on the mark date. The publication of quotations for the shares is comparable to the practice of RICs and helps to ensure that asset valuations are legitimate and sound by allowing potential investors as well as current shareholders to have ready access to price information.

Because quotations for the shares of some PFICs may not be published on a daily basis, the daily publication requirement in the proposed regulations is changed to require that quotations for the shares of the foreign corporation be determined and published no less frequently than weekly. In addition, the publication requirement is changed to clarify that the quotations must be published in a permanent medium not controlled by the issuer of the shares, such as an independent trade publication. The requirement that the medium be permanent does not require the medium to be saved in a printed form; archived electronic data not susceptible to subsequent alteration are permanent. This change is intended to assist shareholders and the IRS in verifying valuations.

The proposed regulations require that the foreign corporation be supervised or regulated as an investment company by a foreign government or instrumentality thereof. One commentator suggested that the condition be clarified with respect to the meaning of governmental supervision. In particular, the commentator asks whether a foreign jurisdiction that requires a local corporation to file information upon incorporation with the local government

or agency would qualify as supervision or regulation.

The condition in the proposed regulations is intended to require that the PFIC be supervised or regulated as an investment company in a manner comparable, but not identical, to RICs. Consequently, the final regulations clarify the type of supervision or regulation required. The final regulations provide that sufficient supervision or regulation requires that the government or agency have broad inspection and enforcement authority and effective oversight over investment companies to ensure that such companies provide complete and accurate disclosure of relevant financial information to shareholders and potential investors and to provide adequate sanctions for false or inadequate disclosure. The mere filing of information upon incorporation does not qualify as supervision or regulation.

Finally, the proposed regulations require that the foreign corporation have no senior securities authorized or outstanding, including any debt other than de minimis amounts. In addition, the proposed regulations require that the foreign corporation meet the PFIC income and asset tests in sections 1297(a)(1) and (2) with the requisite percentages increased from 75 percent to 90 percent and from 50 percent to 90 percent respectively. One commentator asserted that these conditions not be included in the final regulations because there is no basis for requiring a PFIC to have the same borrowing restrictions, asset composition, and characteristics of RICs in order for the PFIC's stock to be marketable stock under section 1296.

Conditions regarding debt and asset composition are essential characteristics of RICs. The IRS and the Treasury Department believe that Congress intended to provide mark-to-market treatment to shares of PFICs that are, in fact, comparable to RICs.

Special Rules for RICs

The proposed regulations provide that if shares in a PFIC are owned directly or indirectly by a RIC, that is offering for sale, or has outstanding any stock of which it is the issuer, and which is redeemable at net asset value, the PFIC shares shall be treated as marketable stock for purposes of section 1296. Section 1296(e)(2) further provides that except as provided in regulations, similar treatment as marketable stock shall apply in the case of any other RIC which publishes net asset valuations at least annually. The IRS and Treasury Department invited comments regarding situations where PFIC stock held by other RICs that publish asset valuations at least annually should not be treated as marketable stock for purposes of section 1296.

One commentator explained why PFIC stock held by any closed-end RIC that publishes net asset values at least annually should be treated as marketable stock. In particular, that commentator pointed out that closed-end RICs are subject to many of the same regulatory requirements as open-end RICs. In addition, that commentator explained that an industry practice has developed under which closed-end RICs typically determine and publish current share prices, together with net asset values, on a weekly basis in print and other media.

At this time, the IRS and Treasury Department know of no reason not to treat PFIC stock held by closed-end funds that publish net asset values at least annually as marketable stock. Consequently, as provided by section 1296(e)(2), PFIC stock held by any closed-end RIC that publishes net asset values at least annually shall be treated as marketable stock. The final regulations, however, continue to reserve this issue in the event that it is determined that situations exist where PFIC stock held by closed-end RICs that publish net asset valuations at least annually should not be treated as marketable stock for purposes of section 1296. If such a situation is found to exist, the reservation will be replaced at that time by a new regulatory exception.

Special Analyses

It has been determined that these regulations are not significant regulatory actions as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and, because the regulations do not impose a requirement for the collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceeding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Robert Laudeman of the Office of the Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding an entry in numerical order to read as follows:

Authority: 26 U.S.C. 7805 * * *. Section 1.1296(e)–1 also issued under 26 U.S.C. 1296(e). * * *

Par. 2. Section 1.1296(e)–1 is added to read as follows:

§ 1.1296(e)–1 Definition of marketable stock.

(a) *General rule.* For purposes of section 1296, the term *marketable stock* means—

(1) Passive foreign investment company (PFIC) stock that is regularly traded, as defined in paragraph (b) of this section, on a qualified exchange or other market, as defined in paragraph (c) of this section;

(2) Stock in certain PFICs, as described in paragraph (d) of this section; and

(3) Options on stock that is described in paragraph (a)(1) or (2) of this section, to the extent provided in paragraph (e) of this section.

(b) *Regularly traded*—(1) *General rule.* For purposes of paragraph (a)(1) of this section, a class of stock that is traded on one or more qualified exchanges or other markets, as defined in paragraph (c) of this section, is regularly traded on such exchanges or markets for any calendar year during which such class of stock is traded, other than in de minimis quantities, on at least 15 days during each calendar quarter.

(2) *Anti-abuse rule.* Trades that have as one of their principal purposes the meeting of the trading requirement of paragraph (b)(1) of this section shall be disregarded. Further, a class of stock shall not be treated as meeting the trading requirement of paragraph (b)(1) of this section if there is a pattern of trades conducted to meet the requirement of paragraph (b)(1) of this section.

(c) *Qualified exchange or other market—(1) General rule.* For purposes of paragraph (a)(1) of this section, the term *qualified exchange or other market* means, for any calendar year—

(i) A national securities exchange that is registered with the Securities and

Exchange Commission or the national market system established pursuant to section 11A of the Securities Exchange Act of 1934 (15 U.S.C. 78f); or

(ii) A foreign securities exchange that is regulated or supervised by a governmental authority of the country in which the market is located and which has the following characteristics—

(A) The exchange has trading volume, listing, financial disclosure, surveillance, and other requirements designed to prevent fraudulent and manipulative acts and practices, to remove impediments to and perfect the mechanism of a free and open, fair and orderly, market, and to protect investors; and the laws of the country in which the exchange is located and the rules of the exchange ensure that such requirements are actually enforced; and

(B) The rules of the exchange effectively promote active trading of listed stocks.

(2) *Exchange with multiple tiers.* If an exchange in a foreign country has more than one tier or market level on which stock may be separately listed or traded, each such tier shall be treated as a separate exchange.

(d) *Stock in certain PFICs*—(1) *General rule.* Except as provided in paragraph (d)(2) of this section, a foreign corporation is a corporation described in section 1296(e)(1)(B), and paragraph (a)(2) of this section, if the foreign corporation offers for sale or has outstanding stock of which it is the issuer and which is redeemable at its net asset value and if the foreign corporation satisfies the following conditions with respect to the class of shares held by the electing taxpayer—

(i) At all times during the calendar year, the foreign corporation has more than one hundred shareholders with respect to the class, other than shareholders who are related under section 267(b);

(ii) At all times during the calendar year, the class of shares of the foreign corporation is readily available for purchase by the general public at its net asset value and the foreign corporation does not require a minimum initial investment of greater than $10,000 (U.S.);

(iii) At all times during the calendar year, quotations for the class of shares of the foreign corporation are determined and published no less frequently than on a weekly basis in a widely-available permanent medium not controlled by the issuer of the shares, such as a newspaper of general circulation or a trade publication;

(iv) No less frequently than annually, independent auditors prepare financial statements of the foreign corporation that include balance sheets (statements of assets, liabilities, and net assets) and statements of income and expenses, and those statements are made available to the public;

(v) The foreign corporation is supervised or regulated as an investment company by a foreign government or an agency or instrumentality thereof that has broad inspection and enforcement authority and effective oversight over investment companies;

(vi) At all times during the calendar year, the foreign corporation has no senior securities authorized or outstanding, including any debt other than in de minimis amounts;

(vii) Ninety percent or more of the gross income of the foreign corporation for its taxable year is passive income, as defined in section 1297(a)(1) and the regulations thereunder; and

(viii) The average percentage of assets held by the foreign corporation during its taxable year which produce passive income or which are held for the production of passive income, as defined in section 1297(a)(2) and the regulations thereunder, is at least 90 percent.

(2) *Anti-abuse rule.* If a foreign corporation undertakes any actions that have as one of their principal purposes the manipulation of the net asset value of a class of its shares, for the calendar year in which the manipulation occurs, the shares are not marketable stock for purposes of paragraph (d)(1) of this section.

(e) [Reserved]

(f) *Special rules for regulated investment companies (RICs)*—(1) *General rule.* In the case of any RIC that is offering for sale, or has outstanding, any stock of which it is the issuer and which is redeemable at net asset value, if the RIC owns directly or indirectly, as defined in sections 958(a)(1) and (2), stock in any passive foreign investment company, that stock will be treated as marketable stock owned by that RIC for purposes of section 1296. Except as provided in paragraph (f)(2) of this section, in the case of any other RIC that publishes net asset valuations at least annually, if the RIC owns directly or indirectly, as defined in sections 958(a)(1) and (2), stock in any passive foreign investment company, that stock will be treated as marketable stock owned by that RIC for purposes of section 1296.

(2) [Reserved]

(g) *Effective date.* This section applies to shareholders whose taxable year ends on or after January 25, 2000 for stock in a foreign corporation whose taxable year ends with or within the shareholder's taxable year. In addition, shareholders may elect to apply these regulations to any taxable year beginning after December 31, 1997, for stock in a foreign corporation whose taxable year ends with or within the shareholder's taxable year.

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

Approved: January 12, 2000.

Jonathan Talisman,

Assistant Secretary of the Treasury.

[FR Doc. 00–1530 Filed 1–21–00; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[TD 8865]

RIN 1545–AS77

Amortization of Intangible Property

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the amortization of certain intangible property. The final regulations reflect changes to the law made by the Omnibus Budget Reconciliation Act of 1993 (OBRA '93) and affect taxpayers who acquired intangible property after August 10, 1993, or made a retroactive election to apply OBRA '93 to intangibles acquired after July 25, 1991.

DATES: *Effective Date:* January 25, 2000.

Applicability Dates: These regulations apply to property acquired after January 25, 2000. Regulations to implement section 197(e)(4)(D) are applicable August 11, 1993, for property acquired after August 10, 1993 (or July 26, 1991, for property acquired after July 25, 1991, if a valid retroactive election has been made under § 1.197–1T).

FOR FURTHER INFORMATION CONTACT: John Huffman at (202) 622–3110 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget (OMB) under 44 U.S.C. 3507 and assigned control number 1545–1671.

The collection of information in this regulation is in § 1.197–2(h)(9). This information is required in order to provide guidance on the time and manner of making the election under section 197(f)(9)(B). Under this election, the seller of a section 197 intangible may pay a tax on the sale in order to avoid the application of the anti-churning rules of section 197(f)(9) to the purchaser. This information will be used to confirm the parties to the transaction, calculate any additional tax due, and notify the purchaser of the seller's election. The likely respondents are business or other for-profit institutions.

Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, OP:FS:FP, Washington, DC 20224. Comments on the collection of information should be received by March 27, 2000. Comments are specifically requested concerning:

Whether the collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Estimated total annual reporting burden: 1500 hours.

Estimated average annual burden hours per respondent varies from 2 to 4 hours, depending on individual circumstances, with an estimated average of 3 hours.

Estimated number of respondents: 500 per year.

Estimated annual frequency of responses: 1.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to this collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

On January 16, 1997, the IRS published proposed regulations (REG–209709–94) in the **Federal Register** (62 FR 2336) inviting comments under sections 167(f) and 197. A public hearing was held May 15, 1997. Numerous comments have been received. After consideration of all the comments, the proposed regulations are adopted as revised by this Treasury decision.

Explanation of Provisions

Section 162(k) Application

Example 4 of the proposed regulation § 1.197–2(k) provided that amounts paid for a covenant not to compete entered into in connection with a redemption was nondeductible under section 162(k) and thus not subject to section 197. Commentators suggested that guidance on the application of section 162(k) to transactions involving section 197 intangibles should be addressed in regulations under section 162(k). No reference to section 162(k) is made in the final regulations.

Purchase of a Trade or Business

Certain intangibles are excepted from the application of section 197 if they are not acquired as part of a purchase of a trade or business. The proposed regulations provide that, for purposes of section 197, a group of assets constitutes a trade or business if their use would constitute a trade or business under section 1060 (that is, if goodwill or going concern value could, under any circumstances, attach to the assets).

In addition, the proposed regulations treat a group of assets as a trade or business if they include any customer-based intangibles or, with certain exceptions, any franchise, trademark, or trade name (the per se rules). The preamble of the proposed regulations state that the IRS intends to provide additional guidance on the circumstances in which a group of assets is treated as a trade or business in regulations under section 1060.

Although a number of comments requested that the final regulations under section 197 provide such additional guidance, the final regulations generally retain, without amplification, the rules in the proposed regulations. The IRS and Treasury Department will, however, continue to consider this issue during the development of final regulations under section 1060.

Commentators also requested modifications to the per se rules. In response to these comments, the final regulations limit the applicability of these rules to the cases specifically described in the legislative history of section 197 (that is, the acquisition of a franchise, trademark, or trade name). The final regulations retain the proposed exceptions under which certain franchises, trademarks, and trade names are disregarded in applying the per se rules. In addition, the regulations clarify that a license of a trademark or trade name is also disregarded in applying the per se rules.

Computer Software

The final regulations contain rules that supersede certain of the procedures set forth in Revenue Procedure 69–21 (1969–2 C.B. 303), which provides guidelines relating to costs incurred to develop, purchase, or lease computer software. Specifically, the final regulations provide that purchased computer software is amortizable over 15 years if section 197 applies and over 36 months if the software is not a section 197 intangible. In addition, the regulations clarify that section 197 (rather than § 1.162–11) applies to certain costs incurred with respect to leased software (that is, costs to acquire a section 197 intangible that is a limited interest in software). Computer software costs included, without being separately stated, in the cost of the computer hardware (bundled software) continue to be capitalized and depreciated as part of the computer hardware. In addition, the final regulations treat software costs as currently deductible (and not subject to section 197) if they are not chargeable to capital account under the rules applicable to licensing transactions (discussed below) and are otherwise currently deductible. The final regulations clarify that, for this purpose, an amount described in § 1.162–11 is not currently deductible if, without regard to § 1.162–11, such amount is properly chargeable to capital account. A proper and consistent practice of taking software costs into account under § 1.162–11 may, however, be continued if the costs are not subject to section 197.

A revenue procedure superseding Rev. Proc. 69–21 and providing procedures consistent with the rules in the final regulations will be issued in the near future. In the meantime, taxpayers may not rely on the

procedures in Rev. Proc. 69–21 to the extent they are inconsistent with section 167(f), section 197, or the final regulations.

Mortgage Servicing Rights

The proposed regulations treat mortgage servicing rights relating to a pool of mortgages as a single asset under section 167(f) (relating to mortgage servicing rights not acquired as part of a purchase of a trade or business). Thus, if some but not all mortgages in a pool prepay, no loss is recognized. Commentators assert that each right in the pool is a discrete asset, and thus, taxpayers should be able to recognize a loss upon the prepayment of an individual mortgage within the pool. The Service and the Treasury Department believe this is generally inappropriate in cases where depreciation is based on the average useful life of the assets. See § 1.167(a)–8. Thus, the regulations retain the rule that no loss is recognized if some but not all mortgages in a pool prepay or are sold or exchanged. The final regulations provide, however, that if a taxpayer establishes multiple accounts within a pool at the time of its acquisition, gain or loss is recognized on the sale or exchange of all mortgage servicing rights within any such account.

When Section 197 Amortization Begins

The proposed regulations provide that amortization begins the later of the first day of the month in which the property is acquired, or the first month in which the active conduct of a trade or business begins. Commentators suggest that the literal language of section 197(a) allows amortization beginning with the month the intangible is acquired. Under section 197(c)(1), however, a section 197 intangible is amortizable only if it is held in connection with the conduct of a trade or business or an activity described in section 212. Moreover, there is no suggestion in the legislative history that Congress intended to apply a rule differing from those applicable under section 167 and former section 1253(d).

Former section 1253(d)(2) provided, in language similar to that in section 197(a), that the amortization of certain amounts begins in the taxable year in which the amounts are paid. Although section 1253(d)(2) did not contain any reference to section 162 or to use in a trade or business, it was nevertheless well established at the time of the enactment of section 197 that the provision embodied a trade or business requirement and that amounts were not deductible thereunder unless the taxpayer was operating or conducting a trade or business after the amounts were paid.

Commentators suggest that it is significant that section 167 refers to ''property used in the trade or business'' while property can qualify for amortization under section 197 if it is ''held in connection with the conduct of a trade or business.'' Further, commentators assert that the language used in section 197 is closer to the ''held in connection with his trade or business'' language used in section 174, which does not require the current conduct of a trade or business, than to the language of section 167. The different language used in these provisions can be explained, however, without departing from previous practice under sections 167 and 1253(d) regarding the time at which amortization commences. Broader language under section 197 is necessary because it applies to assets, such as goodwill, that although held in connection with the conduct of a trade or business are not commonly viewed as being used in the trade or business. Further, modifying the language used in section 174 by adding the words ''conduct of'' indicates that Congress did not intend to change the longstanding trade or business requirement for purposes of determining when amortization commences.

Consequently, the final regulations retain the rule in the proposed regulations that amortization begins no earlier than the first day of the month in which the active trade or business or the activity described in section 212 begins.

Transactions Involving Partnerships

The final regulations relating to partnership transactions have been changed from the proposed regulations in several respects to reflect the recommendations of commentators. *Example 17* of the proposed regulation § 1.197–2(k) provided that a partner may amortize a § 743 adjustment with respect to a section 197 intangible only if the formation of the partnership and the sale of the partnership interest are ''unrelated transactions.'' Commentators suggested that an unrelated transaction standard would create significant confusion for taxpayers. According to the commentators, taxpayers would have greater certainty with respect to their transactions, and the government still would be adequately protected, if these transactions were analyzed under general tax principles, including the step transaction doctrine. The final regulations remove the unrelated transaction requirement. However, if the transaction is structured so that, under general principles of tax law, the transaction is not properly characterized as a sale of a partnership interest, then section 197 will apply to the transaction as recast to reflect its true economic substance.

Certain commentators also requested that *Example 16* of proposed regulation § 1.197–2(k) be modified to allow a partnership to amortize an intangible contributed to the partnership under the transferred basis rules under section 197(f)(2), even if a partner related to the partnership under section 197(f)(9)(C) had owned the intangible during the transition period and, as part of an integrated transaction, had sold the intangible to an unrelated party before forming the partnership. The commentators suggested that because section 197(f)(9)(E) generally permits amortization for the stepped-up basis in a partnership transaction under section 743 where a section 754 election was in effect, amortization also should be allowed in a sale of an intangible followed by a contribution of the intangible to a partnership, an economically similar transaction. This recommendation was not adopted. In general, a partnership is treated as an entity separate from its partners in characterizing related party transfers. See, *e.g.,* Section 707(b)(1) (specifically referenced in section 197(f)(9)(C)(i)(I)). Section 197(f)(9)(E) does provide a special anti-churning rule for certain partnership transactions. However, this special rule is not applicable in situations where a partnership has a transferred basis in the intangible under section 723. With respect to the analogy under section 743, where a transferee is allowed to amortize a section 743 basis step-up, it is only the increase in basis that may be amortized, and the amortization attributable to the basis increase is segregated for use only by the transferee partner. Neither of these results necessarily follow from a sale of property followed by a contribution of the property to the partnership.

The proposed regulations did not allow partners to deduct, for federal income tax purposes, curative or remedial amortization allocations from the partnership in situations where the asset was a section 197(f)(9) intangible (and thus nonamortizable) in the hands of the contributing partner. Commentators have suggested allowing curative and remedial allocations under section 704(c). The final regulations generally permit a partnership to make curative or remedial allocations to its noncontributing partners of amortization relating to an asset that was amortizable (or a zero-basis intangible that otherwise would have

been amortizable) in the hands of the contributor. For assets that were section 197(f)(9) intangibles (and thus nonamortizable) in the hands of the contributor, however, the partnership may make deductible amortization allocations to the noncontributing partners under the remedial method only. The final regulations permit remedial allocations because, under section 704(c), remedial allocations treat the amortizable portion of contributed property like newly purchased property, with a new holding period and determinable allocation of tax items. This result, which is similar to the result obtained for basis increases under section 743, does not follow under the curative method because curative allocations are not determined as if the applicable property were newly purchased property. The decision to allow amortization for remedial allocations in these regulations also is consistent with the decisions regarding fungibility of partnership interests that are inherent in the recently finalized regulations under sections 743 and 755. Finally, the rules governing section 704(c) allocations of amortization from section 197 intangibles contributed to a partnership in a nonrecognition transaction are still subject to the anti-churning provisions. Accordingly, remedial allocations of deductible amortization expenses may not be made to a partner who is related to a partner that contributes an intangible subject to the anti-churning rules. Certain problems may arise in maintaining capital accounts where a partnership elects to make remedial allocations, and the anti-churning rules apply with respect to one or more partners. These problems also arise in the context of section 734(b) adjustments and are discussed in the preamble to the proposed regulations relating to the application of the anti-churning rules to basis adjustments under sections 732(b) and 734(b), which are being issued at the same date as these final regulations.

Commentators requested that the final regulations provide additional guidance on how the special anti-churning rule of section 197(f)(9)(E) applies to increases in the basis of property under sections 732, 734, and 743. In accordance with these comments, the final regulations provide rules for determining the amount of a basis adjustment under sections 732(d) and 743 that will be subject to the anti-churning rules. The Treasury Department and the IRS also are issuing, at the same time as these final regulations, proposed regulations addressing how to determine the amount of a basis adjustment under sections 732(b) and 734(b) that will be subject to the anti-churning rules.

Finally, the final regulations provide that where, for purposes of the anti-churning rules, a partner is treated as holding its proportionate share of partnership property under section 197(f)(9)(E), the continued or subsequent use (by license or otherwise) of an intangible by a partner could cause the anti-churning rules to apply with respect to that partner's share of the intangible in situations where a basis step-up under section 732(d) or 743(b) otherwise would be amortizable. This rule is necessary in order to prevent the circumvention of section 197(f)(9)(A) through the use of a partnership. The proposed regulations being issued in conjunction with these final regulations expand the application of this rule to basis adjustments under sections 732(b) and 734(b).

Contracts for the Use of a Section 197 Intangible

The proposed regulations provide that a right to use a section 197 intangible pursuant to a license, contract, or other arrangement is, itself, a section 197 intangible. The proposed regulations further provide that amounts paid for such a right are chargeable to capital account, whether or not the payments would have been deductible (for example, as a royalty) if the right were not a section 197 intangible. Under the proposed regulations, the amount chargeable to capital account is generally determined without regard to sections 483 and 1274 (that is, no part of the amount paid is recharacterized as unstated interest or original issue discount). Finally, the proposed regulations treat the acquisition of a franchise, trademark, or trade name as the acquisition of a trade or business, thereby preventing other intangibles acquired in the same transaction or series of related transactions from qualifying for any of the exceptions applicable to separately acquired property.

Commentators suggested that these rules have negative consequences for common cross-border and affiliate licenses, which frequently include, in addition to rights that would not be subject to section 197 if not acquired as part of a purchase of a trade or business, rights to use a trademark or trade name. Under prior law, amounts paid for these licenses were generally currently deductible. The proposed regulations, however, require amortization over 15 years. In addition, cost recovery over the 15-year period is significantly backloaded because the licenses generally involve contingent payments that are not includible in basis until the year in which they are paid or incurred and, in addition, the proposed regulations provide that sections 483 and 1274 are generally inapplicable.

After further consideration of this issue in light of the concerns raised by the commentators, the IRS and Treasury Department have concluded that, particularly in the case of common licensing transactions involving technology and similar intangible property, a different approach is appropriate. The clearest indication of Congressional intent on this issue is the statement in the legislative history to the effect that, with certain exceptions, section 197 generally does not apply to amounts that were otherwise currently deductible before the enactment of section 197. Nevertheless, the IRS and Treasury Department are also mindful that Congress directed the issuance of such regulations as may be appropriate to prevent avoidance of the purposes of section 197.

The final regulations generally provide that royalty payments under a contract for the use of section 197 intangibles unconnected with the purchase of a trade or business are not required to be capitalized. Licensing transactions will, however, be closely scrutinized under the principles of section 1235 for purposes of determining whether the payments are, in fact, deductible royalties or, instead, represent purchase price that should be charged to capital account.

The final regulations also modify the rule that treats the acquisition of a franchise, trademark, or trade name as the acquisition of a trade or business. Under the final regulations, the acquisition of an interest in a trademark or trade name is disregarded in determining whether acquired property is a trade or business if, under the principles of section 1253, the grant of the interest is not a transfer of all substantial rights in the trademark or trade name. Thus, the acquisition of such an interest in a trademark or trade name will not subject other intangibles acquired in the same transaction or series of related transactions to the generally less favorable rules applicable to intangibles acquired as part of a purchase of a trade or business.

To prevent abuses, the final regulations provide that if the right to use a section 197 intangible is provided under a license entered into as part of a purchase of a trade or business, amounts paid for the right are, as under the proposed regulations, chargeable to capital account. An exception, not contained in the proposed regulations, is provided for licenses of technology,

know-how, and other similar items (including most types of information base). Royalties paid under these licenses are not required to be capitalized if the taxpayer establishes that the payments are, in fact, deductible royalties under general tax principles and represent an arm's-length consideration for the transferred rights.

Finally, any amount otherwise chargeable to capital account with respect to a section 197 intangible and payable after the acquisition of the intangible to which it relates is treated, in determining the tax treatment of the purchaser, as an amount payable under a debt instrument. Thus, the extent to which such amounts are treated as payments of principal and the time at which the amount treated as principal is included in basis is determined under generally applicable rules relating to imputed interest and original issue discount. If, under these rules, a basis increase occurs after the beginning of the 15-year amortization period, the increase is amortized over the remainder of the 15-year period (or, in the case of an increase occurring after the end of the amortization period, is immediately deductible).

Anti-churning Rules

The anti-churning rules of section 197 prevent taxpayers from converting goodwill, going concern value, and similar assets held or used at any time during the transition period into amortizable section 197 intangibles through transactions such as transfers to related parties. The proposed regulations provide guidance on a number of specific issues arising under the anti-churning rules. The final regulations retain this guidance with certain modifications and, in addition, set forth the purpose of the anti-churning rules (generally, to prevent the amortization of certain intangibles that are not acquired after the applicable effective date in a transaction giving rise to a significant change in ownership or use). The final regulations further provide that the anti-churning rules are to be applied in a manner that carries out their purpose. The final regulations include a rule providing that a transaction will be presumed to have a principal purpose of avoiding the anti-churning rules if it does not effect a significant change in ownership or use.

The final regulations also provide additional guidance concerning the circumstances in which persons are treated as related for purposes of the anti-churning rules. Section 197 provides that a relationship is tested for purposes of the anti-churning rules both immediately before and immediately after the acquisition. The proposed regulations further provide that, in the case of intangibles acquired in a series of related transactions, testing begins immediately before the first acquisition and continues until immediately after the last acquisition. Comments suggested that momentary relationships created in the course of the acquisition should be disregarded for purposes of the anti-churning rules. Such relationships can arise, for example, in the course of a stock acquisition followed by a liquidation or when assets are contributed to a newly created subsidiary and, pursuant to a binding commitment, all stock of the subsidiary is sold to an unrelated person or persons immediately after the contribution.

To address these and similar situations, the final regulations provide that in the case of a series of related transactions (or a series of transactions that together comprise a qualified stock purchase within the meaning of section 338(d)(3)) a person is treated as related to another person if the relationship exists immediately before the earliest such transaction or immediately after the last such transaction. In addition, any relationship created as part of a series of related transactions in which a person acquires stock of a corporation followed by a liquidation of the acquired corporation under section 331 generally is disregarded. Further, as with all other provisions of the regulations relating to the anti-churning rules, these provisions are to be applied in a manner that carries out the purpose of the anti-churning rules.

The final regulations also provide guidance on the exemption from the anti-churning rules if the person from whom the taxpayer acquires an intangible elects to recognize gain and agrees to pay a specified amount of tax. In general, these rules are the same as those contained in the proposed regulations, except that the proposed regulations do not prescribe procedures for making the election. The final regulations provide guidance on the manner of making the election, including procedures that apply to persons not otherwise subject to Federal income tax.

Effective Dates

The regulations under sections 167(f) and 197 were proposed to apply on the date on which the final regulations are published in the **Federal Register**. Regulations to implement section 197(e)(4)(D) (separately acquired contracts of fixed duration or amount) were proposed to apply August 11, 1993, for property acquired after August 10, 1993 (or July 26, 1991, if a valid retroactive election has been made under § 1.197–1T). Comments suggested that the applicability date should be modified to clarify that the regulations (other than the implementation of section 197(e)(4)(D)) apply only to property acquired on or after the date final regulations are published. This suggestion has been adopted. Accordingly, the final regulations generally apply only to intangible property acquired after the date they are published in the **Federal Register**.

The applicability date of the rules implementing section 197(e)(4)(D) is similarly clarified. Thus, the final regulations provide that these rules apply to property acquired after August 10, 1993 (or July 25, 1991, if a valid retroactive election has been made under § 1.197–1T). The regulations also provide consent for changes in method of accounting to comply with the rules and automatic procedures for making the change.

In addition, the final regulations permit taxpayers to apply the rules in the final regulations to property acquired before the applicability date of the final regulations (or to rely on the proposed regulations for such property) and provide similar consent and automatic change procedures for taxpayers that choose to apply the final regulations to pre-effective date acquisitions.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It is hereby certified that these regulations do not have a significant impact on a substantial number of small entities. This certification is based on the fact that the time required to prepare and file the election statement and notify acquirers is minimal and will not have a significant impact on those few small entities that choose to make the election. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is John Huffman, Office of Assistant Chief Counsel (Passthroughs and Special Industries), IRS. However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 602 are amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding an entry in numerical order to read as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.197–2 also issued under 26 U.S.C. 197(g). * * *

Par. 2. Section 1.162–11 is amended by adding a sentence at the end of paragraph (a) to read as follows:

§ 1.162–11 Rentals.

(a) * * * See § 1.197–2 for rules governing the amortization of costs to acquire limited interests in section 197 intangibles.

* * * * *

Par. 3. Section 1.167(a)–3 is amended by adding a sentence at the end to read as follows:

§ 1.167(a)–3 Intangibles.

* * * See sections 197 and 167(f) and, to the extent applicable, §§ 1.197–2 and 1.167(a)–14 for amortization of goodwill and certain other intangibles acquired after August 10, 1993, or after July 25, 1991, if a valid retroactive election under § 1.197–1T has been made.

Par. 4. Section 1.167(a)–6 is amended by adding two sentences at the end of paragraph (a) to read as follows:

§ 1.167(a)–6 Depreciation in special cases.

(a) * * * See § 1.167(a)–14(c)(4) for depreciation of a separately acquired interest in a patent or copyright described in section 167(f)(2) acquired after January 25, 2000. See § 1.197–2 for amortization of interests in patents and copyrights that constitute amortizable section 197 intangibles.

* * * * *

Par. 5. Section 1.167(a)–14 is added to read as follows:

§ 1.167(a)–14 Treatment of certain intangible property excluded from section 197.

(a) *Overview.* This section provides rules for the amortization of certain intangibles that are excluded from section 197 (relating to the amortization of goodwill and certain other intangibles). These excluded intangibles are specifically described in § 1.197–2(c)(4), (6), (7), (11), and (13) and include certain computer software and certain other separately acquired rights, such as rights to receive tangible property or services, patents and copyrights, certain mortgage servicing rights, and rights of fixed duration or amount. Intangibles for which an amortization amount is determined under section 167(f) and intangibles otherwise excluded from section 197 are amortizable only if they qualify as property subject to the allowance for depreciation under section 167(a).

(b) *Computer software*—(1) *In general.* The amount of the deduction for computer software described in section 167(f)(1) and § 1.197–2(c)(4) is determined by amortizing the cost or other basis of the computer software using the straight line method described in § 1.167(b)–1 (except that its salvage value is treated as zero) and an amortization period of 36 months beginning on the first day of the month that the computer software is placed in service. If costs for developing computer software that the taxpayer properly elects to defer under section 174(b) result in the development of property subject to the allowance for depreciation under section 167, the rules of this paragraph (b) will apply to the unrecovered costs. In addition, this paragraph (b) applies to the cost of separately acquired computer software where these costs are separately stated and the costs are required to be capitalized under section 263(a).

(2) *Exceptions.* Paragraph (b)(1) of this section does not apply to the cost of computer software properly and consistently taken into account under § 1.162–11. The cost of acquiring an interest in computer software that is included, without being separately stated, in the cost of the hardware or other tangible property is treated as part of the cost of the hardware or other tangible property that is capitalized and depreciated under other applicable sections of the Internal Revenue Code.

(3) *Additional rules.* Rules similar to those in § 1.197–2 (f)(1)(iii), (f)(1)(iv), and (f)(2) (relating to the computation of amortization deductions and the treatment of contingent amounts) apply for purposes of this paragraph (b).

(c) *Certain interests or rights not acquired as part of a purchase of a trade or business*—(1) *Certain rights to receive tangible property or services.* The amount of the deduction for a right (other than a right acquired as part of a purchase of a trade or business) to receive tangible property or services under a contract or from a governmental unit (as specified in section 167(f)(2) and § 1.197–2(c)(6)) is determined as follows:

(i) *Amortization of fixed amounts.* The basis of a right to receive a fixed amount of tangible property or services is amortized for each taxable year by multiplying the basis of the right by a fraction, the numerator of which is the amount of tangible property or services received during the taxable year and the denominator of which is the total amount of tangible property or services received or to be received under the terms of the contract or governmental grant. For example, if a taxpayer acquires a favorable contract right to receive a fixed amount of raw materials during an unspecified period, the taxpayer must amortize the cost of acquiring the contract right by multiplying the total cost by a fraction, the numerator of which is the amount of raw materials received under the contract during the taxable year and the denominator of which is the total amount of raw materials received or to be received under the contract.

(ii) *Amortization of unspecified amount over fixed period.* The cost or other basis of a right to receive an unspecified amount of tangible property or services over a fixed period is amortized ratably over the period of the right. (See paragraph (c)(3) of this section regarding renewals).

(iii) *Amortization in other cases.* [Reserved]

(2) *Rights of fixed duration or amount.* The amount of the deduction for a right (other than a right acquired as part of a purchase of a trade or business) of fixed duration or amount received under a contract or granted by a governmental unit (specified in section 167(f)(2) and § 1.197–2(c)(13)) and not covered by paragraph (c)(1) of this section is determined as follows:

(i) *Rights to a fixed amount.* The basis of a right to a fixed amount is amortized for each taxable year by multiplying the basis by a fraction, the numerator of which is the amount received during the taxable year and the denominator of which is the total amount received or to be received under the terms of the contract or governmental grant.

(ii) *Rights to an unspecified amount over fixed duration of less than 15 years.* The basis of a right to an unspecified amount over a fixed duration of less than 15 years is amortized ratably over the period of the right.

(3) *Application of renewals.* (i) For purposes of paragraphs (c) (1) and (2) of this section, the duration of a right under a contract (or granted by a governmental unit) includes any renewal period if, based on all of the facts and circumstances in existence at any time during the taxable year in which the right is acquired, the facts clearly indicate a reasonable expectancy of renewal.

(ii) The mere fact that a taxpayer will have the opportunity to renew a contract right or other right on the same terms as are available to others, in a competitive auction or similar process that is designed to reflect fair market value and in which the taxpayer is not contractually advantaged, will generally not be taken into account in determining the duration of such right provided that the bidding produces a fair market value price comparable to the price that would be obtained if the rights were purchased immediately after renewal from a person (other than the person granting the renewal) in an arm's-length transaction.

(iii) The cost of a renewal not included in the terms of the contract or governmental grant is treated as the acquisition of a separate intangible asset.

(4) *Patents and copyrights.* If the purchase price of a interest (other than an interest acquired as part of a purchase of a trade or business) in a patent or copyright described in section 167(f)(2) and § 1.197–2(c)(7) is payable on at least an annual basis as either a fixed amount per use or a fixed percentage of the revenue derived from the use of the patent or copyright, the depreciation deduction for a taxable year is equal to the amount of the purchase price paid or incurred during the year. Otherwise, the basis of such patent or copyright (or an interest therein) is depreciated either ratably over its remaining useful life or under section 167(g) (income forecast method). If a patent or copyright becomes valueless in any year before its legal expiration, the adjusted basis may be deducted in that year.

(5) *Additional rules.* The period of amortization under paragraphs (c) (1) through (4) of this section begins when the intangible is placed in service, and rules similar to those in § 1.197–2(f)(2) apply for purposes of this paragraph (c).

(d) *Mortgage servicing rights*—(1) *In general.* The amount of the deduction for mortgage servicing rights described in section 167(f)(3) and § 1.197–2(c)(11) is determined by using the straight line method described in § 1.167(b)–1 (except that the salvage value is treated as zero) and an amortization period of 108 months beginning on the first day of the month that the rights are placed in service. Mortgage servicing rights are not depreciable to the extent the rights are stripped coupons under section 1286.

(2) *Treatment of rights acquired as a pool*—(i) *In general.* Except as provided in paragraph (d)(2)(ii) of this section, all mortgage servicing rights acquired in the same transaction or in a series of related transactions are treated as a single asset (the pool) for purposes of determining the depreciation deduction under this paragraph (d) and any gain or loss from the sale, exchange, or other disposition of the rights. Thus, if some (but not all) of the rights in a pool become worthless as a result of prepayments, no loss is recognized by reason of the prepayment and the adjusted basis of the pool is not affected by the unrecognized loss. Similarly, any amount realized from the sale or exchange of some (but not all) of the mortgage servicing rights is included in income and the adjusted basis of the pool is not affected by the realization.

(ii) *Multiple accounts.* If the taxpayer establishes multiple accounts within a pool at the time of its acquisition, gain or loss is recognized on the sale or exchange of all mortgage servicing rights within any such account.

(3) *Additional rules.* Rules similar to those in § 1.197–2(f)(1)(iii), (f)(1)(iv), and (f)(2) (relating to the computation of amortization deductions and the treatment of contingent amounts) apply for purposes of this paragraph (d).

(e) *Effective date*—(1) *In general.* This section applies to property acquired after January 25, 2000, except that § 1.167(a)–14(c)(2) (depreciation of the cost of certain separately acquired rights) and so much of § 1.167(a)–14(c)(3) as relates to § 1.167(a)–14(c)(2) apply to property acquired after August 10, 1993 (or July 25, 1991, if a valid retroactive election has been made under § 1.197–1T).

(2) *Change in method of accounting.* See § 1.197–2(l)(4) for rules relating to changes in method of accounting for property to which § 1.167(a)–14 applies.

Par. 6. Section 1.197–0 is added to read as follows:

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Par. 7. Section 1.197–2 is added to read as follows:

§ 1.197–2 Amortization of goodwill and certain other intangibles.

(a) *Overview*—(1) *In general.* Section 197 allows an amortization deduction for the capitalized costs of an amortizable section 197 intangible and prohibits any other depreciation or amortization with respect to that property. Paragraphs (b), (c), and (e) of this section provide rules and definitions for determining whether property is a section 197 intangible, and paragraphs (d) and (e) of this section provide rules and definitions for determining whether a section 197 intangible is an amortizable section 197 intangible. The amortization deduction under section 197 is determined by amortizing basis ratably over a 15-year period under the rules of paragraph (f) of this section. Section 197 also includes various special rules pertaining to the disposition of amortizable section 197 intangibles, nonrecognition transactions, anti-churning rules, and anti-abuse rules. Rules relating to these provisions are contained in paragraphs (g), (h), and (j) of this section. Examples demonstrating the application of these provisions are contained in paragraph (k) of this section. The effective date of the rules in this section is contained in paragraph (l) of this section.

(2) *Section 167(f) property.* Section 167(f) prescribes rules for computing the depreciation deduction for certain property to which section 197 does not apply. See § 1.167(a)–14 for rules under section 167(f) and paragraphs (c)(4), (6), (7), (11), and (13) of this section for a description of the property subject to section 167(f).

(3) *Amounts otherwise deductible.* Section 197 does not apply to amounts that are not chargeable to capital account under paragraph (f)(3) (relating to basis determinations for covenants not to compete and certain contracts for the use of section 197 intangibles) of this section and are otherwise currently deductible. For this purpose, an amount described in § 1.162–11 is not currently deductible if, without regard to § 1.162–11, such amount is properly chargeable to capital account.

(b) *Section 197 intangibles; in general.* Except as otherwise provided in paragraph (c) of this section, the term *section 197 intangible* means any property described in section 197(d)(1). The following rules and definitions provide guidance concerning property

that is a section 197 intangible unless an exception applies:

(1) *Goodwill.* Section 197 intangibles include goodwill. Goodwill is the value of a trade or business attributable to the expectancy of continued customer patronage. This expectancy may be due to the name or reputation of a trade or business or any other factor.

(2) *Going concern value.* Section 197 intangibles include going concern value. Going concern value is the additional value that attaches to property by reason of its existence as an integral part of an ongoing business activity. Going concern value includes the value attributable to the ability of a trade or business (or a part of a trade or business) to continue functioning or generating income without interruption notwithstanding a change in ownership, but does not include any of the intangibles described in any other provision of this paragraph (b). It also includes the value that is attributable to the immediate use or availability of an acquired trade or business, such as, for example, the use of the revenues or net earnings that otherwise would not be received during any period if the acquired trade or business were not available or operational.

(3) *Workforce in place.* Section 197 intangibles include workforce in place. Workforce in place (sometimes referred to as agency force or assembled workforce) includes the composition of a workforce (for example, the experience, education, or training of a workforce), the terms and conditions of employment whether contractual or otherwise, and any other value placed on employees or any of their attributes. Thus, the amount paid or incurred for workforce in place includes, for example, any portion of the purchase price of an acquired trade or business attributable to the existence of a highly-skilled workforce, an existing employment contract (or contracts), or a relationship with employees or consultants (including, but not limited to, any key employee contract or relationship). Workforce in place does not include any covenant not to compete or other similar arrangement described in paragraph (b)(9) of this section.

(4) *Information base.* Section 197 intangibles include any information base, including a customer-related information base. For this purpose, an information base includes business books and records, operating systems, and any other information base (regardless of the method of recording the information) and a customer-related information base is any information base that includes lists or other information with respect to current or prospective customers. Thus, the amount paid or incurred for information base includes, for example, any portion of the purchase price of an acquired trade or business attributable to the intangible value of technical manuals, training manuals or programs, data files, and accounting or inventory control systems. Other examples include the cost of acquiring customer lists, subscription lists, insurance expirations, patient or client files, or lists of newspaper, magazine, radio, or television advertisers.

(5) *Know-how, etc.* Section 197 intangibles include any patent, copyright, formula, process, design, pattern, know-how, format, package design, computer software (as defined in paragraph (c)(4)(iv) of this section), or interest in a film, sound recording, video tape, book, or other similar property. (See, however, the exceptions in paragraph (c) of this section.)

(6) *Customer-based intangibles.* Section 197 intangibles include any customer-based intangible. A customer-based intangible is any composition of market, market share, or other value resulting from the future provision of goods or services pursuant to contractual or other relationships in the ordinary course of business with customers. Thus, the amount paid or incurred for customer-based intangibles includes, for example, any portion of the purchase price of an acquired trade or business attributable to the existence of a customer base, a circulation base, an undeveloped market or market growth, insurance in force, the existence of a qualification to supply goods or services to a particular customer, a mortgage servicing contract (as defined in paragraph (c)(11) of this section), an investment management contract, or other relationship with customers involving the future provision of goods or services. (See, however, the exceptions in paragraph (c) of this section.) In addition, customer-based intangibles include the deposit base and any similar asset of a financial institution. Thus, the amount paid or incurred for customer-based intangibles also includes any portion of the purchase price of an acquired financial institution attributable to the value represented by existing checking accounts, savings accounts, escrow accounts, and other similar items of the financial institution. However, any portion of the purchase price of an acquired trade or business attributable to accounts receivable or other similar rights to income for goods or services provided to customers prior to the acquisition of a trade or business is not an amount paid or incurred for a customer-based intangible.

(7) *Supplier-based intangibles.* Section 197 intangibles include any supplier-based intangible. A supplier-based intangible is the value resulting from the future acquisition, pursuant to contractual or other relationships with suppliers in the ordinary course of business, of goods or services that will be sold or used by the taxpayer. Thus, the amount paid or incurred for supplier-based intangibles includes, for example, any portion of the purchase price of an acquired trade or business attributable to the existence of a favorable relationship with persons providing distribution services (such as favorable shelf or display space at a retail outlet), the existence of a favorable credit rating, or the existence of favorable supply contracts. The amount paid or incurred for supplier-based intangibles does not include any amount required to be paid for the goods or services themselves pursuant to the terms of the agreement or other relationship. In addition, see the exceptions in paragraph (c) of this section, including the exception in paragraph (c)(6) of this section for certain rights to receive tangible property or services from another person.

(8) *Licenses, permits, and other rights granted by governmental units.* Section 197 intangibles include any license, permit, or other right granted by a governmental unit (including, for purposes of section 197, an agency or instrumentality thereof) even if the right is granted for an indefinite period or is reasonably expected to be renewed for an indefinite period. These rights include, for example, a liquor license, a taxi-cab medallion (or license), an airport landing or takeoff right (sometimes referred to as a slot), a regulated airline route, or a television or radio broadcasting license. The issuance or renewal of a license, permit, or other right granted by a governmental unit is considered an acquisition of the license, permit, or other right. (See, however, the exceptions in paragraph (c) of this section, including the exceptions in paragraph (c)(3) of this section for an interest in land, paragraph (c)(6) of this section for certain rights to receive tangible property or services, paragraph (c)(8) of this section for an interest under a lease of tangible property, and paragraph (c)(13) of this section for certain rights granted by a governmental unit. See paragraph (b)(10) of this section for the treatment of franchises.)

(9) *Covenants not to compete and other similar arrangements.* Section 197 intangibles include any covenant not to

compete, or agreement having substantially the same effect, entered into in connection with the direct or indirect acquisition of an interest in a trade or business or a substantial portion thereof. For purposes of this paragraph (b)(9), an acquisition may be made in the form of an asset acquisition (including a qualified stock purchase that is treated as a purchase of assets under section 338), a stock acquisition or redemption, and the acquisition or redemption of a partnership interest. An agreement requiring the performance of services for the acquiring taxpayer or the provision of property or its use to the acquiring taxpayer does not have substantially the same effect as a covenant not to compete to the extent that the amount paid under the agreement represents reasonable compensation for the services actually rendered or for the property or use of the property actually provided.

(10) *Franchises, trademarks, and trade names.* (i) Section 197 intangibles include any franchise, trademark, or trade name. The term *franchise* has the meaning given in section 1253(b)(1) and includes any agreement that provides one of the parties to the agreement with the right to distribute, sell, or provide goods, services, or facilities, within a specified area. The term *trademark* includes any word, name, symbol, or device, or any combination thereof, adopted and used to identify goods or services and distinguish them from those provided by others. The term *trade name* includes any name used to identify or designate a particular trade or business or the name or title used by a person or organization engaged in a trade or business. A license, permit, or other right granted by a governmental unit is a franchise if it otherwise meets the definition of a franchise. A trademark or trade name includes any trademark or trade name arising under statute or applicable common law, and any similar right granted by contract. The renewal of a franchise, trademark, or trade name is treated as an acquisition of the franchise, trademark, or trade name.

(ii) Notwithstanding the definitions provided in paragraph (b)(10)(i) of this section, any amount that is paid or incurred on account of a transfer, sale, or other disposition of a franchise, trademark, or trade name and that is subject to section 1253(d)(1) is not included in the basis of a section 197 intangible. (See paragraph (g)(6) of this section.)

(11) *Contracts for the use of, and term interests in, section 197 intangibles.* Section 197 intangibles include any right under a license, contract, or other arrangement providing for the use of property that would be a section 197 intangible under any provision of this paragraph (b) (including this paragraph (b)(11)) after giving effect to all of the exceptions provided in paragraph (c) of this section. Section 197 intangibles also include any term interest (whether outright or in trust) in such property.

(12) *Other similar items.* Section 197 intangibles include any other intangible property that is similar in all material respects to the property specifically described in section 197(d)(1)(C)(i) through (v) and paragraphs (b)(3) through (7) of this section. (See paragraph (g)(5) of this section for special rules regarding certain reinsurance transactions.)

(c) *Section 197 intangibles; exceptions.* The term *section 197 intangible* does not include property described in section 197(e). The following rules and definitions provide guidance concerning property to which the exceptions apply:

(1)*Interests in a corporation, partnership, trust, or estate.* Section 197 intangibles do not include an interest in a corporation, partnership, trust, or estate. Thus, for example, amortization under section 197 is not available for the cost of acquiring stock, partnership interests, or interests in a trust or estate, whether or not the interests are regularly traded on an established market. (See paragraph (g)(3) of this section for special rules applicable to property of a partnership when a section 754 election is in effect for the partnership.)

(2) *Interests under certain financial contracts.* Section 197 intangibles do not include an interest under an existing futures contract, foreign currency contract, notional principal contract, interest rate swap, or other similar financial contract, whether or not the interest is regularly traded on an established market. However, this exception does not apply to an interest under a mortgage servicing contract, credit card servicing contract, or other contract to service another person's indebtedness, or an interest under an assumption reinsurance contract. (See paragraph (g)(5) of this section for the treatment of assumption reinsurance contracts. See paragraph (c)(11) of this section and § 1.167(a)–14(d) for the treatment of mortgage servicing rights.)

(3) *Interests in land.* Section 197 intangibles do not include any interest in land. For this purpose, an interest in land includes a fee interest, life estate, remainder, easement, mineral right, timber right, grazing right, riparian right, air right, zoning variance, and any other similar right, such as a farm allotment, quota for farm commodities, or crop acreage base. An interest in land does not include an airport landing or takeoff right, a regulated airline route, or a franchise to provide cable television service. The cost of acquiring a license, permit, or other land improvement right, such as a building construction or use permit, is taken into account in the same manner as the underlying improvement.

(4) *Certain computer software*—(i) *Publicly available.* Section 197 intangibles do not include any interest in computer software that is (or has been) readily available to the general public on similar terms, is subject to a nonexclusive license, and has not been substantially modified. Computer software will be treated as readily available to the general public if the software may be obtained on substantially the same terms by a significant number of persons that would reasonably be expected to use the software. This requirement can be met even though the software is not available through a system of retail distribution. Computer software will not be considered to have been substantially modified if the cost of all modifications to the version of the software that is readily available to the general public does not exceed the greater of 25 percent of the price at which the unmodified version of the software is readily available to the general public or $2,000. For the purpose of determining whether computer software has been substantially modified—

(A) Integrated programs acquired in a package from a single source are treated as a single computer program; and

(B) Any cost incurred to install the computer software on a system is not treated as a cost of the software. However, the costs for customization, such as tailoring to a user's specifications (other than embedded programming options) are costs of modifying the software.

(ii) *Not acquired as part of trade or business.* Section 197 intangibles do not include an interest in computer software that is not acquired as part of a purchase of a trade or business.

(iii) *Other exceptions.* For other exceptions applicable to computer software, see paragraph (a)(3) of this section (relating to otherwise deductible amounts) and paragraph (g)(7) of this section (relating to amounts properly taken into account in determining the cost of property that is not a section 197 intangible).

(iv) *Computer software defined.* For purposes of this section, computer software is any program or routine (that is, any sequence of machine-readable

code) that is designed to cause a computer to perform a desired function or set of functions, and the documentation required to describe and maintain that program or routine. It includes all forms and media in which the software is contained, whether written, magnetic, or otherwise. Computer programs of all classes, for example, operating systems, executive systems, monitors, compilers and translators, assembly routines, and utility programs as well as application programs, are included. Computer software also includes any incidental and ancillary rights that are necessary to effect the acquisition of the title to, the ownership of, or the right to use the computer software, and that are used only in connection with that specific computer software. Such incidental and ancillary rights are not included in the definition of trademark or trade name under paragraph (b)(10)(i) of this section. For example, a trademark or trade name that is ancillary to the ownership or use of a specific computer software program in the taxpayer's trade or business and is not acquired for the purpose of marketing the computer software is included in the definition of computer software and is not included in the definition of trademark or trade name. Computer software does not include any data or information base described in paragraph (b)(4) of this section unless the data base or item is in the public domain and is incidental to a computer program. For this purpose, a copyrighted or proprietary data or information base is treated as in the public domain if its availability through the computer program does not contribute significantly to the cost of the program. For example, if a word-processing program includes a dictionary feature used to spell-check a document or any portion thereof, the entire program (including the dictionary feature) is computer software regardless of the form in which the feature is maintained or stored.

(5) *Certain interests in films, sound recordings, video tapes, books, or other similar property.* Section 197 intangibles do not include any interest (including an interest as a licensee) in a film, sound recording, video tape, book, or other similar property (such as the right to broadcast or transmit a live event) if the interest is not acquired as part of a purchase of a trade or business. A film, sound recording, video tape, book, or other similar property includes any incidental and ancillary rights (such as a trademark or trade name) that are necessary to effect the acquisition of title to, the ownership of, or the right to use the property and are used only in connection with that property. Such incidental and ancillary rights are not included in the definition of trademark or trade name under paragraph (b)(10)(i) of this section. For purposes of this paragraph (c)(5), computer software (as defined in paragraph (c)(4)(iv) of this section) is not treated as other property similar to a film, sound recording, video tape, or book. (See section 167 for amortization of excluded intangible property or interests.)

(6) *Certain rights to receive tangible property or services.* Section 197 intangibles do not include any right to receive tangible property or services under a contract or from a governmental unit if the right is not acquired as part of a purchase of a trade or business. Any right that is described in the preceding sentence is not treated as a section 197 intangible even though the right is also described in section 197(d)(1)(D) and paragraph (b)(8) of this section (relating to certain governmental licenses, permits, and other rights) and even though the right fails to meet one or more of the requirements of paragraph (c)(13) of this section (relating to certain rights of fixed duration or amount). (See § 1.167(a)–14(c) (1) and (3) for applicable rules.)

(7) *Certain interests in patents or copyrights.* Section 197 intangibles do not include any interest (including an interest as a licensee) in a patent, patent application, or copyright that is not acquired as part of a purchase of a trade or business. A patent or copyright includes any incidental and ancillary rights (such as a trademark or trade name) that are necessary to effect the acquisition of title to, the ownership of, or the right to use the property and are used only in connection with that property. Such incidental and ancillary rights are not included in the definition of trademark or trade name under paragraph (b)(10)(i) of this section. (See § 1.167(a)–14(c)(4) for applicable rules.)

(8) *Interests under leases of tangible property*—(i) *Interest as a lessor.* Section 197 intangibles do not include any interest as a lessor under an existing lease or sublease of tangible real or personal property. In addition, the cost of acquiring an interest as a lessor in connection with the acquisition of tangible property is taken into account as part of the cost of the tangible property. For example, if a taxpayer acquires a shopping center that is leased to tenants operating retail stores, any portion of the purchase price attributable to favorable lease terms is taken into account as part of the basis of the shopping center and in determining the depreciation deduction allowed with respect to the shopping center. (See section 167(c)(2).)

(ii) *Interest as a lessee.* Section 197 intangibles do not include any interest as a lessee under an existing lease of tangible real or personal property. For this purpose, an airline lease of an airport passenger or cargo gate is a lease of tangible property. The cost of acquiring such an interest is taken into account under section 178 and § 1.162–11(a). If an interest as a lessee under a lease of tangible property is acquired in a transaction with any other intangible property, a portion of the total purchase price may be allocable to the interest as a lessee based on all of the relevant facts and circumstances.

(9) *Interests under indebtedness*—(i) *In general.* Section 197 intangibles do not include any interest (whether as a creditor or debtor) under an indebtedness in existence when the interest was acquired. Thus, for example, the value attributable to the assumption of an indebtedness with a below-market interest rate is not amortizable under section 197. In addition, the premium paid for acquiring a debt instrument with an above-market interest rate is not amortizable under section 197. See section 171 for rules concerning the treatment of amortizable bond premium.

(ii) *Exceptions.* For purposes of this paragraph (c)(9), an interest under an existing indebtedness does not include the deposit base (and other similar items) of a financial institution. An interest under an existing indebtedness includes mortgage servicing rights, however, to the extent the rights are stripped coupons under section 1286.

(10) *Professional sports franchises.* Section 197 intangibles do not include any franchise to engage in professional baseball, basketball, football, or any other professional sport, and any item (even though otherwise qualifying as a section 197 intangible) acquired in connection with such a franchise.

(11) *Mortgage servicing rights.* Section 197 intangibles do not include any right described in section 197(e)(7) (concerning rights to service indebtedness secured by residential real property that are not acquired as part of a purchase of a trade or business). (See § 1.167(a)–14(d) for applicable rules.)

(12) *Certain transaction costs.* Section 197 intangibles do not include any fees for professional services and any transaction costs incurred by parties to a transaction in which all or any portion of the gain or loss is not recognized under part III of subchapter C of the Internal Revenue Code.

(13) *Rights of fixed duration or amount.* (i) Section 197 intangibles do

not include any right under a contract or any license, permit, or other right granted by a governmental unit if the right—

(A) Is acquired in the ordinary course of a trade or business (or an activity described in section 212) and not as part of a purchase of a trade or business;

(B) Is not described in section 197(d)(1)(A), (B), (E), or (F);

(C) Is not a customer-based intangible, a customer-related information base, or any other similar item; and

(D) Either—

(*1*) Has a fixed duration of less than 15 years; or

(*2*) Is fixed as to amount and the adjusted basis thereof is properly recoverable (without regard to this section) under a method similar to the unit-of-production method.

(ii) See § 1.167(a)–14(c)(2) and (3) for applicable rules.

(d) *Amortizable section 197 intangibles*—(1) *Definition.* Except as otherwise provided in this paragraph (d), the term *amortizable section 197 intangible* means any section 197 intangible acquired after August 10, 1993 (or after July 25, 1991, if a valid retroactive election under § 1.197–1T has been made), and held in connection with the conduct of a trade or business or an activity described in section 212.

(2) *Exception for self-created intangibles*—(i) *In general.* Except as provided in paragraph (d)(2)(iii) of this section, amortizable section 197 intangibles do not include any section 197 intangible created by the taxpayer (a self-created intangible).

(ii) *Created by the taxpayer*—(A) *Defined.* A section 197 intangible is created by the taxpayer to the extent the taxpayer makes payments or otherwise incurs costs for its creation, production, development, or improvement, whether the actual work is performed by the taxpayer or by another person under a contract with the taxpayer entered into before the contracted creation, production, development, or improvement occurs. For example, a technological process developed specifically for a taxpayer under an arrangement with another person pursuant to which the taxpayer retains all rights to the process is created by the taxpayer.

(B) *Contracts for the use of intangibles.* A section 197 intangible is not a self-created intangible to the extent that it results from the entry into (or renewal of) a contract for the use of an existing section 197 intangible. Thus, for example, the exception for self-created intangibles does not apply to capitalized costs, such as legal and other professional fees, incurred by a licensee in connection with the entry into (or renewal of) a contract for the use of know-how or similar property.

(C) *Improvements and modifications.* If an existing section 197 intangible is improved or otherwise modified by the taxpayer or by another person under a contract with the taxpayer, the existing intangible and the capitalized costs (if any) of the improvements or other modifications are each treated as a separate section 197 intangible for purposes of this paragraph (d).

(iii) *Exceptions.* (A) The exception for self-created intangibles does not apply to any section 197 intangible described in section 197(d)(1)(D) (relating to licenses, permits or other rights granted by a governmental unit), 197(d)(1)(E) (relating to covenants not to compete), or 197(d)(1)(F) (relating to franchises, trademarks, and trade names). Thus, for example, capitalized costs incurred in the development, registration, or defense of a trademark or trade name do not qualify for the exception and are amortized over 15 years under section 197.

(B) The exception for self-created intangibles does not apply to any section 197 intangible created in connection with the purchase of a trade or business (as defined in paragraph (e) of this section).

(C) If a taxpayer disposes of a self-created intangible and subsequently reacquires the intangible in an acquisition described in paragraph (h)(5)(ii) of this section, the exception for self-created intangibles does not apply to the reacquired intangible.

(3) *Exception for property subject to anti-churning rules.* Amortizable section 197 intangibles do not include any property to which the anti-churning rules of section 197(f)(9) and paragraph (h) of this section apply.

(e) *Purchase of a trade or business.* Several of the exceptions in section 197 apply only to property that is not acquired in (or created in connection with) a transaction or series of related transactions involving the acquisition of assets constituting a trade or business or a substantial portion thereof. Property acquired in (or created in connection with) such a transaction or series of related transactions is referred to in this section as property acquired as part of (or created in connection with) a purchase of a trade or business. For purposes of section 197 and this section, the applicability of the limitation is determined under the following rules:

(1) *Goodwill or going concern value.* An asset or group of assets constitutes a trade or business or a substantial portion thereof if their use would constitute a trade or business under section 1060 (that is, if goodwill or going concern value could under any circumstances attach to the assets). See § 1.1060–1T(b)(2). For this purpose, all the facts and circumstances, including any employee relationships that continue (or covenants not to compete that are entered into) as part of the transfer of the assets, are taken into account in determining whether goodwill or going concern value could attach to the assets.

(2) *Franchise, trademark, or trade name*—(i) *In general.* The acquisition of a franchise, trademark, or trade name constitutes the acquisition of a trade or business or a substantial portion thereof.

(ii) *Exceptions.* For purposes of this paragraph (e)(2)—

(A) A trademark or trade name is disregarded if it is included in computer software under paragraph (c)(4) of this section or in an interest in a film, sound recording, video tape, book, or other similar property under paragraph (c)(5) of this section;

(B) A franchise, trademark, or trade name is disregarded if its value is nominal or the taxpayer irrevocably disposes of it immediately after its acquisition; and

(C) The acquisition of a right or interest in a trademark or trade name is disregarded if the grant of the right or interest is not, under the principles of section 1253, a transfer of all substantial rights to such property or of an undivided interest in all substantial rights to such property.

(3) *Acquisitions to be included.* The assets acquired in a transaction (or series of related transactions) include only assets (including a beneficial or other indirect interest in assets where the interest is of a type described in paragraph (c)(1) of this section) acquired by the taxpayer and persons related to the taxpayer from another person and persons related to that other person. For purposes of this paragraph (e)(3), persons are related only if their relationship is described in section 267(b) or 707(b) or they are engaged in trades or businesses under common control within the meaning of section 41(f)(1).

(4) *Substantial portion.* The determination of whether acquired assets constitute a substantial portion of a trade or business is to be based on all of the facts and circumstances, including the nature and the amount of the assets acquired as well as the nature and amount of the assets retained by the transferor. The value of the assets acquired relative to the value of the assets retained by the transferor is not determinative of whether the acquired

assets constitute a substantial portion of a trade or business.

(5) *Deemed asset purchases under section 338.* A qualified stock purchase that is treated as a purchase of assets under section 338 is treated as a transaction involving the acquisition of assets constituting a trade or business only if the direct acquisition of the assets of the corporation would have been treated as the acquisition of assets constituting a trade or business or a substantial portion thereof.

(6) *Mortgage servicing rights.* Mortgage servicing rights acquired in a transaction or series of related transactions are disregarded in determining for purposes of paragraph (c)(11) of this section whether the assets acquired in the transaction or transactions constitute a trade or business or substantial portion thereof.

(7) *Computer software acquired for internal use.* Computer software acquired in a transaction or series of related transactions solely for internal use in an existing trade or business is disregarded in determining for purposes of paragraph (c)(4) of this section whether the assets acquired in the transaction or series of related transactions constitute a trade or business or substantial portion thereof.

(f) *Computation of amortization deduction*—(1) *In general.* Except as provided in paragraph (f)(2) of this section, the amortization deduction allowable under section 197(a) is computed as follows:

(i) The basis of an amortizable section 197 intangible is amortized ratably over the 15-year period beginning on the later of—

(A) The first day of the month in which the property is acquired; or

(B) In the case of property held in connection with the conduct of a trade or business or in an activity described in section 212, the first day of the month in which the conduct of the trade or business or the activity begins.

(ii) Except as otherwise provided in this section, basis is determined under section 1011 and salvage value is disregarded.

(iii) Property is not eligible for amortization in the month of disposition.

(iv) The amortization deduction for a short taxable year is based on the number of months in the short taxable year.

(2) *Treatment of contingent amounts*—(i) *Amounts added to basis during 15-year period.* Any amount that is properly included in the basis of an amortizable section 197 intangible after the first month of the 15-year period described in paragraph (f)(1)(i) of this section and before the expiration of that period is amortized ratably over the remainder of the 15-year period. For this purpose, the remainder of the 15-year period begins on the first day of the month in which the basis increase occurs.

(ii) *Amounts becoming fixed after expiration of 15-year period.* Any amount that is not properly included in the basis of an amortizable section 197 intangible until after the expiration of the 15-year period described in paragraph (f)(1)(i) of this section is amortized in full immediately upon the inclusion of the amount in the basis of the intangible.

(iii) *Rules for including amounts in basis.* See §§ 1.1275–4(c)(4) and 1.483–4(a) for rules governing the extent to which contingent amounts payable under a debt instrument given in consideration for the sale or exchange of an amortizable section 197 intangible are treated as payments of principal and the time at which the amount treated as principal is included in basis. See § 1.461–1(a)(1) and (2) for rules governing the time at which other contingent amounts are taken into account in determining the basis of an amortizable section 197 intangible.

(3) *Basis determinations for certain assets*—(i) *Covenants not to compete.* In the case of a covenant not to compete or other similar arrangement described in paragraph (b)(9) of this section (a covenant), the amount chargeable to capital account includes, except as provided in this paragraph (f)(3), all amounts that are required to be paid pursuant to the covenant, whether or not any such amount would be deductible under section 162 if the covenant were not a section 197 intangible.

(ii) *Contracts for the use of section 197 intangibles; acquired as part of a trade or business*—(A) *In general.* Except as provided in this paragraph (f)(3), any amount paid or incurred by the transferee on account of the transfer of a right or term interest described in paragraph (b)(11) of this section (relating to contracts for the use of, and term interests in, section 197 intangibles) by the owner of the property to which such right or interest relates and as part of a purchase of a trade or business is chargeable to capital account, whether or not such amount would be deductible under section 162 if the property were not a section 197 intangible.

(B) *Know-how and certain information base.* The amount chargeable to capital account with respect to a right or term interest described in paragraph (b)(11) of this section is determined without regard to the rule in paragraph (f)(3)(ii)(A) of this section if the right or interest relates to property (other than a customer-related information base) described in paragraph (b)(4) or (5) of this section and the acquiring taxpayer establishes that—

(*1*) The transfer of the right or interest is not, under the principles of section 1235, a transfer of all substantial rights to such property or of an undivided interest in all substantial rights to such property; and

(*2*) The right or interest was transferred for an arm's-length consideration.

(iii) *Contracts for the use of section 197 intangibles; not acquired as part of a trade or business.* The transfer of a right or term interest described in paragraph (b)(11) of this section by the owner of the property to which such right or interest relates but not as part of a purchase of a trade or business will be closely scrutinized under the principles of section 1235 for purposes of determining whether the transfer is a sale or exchange and, accordingly, whether amounts paid on account of the transfer are chargeable to capital account. If under the principles of section 1235 the transaction is not a sale or exchange, amounts paid on account of the transfer are not chargeable to capital account under this paragraph (f)(3).

(iv) *Applicable rules*—(A) *Franchises, trademarks, and trade names.* For purposes of this paragraph (f)(3), section 197 intangibles described in paragraph (b)(11) of this section do not include any property that is also described in paragraph (b)(10) of this section (relating to franchises, trademarks, and trade names).

(B) *Certain amounts treated as payable under a debt instrument*—(*1*) *In general.* For purposes of applying any provision of the Internal Revenue Code to a person making payments of amounts that are otherwise chargeable to capital account under this paragraph (f)(3) and are payable after the acquisition of the section 197 intangible to which they relate, such amounts are treated as payable under a debt instrument given in consideration for the sale or exchange of the section 197 intangible.

(*2*) *Rights granted by governmental units.* For purposes of applying any provision of the Internal Revenue Code to any amounts that are otherwise chargeable to capital account with respect to a license, permit, or other right described in paragraph (b)(8) of this section (relating to rights granted by a governmental unit or agency or

instrumentality thereof) and are payable after the acquisition of the section 197 intangible to which they relate, such amounts are treated, except as provided in paragraph (f)(4)(i) of this section (relating to renewal transactions), as payable under a debt instrument given in consideration for the sale or exchange of the section 197 intangible.

(*3*) *Treatment of other parties to transaction.* No person shall be treated as having sold, exchanged, or otherwise disposed of property in a transaction for purposes of any provision of the Internal Revenue Code solely by reason of the application of this paragraph (f)(3) to any other party to the transaction.

(*4*) *Basis determinations in certain transactions* —(*i*) *Certain renewal transactions.* The costs paid or incurred for the renewal of a franchise, trademark, or trade name or any license, permit, or other right granted by a governmental unit or an agency or instrumentality thereof are amortized over the 15-year period that begins with the month of renewal. Any costs paid or incurred for the issuance, or earlier renewal, continue to be taken into account over the remaining portion of the amortization period that began at the time of the issuance, or earlier renewal. Any amount paid or incurred for the protection, expansion, or defense of a trademark or trade name and chargeable to capital account is treated as an amount paid or incurred for a renewal.

(*ii*) *Transactions subject to section 338 or 1060.* In the case of a section 197 intangible deemed to have been acquired as the result of a qualified stock purchase within the meaning of section 338(d)(3), the basis shall be determined pursuant to section 338(b)(5) and the regulations thereunder. In the case of a section 197 intangible acquired in an applicable asset acquisition within the meaning of section 1060(c), the basis shall be determined pursuant to section 1060(a) and the regulations thereunder.

(*iii*) *Certain reinsurance transactions.* See paragraph (g)(5)(ii) of this section for special rules regarding the adjusted basis of an insurance contract acquired through an assumption reinsurance transaction.

(g) *Special rules*—(1) *Treatment of certain dispositions*—(i) *Loss disallowance rules*—(A) *In general.* No loss is recognized on the disposition of an amortizable section 197 intangible if the taxpayer has any retained intangibles. The retained intangibles with respect to the disposition of any amortizable section 197 intangible (the transferred intangible) are all amortizable section 197 intangibles, or rights to use or interests (including beneficial or other indirect interests) in amortizable section 197 intangibles (including the transferred intangible) that were acquired in the same transaction or series of related transactions as the transferred intangible and are retained after its disposition. Except as otherwise provided in paragraph (g)(1)(iv)(B) of this section, the adjusted basis of each of the retained intangibles is increased by the product of—

(*1*) The loss that is not recognized solely by reason of this rule; and

(*2*) A fraction, the numerator of which is the adjusted basis of the retained intangible on the date of the disposition and the denominator of which is the total adjusted bases of all the retained intangibles on that date.

(B) *Abandonment or worthlessness.* The abandonment of an amortizable section 197 intangible, or any other event rendering an amortizable section 197 intangible worthless, is treated as a disposition of the intangible for purposes of this paragraph (g)(1), and the abandoned or worthless intangible is disregarded (that is, it is not treated as a retained intangible) for purposes of applying this paragraph (g)(1) to the subsequent disposition of any other amortizable section 197 intangible.

(C) *Certain nonrecognition transfers.* The loss disallowance rule in paragraph (g)(1)(i)(A) of this section also applies when a taxpayer transfers an amortizable section 197 intangible from an acquired trade or business in a transaction in which the intangible is transferred basis property and, after the transfer, retains other amortizable section 197 intangibles from the trade or business. Thus, for example, the transfer of an amortizable section 197 intangible to a corporation in exchange for stock in the corporation in a transaction described in section 351, or to a partnership in exchange for an interest in the partnership in a transaction described in section 721, when other amortizable section 197 intangibles acquired in the same transaction are retained, followed by a sale of the stock or partnership interest received, will not avoid the application of the loss disallowance provision to the extent the adjusted basis of the transferred intangible at the time of the sale exceeds its fair market value at that time.

(ii) *Separately acquired property.* Paragraph (g)(1)(i) of this section does not apply to an amortizable section 197 intangible that is not acquired in a transaction or series of related transactions in which the taxpayer acquires other amortizable section 197 intangibles (a separately acquired intangible). Consequently, a loss may be recognized upon the disposition of a separately acquired amortizable section 197 intangible. However, the termination or worthlessness of only a portion of an amortizable section 197 intangible is not the disposition of a separately acquired intangible. For example, neither the loss of several customers from an acquired customer list nor the worthlessness of only some information from an acquired data base constitutes the disposition of a separately acquired intangible.

(iii) *Disposition of a covenant not to compete.* If a covenant not to compete or any other arrangement having substantially the same effect is entered into in connection with the direct or indirect acquisition of an interest in one or more trades or businesses, the disposition or worthlessness of the covenant or other arrangement will not be considered to occur until the disposition or worthlessness of all interests in those trades or businesses. For example, a covenant not to compete entered into in connection with the purchase of stock continues to be amortized ratably over the 15-year recovery period (even after the covenant expires or becomes worthless) unless all the trades or businesses in which an interest was acquired through the stock purchase (or all the purchaser's interests in those trades or businesses) also are disposed of or become worthless.

(iv) *Taxpayers under common control*—(A) *In general.* Except as provided in paragraph (g)(1)(iv)(B) of this section, all persons that would be treated as a single taxpayer under section 41(f)(1) are treated as a single taxpayer under this paragraph (g)(1). Thus, for example, a loss is not recognized on the disposition of an amortizable section 197 intangible by a member of a controlled group of corporations (as defined in section 41(f)(5)) if, after the disposition, another member retains other amortizable section 197 intangibles acquired in the same transaction as the amortizable section 197 intangible that has been disposed of.

(B) *Treatment of disallowed loss.* If retained intangibles are held by a person other than the person incurring the disallowed loss, only the adjusted basis of intangibles retained by the person incurring the disallowed loss is increased, and only the adjusted basis of those intangibles is included in the denominator of the fraction described in paragraph (g)(1)(i)(A) of this section. If none of the retained intangibles are held by the person incurring the disallowed loss, the loss is allowed ratably, as a deduction under section 197, over the remainder of the period during which

the intangible giving rise to the loss would have been amortizable, except that any remaining disallowed loss is allowed in full on the first date on which all other retained intangibles have been disposed of or become worthless.

(2) *Treatment of certain nonrecognition and exchange transactions*—(i) *Relationship to anti-churning rules.* This paragraph (g)(2) provides rules relating to the treatment of section 197 intangibles acquired in certain transactions. If these rules apply to a section 197(f)(9) intangible (within the meaning of paragraph (h)(1)(i) of this section), the intangible is, notwithstanding its treatment under this paragraph (g)(2), treated as an amortizable section 197 intangible only to the extent permitted under paragraph (h) of this section.

(ii) *Treatment of nonrecognition and exchange transactions generally*—(A) *Transfer disregarded.* If a section 197 intangible is transferred in a transaction described in paragraph (g)(2)(ii)(C) of this section, the transfer is disregarded in determining—

(*1*) Whether, with respect to so much of the intangible's basis in the hands of the transferee as does not exceed its basis in the hands of the transferor, the intangible is an amortizable section 197 intangible; and

(*2*) The amount of the deduction under section 197 with respect to such basis.

(B) *Application of general rule.* If the intangible described in paragraph (g)(2)(ii)(A) of this section was an amortizable section 197 intangible in the hands of the transferor, the transferee will continue to amortize its adjusted basis, to the extent it does not exceed the transferor's adjusted basis, ratably over the remainder of the transferor's 15-year amortization period. If the intangible was not an amortizable section 197 intangible in the hands of the transferor, the transferee's adjusted basis, to the extent it does not exceed the transferor's adjusted basis, cannot be amortized under section 197. In either event, the intangible is treated, with respect to so much of its adjusted basis in the hands of the transferee as exceeds its adjusted basis in the hands of the transferor, in the same manner for purposes of section 197 as an intangible acquired from the transferor in a transaction that is not described in paragraph (g)(2)(ii)(C) of this section. The rules of this paragraph (g)(2)(ii) also apply to any subsequent transfers of the intangible in a transaction described in paragraph (g)(2)(ii)(C) of this section.

(C) *Transactions covered.* The transactions described in this paragraph (g)(2)(ii)(C) are—

(*1*) Any transaction described in section 332, 351, 361, 721, or 731; and

(*2*) Any transaction between corporations that are members of the same consolidated group immediately after the transaction.

(iii) *Certain exchanged-basis property.* This paragraph (g)(2)(iii) applies to property that is acquired in a transaction subject to section 1031 or 1033 and is permitted to be acquired without recognition of gain (replacement property). Replacement property is treated as if it were the property by reference to which its basis is determined (the predecessor property) in determining whether, with respect to so much of its basis as does not exceed the basis of the predecessor property, the replacement property is an amortizable section 197 intangible and the amortization period under section 197 with respect to such basis. Thus, if the predecessor property was an amortizable section 197 intangible, the taxpayer will amortize the adjusted basis of the replacement property, to the extent it does not exceed the adjusted basis of the predecessor property, ratably over the remainder of the 15-year amortization period for the predecessor property. If the predecessor property was not an amortizable section 197 intangible, the adjusted basis of the replacement property, to the extent it does not exceed the adjusted basis of the predecessor property, may not be amortized under section 197. In either event, the replacement property is treated, with respect to so much of its adjusted basis as exceeds the adjusted basis of the predecessor property, in the same manner for purposes of section 197 as property acquired from the transferor in a transaction that is not subject to section 1031 or 1033.

(iv) *Transfers under section 708(b)(1)*—(A) *In general.* Paragraph (g)(2)(ii) of this section applies to transfers of section 197 intangibles that occur or are deemed to occur by reason of the termination of a partnership under section 708(b)(1).

(B) *Termination by sale or exchange of interest.* In applying paragraph (g)(2)(ii) of this section to a partnership that is terminated pursuant to section 708(b)(1)(B) (relating to deemed terminations from the sale or exchange of an interest), the terminated partnership is treated as the transferor and the new partnership is treated as the transferee with respect to any section 197 intangible held by the terminated partnership immediately preceding the termination. (See paragraph (g)(3) of this section for the treatment of increases in the bases of property of the terminated partnership under section 743(b).)

(C) *Other terminations.* In applying paragraph (g)(2)(ii) of this section to a partnership that is terminated pursuant to section 708(b)(1)(A) (relating to cessation of activities by a partnership), the terminated partnership is treated as the transferor and the distributee partner is treated as the transferee with respect to any section 197 intangible held by the terminated partnership immediately preceding the termination.

(3) *Increase in the basis of partnership property under section 732(b), 734(b), 743(b), or 732(d).* Any increase in the adjusted basis of a section 197 intangible under sections 732(b) or 732(d) (relating to a partner's basis in property distributed by a partnership), section 734(b) (relating to the optional adjustment to the basis of undistributed partnership property after a distribution of property to a partner), or section 743(b) (relating to the optional adjustment to the basis of partnership property after transfer of a partnership interest) is treated as a separate section 197 intangible. For purposes of determining the amortization period under section 197 with respect to the basis increase, the intangible is treated as having been acquired at the time of the transaction that causes the basis increase. The provisions of paragraph (f)(2) of this section apply to the extent that the amount of the basis increase is determined by reference to contingent payments. For purposes of the effective date and anti-churning provisions (paragraphs (l)(1) and (h) of this section) for a basis increase under section 732(d), the intangible is treated as having been acquired by the transferee partner at the time of the transfer of the partnership interest described in section 732(d).

(4) *Section 704(c) allocations* —(i) *Allocations where the intangible is amortizable by the contributor.* To the extent that the intangible was an amortizable section 197 intangible in the hands of the contributing partner, a partnership may make allocations of amortization deductions with respect to the intangible to all of its partners under either the curative or remedial allocation methods described in the regulations under section 704(c). See § 1.704–3(c) and (d).

(ii) *Allocations where the intangible is not amortizable by the contributor.* To the extent that the intangible was not an amortizable section 197 intangible in the hands of the contributing partner, the intangible is not amortizable by the partnership. However, if a partner

contributes a section 197 intangible to a partnership and the partnership adopts the remedial allocation method for making section 704(c) allocations of amortization deductions, the partnership generally may make remedial allocations of amortization deductions with respect to the contributed section 197 intangible in accordance with § 1.704–3(d). See paragraph (h)(12) of this section to determine the application of the anti-churning rules in the context of remedial allocations.

(5) *Treatment of certain reinsurance transactions*—(i) *In general.* Section 197 applies to any insurance contract acquired from another person through an assumption reinsurance transaction. For purposes of section 197, an assumption reinsurance transaction is—

(A) Any arrangement in which one insurance company (the reinsurer) becomes solely liable to policyholders on contracts transferred by another insurance company (the ceding company); and

(B) Any acquisition of an insurance contract that is treated as occurring by reason of an election under section 338.

(ii) *Determination of adjusted basis*—(A) *Acquisitions (other than under section 338) of specified insurance contracts.* The amount taken into account for purposes of section 197 as the adjusted basis of specified insurance contracts (as defined in section 848(e)(1)) acquired in an assumption reinsurance transaction that is not described in paragraph (g)(5)(i)(B) of this section is equal to the excess of—

(*1*) The amount paid or incurred (or treated as having been paid or incurred) by the reinsurer for the purchase of the contracts (as determined under § 1.817–4(d)(2)); over

(*2*) The amount of the specified policy acquisition expenses that are attributable to the reinsurer's net positive consideration for the reinsurance agreement (as determined under § 1.848–2(f)(3)).

(B) *Insolvent ceding company.* The reduction of the amount of specified policy acquisition expenses by the reinsurer with respect to an assumption reinsurance transaction with an insolvent ceding company where the ceding company and reinsurer have made a valid joint election under section 1.848–2(i)(4) is disregarded in determining the amount of specified policy acquisition expenses for purposes of this paragraph (g)(5)(ii).

(C) *Other acquisitions.* [Reserved]

(6) *Amounts paid or incurred for a franchise, trademark, or trade name.* If an amount to which section 1253(d) (relating to the transfer, sale, or other disposition of a franchise, trademark, or trade name) applies is described in section 1253(d)(1)(B) (relating to contingent serial payments deductible under section 162), the amount is not included in the adjusted basis of the intangible for purposes of section 197. Any other amount, whether fixed or contingent, to which section 1253(d) applies is chargeable to capital account under section 1253(d)(2) and is amortizable only under section 197.

(7) *Amounts properly taken into account in determining the cost of property that is not a section 197 intangible.* Section 197 does not apply to an amount that is properly taken into account in determining the cost of property that is not a section 197 intangible. The entire cost of acquiring the other property is included in its basis and recovered under other applicable Internal Revenue Code provisions. Thus, for example, section 197 does not apply to the cost of an interest in computer software to the extent such cost is included, without being separately stated, in the cost of the hardware or other tangible property and is consistently treated as part of the cost of the hardware or other tangible property.

(8) *Treatment of amortizable section 197 intangibles as depreciable property.* An amortizable section 197 intangible is treated as property of a character subject to the allowance for depreciation under section 167. Thus, for example, an amortizable section 197 intangible is not a capital asset for purposes of section 1221, but if used in a trade or business and held for more than one year, gain or loss on its disposition generally qualifies as section 1231 gain or loss. Also, an amortizable section 197 intangible is section 1245 property and section 1239 applies to any gain recognized upon its sale or exchange between related persons (as defined in section 1239(b)).

(h) *Anti-churning rules*—(1) *Scope and purpose*—(i) *Scope.* This paragraph (h) applies to section 197(f)(9) intangibles. For this purpose, section 197(f)(9) intangibles are goodwill and going concern value that was held or used at any time during the transition period and any other section 197 intangible that was held or used at any time during the transition period and was not depreciable or amortizable under prior law.

(ii) *Purpose.* To qualify as an amortizable section 197 intangible, a section 197 intangible must be acquired after the applicable date (July 25, 1991, if the acquiring taxpayer has made a valid retroactive election pursuant to § 1.197–1T; August 10, 1993, in all other cases). The purpose of the anti-churning rules of section 197(f)(9) and this paragraph (h) is to prevent the amortization of section 197(f)(9) intangibles unless they are transferred after the applicable effective date in a transaction giving rise to a significant change in ownership or use. (Special rules apply for purposes of determining whether transactions involving partnerships give rise to a significant change in ownership or use. See paragraph (h)(12) of this section.) The anti-churning rules are to be applied in a manner that carries out their purpose.

(2) *Treatment of section 197(f)(9) intangibles.* Except as otherwise provided in this paragraph (h), a section 197(f)(9) intangible acquired by a taxpayer after the applicable effective date does not qualify for amortization under section 197 if—

(i) The taxpayer or a related person held or used the intangible or an interest therein at any time during the transition period;

(ii) The taxpayer acquired the intangible from a person that held the intangible at any time during the transition period and, as part of the transaction, the user of the intangible does not change; or

(iii) The taxpayer grants the right to use the intangible to a person that held or used the intangible at any time during the transition period (or to a person related to that person), but only if the transaction in which the taxpayer grants the right and the transaction in which the taxpayer acquired the intangible are part of a series of related transactions.

(3) *Amounts deductible under section 1253(d) or § 1.162–11.* For purposes of this paragraph (h), deductions allowable under section 1253(d)(2) or pursuant to an election under section 1253(d)(3) (in either case as in effect prior to the enactment of section 197) and deductions allowable under § 1.162–11 are treated as deductions allowable for amortization under prior law.

(4) *Transition period.* For purposes of this paragraph (h), the transition period is July 25, 1991, if the acquiring taxpayer has made a valid retroactive election pursuant to § 1.197–1T and the period beginning on July 25, 1991, and ending on August 10, 1993, in all other cases.

(5) *Exceptions.* The anti-churning rules of this paragraph (h) do not apply to—

(i) The acquisition of a section 197(f)(9) intangible if the acquiring taxpayer's basis in the intangible is determined under section 1014(a); or

(ii) The acquisition of a section 197(f)(9) intangible that was an

amortizable section 197 intangible in the hands of the seller (or transferor), but only if the acquisition transaction and the transaction in which the seller (or transferor) acquired the intangible or interest therein are not part of a series of related transactions.

(6) *Related person*—(i) *In general.* Except as otherwise provided in paragraph (h)(6)(ii) of this section, a person is related to another person for purposes of this paragraph (h) if—

(A) The person bears a relationship to that person that would be specified in section 267(b) (determined without regard to section 267(e)) and, by substitution, section 267(f)(1), if those sections were amended by substituting 20 percent for 50 percent; or

(B) The person bears a relationship to that person that would be specified in section 707(b)(1) if that section were amended by substituting 20 percent for 50 percent; or

(C) The persons are engaged in trades or businesses under common control (within the meaning of section 41(f)(1)(A) and (B)).

(ii) *Time for testing relationships.* Except as provided in paragraph (h)(6)(iii) of this section, a person is treated as related to another person for purposes of this paragraph (h) if the relationship exists—

(A) In the case of a single transaction, immediately before or immediately after the transaction in which the intangible is acquired; and

(B) In the case of a series of related transactions (or a series of transactions that together comprise a qualified stock purchase within the meaning of section 338(d)(3)), immediately before the earliest such transaction or immediately after the last such transaction.

(iii) *Certain relationships disregarded.* In applying the rules in paragraph (h)(7) of this section, if a person acquires an intangible in a series of related transactions in which the person acquires stock (meeting the requirements of section 1504(a)(2)) of a corporation in a fully taxable transaction followed by a liquidation of the acquired corporation under section 331, any relationship created as part of such series of transactions is disregarded in determining whether any person is related to such acquired corporation immediately after the last transaction.

(iv) *De minimis rule*—(A) *In general.* Two corporations are not treated as related persons for purposes of this paragraph (h) if—

(*1*) The corporations would (but for the application of this paragraph (h)(6)(iv)) be treated as related persons solely by reason of substituting ''more than 20 percent'' for ''more than 50 percent'' in section 267(f)(1)(A); and

(*2*) The beneficial ownership interest of each corporation in the stock of the other corporation represents less than 10 percent of the total combined voting power of all classes of stock entitled to vote and less than 10 percent of the total value of the shares of all classes of stock outstanding.

(B) *Determination of beneficial ownership interest.* For purposes of this paragraph (h)(6)(iv), the beneficial ownership interest of one corporation in the stock of another corporation is determined under the principles of section 318(a), except that—

(*1*) In applying section 318(a)(2)(C), the 50-percent limitation contained therein is not applied; and

(*2*) Section 318(a)(3)(C) is applied by substituting ''20 percent'' for ''50 percent''.

(7) *Special rules for entities that owned or used property at any time during the transition period and that are no longer in existence.* A corporation, partnership, or trust that owned or used a section 197 intangible at any time during the transition period and that is no longer in existence is deemed, for purposes of determining whether a taxpayer acquiring the intangible is related to such entity, to be in existence at the time of the acquisition.

(8) *Special rules for section 338 deemed acquisitions.* In the case of a qualified stock purchase that is treated as a deemed sale and purchase of assets pursuant to section 338, the corporation treated as purchasing assets as a result of an election thereunder (new target) is not considered the person that held or used the assets during any period in which the assets were held or used by the corporation treated as selling the assets (old target). Thus, for example, if a corporation (the purchasing corporation) makes a qualified stock purchase of the stock of another corporation after the transition period, new target will not be treated as the owner during the transition period of assets owned by old target during that period even if old target and new target are treated as the same corporation for certain other purposes of the Internal Revenue Code or old target and new target are the same corporation under the laws of the State or other jurisdiction of its organization. However, the anti-churning rules of this paragraph (h) may nevertheless apply to a deemed asset purchase resulting from a section 338 election if new target is related (within the meaning of paragraph (h)(6) of this section) to old target.

(9) *Gain-recognition exception*—(i) *Applicability.* A section 197(f)(9) intangible qualifies for the gain-recognition exception if—

(A) The taxpayer acquires the intangible from a person that would not be related to the taxpayer but for the substitution of 20 percent for 50 percent under paragraph (h)(6)(i)(A) of this section; and

(B) That person (whether or not otherwise subject to Federal income tax) elects to recognize gain on the disposition of the intangible and agrees, notwithstanding any other provision of law or treaty, to pay for the taxable year in which the disposition occurs an amount of tax on the gain that, when added to any other Federal income tax on such gain, equals the gain on the disposition multiplied by the highest marginal rate of tax for that taxable year.

(ii) *Effect of exception.* The anti-churning rules of this paragraph (h) apply to a section 197(f)(9) intangible that qualifies for the gain-recognition exception only to the extent the acquiring taxpayer's basis in the intangible exceeds the gain recognized by the transferor.

(iii) *Time and manner of election.* The election described in this paragraph (h)(9) must be made by the due date (including extensions of time) of the electing taxpayer's Federal income tax return for the taxable year in which the disposition occurs. The election is made by attaching an election statement satisfying the requirements of paragraph (h)(9)(viii) of this section to the electing taxpayer's original or amended income tax return for that taxable year (or by filing the statement as a return for the taxable year under paragraph (h)(9)(xi) of this section). In addition, the taxpayer must satisfy the notification requirements of paragraph (h)(9)(vi) of this section. The election is binding on the taxpayer and all parties whose Federal tax liability is affected by the election.

(iv) *Special rules for certain entities.* In the case of a partnership, S corporation, estate or trust, the election under this paragraph (h)(9) is made by the entity rather than by its owners or beneficiaries. If a partnership or S corporation makes an election under this paragraph (h)(9) with respect to the disposition of a section 197(f)(9) intangible, each of its partners or shareholders is required to pay a tax determined in the manner described in paragraph (h)(9)(i)(B) of this section on the amount of gain that is properly allocable to such partner or shareholder with respect to the disposition.

(v) *Effect of nonconforming elections.* An attempted election that does not

substantially comply with each of the requirements of this paragraph (h)(9) is disregarded in determining whether a section 197(f)(9) intangible qualifies for the gain-recognition exception.

(vi) *Notification requirements.* A taxpayer making an election under this paragraph (h)(9) with respect to the disposition of a section 197(f)(9) intangible must provide written notification of the election on or before the due date of the return on which the election is made to the person acquiring the section 197 intangible. In addition, a partnership or S corporation making an election under this paragraph (h)(9) must attach to the Schedule K–1 furnished to each partner or shareholder a written statement containing all information necessary to determine the recipient's additional tax liability under this paragraph (h)(9).

(vii) *Revocation.* An election under this paragraph (h)(9) may be revoked only with the consent of the Commissioner.

(viii) *Election Statement.* An election statement satisfies the requirements of this paragraph (h)(9)(viii) if it is in writing and contains the information listed below. The required information should be arranged and identified in accordance with the following order and numbering system:

(A) The name and address of the electing taxpayer.

(B) Except in the case of a taxpayer that is not otherwise subject to Federal income tax, the taxpayer identification number (TIN) of the electing taxpayer.

(C) A statement that the taxpayer is making the election under section 197(f)(9)(B).

(D) Identification of the transaction and each person that is a party to the transaction or whose tax return is affected by the election (including, except in the case of persons not otherwise subject to Federal income tax, the TIN of each such person).

(E) The calculation of the gain realized, the applicable rate of tax, and the amount of the taxpayer's additional tax liability under this paragraph (h)(9).

(F) The signature of the taxpayer or an individual authorized to sign the taxpayer's Federal income tax return.

(ix) *Determination of highest marginal rate of tax and amount of other Federal income tax on gain*—(A) *Marginal rate.* The following rules apply for purposes of determining the highest marginal rate of tax applicable to an electing taxpayer:

(*1*) *Noncorporate taxpayers.* In the case of an individual, estate, or trust, the highest marginal rate of tax is the highest marginal rate of tax in effect under section 1, determined without regard to section 1(h).

(*2*) *Corporations and tax-exempt entities.* In the case of a corporation or an entity that is exempt from tax under section 501(a), the highest marginal rate of tax is the highest marginal rate of tax in effect under section 11, determined without regard to any rate that is added to the otherwise applicable rate in order to offset the effect of the graduated rate schedule.

(B) *Other Federal income tax on gain.* The amount of Federal income tax (other than the tax determined under this paragraph (h)(9)) imposed on any gain is the lesser of—

(*1*) The amount by which the taxpayer's Federal income tax liability (determined without regard to this paragraph (h)(9)) would be reduced if the amount of such gain were not taken into account; or

(*2*) The amount of the gain multiplied by the highest marginal rate of tax for the taxable year.

(x) *Coordination with other provisions*—(A) *In general.* The amount of gain subject to the tax determined under this paragraph (h)(9) is not reduced by any net operating loss deduction under section 172(a), any capital loss under section 1212, or any other similar loss or deduction. In addition, the amount of tax determined under this paragraph (h)(9) is not reduced by any credit of the taxpayer. In computing the amount of any net operating loss, capital loss, or other similar loss or deduction, or any credit that may be carried to any taxable year, any gain subject to the tax determined under this paragraph (h)(9) and any tax paid under this paragraph (h)(9) is not taken into account.

(B) *Section 1374.* No provision of paragraph (h)(9)(iv) of this section precludes the application of section 1374 (relating to a tax on certain built-in gains of S corporations) to any gain with respect to which an election under this paragraph (h)(9) is made. In addition, neither paragraph (h)(9)(iv) nor paragraph (h)(9)(x)(A) of this section precludes a taxpayer from applying the provisions of section 1366(f)(2) (relating to treatment of the tax imposed by section 1374 as a loss sustained by the S corporation) in determining the amount of tax payable under paragraph (h)(9) of this section.

(C) *Procedural and administrative provisions.* For purposes of subtitle F, the amount determined under this paragraph (h)(9) is treated as a tax imposed by section 1 or 11, as appropriate.

(D) *Installment method.* The gain subject to the tax determined under paragraph (h)(9)(i) of this section may not be reported under the method described in section 453(a). Any such gain that would, but for the application of this paragraph (h)(9)(x)(D), be taken into account under section 453(a) shall be taken into account in the same manner as if an election under section 453(d) (relating to the election not to apply section 453(a)) had been made.

(xi) *Special rules for persons not otherwise subject to Federal income tax.* If the person making the election under this paragraph (h)(9) with respect to a disposition is not otherwise subject to Federal income tax, the election statement satisfying the requirements of paragraph (h)(9)(viii) of this section must be filed with the Philadelphia Service Center. For purposes of this paragraph (h)(9) and subtitle F, the statement is treated as an income tax return for the calendar year in which the disposition occurs and as a return due on or before March 15 of the following year.

(10) *Transactions subject to both anti-churning and nonrecognition rules.* If a person acquires a section 197(f)(9) intangible in a transaction described in paragraph (g)(2) of this section from a person in whose hands the intangible was an amortizable section 197 intangible, and immediately after the transaction (or series of transactions described in paragraph (h)(6)(ii)(B) of this section) in which such intangible is acquired, the person acquiring the section 197(f)(9) intangible is related to any person described in paragraph (h)(2) of this section, the intangible is, notwithstanding its treatment under paragraph (g)(2) of this section, treated as an amortizable section 197 intangible only to the extent permitted under this paragraph (h). (See, for example, paragraph (h)(5)(ii) of this section.)

(11) *Avoidance purpose.* A section 197(f)(9) intangible acquired by a taxpayer after the applicable effective date does not qualify for amortization under section 197 if one of the principal purposes of the transaction in which it is acquired is to avoid the operation of the anti-churning rules of section 197(f)(9) and this paragraph (h). A transaction will be presumed to have a principal purpose of avoidance if it does not effect a significant change in the ownership or use of the intangible. Thus, for example, if section 197(f)(9) intangibles are acquired in a transaction (or series of related transactions) in which an option to acquire stock is issued to a party to the transaction, but the option is not treated as having been exercised for purposes of paragraph (h)(6) of this section, this paragraph (h)(11) may apply to the transaction.

(12) *Additional partnership anti-churning rules*—(i) *In general.* In

determining whether the anti-churning rules of this paragraph (h) apply to any increase in the basis of a section 197(f)(9) intangible under section 732(b), 732(d), 734(b), or 743(b), the determinations are made at the partner level and each partner is treated as having owned and used the partner's proportionate share of partnership property. In determining whether the anti-churning rules of this paragraph (h) apply to any transaction under another section of the Internal Revenue Code, the determinations are made at the partnership level, unless under § 1.701–2(e) the Commissioner determines that the partner level is more appropriate.

(ii) *Section 732(b) adjustments—Reserved.*

(iii) *Section 732(d) adjustments.* The anti-churning rules of this paragraph (h) do not apply to an increase in the basis of partnership property under section 732(d) if the distributee partner was not related (at the time of the transfer of the partnership interest) to the person who transferred the partnership interest with respect to which the distribution is being made.

(iv) *Section 734(b) adjustments—Reserved.*

(v) *Section 743(b) adjustments.* The anti-churning rules of this paragraph (h) do not apply to an increase in the basis of partnership property under section 743(b) if the person acquiring the partnership interest is not related to the person transferring the partnership interest.

(vi) *Partner is or becomes a user of partnership intangible*—(A) *General rule.* If, as part of a series of related transactions that includes a transaction described in paragraph (h)(12) (iii) or (v) of this section, an anti-churning partner or a person related to an anti-churning partner becomes (or remains) a user of an intangible that is treated as transferred in the transaction (as a result of the partners being treated as having owned their proportionate share of partnership assets), the anti-churning rules of this paragraph (h) apply to the proportionate share of such intangible that is treated as transferred by the anti-churning partner, notwithstanding the application of paragraph (h)(12) (iii) or (v) of this section.

(B) *Anti-churning partner.* For purposes of this paragraph (h)(12)(vi), anti-churning partner means—

(*1*) With respect to all intangibles held by a partnership on or before August 10, 1993, any partner, but only to the extent that

(*i*) The partner's interest in the partnership was acquired on or before August 10, 1993, or

(*ii*) The interest was acquired from a person related to the partner on or after August 10, 1993, and such interest was not held by any person other than persons related to such partner at any time after August 10, 1993 (disregarding, for this purpose, a person's holding of an interest if the acquisition of such interest was part of a transaction or series of related transactions in which the partner or persons related to the partner subsequently acquired such interest),

(*2*) With respect to any section 197(f)(9) intangible acquired by a partnership after August 10, 1993, that is not amortizable with respect to the partnership, any partner, but only to the extent that

(*i*) The partner's interest in the partnership was acquired on or before the date the partnership acquired the section 197(f)(9) intangible, or

(*ii*) The interest was acquired from a person related to the partner on or after the date the partnership acquired the section 197(f)(9) intangible, and such interest was not held by any person other than persons related to such partner at any time after the date the partnership acquired the section 197(f)(9) intangible (disregarding, for this purpose, a person's holding of an interest if the acquisition of such interest was part of a transaction or series of related transactions in which the partner or persons related to the partner subsequently acquired such interest), and

(*3*) With respect to any intangible, a partner who received an interest in the partnership in exchange for such intangible (or a portion thereof) or a related person who received such interest in the partnership from such a partner, but only to the extent that the intangible (or portion thereof) transferred by such partner is not an amortizable section 197 intangible with respect to the partnership.

(C) *Effect of retroactive elections.* For purposes of paragraph (h)(12)(vi)(B) of this section, references to August 10, 1993, are treated as references to July 25, 1991, if the relevant party made a valid retroactive election under § 1.197–1T.

(vii) *Section 704(c) allocations*—(A) *Allocations where the intangible is amortizable by the contributor.* The anti-churning rules of this paragraph (h) do not apply to the curative or remedial allocations of amortization with respect to a section 197(f)(9) intangible if the intangible was an amortizable section 197 intangible in the hands of the contributing partner (unless paragraph (h)(10) of this section applies so as to cause the intangible to cease to be an amortizable section 197 intangible in the hands of the partnership).

(B) *Allocations where the intangible is not amortizable by the contributor.* Notwithstanding paragraph (g)(3)(ii) of this section, where the section 197(f)(9) intangible was not an amortizable section 197 intangible in the hands of the contributing partner, a partner may not receive remedial allocations of amortization under section 704(c) that are deductible for Federal income tax purposes if that partner is related to the partner that contributed the intangible. Taxpayers may use any reasonable method to determine amortization of the asset for book purposes, provided that the method used does not contravene the purposes of the anti-churning rules under section 197 and this paragraph (h). A method will be considered to contravene the purposes of the anti-churning rules if the effect of the book adjustments resulting from the method is such that any portion of the tax deduction for amortization attributable to section 704(c) is allocated, directly or indirectly, to a partner who is subject to the anti-churning rules with respect to such adjustment.

(viii) *Operating rule for transfers upon death.* For purposes of this paragraph (h)(12), if the basis of a partner's interest in a partnership is determined under section 1014(a), such partner is treated as acquiring such interest from a person who is not related to such partner, and such interest is treated as having previously been held by a person who is not related to such partner.

(i) [Reserved]

(j) *General anti-abuse rule.* The Commissioner will interpret and apply the rules in this section as necessary and appropriate to prevent avoidance of the purposes of section 197. If one of the principal purposes of a transaction is to achieve a tax result that is inconsistent with the purposes of section 197, the Commissioner will recast the transaction for Federal tax purposes as appropriate to achieve tax results that are consistent with the purposes of section 197, in light of the applicable statutory and regulatory provisions and the pertinent facts and circumstances.

(k) *Examples.*The following examples illustrate the application of this section:

Example 1. Advertising costs. (i) Q manufactures and sells consumer products through a series of wholesalers and distributors. In order to increase sales of its products by encouraging consumer loyalty to its products and to enhance the value of the goodwill, trademarks, and trade names of the business, Q advertises its products to the consuming public. It regularly incurs costs to develop radio, television, and print advertisements. These costs generally consist

of employee costs and amounts paid to independent advertising agencies. Q also incurs costs to run these advertisements in the various media for which they were developed.

(ii) The advertising costs are not chargeable to capital account under paragraph (f)(3) of this section (relating to costs incurred for covenants not to compete, rights granted by governmental units, and contracts for the use of section 197 intangibles) and are currently deductible as ordinary and necessary expenses under section 162. Accordingly, under paragraph (a)(3) of this section, section 197 does not apply to these costs.

Example 2. Computer software. (i) X purchases all of the assets of an existing trade or business from Y. One of the assets acquired is all of Y's rights in certain computer software previously used by Y under the terms of a nonexclusive license from the software developer. The software was developed for use by manufacturers to maintain a comprehensive accounting system, including general and subsidiary ledgers, payroll, accounts receivable and payable, cash receipts and disbursements, fixed asset accounting, and inventory cost accounting and controls. The developer modified the software for use by Y at a cost of $1,000 and Y made additional modifications at a cost of $500. The developer does not maintain wholesale or retail outlets but markets the software directly to ultimate users. Y's license of the software is limited to an entity that is actively engaged in business as a manufacturer.

(ii) Notwithstanding these limitations, the software is considered to be readily available to the general public for purposes of paragraph (c)(4)(i) of this section. In addition, the software is not substantially modified because the cost of the modifications by the developer and Y to the version of the software that is readily available to the general public does not exceed $2,000. Accordingly, the software is not a section 197 intangible.

Example 3. Acquisition of software for internal use. (i) B, the owner and operator of a worldwide package-delivery service, purchases from S all rights to software developed by S. The software will be used by B for the sole purpose of improving its package-tracking operations. B does not purchase any other assets in the transaction or any related transaction.

(ii) Because B acquired the software solely for internal use, it is disregarded in determining for purposes of paragraph (c)(4)(ii) of this section whether the assets acquired in the transaction or series of related transactions constitute a trade or business or substantial portion thereof. Since no other assets were acquired, the software is not acquired as part of a purchase of a trade or business and under paragraph (c)(4)(ii) of this section is not a section 197 intangible.

Example 4. Governmental rights of fixed duration. (i) City M operates a municipal water system. In order to induce X to locate a new manufacturing business in the city, M grants X the right to purchase water for 16 years at a specified price.

(ii) The right granted by M is a right to receive tangible property or services described in section 197(e)(4)(B) and paragraph (c)(6) of this section and, thus, is not a section 197 intangible. This exclusion applies even though the right does not qualify for exclusion as a right of fixed duration or amount under section 197(e)(4)(D) and paragraph (c)(13) of this section because the duration exceeds 15 years and the right is not fixed as to amount. It is also immaterial that the right would not qualify for exclusion as a self-created intangible under section 197(c)(2) and paragraph (d)(2) of this section because it is granted by a governmental unit.

Example 5. Separate acquisition of franchise. (i) S is a franchiser of retail outlets for specialty coffees. G enters into a franchise agreement (within the meaning of section 1253(b)(1)) with S pursuant to which G is permitted to acquire and operate a store using the S trademark and trade name at the location specified in the agreement. G agrees to pay S $100,000 upon execution of the agreement and also agrees to pay, throughout the term of the franchise, additional amounts that are deductible under section 1253(d)(1). The agreement contains detailed specifications for the construction and operation of the business, but G is not required to purchase from S any of the materials necessary to construct the improvements at the location specified in the franchise agreement.

(ii) The franchise is a section 197 intangible within the meaning of paragraph (b)(10) of this section. The franchise does not qualify for the exclusion relating to self-created intangibles described in section 197(c)(2) and paragraph (d)(2) of this section because the franchise is described in section 197(d)(1)(F). In addition, because the acquisition of the franchise constitutes the acquisition of an interest in a trade or business or a substantial portion thereof, the franchise may not be excluded under section 197(e)(4). Thus, the franchise is an amortizable section 197 intangible, the basis of which must be recovered over a 15-year period. However, the amounts that are deductible under section 1253(d)(1) are not subject to the provisions of section 197 by reason of section 197(f)(4)(C) and paragraph (b)(10)(ii) of this section.

Example 6. Acquisition and amortization of covenant not to compete. (i) As part of the acquisition of a trade or business from C, B and C enter into an agreement containing a covenant not to compete. Under this agreement, C agrees that it will not compete with the business acquired by B within a prescribed geographical territory for a period of three years after the date on which the business is sold to B. In exchange for this agreement, B agrees to pay C $90,000 per year for each year in the term of the agreement. The agreement further provides that, in the event of a breach by C of his obligations under the agreement, B may terminate the agreement, cease making any of the payments due thereafter, and pursue any other legal or equitable remedies available under applicable law. The amounts payable to C under the agreement are not contingent payments for purposes of § 1.1275–4. The present fair market value of B's rights under the agreement is $225,000. The aggregate consideration paid for all assets acquired in the transaction (including the covenant not to compete) exceeds the sum of the amount of Class I assets and the aggregate fair market value of all Class II, Class III, Class IV, Class V, and Class VI assets by $50,000. See § 1.338–6T(b) for rules for determining the assets in each class.

(ii) Because the covenant is acquired in an applicable asset acquisition (within the meaning of section 1060(c)), paragraph (f)(4)(ii) of this section applies and the basis of B in the covenant is determined pursuant to section 1060(a) and the regulations thereunder. Under §§ 1.1060–1T(c)(2) and 1.338–6T(c)(1), B's basis in the covenant cannot exceed its fair market value. Thus, B's basis in the covenant immediately after the acquisition is $225,000. This basis is amortized ratably over the 15-year period beginning on the first day of the month in which the agreement is entered into. Although the payments under the agreement ($270,000) exceed the amount allocated to the covenant by $45,000, all of the remaining consideration ($50,000) is allocated to Class VII assets (goodwill and going concern value). See §§ 1.1060–1T(c)(2) and 1.338–6T(b).

Example 7. Stand-alone license of technology. (i) X is a manufacturer of consumer goods that does business throughout the world through subsidiary corporations organized under the laws of each country in which business is conducted. X licenses to Y, its subsidiary organized and conducting business in Country K, all of the patents, formulas, designs, and know-how necessary for Y to manufacture the same products that X manufactures in the United States. Assume that the license is not considered a sale or exchange under the principles of section 1235. The license is for a term of 18 years, and there are no facts to indicate that the license does not have a fixed duration. Y agrees to pay X a royalty equal to a specified, fixed percentage of the revenues obtained from selling products manufactured using the licensed technology. Assume that the royalty is reasonable and is not subject to adjustment under section 482. The license is not entered into in connection with any other transaction. Y incurs capitalized costs in connection with entering into the license.

(ii) The license is a contract for the use of a section 197 intangible within the meaning of paragraph (b)(11) of this section. It does not qualify for the exception in section 197(e)(4)(D) and paragraph (c)(13) of this section (relating to rights of fixed duration or amecause it does not have a term of less than 15 years, and the other exceptions in section 197(e) and paragraph (c) of this section are also inapplicable. Accordingly, the license is a section 197 intangible.

(iii) The license is not acquired as part of a purchase of a trade or business. Thus, under paragraph (f)(3)(iii) of this section, the license will be closely scrutinized under the principles of section 1235 for purposes of determining whether the transfer is a sale or exchange and, accordingly, whether the payments under the license are chargeable to

capital account. Because the license is not a sale or exchange under the principles of section 1235, the royalty payments are not chargeable to capital account for purposes section 197. The capitalized costs of entering into the license are not within the exception under paragraph (d)(2) of this section for self-created intangibles, and thus are amortized under section 197.

Example 8. License of technology and trademarks. (i) The facts are the same as in *Example 7*, except that the license also includes the use of the trademarks and trade names that X uses to manufacture and distribute its products in the United States. Assume that under the principles of section 1253 the transfer is not a sale or exchange of the trademarks and trade names or an undivided interest therein and that the royalty payments are described in section 1253(d)(1)(B).

(ii) As in *Example 7*, the license is a section 197 intangible. Although the license conveys an interest in X's trademarks and trade names to Y, the transfer of the interest is disregarded for purposes of paragraph (e)(2) of this section unless the transfer is considered a sale or exchange of the trademarks and trade names or an undivided interest therein. Accordingly, the licensing of the technology and the trademarks and trade names is not treated as part of a purchase of a trade or business under paragraph (e)(2) of this section.

(iii) Because the technology license is not part of the purchase of a trade or business, it is treated in the manner described in *Example 7.* The royalty payments for the use of the trademarks and trade names are deductible under section 1253(d)(1) and, under section 197(f)(4)(C) and paragraph (b)(10)(ii) of this section, are not chargeable to capital account for purposes of section 197. The capitalized costs of entering into the license are treated in the same manner as in example 7.

Example 9. Disguised sale. (i) The facts are the same as in *Example 7*, except that Y agrees to pay X, in addition to the contingent royalty, a fixed minimum royalty immediately upon entering into the agreement and there are sufficient facts present to characterize the transaction, for federal tax purposes, as a transfer of ownership of the intellectual property from X to Y.

(ii) The purported license of technology is, in fact, an acquisition of an intangible described in section 197(d)(1)(C)(iii) and paragraph (b)(5) of this section (relating to know-how, etc.). As in *Example 7*, the exceptions in section 197(e) and paragraph (c) of this section do not apply to the transfer. Accordingly, the transferred property is a section 197 intangible. Y's basis in the transferred intangible includes the capitalized costs of entering into the agreement and the fixed minimum royalty payment payable at the time of the transfer. In addition, except to the extent that a portion of any payment will be treated as interest or original issue discount under applicable provisions of the Internal Revenue Code, all of the contingent payments under the purported license are properly chargeable to capital account for purposes of section 197 and this section. The extent to which such payments are treated as payments of principal and the time at which any amount treated as a payment of principal is taken into account in determining basis are determined under the rules of § 1.1275–4(c)(4) or 1.483–4(a), whichever is applicable. Any contingent amount that is included in basis after the month in which the acquisition occurs is amortized under the rules of paragraph (f)(2)(i) or (ii) of this section.

Example 10. License of technology and customer list as part of sale of a trade or business. (i) X is a computer manufacturer that produces, in separate operating divisions, personal computers, servers, and peripheral equipment. In a transaction that is the purchase of a trade or business for purposes of section 197, Y (who is unrelated to X) purchases from X all assets of the operating division producing personal computers, except for certain patents that are also used in the division manufacturing servers and customer lists that are also used in the division manufacturing peripheral equipment. As part of the transaction, X transfers to Y the right to use the retained patents and customer lists solely in connection with the manufacture and sale of personal computers. The transfer agreement requires annual royalty payments contingent on the use of the patents and also requires a payment for each use of the customer list. In addition, Y incurs capitalized costs in connection with entering into the licenses.

(ii) The rights to use the retained patents and customer lists are contracts for the use of section 197 intangibles within the meaning of paragraph (b)(11) of this section. The rights do not qualify for the exception in 197(e)(4)(D) and paragraph (c)(13) of this section (relating to rights of fixed duration or amount) because they are transferred as part of a purchase of a trade or business and the other exceptions in section 197(e) and paragraph (c) of this section are also inapplicable. Accordingly, the licenses are section 197 intangibles.

(iii) Because the right to use the retained patents is described in paragraph (b)(11) of this section and the right is transferred as part of a purchase of a trade or business, the treatment of the royalty payments is determined under paragraph (f)(3)(ii) of this section. In addition, however, the retained patents are described in paragraph (b)(5) of this section. Thus, the annual royalty payments are chargeable to capital account under the general rule of paragraph (f)(3)(ii)(A) of this section unless Y establishes that the license is not a sale or exchange under the principles of section 1235 and the royalty payments are an arm's length consideration for the rights transferred. If these facts are established, the exception in paragraph (f)(3)(ii)(B) of this section applies and the royalty payments are not chargeable to capital account for purposes of section 197. The capitalized costs of entering into the license are treated in the same manner as in Example 7.

(iv) The right to use the retained customer list is also described in paragraph (b)(11) of this section and is transferred as part of a purchase of a trade or business. Thus, the treatment of the payments for use of the customer list is also determined under paragraph (f)(3)(ii) of this section. The customer list, although described in paragraph (b)(6) of this section, is a customer-related information base. Thus, the exception in paragraph (f)(3)(ii)(B) of this section does not apply. Accordingly, payments for use of the list are chargeable to capital account under the general rule of paragraph (f)(3)(ii)(A) of this section and are amortized under section 197. In addition, the capitalized costs of entering into the contract for use of the customer list are treated in the same manner as in *Example 7.*

Example 11. Loss disallowance rules involving related persons. (i) Assume that X and Y are treated as a single taxpayer for purposes of paragraph (g)(1) of this section. In a single transaction, X and Y acquired from Z all of the assets used by Z in a trade or business. Z had operated this business at two locations, and X and Y each acquired the assets used by Z at one of the locations. Three years after the acquisition, X sold all of the assets it acquired, including amortizable section 197 intangibles, to an unrelated purchaser. The amortizable section intangibles are sold at a loss of $120,000.

(ii) Because X and Y are treated as a single taxpayer for purposes of the loss disallowance rules of section 197(f)(1) and paragraph (g)(1) of this section, X's loss on the sale of the amortizable section 197 intangibles is not recognized. Under paragraph (g)(1)(iv)(B) of this section, X's disallowed loss is allowed ratably, as a deduction under section 197, over the remainder of the 15-year period during which the intangibles would have been amortized, and Y may not increase the basis of the amortizable section 197 intangibles that it acquired from Z by the amount of X's disallowed loss.

Example 12. Disposition of retained intangibles by related person. (i) The facts are the same as in *Example 11*, except that 10 years after the acquisition of the assets by X and Y and 7 years after the sale of the assets by X, Y sells all of the assets acquired from Z, including amortizable section 197 intangibles, to an unrelated purchaser.

(ii) Under paragraph (g)(1)(iv)(B) of this section, X may recognize, on the date of the sale by Y, any loss that has not been allowed as a deduction under section 197. Accordingly, X recognizes a loss of $50,000, the amount obtained by reducing the loss on the sale of the assets at the end of the third year ($120,000) by the amount allowed as a deduction under paragraph (g)(1)(iv)(B) of this section during the 7 years following the sale by X ($70,000).

Example 13. Acquisition of an interest in partnership with no section 754 election. (i) A, B, and C each contribute $1,500 for equal shares in general partnership P. On January 1, 1998, P acquires as its sole asset an amortizable section 197 intangible for $4,500. P still holds the intangible on January 1, 2003, at which time the intangible has an adjusted basis to P of $3,000, and A, B, and C each have an adjusted basis of $1,000 in their partnership interests. D (who is not related to A) acquires A's interest in P for $1,600. No section 754 election is in effect for 2003.

(ii) Because there is no change in the basis of the intangible under section 743(b), D merely steps into the shoes of A with respect to the intangible. D's proportionate share of P's adjusted basis in the intangible is $1,000, which continues to be amortized over the 10 years remaining in the original 15-year amortization period for the intangible.

Example 14. Acquisition of an interest in partnership with a section 754 election. (i) The facts are the same as in *Example 13,* except that a section 754 election is in effect for 2003.

(ii) Pursuant to paragraph (g)(3) of this section, for purposes of section 197, D is treated as if P owns two assets. D's proportionate share of P's adjusted basis in one asset is $1,000, which continues to be amortized over the 10 years remaining in the original 15-year amortization period. For the other asset, D's proportionate share of P's adjusted basis is $600 (the amount of the basis increase under section 743 as a result of the section 754 election), which is amortized over a new 15-year period beginning January 2003. With respect to B and C, P's remaining $2,000 adjusted basis in the intangible continues to be amortized over the 10 years remaining in the original 15-year amortization period.

Example 15. Payment to a retiring partner by partnership with a section 754 election. (i) The facts are the same as in *Example 13,* except that a section 754 election is in effect for 2003 and, instead of D acquiring A's interest in P, A retires from P. A, B, and C are not related to each other within the meaning of paragraph (h)(6) of this section. P borrows $1,600, and A receives a payment under section 736 from P of such amount, all of which is in exchange for A's interest in the intangible asset owned by P. (Assume, for purposes of this example, that the borrowing by P and payment of such funds to A does not give rise to a disguised sale of A's partnership interest under section 707(a)(2)(B).) P makes a positive basis adjustment of $600 with respect to the section 197 intangible under section 734(b).

(ii) Pursuant to paragraph (g)(3) of this section, because of the section 734 adjustment, P is treated as having two amortizable section 197 intangibles, one with a basis of $3,000 and a remaining amortization period of 10 years and the other with a basis of $600 and a new amortization period of 15 years.

Example 16. Termination of partnership under section 708(b)(1)(B). (i) A and B are partners with equal shares in the capital and profits of general partnership P. P's only asset is an amortizable section 197 intangible, which P had acquired on January 1, 1995. On January 1, 2000, the asset had a fair market value of $100 and a basis to P of $50. On that date, A sells his entire partnership interest in P to C, who is unrelated to A, for $50. At the time of the sale, the basis of each of A and B in their respective partnership interests is $25.

(ii) The sale causes a termination of P under section 708(b)(1)(B). Under section 708, the transaction is treated as if P transfers its sole asset to a new partnership in exchange for the assumption of its liabilities and the receipt of all of the interests in the new partnership. Immediately thereafter, P is treated as if it is liquidated, with B and C each receiving their proportionate share of the interests in the new partnership. The contribution by P of its asset to the new partnership is governed by section 721, and the liquidating distributions by P of the interests in the new partnership are governed by section 731. C does not realize a basis adjustment under section 743 with respect to the amortizable section 197 intangible unless P had a section 754 election in effect for its taxable year in which the transfer of the partnership interest to C occurred or the taxable year in which the deemed liquidation of P occurred.

(iii) Under section 197, if P had a section 754 election in effect, C is treated as if the new partnership had acquired two assets from P immediately preceding its termination. Even though the adjusted basis of the new partnership in the two assets is determined solely under section 723, because the transfer of assets is a transaction described in section 721, the application of sections 743(b) and 754 to P immediately before its termination causes P to be treated as if it held two assets for purposes of section 197. See paragraph (g)(3) of this section. B's and C's proportionate share of the new partnership's adjusted basis is $25 each in one asset, which continues to be amortized over the 10 years remaining in the original 15-year amortization period. For the other asset, C's proportionate share of the new partnership's adjusted basis is $25 (the amount of the basis increase resulting from the application of section 743 to the sale or exchange by A of the interest in P), which is amortized over a new 15-year period beginning in January 2000.

(iv) If P did not have a section 754 election in effect for its taxable year in which the sale of the partnership interest by A to C occurred or the taxable year in which the deemed liquidation of P occurred, the adjusted basis of the new partnership in the amortizable section 197 intangible is determined solely under section 723, because the transfer is a transaction described in section 721, and P does not have a basis increase in the intangible. Under section 197(f)(2) and paragraph (g)(2)(ii) of this section, the new partnership continues to amortize the intangible over the 10 years remaining in the original 15-year amortization period. No additional amortization is allowable with respect to this asset.

Example 17. Disguised sale to partnership. (i) E and F are individuals who are unrelated to each other within the meaning of paragraph (h)(6) of this section. E has been engaged in the active conduct of a trade or business as a sole proprietor since 1990. E and F form EF Partnership. E transfers all of the assets of the business, having a fair market value of $100, to EF, and F transfers $40 of cash to EF. E receives a 60 percent interest in EF and the $40 of cash contributed by F, and F receives a 40 percent interest in EF, under circumstances in which the transfer by E is partially treated as a sale of property to EF under § 1.707–3(b).

(ii) Under § 1.707–3(a)(1), the transaction is treated as if E had sold to EF a 40 percent interest in each asset for $40 and contributed the remaining 60 percent interest in each asset to EF in exchange solely for an interest in EF. Because E and EF are related persons within the meaning of paragraph (h)(6) of this section, no portion of any transferred section 197(f)(9) intangible that E held during the transition period (as defined in paragraph (h)(4) of this section) is an amortizable section 197 intangible pursuant to paragraph (h)(2) of this section. Section 197(f)(9)(F) and paragraph (g)(3) of this section do not apply to any portion of the section 197 intangible in the hands of EF because the basis of EF in these assets was not increased under any of sections 732, 734, or 743.

Example 18. Acquisition by related person in nonrecognition transaction. (i) A owns a nonamortizable intangible that A acquired in 1990. In 2000, A sells a one-half interest in the intangible to B for cash. Immediately after the sale, A and B, who are unrelated to each other, form partnership P as equal partners. A and B each contribute their one-half interest in the intangible to P.

(ii) P has a transferred basis in the intangible from A and B under section 723. The nonrecognition transfer rule under paragraph (g)(2)(ii) of this section applies to A's transfer of its one-half interest in the intangible to P, and consequently P steps into A's shoes with respect to A's nonamortizable transferred basis. The anti-churning rules of paragraph (h) of this section apply to B's transfer of its one-half interest in the intangible to P, because A, who is related to P under paragraph (h)(6) of this section immediately after the series of transactions in which the intangible was acquired by P, held B's one-half interest in the intangible during the transition period. Pursuant to paragraph (h)(10) of this section, these rules apply to B's transfer of its one-half interest to P even though the nonrecognition transfer rule under paragraph (g)(2)(ii) of this section would have permitted P to step into B's shoes with respect to B's otherwise amortizable basis. Therefore, P's entire basis in the intangible is nonamortizable. However, if A (not B) elects to recognize gain under paragraph (h)(9) of this section on the transfer of each of the one-half interests in the intangible to B and P, then the intangible would be amortizable by P to the extent provided in section 197(f)(9)(B) and paragraph (h)(9) of this section.

Example 19. Acquisition of partnership interest following formation of partnership. (i) The facts are the same as in *Example 18* except that, in 2000, A formed P with an affiliate, S, and contributed the intangible to the partnership and except that in a subsequent year, in a transaction that is properly characterized as a sale of a partnership interest for Federal tax purposes, B purchases a 50 percent interest in P from A. P has a section 754 election in effect and holds no assets other than the intangible and cash.

(ii) For the reasons set forth in *Example 16* (iii), B is treated as if P owns two assets. B's proportionate share of P's adjusted basis in one asset is the same as A's proportionate share of P's adjusted basis in that asset, which is not amortizable under section 197. For the other asset, B's proportionate share of the remaining adjusted basis of P is amortized over a new 15-year period.

Example 20. Acquisition by related corporation in nonrecognition transaction. (i) The facts are the same as *Example 18,* except that A and B form corporation P as equal owners.

(ii) P has a transferred basis in the intangible from A and B under section 362. Pursuant to paragraph (h)(10) of this section, the application of the nonrecognition transfer rule under paragraph (g)(2)(ii) of this section and the anti-churning rules of paragraph (h) of this section to the facts of this *Example 18* is the same as in *Example 16.* Thus, P's entire basis in the intangible is nonamortizable.

Example 21. Acquisition from corporation related to purchaser through remote indirect interest. (i) X, Y, and Z are each corporations that have only one class of issued and outstanding stock. X owns 25 percent of the stock of Y and Y owns 25 percent of the outstanding stock of Z. No other shareholder of any of these corporations is related to any other shareholder or to any of the corporations. On June 30, 2000, X purchases from Z section 197(f)(9) intangibles that Z owned during the transition period (as defined in paragraph (h)(4) of this section).

(ii) Pursuant to paragraph (h)(6)(iv)(B) of this section, the beneficial ownership interest of X in Z is 6.25 percent, determined by treating X as if it owned a proportionate (25 percent) interest in the stock of Z that is actually owned by Y. Thus, even though X is related to Y and Y is related to Z, X and Z are not considered to be related for purposes of the anti-churning rules of section 197.

Example 22. Gain recognition election. (i) B owns 25 percent of the stock of S, a corporation that uses the calendar year as its taxable year. No other shareholder of B or S is related to each other. S is not a member of a controlled group of corporations within the meaning of section 1563(a). S has section 197(f)(9) intangibles that it owned during the transition period. S has a basis of $25,000 in the intangibles. In 2001, S sells these intangibles to B for $75,000. S recognizes a gain of $50,000 on the sale and has no other items of income, deduction, gain, or loss for the year, except that S also has a net operating loss of $20,000 from prior years that it would otherwise be entitled to use in 2001 pursuant to section 172(b). S makes a valid gain recognition election pursuant to section 197(f)(9)(B) and paragraph (h)(9) of this section. In 2001, the highest marginal tax rate applicable to S is 35 percent. But for the election, all of S's taxable income would be taxed at a rate of 15 percent.

(ii) If the gain recognition election had not been made, S would have taxable income of $30,000 for 2001 and a tax liability of $4,500. If the gain were not taken into account, S would have no tax liability for the taxable year. Thus, the amount of tax (other than the tax imposed under paragraph (h)(9) of this section) imposed on the gain is also $4,500. The gain on the disposition multiplied by the highest marginal tax rate is $17,500 ($50,000 × .35). Accordingly, S's tax liability for the year is $4,500 plus an additional tax under paragraph (h)(9) of this section of $13,000 ($17,500—$4,500).

(iii) Pursuant to paragraph (h)(9)(x)(A) of this section, S determines the amount of its net operating loss deduction in subsequent years without regard to the gain recognized on the sale of the section 197 intangible to B. Accordingly, the entire $20,000 net operating loss deduction that would have been available in 2001 but for the gain recognition election may be used in 2002, subject to the limitations of section 172.

(iv) B has a basis of $75,000 in the section 197(f)(9) intangibles acquired from S. As the result of the gain recognition election by S, B may amortize $50,000 of its basis under section 197. Under paragraph (h)(9)(ii) of this section, the remaining basis does not qualify for the gain-recognition exception and may not be amortized by B.

Example 23. Section 338 election. (i) Corporation P makes a qualified stock purchase of the stock of T corporation from two shareholders in July 2000, and a section 338 election is made by P. No shareholder of either T or P owns stock in both of these corporations, and no other shareholder is related to any other shareholder of either corporation.

(ii) Pursuant to paragraph (h)(8) of this section, in the case of a qualified stock purchase that is treated as a deemed sale and purchase of assets pursuant to section 338, the corporation treated as purchasing assets as a result of an election thereunder (new target) is not considered the person that held or used the assets during any period in which the assets were held or used by the corporation treated as selling the assets (old target). Because there are no relationships described in paragraph (h)(6) of this section among the parties to the transaction, any nonamortizable section 197(f)(9) intangible held by old target is an amortizable section 197 intangible in the hands of new target.

(iii) Assume the same facts as set forth in paragraph (i) of this *Example 23,* except that one of the selling shareholders is an individual who owns 25 percent of the total value of the stock of each of the T and P corporation.

(iv) Old target and new target (as these terms are defined in § 1.338–1(c)(13)) are members of a controlled group of corporations under section 267(b)(3), as modified by section 197(f)(9)(C)(i), and any nonamortizable section 197(f)(9) intangible held by old target is not an amortizable section 197 intangible in the hands of new target. However, a gain recognition election under paragraph (h)(9) of this section may be made with respect to this transaction.

Example 24. Relationship created as part of public offering. (i) On January 1, 2001, Corporation X engages in a series of related transactions to discontinue its involvement in one line of business. X forms a new corporation, Y, with a nominal amount of cash. Shortly thereafter, X transfers all the stock of its subsidiary conducting the unwanted business (Target) to Y in exchange for 100 shares of Y common stock and a Y promissory note. Target owns a nonamortizable section 197(f)(9) intangible. Prior to January 1, 2001, X and an underwriter (U) had entered into a binding agreement pursuant to which U would purchase 85 shares of Y common stock from X and then sell those shares in a public offering. On January 6, 2001, the public offering closes. X and Y make a section 338(h)(10) election for Target.

(ii) Pursuant to paragraph (h)(8) of this section, in the case of a qualified stock purchase that is treated as a deemed sale and purchase of assets pursuant to section 338, the corporation treated as purchasing assets as a result of an election thereunder (new target) is not considered the person that held or used the assets during any period in which the assets were held or used by the corporation treated as selling the assets (old target). Further, for purposes of determining whether the nonamortizable section 197(f)(9) intangible is acquired by new target from a related person, because the transactions are a series of related transactions, the relationship between old target and new target must be tested immediately before the first transaction in the series (the formation of Y) and immediately after the last transaction in the series (the sale to U and the public offering). See paragraph (h)(6)(ii)(B) of this section. Because there was no relationship between old target and new target immediately before the formation of Y (because the section 338 election had not been made) and only a 15% relationship between old target and new target immediately after, old target is not related to new target for purposes of applying the anti-churning rules of paragraph (h) of this section. Accordingly, Target may amortize the section 197 intangible.

Example 25. Other transfers to controlled corporations. (i) In 2001, Corporation A transfers a section 197(f)(9) intangible that it held during the transition period to X, a newly formed corporation, in exchange for 15% of X's stock. As part of the same transaction, B transfers property to X in exchange for the remaining 85% of X stock.

(ii) Because the acquisition of the intangible by X is part of a qualifying section 351 exchange, under section 197(f)(2) and paragraph (g)(2)(ii) of this section, X is treated in the same manner as the transferor of the asset. Accordingly, X may not amortize the intangible. If, however, at the time of the exchange, B has a binding commitment to sell 25 percent of the X stock to C, an unrelated third party, the exchange, including A's transfer of the section 197(f)(9) intangible, would fail to qualify as a section 351 exchange. Because the formation of X, the transfers of property to X, and the sale of X stock by B are part of a series of related transactions, the relationship between A and X must be tested immediately before the first transaction in the series (the transfer of property to X) and immediately after the last transaction in the series (the sale of X stock to C). See paragraph (h)(6)(ii)(B) of this section. Because there was no relationship between A and X immediately before and only a 15% relationship immediately after, A is not related to X for purposes of applying the anti-churning rules of paragraph (h) of this section. Accordingly, X may amortize the section 197 intangible.

Example 26. Relationship created as part of stock acquisition followed by liquidation. (i) In 2001, Partnership P purchases 100 percent of the stock of Corporation X. P and X were not related prior to the acquisition. Immediately after acquiring the X stock, and

as part of a series of related transactions, P liquidates X under section 331. In the liquidating distribution, P receives a section 197(f)(9) intangible that was held by X during the transition period.

(ii) Because the relationship between P and X was created pursuant to a series of related transactions where P acquires stock (meeting the requirements of section 1504(a)(2)) in a fully taxable transaction followed by a liquidation under section 331, the relationship immediately after the last transaction in the series (the liquidation) is disregarded. See paragraph (h)(6)(iii) of this section. Accordingly, P is entitled to amortize the section 197(f)(9) intangible.

Example 27. Section 743(b) adjustment with no change in user. (i) On January 1, 2001, A forms a partnership (PRS) with B in which A owns a 60-percent, and B owns a 40-percent, interest in profits and capital. A contributes a nonamortizable section 197(f)(9) intangible with a value of $80 and an adjusted basis of $0 to PRS in exchange for its PRS interest and B contributes $120 cash. At the time of the contribution, PRS licenses the section 197(f)(9) intangible to A. On February 1, 2001, A sells its entire interest in PRS to C, an unrelated person, for $80. PRS has a section 754 election in effect.

(ii) The section 197(f)(9) intangible contributed to PRS by A is not amortizable in the hands of PRS. Pursuant to section (g)(2)(ii) of this section, PRS steps into the shoes of A with respect to A's nonamortizable transferred basis in the intangible.

(iii) When A sells the PRS interest to C, C will have a basis adjustment in the PRS assets under section 743(b) equal to $80. The entire basis adjustment will be allocated to the intangible because the only other asset held by PRS is cash. Ordinarily, under paragraph (h)(12)(v) of this section, the anti-churning rules will not apply to an increase in the basis of partnership property under section 743(b) if the person acquiring the partnership interest is not related to the person transferring the partnership interest. However, A is an anti-churning partner under paragraph (h)(12)(vi)(B)(*3*) of this section. Because A remains a user of the section 197(f)(9) intangible after the transfer to C, paragraph (h)(12)(vi)(A) of this section will cause the anti-churning rules to apply to the entire basis adjustment under section 743(b).

(l) Effective dates—(1) *In general.* This section applies to property acquired after January 25, 2000, except that paragraph (c)(13) of this section (exception from section 197 for separately acquired rights of fixed duration or amount) applies to property acquired after August 10, 1993 (or July 25, 1991, if a valid retroactive election has been made under § 1.197–1T).

(2) *Application to pre-effective date acquisitions.* A taxpayer may choose, on a transaction-by-transaction basis, to apply the provisions of this section and § 1.167(a)–14 to property acquired after August 10, 1993 (or July 25, 1991, if a valid retroactive election has been made under § 1.197–1T) and on or before January 25, 2000.

(3) *Application of regulation project REG–209709–94 to pre-effective date acquisitions.* A taxpayer may rely on the provisions of regulation project REG–209709–94 (1997–1 C.B. 731) for property acquired after August 10, 1993 (or July 25, 1991, if a valid retroactive election has been made under § 1.197–1T) and on or before January 25, 2000.

(4) *Change in method of accounting*—(i) *In general.* For the first taxable year ending after January 25, 2000, a taxpayer that has acquired property to which the exception in § 1.197–2(c)(13) applies is granted consent of the Commissioner to change its method of accounting for such property to comply with the provisions of this section and § 1.167(a)–14 unless the proper treatment of such property is an issue under consideration (within the meaning of Rev. Proc. 97–27 (1997–21 IRB 10)(see § 601.601(d)(2) of this chapter)) in an examination, before an Appeals office, or before a Federal court.

(ii) *Application to pre-effective date acquisitions.* For the first taxable year ending after January 25, 2000, a taxpayer is granted consent of the Commissioner to change its method of accounting for all property acquired in transactions described in paragraph (l)(2) of this section to comply with the provisions of this section and § 1.167(a)–14 unless the proper treatment of any such property is an issue under consideration (within the meaning of Rev. Proc. 97–27 (1997–21 IRB 10)(see § 601.601(d)(2) of this chapter)) in an examination, before an Appeals office, or before a Federal court.

(iii) *Automatic change procedures.* A taxpayer changing its method of accounting in accordance with this paragraph (l)(4) must follow the automatic change in accounting method provisions of Rev. Proc. 99–49 (1999–52 IRB 725)(see § 601.601(d)(2) of this chapter) except, for purposes of this paragraph (l)(4), the scope limitations in section 4.02 of Rev. Proc. 99–49 (1999–52 IRB 725) are not applicable. However, if the taxpayer is under examination, before an appeals office, or before a federal court, the taxpayer must provide a copy of the application to the examining agent(s), appeals officer, or counsel for the government, as appropriate, at the same time that it files the copy of the application with the National Office. The application must contain the name(s) and telephone number(s) of the examining agent(s), appeals officer, or counsel for the government, as appropriate.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 8. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 9. In § 602.101, paragraph (b) is amended by adding an entry to the table in numerical order to read as follows.

§ 602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section identified and described	Current OMB Control No.
* * * * *	
1.197–2	1545–1671
* * * * *	

David Mader,

Acting Deputy Commissioner of Internal Revenue.

Approved: January 14, 2000.

Jonathan Talisman,

Acting Assistant Secretary of the Treasury.

[FR Doc. 00–1380 Filed 1–20–00; 1:19 pm]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 301, and 602

[TD 8869]

RIN 1545–AU77

Subchapter S Subsidiaries

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that relate to the treatment of corporate subsidiaries of S corporations and interpret the rules added to the Internal Revenue Code by section 1308 of the Small Business Job Protection Act of 1996. These regulations provide the public with guidance needed to comply with applicable law and will affect S corporations and their shareholders.

DATES: *Effective Date:* These regulations are effective January 20, 2000.

Applicability Date: For dates of applicability, see §§ 1.1361–4(a)(3)(iii), 1.1361–4(a)(5)(i), 1.1361–5(c)(2), 1.1361–6, 1.1362–8(e), and 301.6109–1(i)(4).

FOR FURTHER INFORMATION CONTACT: Jeanne M. Sullivan (202) 622–3050 (not

a toll-free number) or David J. Sotos (202) 622–3050 (Subchapter S); Michael N. Kaibni (202) 622–7550 (Subchapter C) (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in these final regulations have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545–1590. Responses to these collections of information are required to determine the manner in which a corporate subsidiary of an S corporation will be treated under the Internal Revenue Code.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by the Office of Management and Budget.

The estimated annual burden per respondent/recordkeeper varies from 45 minutes to 1 hour, depending on individual circumstances, with an estimated average of 57 minutes.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be sent to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, OP:FS:FP, Washington, DC 20224, and to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Books or records relating to this collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

On April 22, 1998, the IRS published in the **Federal Register** a notice of proposed rulemaking (REG–251698–96, 63 FR 19864) concerning the treatment of corporate subsidiaries of S corporations. The regulations interpreted rules added to the Internal Revenue Code (Code) by section 1308 of the Small Business Job Protection Act of 1996, Public Law 104–188, 110 Stat. 1755 (the Act), as amended by section 1601 of the Taxpayer Relief Act of 1997, Public Law 105–34, 111 Stat. 788 (the 1997 Act). The Act modified section 1361 of the Code to permit an S corporation: (1) To own 80 percent or more of the stock of a C corporation, and (2) to elect to treat a wholly owned subsidiary as a qualified subchapter S subsidiary (QSub). The 1997 Act made a technical correction to section 1361 to provide regulatory authority to make exceptions to the general tax treatment of an election to be a QSub.

Written comments were received in response to the notice of proposed rulemaking, and a public hearing was held on October 14, 1998. After consideration of all the comments, the proposed regulations under sections 1361, 1362, and 1374 are adopted, as revised by this Treasury decision. The comments received and the revisions are discussed below. In addition, regulations under section 6109 are adopted to provide additional guidance consistent with the QSub provisions.

On January 13, 1997, the IRS published Notice 97–4, 1997–1 C.B. 351, to provide a temporary procedure for making a QSub (formerly QSSS) election. Taxpayers should continue to follow Notice 97–4 when making a QSub election until the QSub election form is published.

Explanation of Provisions

1. Step Transaction Doctrine

a. QSub Election

The proposed regulations provide that, when an S corporation makes a valid QSub election with respect to a subsidiary, the subsidiary is deemed to have liquidated into the parent S corporation immediately before the QSub election is effective. The tax treatment of this liquidation, alone or in the context of any larger transaction (for example, a transaction that also includes the acquisition of the subsidiary's stock), generally is determined under all relevant provisions of the Code and general principles of tax law, including the step transaction doctrine. However, the proposed regulations include a special transition rule that applies to certain elections effective prior to the date that is 60 days after publication of final regulations in the **Federal Register**. The transition rule suspends the application of the step transaction doctrine with respect to the acquisition of stock followed by a QSub election in cases where the S corporation and the subsidiary are related (as described in section 267(b)) prior to the acquisition of the subsidiary's stock.

Commentators expressed concern over the application of the step transaction doctrine to transactions that include the deemed liquidation that occurs as the result of a QSub election. These commentators argued that applying step transaction to the acquisition of stock that precedes a QSub election can cause the transaction to be recast as an asset acquisition under section 368 with results that may be inconsistent with the expectations of some taxpayers. Under step transaction principles, for example, if, pursuant to a plan, a shareholder contributes the stock of one wholly owned S corporation (S2) to another wholly owned S corporation (S1), and makes a QSub election for S2, the transaction generally would be a reorganization under section 368(a)(1)(D), with the possibility of gain recognition under section 357(c). See generally, Rev. Rul. 67–274 (1967–2 C.B. 141). In the opinion of these commentators, the legislative history of the QSub provisions indicates that the deemed liquidation that is incident to a QSub election should be respected as an independent, tax-free liquidation under section 332, rather than recast under the principles of the step transaction doctrine.

After consideration of all of the comments, Treasury and the IRS believe that the proposed regulations are consistent with the legislative history of the QSub provisions, conform the results of the deemed liquidation to the results that would obtain if an actual liquidation occurred, and follow the approach taken in other provisions of the tax law. (In regulations published on November 29, 1999 (64 FR 66580), rules for elective changes in the classification of an entity for Federal tax purposes also provide that the tax treatment of a change in the classification of an entity by election is determined under all relevant provisions of the Internal Revenue Code and general principles of tax law, including the step transaction doctrine.) Accordingly, the final regulations provide that general principles of tax law, including step transaction, apply to determine the tax consequences of the transactions that include a QSub election. The final regulations provide examples illustrating the results of applying step transaction in the context of a QSub election.

The final regulations also provide for an extended transition period during which step transaction will be suspended. During the extended transition period, it is anticipated that proposed regulations published in the **Federal Register** on June 14, 1999, relating to the tax treatment of partially controlled subsidiaries under section 368(a)(1)(C) (64 FR 31770), will be finalized. These regulations generally reverse the IRS's position that the acquisition of assets of a partially controlled subsidiary does not qualify as

a tax-free reorganization under section 368(a)(1)(C). *See Bausch & Lomb Optical Co.* v. *Commissioner,* 30 T.C. 602 (1958), aff'd 267 F.2d 75 (2d Cir.), cert. denied, 361 U.S. 835 (1959); Rev. Rul. 54–396, 1954–2 C.B. 147. The regulations provide that preexisting ownership of a portion of a target corporation's stock by an acquiring corporation generally will not prevent the solely for voting stock requirement in a ''C'' reorganization from being satisfied. See also Notice 2000–1, 2000–2 I.R.B. 1, which provides that the proposed regulations, when finalized, will provide that the regulations generally will apply to transactions occurring after December 31, 1999, with an exception for transactions pursuant to binding agreements. The finalization of these regulations will provide additional certainty as to the tax consequences of making a QSUB election in situations where an S corporation acquires the remainder of a partially controlled subsidiary in exchange for stock of the S corporation and immediately thereafter elects QSUB status with respect to the subsidiary.

b. QSUB Termination

Section 1361(b)(3)(C) provides that, if a QSUB election terminates, the corporation is treated as a new corporation acquiring all of its assets (and assuming all of its liabilities) from the S corporation in exchange for stock of the new corporation immediately before the termination. The proposed regulations provide that the tax treatment of this transaction or of a larger transaction that includes this transaction will be determined under the Code and general principles of tax law, including the step transaction doctrine. The proposed regulations include examples illustrating the application of the step transaction doctrine in the context of the termination of a QSUB election.

Commentators recommended that step transaction not apply to the termination of a QSUB election. Those commentators argue that the application of the step transaction doctrine causes inappropriate tax results in some situations. One example cited is the sale of 21 percent of the stock of a QSUB, thereby terminating the QSUB election. Under step transaction principles, the deemed formation of a new corporation that occurs as a result of the QSub termination fails to qualify under section 351 because the S corporation parent is not in control of the new corporation as defined in section 368(c) after the disposition. As a result of the failure to qualify under section 351, gain would be recognized on all of the QSub's assets.

Treasury and the IRS believe that it is appropriate to apply the step transaction doctrine to the termination of a QSub election. Applying the step transaction principles to the control requirement of section 351 after the disposition of QSub stock is completed is consistent with the legislative history of the QSub termination provisions. S. Rep. No. 104–281, 104th Cong., 2d Sess. 52 n.59 (1996). Moreover, in many cases, application of the step transaction doctrine will provide a more taxpayer favorable result than giving separate effect to each step. This may occur, for example, if 100 percent of the stock of a QSub is sold. In that case, applying step transaction principles would result in a fair market value basis for the former QSub's assets, rather than a lower carryover basis that would result (absent a section 338 election) from treating the deemed formation of the new corporation as an independent step qualifying under section 351. In order to assist taxpayers to understand the effect of QSub terminations, the final regulations include two examples that illustrate the contrasting tax consequences of purchasing 21 percent of the stock of a QSub as opposed to the tax consequences of contributing property to the QSub in exchange for 21 percent of the former QSub's stock. The final regulations include additional examples illustrating the consequences of revoking the QSub election prior to sale of the QSub's stock and of merging a QSub into a disregarded entity prior to such sale.

2. ''F'' Reorganizations During the Transition Period

As noted above, commentators generally oppose applying the step transaction doctrine to the acquisition of the stock of a corporation followed immediately by a QSub election. Some commentators, however, suggested that, for policy and other reasons, during the transition period, the formation of a new shell S corporation (Newco) by the shareholders of an existing S corporation, followed by the contribution of the stock of the existing S corporation to Newco, coupled with an immediate QSub election for the existing corporation, should be characterized as a reorganization under section 368(a)(1)(F) if all of the other requisites of that section are met. Treating the transaction as an ''F'' reorganization (as opposed to a stock acquisition followed by a section 332 liquidation) can be beneficial to taxpayers. For example, the existing S corporation's taxable year does not close if it undergoes an ''F'' reorganization.

In light of the underlying purpose of the transition rule as a relief provision for the benefit of taxpayers, during the extended transition period provided in the final regulations, the IRS will not challenge taxpayers who, through application of the step transaction doctrine to an acquisition of stock followed by a QSub election, obtain tax treatment similar to that applied in a valid reorganization under section 368(a)(1)(F) if, without regard to the transition rule, the transaction would properly qualify as such a reorganization.

3. Timing of Adoption of Plan of Liquidation

Under section 332(a), no gain or loss shall be recognized on the receipt by a corporation of property distributed in complete liquidation of another corporation if the requirements of section 332(b) are satisfied. Those requirements include the adoption of a plan of liquidation at a time when the corporation receiving the distribution owns 80 percent or more of the stock of the liquidating corporation. A QSub election results in a constructive liquidation for Federal tax purposes. Formally adopting a plan of liquidation for the QSub, however, is potentially incompatible with the QSub provisions of the Code, which allow the state-law entity to continue to exist while liquidating only for Federal tax purposes. In order to provide tax treatment for the constructive liquidation incident to a QSub election that is compatible with the requirements of section 332, the proposed regulations include a provision that the making of a QSub election satisfies the requirement of adopting a plan of liquidation.

One commentator asked that the regulations provide a safe harbor with respect to the timing of the adoption of the plan of liquidation for purposes of section 332. The commentator argued that, where the acquisition of stock followed by the deemed liquidation does not constitute a reorganization (after appropriate application of step-transaction principles), the regulations should provide that, for purposes of applying section 332 to the liquidation incident to a QSub election, the S corporation will be deemed to adopt a plan of liquidation for its subsidiary as of the effective date of the election, which should not precede the acquisition by the S corporation of 100 percent of the stock of the subsidiary.

The timing of the adoption of the plan of liquidation is important in the

context of section 332 because only liquidating distributions to a corporation that owns 80 percent or more of the stock of the subsidiary when the plan is adopted qualify for tax-free treatment. A QSub election cannot be effective until the parent S corporation owns 100 percent of the subsidiary. Thus, the constructive liquidation incident to a QSub election cannot commence before that level of ownership is attained. Furthermore, providing certainty with respect to the deemed timing of the adoption of the plan of liquidation facilitates the efficient administration and use of the QSub provisions. Accordingly, to provide tax treatment of a QSub election that is compatible with the requirements of section 332, the final regulations provide that, for purposes of satisfying the requirement of section 332(b) that the parent corporation own stock in the subsidiary meeting the requirements of section 1504(a)(2) on the date of adoption of the plan of liquidation of the subsidiary, the plan of liquidation is deemed adopted immediately before the deemed liquidation incident to a QSub election unless a formal plan of liquidation that contemplates the filing of the QSub election is adopted on an earlier date. (Although no similar rule is contained in the rules for elective changes in the classification of an entity for Federal tax purposes, Treasury and the IRS intend to amend those regulations to include such a rule.) However, if as a result of the application of general tax principles the transactions that include the QSub election are treated as an asset acquisition, section 332 is not applicable and this rule has no relevance.

4. Insolvent Subsidiaries

In general, section 332 does not apply to the liquidation of an insolvent corporation, because the parent corporation does not receive at least partial payment for the stock of its subsidiary. See, e.g., § 1.332–2(b) and Rev. Rul. 68–602 (1968–2 C.B. 135). One commentator recommended that a QSub election made for an insolvent subsidiary be eligible for tax-free treatment under section 332. The commentator argued that the legislative history of the QSub provisions makes it clear that a QSub election should qualify as a liquidation under section 332 unless regulations provide otherwise and that taxpayers may be unaware of the harsh results of making a QSub election for an insolvent corporation.

Treasury and the IRS do not agree that the legislative history indicates that section 332 applies to the liquidation of an insolvent corporation. In order to assist taxpayers, an example illustrates the effect of a QSub election for an insolvent corporation.

5. Definition of Stock of the QSub

Commentators recommended that, for purposes of determining whether a subsidiary is wholly owned by the parent S corporation, arrangements that are not considered to be stock under the one-class-of-stock rules of § 1.1361–1(l) should be disregarded. The commentators noted that applying the principles of these regulations would provide certainty with respect to the subsidiary's eligibility to be a QSub and avoid difficult debt/equity determinations.

The final regulations adopt the position recommended by the commentators. The final regulations provide that, for purposes of determining whether the deemed liquidation of the subsidiary qualifies under section 332, the deemed exercise of an option under § 1.1504–4 and any instrument, obligation, or arrangement that would not be considered stock under the one-class-of-stock rules of § 1.1361–1(l) are disregarded in determining if the stock ownership requirements of section 332(b) are met. For example, an option that would not be treated as stock under § 1.1361–1, but that would be treated as exercised under § 1.1504–4, is disregarded. Similarly, if a QSub election terminates, in determining the applicability of section 351, the determination of whether stock ownership of the newly formed corporation satisfies the control requirement of section 368(c) is made without regard to instruments, obligations, or other arrangements that are not treated as stock for purposes of the 100 percent stock ownership requirement for the election.

The rule regarding options under § 1.1504–4 is included for purposes of applying section 332 because section 332 explicitly incorporates the affiliation rules of section 1504. See § 1.1504–4(a)(1) (the option rules apply to all provisions under the Code and the regulations to which affiliation within the meaning of section 1504(a) is relevant). The affiliation rules are not relevant for purposes of applying the rules regarding the 100 percent stock ownership requirement in section 1361(b)(3)(B)(i). Accordingly, the rule concerning the treatment of stock in applying the 100 percent stock ownership requirement does not refer to the option rules under § 1.1504–4.

6. Section 1374 and Excess Loss Accounts

Commentary on the proposed regulations identified certain discrepancies in the treatment of tiered groups of corporations when QSub elections are made for some or all of the members of the group and certain unintended implications of the sentence added to § 1.1374–8(b) in the proposed regulations.

a. Section 1374

Section 1374(d)(8) and § 1.1374–8(a) generally provide that, if an S corporation acquires assets in a transaction in which the S corporation's basis in the assets is determined (in whole or in part) by reference to a C corporation's basis in the assets (or any other property) (a section 1374(d)(8) transaction), section 1374 applies to the net recognized built-in gain attributable to the assets acquired in such a transaction. Section 1.1374–8(b) provides that, for purposes of the tax imposed under section 1374(d)(8), a separate determination of tax is made with respect to the assets the S corporation acquires in one section 1374(d)(8) transaction from the assets the S corporation acquires in another section 1374(d)(8) transaction and from the assets the corporation held when it became an S corporation.

A corporation's section 1374 attributes (loss carryforwards, credits, and credit carryforwards as provided in § 1.1374–1(c)) may be used only to reduce the section 1374 tax imposed on the disposition of assets held by the S corporation at the time it converted from C status. Likewise, section 1374 attributes acquired in one section 1374(d)(8) transaction may be used only to reduce tax on the disposition of assets acquired in that transaction. This results in separate section 1374 pools for purposes of calculating the tax imposed by section 1374.

One commentator noted that § 1.1374–8(b) of the proposed regulations implies that a QSub election for two or more corporations results in a section 1374(d)(8) transaction for each subsidiary and that this implication is contrary to the general timing rules of § 1.1361–4(b)(1). Those general timing rules provide that the deemed liquidation of a tiered group of C corporations that elect S and QSub status effective on the same day occurs at the close of the day before the effective date of the elections, while the parent is a C corporation. As a result of the operation of the general timing rules, there is a single section 1374 pool when the parent corporation's S election

is effective. Moreover, the commentator noted that a literal reading of § 1.1374–8(b) of the proposed regulations may cause the assets of an S corporation that is acquired by a C corporation to become subject to section 1374 when the acquiring C corporation immediately makes an S election for itself and a QSub election for the acquired S corporation. Finally, the commentator requested that the final regulations provide that when an S corporation acquires a tiered group of corporations and makes QSub elections effective on the same date for some or all of the corporations, the assets deemed acquired by the S corporation will be treated as acquired in a single section 1374(d)(8) transaction, consistent with the apparent intent of the general timing rules of § 1.1361–4(b)(1) of the proposed regulations.

b. Excess Loss Accounts

Section 1.1502–19 of the Income Tax Regulations provides rules requiring, in certain instances, a member (X) of a consolidated group of corporations to include in income its excess loss account (ELA) in the stock of another member (Y) of the group. An ELA reflects X's negative adjustments with respect to Y's stock to the extent the negative adjustments exceed X's basis in the stock. An ELA must be included in X's income if X is treated as disposing of Y's stock. See § 1.1502–19(b)(1). A merger or liquidation of X into an S corporation or an S election by X is treated as a disposition that triggers income recognition with respect to an ELA in Y stock. In contrast, X's income or gain in certain cases is subject to any nonrecognition or deferral rules applicable, including section 332. As a result, if Y liquidates into X in a transaction subject to section 332, there is no income recognition with respect to an ELA in Y's stock. See § 1.1502–19(b)(2)(i).

Under the general timing rules of § 1.1361–4(b)(1), if the common parent elects S status, the deemed liquidations of the subsidiary members of the consolidated group for which QSub elections are made (effective on the same date as the S election) occur as of the close of the day before the QSub elections are effective, while the S electing parent corporation is still a C corporation. As a result, there is no triggering of income with respect to ELAs in the stock of the subsidiary corporations if the liquidations qualify under section 332. In contrast, if a consolidated group of corporations is acquired by an S corporation and the acquiring S corporation makes QSub elections for the parent and members of the consolidated group, a deemed liquidation of the parent prior to the deemed liquidation of other members of the consolidated group may be a disposition that triggers income recognition with respect to ELAs in the subsidiaries' stock.

c. Modifications Adopted in the Final Regulations

The final regulations remove the proposed amendment to § 1.1374–8(b). Furthermore, an amendment to the general timing rules under § 1.1361–4(b)(1) for acquired S corporations clarifies that an acquired S corporation liquidates into an acquiring corporation as of the beginning of the day of acquisition, after the parent's S election, if any, is effective. There is no section 1374(d)(8) transaction when an S corporation acquires assets from another S corporation, if the acquired S corporation has no C corporation history. The modification to the timing rule also clarifies that there is no period during which an acquired S corporation is a C corporation if the QSub election is made effective as of the time of the acquisition.

As noted in the commentary, the order of the deemed liquidations for a tiered group of corporations for which QSub elections are made (effective on the same date) is significant for purposes of section 1374 and under § 1.1502–19. In many situations, it is preferable to have the deemed liquidations occur in order from the lowest tier subsidiary to the highest tier subsidiary, a bottom-up liquidation order. As a result of that ordering, the final liquidation of the highest tier subsidiary results in a single section 1374 pool for the group. In addition, in the case of a consolidated group of corporations, because the deemed liquidation of the common parent follows the deemed liquidation of its subsidiaries, there is no deconsolidation for purposes of § 1.1502–19 and no triggering of ELAs. In other circumstances, however, a top to bottom liquidation of a tiered group of subsidiaries may be preferable. Therefore, the final regulations allow the S corporation to specify the order of the deemed liquidations when QSub elections are made (effective on the same day) for a tiered group of subsidiaries. In default of an election, the deemed liquidations occur in succession on the effective date of the election, beginning with the lowest tier subsidiary.

7. Timing

One commentator noted a potential lack of coordination in the regulations that determine the timing of the termination of the S election of an acquired S corporation and the deemed liquidation incident to a QSub election for that S corporation. The commentator acknowledged that the intent of the proposed regulations is to provide that an acquired S corporation for which a QSub election is made effective immediately on acquisition should have no intervening C period.

Other timing issues can arise with respect to the termination of a QSub election. The regulations provide rules that govern the timing of the deemed liquidation incident to a QSub election and of the termination of a QSub election. The regulations also provide examples illustrating those rules. The regulations generally are intended to provide that a corporation may move between S and QSub status without an intervening C period, if the appropriate election is made effective as of the termination of the previous S or QSub election. The regulations are coordinated with provisions under section 338 and §§ 1.1362–2 and 1.1502–76 that have differing timing provisions.

8. Inadvertent QSub Election and Inadvertent Termination Relief

One commentator requested that the regulations provide inadvertent invalid QSub election relief similar to the relief that is available under section 1362(f) for inadvertent invalid S elections and inadvertent S terminations. The proposed regulations include a provision indicating that inadvertent QSub termination relief may be available under standards established by the Commissioner for inadvertent termination of an S election under § 1.1362–4.

The QSub provisions include no section analogous to section 1362(f) that allows the IRS to determine that a corporation is a QSub during a period when the corporation does not satisfy the requirement of section 1361(b)(3)(B)(i). For example, if the parent corporation inadvertently transfers one share of QSub stock to another person, the QSub election terminates. The subsidiary is not eligible to have a QSub election in effect for the period during which the parent does not own 100 percent of its stock. If the QSub election terminates because of the inadvertent termination of the parent's S election, however, relief may be available under section 1362(f). A favorable determination under that section causes the subsidiary to continue to satisfy the requirements of section 1361(b)(3)(B)(ii) during the period when the parent is accorded

relief for inadvertent termination of its S election. Moreover, if the parent fails to make a timely QSub election, relief may be available under the procedures applicable under § 301.9100–1 and § 301.9100–3.

The final regulations do not include the provision relating to the inadvertent termination of a QSub election. The removal of that provision is not intended to suggest that relief under section 1362(f) is not available in appropriate circumstances (such as those discussed above), but is intended to avoid confusion with respect to the scope of the IRS's statutory authority under section 1362(f).

9. Ordering Rule for Termination of QSub Elections

Commentators requested that the final regulations provide an ordering rule for the simultaneous termination of QSub elections as the result of the termination of an upper-tier subsidiary's QSub election. The final regulations provide that the terminations occur in succession, beginning with the upper-tier subsidiary, and include examples to illustrate the effect of simultaneous QSub terminations.

10. Banking Provisions

Consistent with the proposed regulations, the final regulations provide that any special rules applicable to banks under the Code continue to apply separately to banks as if the deemed liquidation incident to a QSub election had not occurred (the banking provisions). Commentators requested that the banking provisions be retroactive to the effective date of the Act, by election. As authorized by section 1601 of the 1997 Act, and as first announced in Notice 97–5 (1997–1 C.B. 352), the final regulations provide that the banking provisions apply to taxable years beginning after December 31, 1996. This rule applies to all taxpayers and is not subject to an election. The banking provisions also include a reference to other published guidance for section 265(b); see Rev. Rul. 90–44 (1990–1 C.B. 54, 57).

11. Taxpayer Identifying Numbers

The regulations provide clarification regarding employer identification numbers (EINs) for QSubs. The regulations restate the general rules that: (1) When an entity's classification changes as a result of an election, it retains its EIN; and (2) unless regulations or published guidance provide otherwise, a disregarded entity (including a QSub) must use its owner's EIN for Federal tax purposes.

Notice 99–6 (1999–3 I.R.B. 12) provides guidance that, under limited circumstances, a disregarded entity may use its own EIN. If a QSub wishes to use its own EIN in accordance with Notice 99–6 but did not have an EIN prior to becoming a QSub, it must apply for a new EIN.

If a subsidiary's QSub election terminates, the new corporation formed as a result of that termination must use its own EIN for Federal tax purposes. If the new corporation had an EIN before the effective date of its QSub election or during its QSub status, it should use that EIN. Otherwise, the new corporation must apply for a new EIN.

12. Effective Date and Transition Rules

The regulations generally apply to taxable years that begin on or after January 20, 2000; however, taxpayers may elect to apply the regulations in whole, but not in part (aside from those sections with special dates of applicability), for taxable years beginning on or after January 1, 2000, provided the corporation and all affected taxpayers apply the regulations in a consistent manner. To make the election, the corporation and all affected taxpayers must file a return or an amended return that is consistent with these rules for the taxable year for which the election is made. For purposes of this section, affected taxpayers means all taxpayers whose returns are affected by the election to apply the regulations. The rules relating to the treatment of banks apply to all taxable years beginning after December 31, 1996; see § 1.1361–4(a)(3)(iii). The provision relating to transitional relief from the step transaction applies to certain QSub elections effective on or before the end of calendar year 2000; see § 1.1361–4(a)(5)(i). Section 1.1361–5(c)(2), relating to automatic consent for an S or QSub election made for a corporation whose QSub election has terminated within the five-year period described in section 1361(b)(3)(D), applies to certain QSub elections effective after December 31, 1996. Section 301.6109–1(i), relating to EINs, applies on or after January 20, 2000.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information in these regulations will not have a significant impact on a substantial number of small businesses. This certification is based upon the fact that the economic burden imposed on taxpayers by the collection of information and recordkeeping requirements of these regulations is insignificant. For example, the estimated average annual burden per respondent is less than one hour. Furthermore, most taxpayers will only have to respond to the requests for information contained in §§ 1.1361–3 and 1.1361–5 one time in the life of the corporation. Therefore, a Regulatory Flexibility Analysis is not required under the Regulatory Flexibility Act (5 U.S.C. chapter 6). Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal authors of these regulations are Jeanne M. Sullivan and David J. Sotos of the Office of the Assistant Chief Counsel (Passthroughs & Special Industries); and Michael N. Kaibni of the Office of the Assistant Chief Counsel (Corporate). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1, 301, and 602 are amended as follows:

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 7805 * *

Par. 2. Amend § 1.1361–0 as follows:

1. Revise the introductory text.
2. Remove the entry for § 1.1361–1(d)(3).

3. Add entries for §§ 1.1361–2, 1.1361–3, 1.1361–4, 1.1361–5, and 1.1361–6.

The revisions and additions read as follows:

§ 1.1361–0 Table of contents.

This section lists captions contained in §§ 1.1361–1, 1.1361–2, 1.1361–3, 1.1361–4, 1.1361–5, and 1.1361–6.

* * * * *

§ 1.1361–2 Definitions relating to S corporation subsidiaries.

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(b) Stock treated as held by S corporation.
(c) Straight debt safe harbor.
(d) Examples.

§ 1.1361–3 QSub election.

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(6) Extension of time for making a QSub election.
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§ 1.1361–4 Effect of QSub election.

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(ii) Special rules for acquired S corporations.
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§ 1.1361–5 Termination of QSub election.

(a) In general.
(1) Effective date.
(2) Information to be provided upon termination of QSub election by failure to qualify as a QSub.
(3) QSub joins a consolidated group.
(4) Examples.
(b) Effect of termination of QSub election.
(1) Formation of new corporation.
(i) In general.
(ii) Termination for tiered QSubs.
(2) Carryover of disallowed losses and deductions.
(3) Examples.
(c) Election after QSub termination.
(1) In general.
(2) Exception.
(3) Examples.

§ 1.1361–6 Effective date.

Par. 3. Amend § 1.1361–1 as follows:

1. Revise paragraph (b)(1)(i).
2. Remove paragraph (d)(1)(i).
3. Redesignate paragraphs (d)(1)(ii), (d)(1)(iii), (d)(1)(iv), and (d)(1)(v) as paragraphs (d)(1)(i), (d)(1)(ii), (d)(1)(iii), and (d)(1)(iv), respectively.
4. Revise newly designated paragraph (d)(1)(i).
5. Remove paragraph (d)(3).
6. Revise the first sentence of paragraph (e)(1).

The revisions read as follows:

§ 1.1361–1 S corporation defined.

* * * * *

(b) * * *

(1) * * *

(i) More than 75 shareholders (35 for taxable years beginning before January 1, 1997);

* * * * *

(d) * * *

(1) * * *

(i) For taxable years beginning on or after January 1, 1997, a financial institution that uses the reserve method of accounting for bad debts described in section 585 (for taxable years beginning prior to January 1, 1997, a financial institution to which section 585 applies (or would apply but for section 585(c)) or to which section 593 applies);

* * * * *

(e) * * *

(1) *General rule.* A corporation does not qualify as a small business corporation if it has more than 75 shareholders (35 for taxable years beginning prior to January 1, 1997).

* * *

* * * * *

Par. 4. Add §§ 1.1361–2, 1.1361–3, 1.1361–4, 1.1361–5, and 1.1361–6 to read as follows:

§ 1.1361–2 Definitions relating to S corporation subsidiaries.

(a) *In general.* The term *qualified subchapter S subsidiary* (QSub) means any domestic corporation that is not an ineligible corporation (as defined in section 1361(b)(2) and the regulations thereunder), if—

(1) 100 percent of the stock of such corporation is held by an S corporation; and

(2) The S corporation properly elects to treat the subsidiary as a QSub under § 1.1361–3.

(b) *Stock treated as held by S corporation.* For purposes of satisfying the 100 percent stock ownership requirement in section 1361(b)(3)(B)(i) and paragraph (a)(1) of this section—

(1) Stock of a corporation is treated as held by an S corporation if the S corporation is the owner of that stock for Federal income tax purposes; and

(2) Any outstanding instruments, obligations, or arrangements of the corporation which would not be considered stock for purposes of section 1361(b)(1)(D) if the corporation were an S corporation are not treated as outstanding stock of the QSub.

(c) *Straight debt safe harbor.* Section 1.1361–1(l)(5)(iv) and (v) apply to an obligation of a corporation for which a QSub election is made if that obligation would satisfy the definition of straight debt in § 1.1361–1(l)(5) if issued by the S corporation.

(d) *Examples.* The following examples illustrate the application of this section:

Example 1. X, an S corporation, owns 100 percent of Y, a corporation for which a valid QSub election is in effect for the taxable year. Y owns 100 percent of Z, a corporation otherwise eligible for QSub status. X may elect to treat Z as a QSub under section 1361(b)(3)(B)(ii).

Example 2. Assume the same facts as in *Example 1,* except that Y is a business entity that is disregarded as an entity separate from its owner under § 301.7701–2(c)(2) of this chapter. X may elect to treat Z as a QSub.

Example 3. Assume the same facts as in *Example 1,* except that Y owns 50 percent of Z, and X owns the other 50 percent. X may elect to treat Z as a QSub.

Example 4. Assume the same facts as in *Example 1,* except that Y is a C corporation. Although Y is a domestic corporation that is otherwise eligible to be a QSub, no QSub election has been made for Y. Thus, X is not treated as holding the stock of Z. Consequently, X may not elect to treat Z as a QSub.

Example 5. Individuals A and B own 100 percent of the stock of corporation X, an S corporation, and, except for C's interest (described below), X owns 100 percent of corporation Y, a C corporation. Individual C holds an instrument issued by Y that is considered to be equity under general principles of tax law but would satisfy the definition of straight debt under § 1.1361–1(l)(5) if Y were an S corporation. In determining whether X owns 100 percent of Y for purposes of making the QSub election, the instrument held by C is not considered outstanding stock. In addition, under § 1.1361–1(l)(5)(v), the QSub election is not treated as an exchange of debt for stock with respect to such instrument, and § 1.1361–1(l)(5)(iv) applies to determine the tax treatment of payments on the instrument while Y's QSub election is in effect.

§ 1.1361–3 QSub election.

(a) *Time and manner of making election*—(1) *In general.* The corporation for which the QSub election is made must meet all the requirements of section 1361(b)(3)(B) at the time the election is made and for all periods for which the election is to be effective.

(2) *Manner of making election.* Except as provided in section 1361(b)(3)(D) and § 1.1361–5(c) (five-year prohibition on re-election), an S corporation may elect to treat an eligible subsidiary as a QSub by filing a completed form to be prescribed by the IRS. The election form must be signed by a person authorized to sign the S corporation's return required to be filed under section 6037. Unless the election form provides otherwise, the election must be submitted to the service center where the subsidiary filed its most recent tax return (if applicable), and, if an S corporation forms a subsidiary and makes a valid QSub election (effective upon the date of the subsidiary's formation) for the subsidiary, the election should be submitted to the service center where the S corporation filed its most recent return.

(3) *Time of making election.* A QSub election may be made by the S corporation parent at any time during the taxable year.

(4) *Effective date of election.* A QSub election will be effective on the date specified on the election form or on the date the election form is filed if no date is specified. The effective date specified on the form cannot be more than two months and 15 days prior to the date of filing and cannot be more than 12 months after the date of filing. For this purpose, the definition of the term *month* found in § 1.1362–6(a)(2)(ii)(C) applies. If an election form specifies an effective date more than two months and 15 days prior to the date on which the election form is filed, it will be effective two months and 15 days prior to the date it is filed. If an election form specifies an effective date more than 12 months after the date on which the election is filed, it will be effective 12 months after the date it is filed.

(5) *Example.* The following example illustrates the application of paragraph (a)(4) of this section:

Example. X has been a calendar year S corporation engaged in a trade or business for several years. X acquires the stock of Y, a calendar year C corporation, on April 1, 2002. On August 10, 2002, X makes an election to treat Y as a QSub. Unless otherwise specified on the election form, the election will be effective as of August 10, 2002. If specified on the election form, the election may be effective on some other date that is not more than two months and 15 days prior to August 10, 2002, and not more than 12 months after August 10, 2002.

(6) *Extension of time for making a QSub election.* An extension of time to make a QSub election may be available under the procedures applicable under §§ 301.9100–1 and 301.9100–3 of this chapter.

(b) *Revocation of QSub election*—(1) *Manner of revoking QSub election.* An S corporation may revoke a QSub election under section 1361 by filing a statement with the service center where the S corporation's most recent tax return was properly filed. The revocation statement must include the names, addresses, and taxpayer identification numbers of both the parent S corporation and the QSub, if any. The statement must be signed by a person authorized to sign the S corporation's return required to be filed under section 6037.

(2) *Effective date of revocation.* The revocation of a QSub election is effective on the date specified on the revocation statement or on the date the revocation statement is filed if no date is specified. The effective date specified on the revocation statement cannot be more than two months and 15 days prior to the date on which the revocation statement is filed and cannot be more than 12 months after the date on which the revocation statement is filed. If a revocation statement specifies an effective date more than two months and 15 days prior to the date on which the statement is filed, it will be effective two months and 15 days prior to the date it is filed. If a revocation statement specifies an effective date more than 12 months after the date on which the statement is filed, it will be effective 12 months after the date it is filed.

(3) *Revocation after termination.* A revocation may not be made after the occurrence of an event that renders the subsidiary ineligible for QSub status under section 1361(b)(3)(B).

(4) *Revocation before QSub election effective.* For purposes of Section 1361(b)(3)(D) and § 1.1361–5(c) (five-year prohibition on re-election), a revocation effective on the first day the QSub election was to be effective will not be treated as a termination of a QSub election.

§ 1.1361–4 Effect of QSub election.

(a) *Separate existence ignored*—(1) *In general.* Except as otherwise provided in paragraph (a)(3) of this section, for Federal tax purposes—

(i) A corporation which is a QSub shall not be treated as a separate corporation; and

(ii) All assets, liabilities, and items of income, deduction, and credit of a QSub shall be treated as assets, liabilities, and items of income, deduction, and credit of the S corporation.

(2) *Liquidation of subsidiary*—(i) *In general.* If an S corporation makes a valid QSub election with respect to a subsidiary, the subsidiary is deemed to have liquidated into the S corporation. Except as provided in paragraph (a)(5) of this section, the tax treatment of the liquidation or of a larger transaction that includes the liquidation will be determined under the Internal Revenue Code and general principles of tax law, including the step transaction doctrine. Thus, for example, if an S corporation forms a subsidiary and makes a valid QSub election (effective upon the date of the subsidiary's formation) for the subsidiary, the transfer of assets to the subsidiary and the deemed liquidation are disregarded, and the corporation will be deemed to be a QSub from its inception.

(ii) *Examples.* The following examples illustrate the application of this paragraph (a)(2)(i) of this section:

Example 1. Corporation X acquires all of the outstanding stock of solvent corporation Y from an unrelated individual for cash and short-term notes. Thereafter, as part of the same plan, X immediately makes an S election and a QSub election for Y. Because X acquired all of the stock of Y in a qualified stock purchase within the meaning of section 338(d)(3), the liquidation described in paragraph (a)(2) of this section is respected as an independent step separate from the stock acquisition, and the tax consequences of the liquidation are determined under sections 332 and 337.

Example 2. Corporation X, pursuant to a plan, acquires all of the outstanding stock of corporation Y from the shareholders of Y solely in exchange for 10 percent of the voting stock of X. Prior to the transaction, Y and its shareholders are unrelated to X. Thereafter, as part of the same plan, X immediately makes an S election and a QSub election for Y. The transaction is a reorganization described in section 368(a)(1)(C), assuming the other conditions for reorganization treatment (e.g., continuity of business enterprise) are satisfied.

Example 3. After the expiration of the transition period provided in paragraph (a)(5)(i) of this section, individual A, pursuant to a plan, contributes all of the outstanding stock of Y to his wholly owned S corporation, X, and immediately causes X to make a QSub election for Y. The transaction is a reorganization under section 368(a)(1)(D), assuming the other conditions for reorganization treatment (e.g., continuity of business enterprise) are satisfied. If the sum of the amount of liabilities of Y treated as assumed by X exceeds the total of the

adjusted basis of the property of Y, then section 357(c) applies and such excess is considered as gain from the sale or exchange of a capital asset or of property which is not a capital asset, as the case may be.

(iii) *Adoption of plan of liquidation.* For purposes of satisfying the requirement of adoption of a plan of liquidation under section 332, unless a formal plan of liquidation that contemplates the QSub election is adopted on an earlier date, the making of the QSub election is considered to be the adoption of a plan of liquidation immediately before the deemed liquidation described in paragraph (a)(2)(i) of this section.

(iv) *Example.* The following example illustrates the application of paragraph (a)(2)(iii) of this section:

Example. Corporation X owns 75 percent of a solvent corporation Y, and individual A owns the remaining 25 percent of Y. As part of a plan to make a QSub election for Y, X causes Y to redeem A's 25 percent interest on June 1 for cash and makes a QSub election for Y effective on June 3. The making of the QSub election is considered to be the adoption of a plan of liquidation immediately before the deemed liquidation. The deemed liquidation satisfies the requirements of section 332.

(v) *Stock ownership requirements of section 332.* The deemed exercise of an option under § 1.1504–4 and any instruments, obligations, or arrangements that are not considered stock under § 1.1361–2(b)(2) are disregarded in determining if the stock ownership requirements of section 332(b) are met with respect to the deemed liquidation provided in paragraph (a)(2)(i) of this section.

(3) *Treatment of banks*—(i) *In general.* If an S corporation is a bank, or if an S corporation makes a valid QSub election for a subsidiary that is a bank, any special rules applicable to banks under the Internal Revenue Code continue to apply separately to the bank parent or bank subsidiary as if the deemed liquidation of any QSub under paragraph (a)(2) of this section had not occurred (except as other published guidance may apply section 265(b) and section 291(a)(3) and (e)(1)(B) not only to the bank parent or bank subsidiary but also to any QSub deemed to have liquidated under paragraph (a)(2) of this section). For any QSub that is a bank, however, all assets, liabilities, and items of income, deduction, and credit of the QSub, as determined in accordance with the special bank rules, are treated as assets, liabilities, and items of income, deduction, and credit of the S corporation. For purposes of this paragraph (a)(3)(i), the term bank has the same meaning as in section 581.

(ii) *Examples.* The following examples illustrate the application of this paragraph (a)(3):

Example 1. X, an S corporation, is a bank as defined in section 581. X owns 100 percent of Y and Z, corporations for which valid QSub elections are in effect. Y is a bank as defined in section 581, and Z is not a financial institution. Pursuant to paragraph (a)(3)(i) of this section, any special rules applicable to banks under the Internal Revenue Code continue to apply separately to X and Y and do not apply to Z. Thus, for example, section 265(b), which provides special rules for interest expense deductions of banks, applies separately to X and Y. That is, X and Y each must make a separate determination under section 265(b) of interest expense allocable to tax-exempt interest, and no deduction is allowed for that interest expense. Section 265(b) does not apply to Z except as published guidance may provide otherwise.

Example 2. X, an S corporation, is a bank holding company and thus is not a bank as defined in section 581. X owns 100 percent of Y, a corporation for which a valid QSub election is in effect. Y is a bank as defined in section 581. Pursuant to paragraph (a)(3)(i) of this section, any special rules applicable to banks under the Internal Revenue Code continue to apply to Y and do not apply to X. However, all of Y's assets, liabilities, and items of income, deduction, and credit, as determined in accordance with the special bank rules, are treated as those of X. Thus, for example, section 582(c), which provides special rules for sales and exchanges of debt by banks, applies only to sales and exchanges by Y. However, any gain or loss on such a transaction by Y that is considered ordinary income or ordinary loss pursuant to section 582(c) is treated as ordinary income or ordinary loss of X.

(iii) *Effective date.* This paragraph (a)(3) applies to taxable years beginning after December 31, 1996.

(4) *Treatment of stock of QSub.* Except for purposes of section 1361(b)(3)(B)(i) and § 1.1361–2(a)(1), the stock of a QSub shall be disregarded for all Federal tax purposes.

(5) *Transitional relief*—(i) *General rule.* If an S corporation and another corporation (the related corporation) are persons specified in section 267(b) prior to an acquisition by the S corporation of some or all of the stock of the related corporation followed by a QSub election for the related corporation, the step transaction doctrine will not apply to determine the tax consequences of the acquisition. This paragraph (a)(5) shall apply to QSub elections effective before January 1, 2001.

(ii) *Examples.* The following examples illustrate the application of this paragraph (a)(5):

Example 1. Individual A owns 100 percent of the stock of X, an S corporation. X owns 79 percent of the stock of Y, a solvent corporation, and A owns the remaining 21 percent. On May 4, 1998, A contributes its Y stock to X in exchange for X stock. X makes a QSub election with respect to Y effective immediately following the transfer. The liquidation described in paragraph (a)(2) of this section is respected as an independent step separate from the stock acquisition, and the tax consequences of the liquidation are determined under sections 332 and 337. The contribution by A of the Y stock qualifies under section 351, and no gain or loss is recognized by A, X, or Y.

Example 2. Individual A owns 100 percent of the stock of two solvent S corporations, X and Y. On May 4, 1998, A contributes the stock of Y to X. X makes a QSub election with respect to Y immediately following the transfer. The liquidation described in paragraph (a)(2) of this section is respected as an independent step separate from the stock acquisition, and the tax consequences of the liquidation are determined under sections 332 and 337. The contribution by A of the Y stock to X qualifies under section 351, and no gain or loss is recognized by A, X, or Y. Y is not treated as a C corporation for any period solely because of the transfer of its stock to X, an ineligible shareholder. Compare *Example 3* of § 1.1361–4(a)(2)(ii).

(b) *Timing of the liquidation*—(1) *In general.* Except as otherwise provided in paragraph (b)(3) or (4) of this section, the liquidation described in paragraph (a)(2) of this section occurs at the close of the day before the QSub election is effective. Thus, for example, if a C corporation elects to be treated as an S corporation and makes a QSub election (effective the same date as the S election) with respect to a subsidiary, the liquidation occurs immediately before the S election becomes effective, while the S electing parent is still a C corporation.

(2) *Application to elections in tiered situations.* When QSub elections for a tiered group of subsidiaries are effective on the same date, the S corporation may specify the order of the liquidations. If no order is specified, the liquidations that are deemed to occur as a result of the QSub elections will be treated as occurring first for the lowest tier entity and proceed successively upward until all of the liquidations under paragraph (a)(2) of this section have occurred. For example, S, an S corporation, owns 100 percent of C, the common parent of an affiliated group of corporations that includes X and Y. C owns all of the stock of X and X owns all of the stock of Y. S elects under § 1.1361–3 to treat C, X and Y as QSubs effective on the same date. If no order is specified for the elections, the following liquidations are deemed to occur as a result of the elections, with each successive liquidation occuring on the same day immediately after the preceding liquidation: Y is treated as liquidating into X, then X is treated as liquidating

into C, and finally C is treated as liquidating into S.

(3) *Acquisitions.* (i) *In general.* If an S corporation does not own 100 percent of the stock of the subsidiary on the day before the QSub election is effective, the liquidation described in paragraph (a)(2) of this section occurs immediately after the time at which the S corporation first owns 100 percent of the stock.

(ii) *Special rules for acquired S corporations.* Except as provided in paragraph (b)(4) of this section, if a corporation (Y) for which an election under section 1362(a) was in effect is acquired, and a QSub election is made effective on the day Y is acquired, Y is deemed to liquidate into the S corporation at the beginning of the day the termination of its S election is effective. As a result, if corporation X acquires Y, an S corporation, and makes an S election for itself and a QSub election for Y effective on the day of acquisition, Y liquidates into X at the beginning of the day when X's S election is effective, and there is no period between the termination of Y's S election and the deemed liquidation of Y during which Y is a C corporation. Y's taxable year ends for all Federal income tax purposes at the close of the preceding day. Furthermore, if Y owns Z, a corporation for which a QSub election was in effect prior to the acquisition of Y by X, and X makes QSub elections for Y and Z, effective on the day of acquisition, the transfer of assets to Z and the deemed liquidation of Z are disregarded. See §§ 1.1361–4(a)(2) and 1.1361–5(b)(1)(i).

(4) *Coordination with section 338 election.* An S corporation that makes a qualified stock purchase of a target may make an election under section 338 with respect to the acquisition if it meets the requirements for the election, and may make a QSub election with respect to the target. If an S corporation makes an election under section 338 with respect to a subsidiary acquired in a qualified stock purchase, a QSub election made with respect to that subsidiary is not effective before the day after the acquisition date (within the meaning of section 338(h)(2)). If the QSub election is effective on the day after the acquisition date, the liquidation under paragraph (a)(2) of this section occurs immediately after the deemed asset purchase by the new target corporation under section 338. If an S corporation makes an election under section 338 (without a section 338(h)(10) election) with respect to a target, the target must file a final or deemed sale return as a C corporation reflecting the deemed sale. See § 1.338–10T(a).

(c) *Carryover of disallowed losses and deductions.* If an S corporation (S1) acquires the stock of another S corporation (S2), and S1 makes a QSub election with respect to S2 effective on the day of the acquisition, see § 1.1366–2(c)(1) for provisions relating to the carryover of losses and deductions with respect to a former shareholder of S2 that may be available to that shareholder as a shareholder of S1.

(d) *Examples.* The following examples illustrate the application of this section:

Example 1. X, an S corporation, owns 100 percent of the stock of Y, a C corporation. On June 2, 2002, X makes a valid QSub election for Y, effective June 2, 2002. Assume that, under general principles of tax law, including the step transaction doctrine, X's acquisition of the Y stock and the subsequent QSub election would not be treated as related. The liquidation described in paragraph (a)(2) of this section occurs at the close of the day on June 1, 2002, the day before the QSub election is effective, and the plan of liquidation is considered adopted on that date. Y's taxable year and separate existence for Federal tax purposes end at the close of June 1, 2002.

Example 2. X, a C corporation, owns 100 percent of the stock of Y, another C corporation. On December 31, 2002, X makes an election under section 1362 to be treated as an S corporation and a valid QSub election for Y, both effective January 1, 2003. Assume that, under general principles of tax law, including the step transaction doctrine, X's acquisition of the Y stock and the subsequent QSub election would not be treated as related. The liquidation described in paragraph (a)(2) of this section occurs at the close of December 31, 2002, the day before the QSub election is effective. The QSub election for Y is effective on the same day that X's S election is effective, and the deemed liquidation is treated as occurring before the S election is effective, when X is still a C corporation. Y's taxable year ends at the close of December 31, 2002. See § 1.381(b)–1.

Example 3. On June 1, 2002, X, an S corporation, acquires 100 percent of the stock of Y, an existing S corporation, for cash in a transaction meeting the requirements of a qualified stock purchase (QSP) under section 338. X immediately makes a QSub election for Y effective June 2, 2002, and also makes a joint election under section 338(h)(10) with the shareholder of Y. Under section 338(a) and § 1.338(h)(10)–1T(d)(3), Y is treated as having sold all of its assets at the close of the acquisition date, June 1, 2002. Y is treated as a new corporation which purchased all of those assets as of the beginning of June 2, 2000, the day after the acquisition date. Section 338(a)(2). The QSub election is effective on June 2, 2002, and the liquidation under paragraph (a)(2) of this section occurs immediately after the deemed asset purchase by the new corporation.

Example 4. X, an S corporation, owns 100 percent of Y, a corporation for which a QSub election is in effect. On May 12, 2002, a date on which the QSub election is in effect, X issues Y a $10,000 note under state law that matures in ten years with a market rate of interest. Y is not treated as a separate corporation, and X's issuance of the note to Y on May 12, 2002, is disregarded for Federal tax purposes.

Example 5. X, an S corporation, owns 100 percent of the stock of Y, a C corporation. At a time when Y is indebted to X in an amount that exceeds the fair market value of Y's assets, X makes a QSub election effective on the date it is filed with respect to Y. The liquidation described in paragraph (a)(2) of this section does not qualify under sections 332 and 337 and, thus, Y recognizes gain or loss on the assets distributed, subject to the limitations of section 267.

§ 1.1361–5 Termination of QSub election.

(a) In *general*—(1) *Effective date.* The termination of a QSub election is effective—

(i) On the effective date contained in the revocation statement if a QSub election is revoked under § 1.1361–3(b);

(ii) At the close of the last day of the parent's last taxable year as an S corporation if the parent's S election terminates under § 1.1362–2; or

(iii) At the close of the day on which an event (other than an event described in paragraph (a)(1)(ii) of this section) occurs that renders the subsidiary ineligible for QSub status under section 1361(b)(3)(B).

(2) *Information to be provided upon termination of QSub election by failure to qualify as a QSub.* If a QSub election terminates because an event renders the subsidiary ineligible for QSub status, the S corporation must attach to its return for the taxable year in which the termination occurs a notification that a QSub election has terminated, the date of the termination, and the names, addresses, and employer identification numbers of both the parent corporation and the QSub.

(3) *QSub joins a consolidated group.* If a QSub election terminates because the S corporation becomes a member of a consolidated group (and no election under section 338(g) is made) the principles of § 1.1502–76(b)(1)(ii)(A)(2) (relating to a special rule for S corporations that join a consolidated group) apply to any QSub of the S corporation that also becomes a member of the consolidated group at the same time as the S corporation. See *Example 4* of paragraph (a)(4) of this section.

(4) *Examples. The following examples illustrate the application of this paragraph (a):*

Example 1.Termination because parent's S election terminates. X, an S corporation, owns 100 percent of Y. A QSub election is in effect with respect to Y for 2001. Effective on January 1, 2002, X revokes its S election. Because X is no longer an S corporation, Y

no longer qualifies as a QSub at the close of December 31, 2001.

Example 2.Termination due to transfer of QSub stock. X, an S corporation, owns 100 percent of Y. A QSub election is in effect with respect to Y. On December 10, 2002, X sells one share of Y stock to A, an individual. Because X no longer owns 100 percent of the stock of Y, Y no longer qualifies as a QSub. Accordingly, the QSub election made with respect to Y terminates at the close of December 10, 2002.

Example 3. No termination on stock transfer between QSub and parent. X, an S corporation, owns 100 percent of the stock of Y, and Y owns 100 percent of the stock of Z. QSub elections are in effect with respect to both Y and Z. Y transfers all of its Z stock to X. Because X is treated as owning the stock of Z both before and after the transfer of stock solely for purposes of determining whether the requirements of section 1361(b)(3)(B)(i) and § 1.1361–2(a)(1) have been satisfied, the transfer of Z stock does not terminate Z's QSub election. Because the stock of Z is disregarded for all other Federal tax purposes, no gain is recognized under section 311.

Example 4. Termination due to acquisition of S parent by a consolidated group. X, an S corporation, owns 100 percent of Y, a corporation for which a QSub election is in effect. Z, the common parent of a consolidated group of corporations, acquires 80 percent of the stock of X on June 1, 2002. Z does not make an election under section 338(g) with respect to the purchase of X stock. X's S election terminates as of the close of the preceding day, May 31, 2002. Y's QSub election also terminates at the close of May 31, 2002. Under § 1.1502–76(b)(1)(ii)(A)(2) and paragraph (a)(3) of this section, X and Y become members of Z's consolidated group of corporations as of the beginning of the day June 1, 2002.

Example 5. Termination due to acquisition of QSub by a consolidated group. The facts are the same as in Example 4, except that Z acquires 80 percent of the stock of Y (instead of X) on June 1, 2002. In this case, Y's QSub election terminates as of the close of June 1, 2002, and, under § 1.1502–76(b)(1)(ii)(A)(1), Y becomes a member of the consolidated group at that time.

(b) *Effect of termination of QSub election*—(1) *Formation of new corporation*—(i) *In general.* If a QSub election terminates under paragraph (a) of this section, the former QSub is treated as a new corporation acquiring all of its assets (and assuming all of its liabilities) immediately before the termination from the S corporation parent in exchange for stock of the new corporation. he tax treatment of this transaction or of a larger transaction that includes this transaction will be determined under the Internal Revenue Code and general principles of tax law, including the step transaction doctrine. For purposes of determining the application of section 351 with respect to this transaction, instruments, obligations, or other arrangements that are not treated as stock of the QSub under § 1.1361–2(b) are disregarded in determining control for purposes of section 368(c) even if they are equity under general principles of tax law.

(ii) *Termination for tiered QSubs.* If QSub elections terminate for tiered QSubs on the same day, the formation of any higher tier subsidiary precedes the formation of its lower tier subsidiary. See Example 6 in paragraph (b)(3) of this section.

(2) *Carryover of disallowed losses and deductions.* If a QSub terminates because the S corporation distributes the QSub stock to some or all of the S corporation's shareholders in a transaction to which section 368(a)(1)(D) applies by reason of section 355 (or so much of section 356 as relates to section 355), see § 1.1366–2(c)(2) for provisions relating to the carryover of disallowed losses and deductions that may be available.

(3) *Examples.* The following examples illustrate the application of this paragraph (b):

Example 1. X, an S corporation, owns 100 percent of the stock of Y, a corporation for which a QSub election is in effect. X sells 21 percent of the Y stock to Z, an unrelated corporation, for cash, thereby terminating the QSub election. Y is treated as a new corporation acquiring all of its assets (and assuming all of its liabilities) in exchange for Y stock immediately before the termination from the S corporation. The deemed exchange by X of assets for Y stock does not qualify under section 351 because X is not in control of Y within the meaning of section 368(c) immediately after the transfer as a result of the sale of stock to Z. Therefore, X must recognize gain, if any, on the assets transferred to Y in exchange for its stock. X's losses, if any, on the assets transferred are subject to the limitations of section 267.

Example 2. (i) X, an S corporation, owns 100 percent of the stock of Y, a corporation for which a QSub election is in effect. As part of a plan to sell a portion of Y, X causes Y to merge into T, a limited liability company wholly owned by X that is disregarded as an entity separate from its owner for Federal tax purposes. X then sells 21 percent of T to Z, an unrelated corporation, for cash. Following the sale, no entity classification election is made under § 301.7701–3(c) of this chapter to treat the limited liability company as an association for Federal tax purposes.

(ii) The merger of Y into T causes a termination of Y's QSub election. The new corporation (Newco) that is formed as a result of the termination is immediately merged into T, an entity that is disregarded for Federal tax purposes. Because, at the end of the series of transactions, the assets continue to be held by X for Federal tax purposes, under step transaction principles, the formation of Newco and the transfer of assets pursuant to the merger of Newco into T are disregarded. The sale of 21 percent of T is treated as a sale of a 21 percent undivided interest in each of T's assets. Immediately thereafter, X and Z are treated as contributing their respective interests in those assets to a partnership in exchange for ownership interests in the partnership.

(iii) Under section 1001, X recognizes gain or loss from the deemed sale of the 21 percent interest in each asset of the limited liability company to Z. Under section 721(a), no gain or loss is recognized by X and Z as a result of the deemed contribution of their respective interests in the assets to the partnership in exchange for ownership interests in the partnership.

Example 3. Assume the same facts as in *Example 1,* except that, instead of purchasing Y stock, Z contributes to Y an operating asset in exchange for 21 percent of the Y stock. Y is treated as a new corporation acquiring all of its assets (and assuming all of its liabilities) in exchange for Y stock immediately before the termination. Because X and Z are co-transferors that control the transferee immediately after the transfer, the transaction qualifies under section 351.

Example 4. X, an S corporation, owns 100 percent of the stock of Y, a corporation for which a QSub election is in effect. X distributes all of the Y stock pro rata to its shareholders, and the distribution terminates the QSub election. The transaction can qualify as a distribution to which sections 368(a)(1)(D) and 355 apply if the transaction otherwise satisfies the requirements of those sections.

Example 5. X, an S corporation, owns 100 percent of the stock of Y, a corporation for which a QSub election is in effect. X subsequently revokes the QSub election. Y is treated as a new corporation acquiring all of its assets (and assuming all of its liabilities) immediately before the revocation from its S corporation parent in a deemed exchange for Y stock. On a subsequent date, X sells 21 percent of the stock of Y to Z, an unrelated corporation, for cash. Assume that under general principles of tax law including the step transaction doctrine, the sale is not taken into account in determining whether X is in control of Y immediately after the deemed exchange of assets for stock. The deemed exchange by X of assets for Y stock and the deemed assumption by Y of its liabilities qualify under section 351 because, for purposes of that section, X is in control of Y within the meaning of section 368(c) immediately after the transfer.

Example 6. (i) X, an S corporation, owns 100 percent of the stock of Y, and Y owns 100 percent of the stock of Z. Y and Z are corporations for which QSub elections are in effect. X subsequently revokes the QSub elections and the effective date specified on each revocation statement is June 26, 2002, a date that is less than 12 months after the date on which the revocation statements are filed.

(ii) Immediately before the QSub elections terminate, Y is treated as a

new corporation acquiring all of its assets (and assuming all of its liabilities) directly from X in exchange for the stock of Y. Z is treated as a new corporation acquiring all of its assets (and assuming all of its liabilities) directly from Y in exchange for the stock of Z.

Example 7. (i) The facts are the same as in Example 6, except that, prior to June 26, 2002 (the effective date of the revocations), Y distributes the Z stock to X under state law.

(ii) Immediately before the QSub elections terminate, Y is treated as a new corporation acquiring all of its assets (and assuming all of its liabilities) directly from X in exchange for the stock of Y. Z is also treated as a new corporation acquiring all of its assets (and assuming all of its liabilities) directly from X in exchange for the stock of Z.

Example 8. Merger of parent into QSub. X, an S corporation, owns 100 percent of the stock of Y, a corporation for which a QSub election is in effect. X merges into Y under state law, causing the QSub election for Y to terminate, and Y survives the merger. The formation of the new corporation, Y, and the merger of X into Y can qualify as a reorganization described in section 368(a)(1)(F) if the transaction otherwise satisfies the requirements of that section.

Example 9. Transfer of 100 percent of QSub. X, an S corporation, owns 100 percent of the stock of Y, a corporation for which a QSub election is in effect. Z, an unrelated C corporation, acquires 100 percent of the stock of Y. The deemed formation of Y by X (as a consequence of the termination of Y's QSub election) is disregarded for Federal income tax purposes. The transaction is treated as a transfer of the assets of Y to Z, followed by Z's transfer of these assets to the capital of Y in exchange for Y stock. Furthermore, if Z is an S corporation and makes a QSub election for Y effective as of the acquisition, Z's transfer of the assets of Y in exchange for Y stock, followed by the immediate liquidation of Y as a consequence of the QSub election are disregarded for Federal income tax purposes.

(c) *Election after QSub termination*—(1) *In general.* Absent the Commissioner's consent, and except as provided in paragraph (c)(2) of this section, a corporation whose QSub election has terminated under paragraph (a) of this section (or a successor corporation as defined in paragraph (b) of this section) may not make an S election under section 1362 or have a QSub election under section 1361(b)(3)(B)(ii) made with respect to it for five taxable years (as described in section 1361(b)(3)(D)). The Commissioner may permit an S election by the corporation or a new QSub election with respect to the corporation before the five-year period expires. The corporation requesting consent to make the election has the burden of establishing that, under the relevant facts and circumstances, the Commissioner should consent to a new election.

(2) *Exception.* In the case of S and QSub elections effective after December 31, 1996, if a corporation's QSub election terminates, the corporation may, without requesting the Commissioner's consent, make an S election or have a QSub election made with respect to it before the expiration of the five-year period described in section 1361(b)(3)(D) and paragraph (c)(1) of this section, provided that—

(i) Immediately following the termination, the corporation (or its successor corporation) is otherwise eligible to make an S election or have a QSub election made for it; and

(ii) The relevant election is made effective immediately following the termination of the QSub election.

(3) *Examples.* The following examples illustrate the application of this paragraph (c):

Example 1. Termination upon distribution of QSub stock to shareholders of parent. X, an S corporation, owns Y, a QSub. X distributes all of its Y stock to X's shareholders. The distribution terminates the QSub election because Y no longer satisfies the requirements of a QSub. Assuming Y is otherwise eligible to be treated as an S corporation, Y's shareholders may elect to treat Y as an S corporation effective on the date of the stock distribution without requesting the Commissioner's consent.

Example 2. Sale of 100 percent of QSub stock. X, an S corporation, owns Y, a QSub. X sells 100 percent of the stock of Y to Z, an unrelated S corporation. Z may elect to treat Y as a QSub effective on the date of purchase without requesting the Commissioner's consent.

§ 1.1361–6 Effective date.

Except as provided in §§ 1.1361–4(a)(3)(iii), 1.1361–4(a)(5)(i), and 1.1361–5(c)(2), the provisions of §§ 1.1361–2 through 1.1361–5 apply to taxable years beginning on or after January 20, 2000; however, taxpayers may elect to apply the regulations in whole, but not in part (aside from those sections with special dates of applicability), for taxable years beginning on or after January 1, 2000, provided all affected taxpayers apply the regulations in a consistent manner. To make this election, the corporation and all affected taxpayers must file a return or an amended return that is consistent with these rules for the taxable year for which the election is made. For purposes of this section, affected taxpayers means all taxpayers whose returns are affected by the election to apply the regulations.

Par. 5. Amend § 1.1362–0 by adding an entry for § 1.1362–8 to read as follows:

§ 1.1362–0 Table of contents.

* * * * *

§ .1362–8 Dividends received from affiliated subsidiaries.

(a) In general.
(b) Determination of active or passive earnings and profits.
(1) In general.
(2) Lower tier subsidiaries.
(3) De minimis exception.
(4) Special rules for earnings and profits accumulated by a C corporation prior to 80 percent acquisition.
(5) Gross receipts safe harbor.
(c) Allocating distributions to active or passive earnings and profits.
(1) Distributions from current earnings and profits.
(2) Distributions from accumulated earnings and profits.
(3) Adjustments to active earnings and profits.
(4) Special rules for consolidated groups.
(d) Examples.
(e) Effective date.

Par. 6. Section 1.1362–2 is amended by adding a sentence to the end of the paragraph (c)(5)(ii)(C) to read as follows:

§ 1.1362–2 Termination of election.

* * * * *

(c) * * *
(5) * * *
(ii) * * *
(C) * * * See § 1.1362–8 for special rules regarding the treatment of dividends received by an S corporation from a C corporation in which the S corporation holds stock meeting the requirements of section 1504(a)(2).

* * * * *

Par. 7. Section 1.1362–8 is added to read as follows:

§ 1.1362–8 Dividends received from affiliated subsidiaries.

(a) *In general.* For purposes of section 1362(d)(3), if an S corporation holds stock in a C corporation meeting the requirements of section 1504(a)(2), the term *passive investment income* does not include dividends from the C corporation to the extent those dividends are attributable to the earnings and profits of the C corporation derived from the active conduct of a trade or business (active earnings and profits). For purposes of applying section 1362(d)(3), earnings and profits of a C corporation are active earnings and profits to the extent that the earnings and profits are derived from activities that would not produce passive investment income (as defined in section 1362(d)(3)) if the C corporation were an S corporation.

(b) *Determination of active or passive earnings and profits*—(1) *In general.* An S corporation may use any reasonable method to determine the amount of

dividends that are not treated as passive investment income under section 1362(d)(3)(E). Paragraph (b)(5) of this section describes a method of determining the amount of dividends that are not treated as passive investment income under section 1362(d)(3)(E) that is deemed to be reasonable under all circumstances.

(2) *Lower tier subsidiaries.* If a C corporation subsidiary (upper tier corporation) holds stock in another C corporation (lower tier subsidiary) meeting the requirements of section 1504(a)(2), the upper tier corporation's gross receipts attributable to a dividend from the lower tier subsidiary are considered to be derived from the active conduct of a trade or business to the extent the lower tier subsidiary's earnings and profits are attributable to the active conduct of a trade or business by the subsidiary under paragraph (b)(1), (3), (4), or (5) of this section. For purposes of this section, distributions by the lower tier subsidiary will be considered attributable to active earnings and profits according to the rule in paragraph (c) of this section. This paragraph (b)(2) does not apply to any member of a consolidated group (as defined in § 1.1502–1(h)).

(3) *De minimis exception.* If less than 10 percent of a C corporation's earnings and profits for a taxable year are derived from activities that would produce passive investment income if the C corporation were an S corporation, all earnings and profits produced by the corporation during that taxable year are considered active earnings and profits.

(4) *Special rules for earnings and profits accumulated by a C corporation prior to 80 percent acquisition.* A C corporation may treat all earnings and profits accumulated by the corporation in all taxable years ending before the S corporation held stock meeting the requirements of section 1504(a)(2) as active earnings and profits in the same proportion as the C corporation's active earnings and profits for the three taxable years ending prior to the time when the S corporation acquired 80 percent of the C corporation bears to the C corporation's total earnings and profits for those three taxable years.

(5) *Gross receipts safe harbor.* A corporation may treat its earnings and profits for a year as active earnings and profits in the same proportion as the corporation's gross receipts (as defined in § 1.1362–2(c)(4)) derived from activities that would not produce passive investment income (if the C corporation were an S corporation), including those that do not produce passive investment income under paragraphs (b)(2) through (b)(4) of this section, bear to the corporation's total gross receipts for the year in which the earnings and profits are produced.

(c) *Allocating distributions to active or passive earnings and profits*—(1) *Distributions from current earnings and profits.* Dividends distributed by a C corporation from current earnings and profits are attributable to active earnings and profits in the same proportion as current active earnings and profits bear to total current earnings and profits of the C corporation.

(2) *Distributions from accumulated earnings and profits.* Dividends distributed by a C corporation out of accumulated earnings and profits for a taxable year are attributable to active earnings and profits in the same proportion as accumulated active earnings and profits for that taxable year bear to total accumulated earnings and profits for that taxable year immediately prior to the distribution.

(3) *Adjustments to active earnings and profits.* For purposes of applying paragraph (c) (1) or (2) of this section to a distribution, the active earnings and profits of a corporation shall be reduced by the amount of any prior distribution properly treated as attributable to active earnings and profits from the same taxable year.

(4) *Special rules for consolidated groups.* For purposes of applying section 1362(d)(3) and this section to dividends received by an S corporation from the common parent of a consolidated group (as defined in § 1.1502–1(h)), the following rules apply—

(i) The current earnings and profits, accumulated earnings and profits, and active earnings and profits of the common parent shall be determined under the principles of § 1.1502–33 (relating to earnings and profits of any member of a consolidated group owning stock of another member); and

(ii) The gross receipts of the common parent shall be the sum of the gross receipts of each member of the consolidated group (including the common parent), adjusted to eliminate gross receipts from intercompany transactions (as defined in § 1.1502–13(b)(1)(i)).

(d) *Examples.* The following examples illustrate the principles of this section:

Example 1. (i) X, an S corporation, owns 85 percent of the one class of stock of Y. On December 31, 2002, Y declares a dividend of $100 ($85 to X), which is equal to Y's current earnings and profits. In 2002, Y has total gross receipts of $1,000, $200 of which would be passive investment income if Y were an S corporation.

(ii) One-fifth ($200/$1,000) of Y's gross receipts for 2002 is attributable to activities that would produce passive investment income. Accordingly, one-fifth of the $100 of earnings and profits is passive, and $17 (1/5 of $85) of the dividend from Y to X is passive investment income.

Example 2. (i) The facts are the same as in *Example 1,* except that Y owns 90 percent of the stock of Z. Y and Z do not join in the filing of a consolidated return. In 2002, Z has gross receipts of $15,000, $12,000 of which are derived from activities that would produce passive investment income. On December 31, 2002, Z declares a dividend of $1,000 ($900 to Y) from current earnings and profits.

(ii) Four-fifths ($12,000/15,000) of the dividend from Z to Y are attributable to passive earnings and profits. Accordingly, $720 (4/5 of $900) of the dividend from Z to Y is considered gross receipts from an activity that would produce passive investment income. The $900 dividend to Y gives Y a total of $1,900 ($1,000 + $900) in gross receipts, $920 ($200 + $720) of which is attributable to passive investment income-producing activities. Under these facts, $41 ($920/1,900 of $85) of Y's distribution to X is passive investment income to X.

(e) *Effective date.* This section applies to dividends received in taxable years beginning on or after January 20, 2000; however, taxpayers may elect to apply the regulations in whole, but not in part, for taxable years beginning on or after January 1, 2000, provided all affected taxpayers apply the regulations in a consistent manner. To make this election, the corporation and all affected taxpayers must file a return or an amended return that is consistent with these rules for the taxable year for which the election is made. For purposes of this section, affected taxpayers means all taxpayers whose returns are affected by the election to apply the regulations.

§ 1.1368–0 [Amended]

Par. 8.

Amend § 1.1368–0 in the entry for § 1.1368–2(d)(2) by revising ''Reorganizations'' to read ''Liquidations and reorganizations''.

§ 1.1368–2 [Amended]

Par. 9. Amend § 1.1368–2 in paragraph (d)(2) by revising ''Reorganizations'' to read ''Liquidations and reorganizations'' in the heading and by revising ''section 381(a)(2)'' to read ''section 381(a)'' in the first sentence.

Par. 10. Amend § 1.1374–8 by adding one sentence to the end of paragraph (b) to read as follows:

§ 1.1374–8 Section 1374(d)(8) transactions.

* * * * *

(b) *Separate determination of tax.* * * * If an S corporation makes QSub elections under section 1361(b)(3) for a tiered group of subsidiaries effective on the same day, see § 1.1361–4(b)(2).

PART 301—PROCEDURE AND ADMINISTRATION

Par. 11. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 12. Section 301.6109–1 is amended as follows:

1. Paragraph (i) is redesignated as paragraph (j) and the first sentence of newly designated paragraph (j)(1) is amended by removing the language ''paragraph (i)'' and adding ''paragraph (j)'' in its place.

2. A new paragraph (i) is added.

The addition reads as follows:

§ 301.6109–1 Identifying numbers.

* * * * *

(i) *Special rule for qualified subchapter S subsidiaries (QSubs)*—(1) *General rule.* Any entity that has an employer identification number (EIN) will retain that EIN if a QSub election is made for the entity under § 1.1361–3 or if a QSub election that was in effect for the entity terminates under § 1.1361–5.

(2) *EIN while QSub election in effect.* Except as otherwise provided in regulations or other published guidance, a QSub must use the parent S corporation's EIN for Federal tax purposes.

(3) *EIN when QSub election terminates.* If an entity's QSub election terminates, it may not use the EIN of the parent S corporation after the termination. If the entity had an EIN prior to becoming a QSub or obtained an EIN while it was a QSub in accordance with regulations or other published guidance, the entity must use that EIN. If the entity had no EIN, it must obtain an EIN upon termination of the QSub election.

(4) *Effective date.* The rules of this paragraph (i) apply on January 20, 2000.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 13. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 14. In § 602.101, paragraph (b) is amended by adding entries for §§ 1.1361–3, 1.1361–5, and 1.1362–8 to the table in numerical order to read as follows:

§ 602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part of section where identified and described	Current OMB control No.
* * * * *	
1.1361–3	1545–1590
1.1361–5	1545–1590
* * * * *	
1.1362–8	1545–1590
* * * * *	

Robert E. Wenzel,

Deputy Commissioner, Internal Revenue Service.

Approved: January 19, 2000.

Jonathan Talisman,

Acting Assistant Secretary of the Treasury.

[FR Doc. 00–1718 Filed 1–20–00; 1:19 pm]

BILLING CODE 4830–01–U

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Parts 251, 254, and 282

RIN 1010–AC32

Outer Continental Shelf Appeals Procedures

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Technical amendments.

SUMMARY: This document makes technical changes to regulations that were published in various **Federal Register** documents and are codified in the July 1, 1999, edition of Title 30—Minerals Resources, Parts 200–699. The changes are necessary to make the references to appeals procedures in various parts of our regulations consistent with the new MMS appeal procedures regulations.

EFFECTIVE DATE: January 25, 2000.

FOR FURTHER INFORMATION CONTACT: Greg Gould, (703) 787–1600.

SUPPLEMENTARY INFORMATION:

Background

These technical amendments affect all offshore operators, lessees, and permittees. On May 13, 1999 (64 FR 26240), MMS published final regulations, effective the same date, governing the appeal of orders and decisions from MMS's Royalty Management and Offshore Minerals Management Programs in 30 CFR parts 208, 241, 242, 243, 250, and 290. The final regulations neglected to amend several other sections of our Offshore Minerals Management regulations in parts 251, 254, and 282 to make them consistent with the MMS Appeals rule. This was an inadvertent oversight that we are now correcting.

Need for Correction

As published, the final regulations contain inconsistencies with the intent of the appeals final rulemaking, which may prove to be misleading, and are in need of clarification.

List of Subjects

30 CFR Part 251

Continental shelf, Freedom of information, Oil and gas exploration, Public lands—mineral resources, Public lands—rights-of-way, Report and recordkeeping requirements, Research.

30 CFR Part 254

Continental shelf, Environmental protection, Oil and gas development and production, Oil and gas exploration, Pipelines, Public lands—mineral resources, Public lands—rights-of-way, Report and recordkeeping requirements.

30 CFR Part 282

Continental shelf, Prospecting, Public lands—mineral resources, Public lands—rights-of-way, Report and recordkeeping requirements, Research.

Accordingly, 30 CFR parts 251, 254, and 282 are amended by making the following technical amendments:

PART 251—GEOLOGICAL AND GEOPHYSICAL (G&G) EXPLORATIONS OF THE OUTER CONTINENTAL SHELF

1. The authority citation for part 251 continues to read as follows:

Authority: 43 U.S.C. 1331 *et seq.*

§ 251.10 [Amended]

2. In § 251.10, paragraph (c) is revised to read as follows:

§ 251.10 Penalties and appeals.

* * * * *

(c) *Procedures to appeal orders or decisions MMS issues.* See 30 CFR part 290 for instructions on how to appeal any order or decision that we issue under this part.

PART 254—OIL-SPILL RESPONSE REQUIREMENTS FOR FACILITIES LOCATED SEAWARD OF THE COAST LINE

3. The authority citation for part 254 continues to read as follows:

Authority: 33 U.S.C. 1321.

§ 254.8 [Amended]

4. Section 254.8 and its title are revised to read as follows:

§ 254.8 May I appeal decisions under this part?

See 30 CFR part 290 for instructions on how to appeal any order or decision that we issue under this part.

PART 282—OPERATIONS IN THE OUTER CONTINENTAL SHELF FOR MINERALS OTHER THAN OIL, GAS, AND SULPHUR

5. The authority citation for part 282 continues to read as follows:

Authority: 43 U.S.C. 1331 *et seq.*

§ 282.50 [Amended]

6. Section 282.50 is revised to read as follows:

§ 282.50 Appeals.

See 30 CFR part 290 for instructions on how to appeal any order or decision that we issue under this part.

Dated: January 11, 2000.

E.P. Danenberger,

Chief, Engineering and Operations Division.

[FR Doc. 00–1675 Filed 1–24–00; 8:45 am]

BILLING CODE 4310–MR–U

POSTAL SERVICE

39 CFR Part 265

Release of Information

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: This final rule amends the Postal Service regulations that govern the disclosure of information contained in PS Form 1093, Application for Post Office Box or Caller Service, and PS Form 1583, Application for Delivery of Mail Through Agent. The recorded business name, address, and telephone number of a post office box used for doing or soliciting business with the public will no longer be provided to the general public upon request. Disclosure to the public of information contained in Form 1583 will continue to be prohibited. In addition, information from both Forms 1093 and 1583 will no longer be made available in response to an oral request from a law enforcement agency engaged in a criminal investigation. Disclosure of information from either form also will be prohibited, except pursuant to the order of a court of competent jurisdiction, when the individual customer has presented the Postal Service with an appropriate court order of protection.

EFFECTIVE DATE: February 24, 2000.

FOR FURTHER INFORMATION CONTACT: Lawrence Maxwell, (202) 268–5015.

SUPPLEMENTARY INFORMATION: This final rule adopts the change to the regulation governing disclosure of names and addresses of post office boxholders that was published as a proposed rule on August 26, 1999 (64 FR 46630). This change repeals the provision that authorized disclosure to the general public, upon request, of the name, address, and telephone number of the holder of a post office box being used for the purpose of doing or soliciting business with the public. The purpose of the change is to provide a greater degree of privacy and security to the growing number of small-business owners who operate out of the home. The background for this rulemaking was provided in the August 26 notice and will not be repeated here.

After consideration of the comments made on the August 26 proposal, which are discussed below, the Postal Service has decided to adopt as part of this final rule two additional changes to the regulations governing disclosure of information about post office boxholders and the customers of commercial mail receiving agencies (CMRAs). In response to concerns for the safety of battered individuals and their children, stalking victims, and other persons who consider themselves at risk of harm if their physical location is not kept private, the Postal Service will further restrict disclosure of the names and addresses of post office boxholders and CMRA customers in the following ways.

First, the existing provision that authorizes disclosure in response to oral requests of law enforcement agencies for criminal investigations, when made through the Inspection Service, is made inapplicable to information concerning post office boxholders and CMRA customers.

Second, when the individual boxholder has presented to the Postal Service a protective court order, information from neither Form 1093 nor Form 1583 will be made available under the existing provision that authorizes disclosure to federal, state, or local government agencies upon written request. In such a case, the government agency seeking the information must furnish to the Postal Service an order of a court of competent jurisdiction that requires disclosure to the agency. The Postal Service has already reserved the right to withhold information about a particular individual's address, including a boxholder's address, for sufficient reasons of personal safety, and has provided for the submission of protective court orders to block access of the general public in such situations. The present rule change respecting post office boxholders and CMRA customers will block access not just of the public but also of government agencies, including law enforcement agencies, when there is a protective order on file, unless the agency obtains a countervailing court order that requires the Postal Service to release the information.

As revised by this rule, the regulations that govern the disclosure of information contained in Form 1093 and 1583 may be summarized as follows. Information provided by a post office boxholder on Form 1093 will not generally be available to the public. It will be disclosed only to a government agency upon written certification of official need; to an appropriate person when needed for the service of process; and in compliance with a subpoena, when appropriate, or a court order. When the boxholder is an individual, as opposed to a business or organization, a subpoena will not be honored—a court order signed by a judge will be required. In addition, copies of the 1093 will not be disclosed except when requested by a government agency upon written certification of official need or in compliance with a subpoena or court order. When the boxholder has submitted a court order of protection, the Postal Service will not disclose the boxholder's name, address, or telephone number pursuant to any of the foregoing provisions, nor make available a copy of the form, unless the requester has obtained an order of a court of competent jurisdiction that requires the disclosure notwithstanding the existence of the boxholder's protective order.

Information provided by a CMRA customer on Form 1583 will not be available to the public. It will be disclosed only to a government agency upon written certification of official need or pursuant to a subpoena (only if the CMRA customer is not an individual) or to a court order. When the customer has submitted a court order of protection, however, the Postal Service will not disclose the customer's name or address pursuant to these provisions, unless the requester obtains a court order as provided in the foregoing paragraph.

Analysis of Comments Received

A total of 318 written comments were received in response to the August 26 proposed rule. Nineteen of these were from state agencies, four were from members of Congress, two were from public-interest organizations, and the bulk of the remainder were from CMRA customers and operators. Only one commenter objected to the proposal to

repeal the provision that authorizes disclosure of information concerning a post office boxholder who uses the box to do or solicit business with the public. This comment came from an asset recovery firm that routinely relies on the provision to arrange for the return of assets to boxholders.

Twenty-five commenters stated their unqualified approval of the proposal. Nineteen others limited their comments to approval of the existing regulations as they authorize disclosure to government agencies. These latter comments were provided by the Attorneys General for 18 states and one state agency for workforce development. The comments of the states' Attorneys General stressed the need of state law enforcement agencies (and those state agencies that work with them) for the information in connection with the investigation and prosecution of fraud, including consumer and charities fraud. They stated that it is ''critical'' that these investigatory agencies have access to the 1583s.

Twenty-four comments were limited to objections to the underlying CMRA regulations and so are not within the scope of the present rulemaking. While most of the remaining 80 percent of the commenters stated approval of the repeal of the provision allowing disclosure of information about post office boxholders doing business with the public, none discussed that provision; instead, they focused their attention on objections to various provisions relating to CMRA customers. Overall, these latter comments revealed widespread misinformation about the existing regulations and the limited nature of the current proposal. Only a few of those providing negative comments appeared to understand that no new disclosure was proposed in the August 26 notice. A number of comments revealed a fundamental misunderstanding of this rulemaking by complaining that the new rule would allow the release of private boxholder information when the box is being used to conduct business with the public. The Postal Service withdrew its proposal to make such a provision applicable to CMRA customers in the August 26 notice, and, in the same notice, proposed to eliminate the existing parallel provision respecting post office boxholders.

A national nonprofit organization interested in the prevention of domestic violence objected to the release of information from the Form 1583 to government agencies, including law enforcement agencies, without a warrant. The organization stated that it is ''imperative'' that no one obtain the address of a battered women's shelter without a warrant. The commenter expressed concern that disclosure to law enforcement would increase the possibility of unwitting release to the public, to a person impersonating a law enforcement officer, or to a law enforcement officer engaging in misconduct. Several other individual commenters objected to release of information in response to oral law enforcement requests made through the Inspection Service, because they thought that this would produce no ''paper trail'' and thus encourage abuse.

The national organization also objected to disclosure to government agencies in general as an expansion of the categories of persons having access to the information. This latter comment suggests a misunderstanding of what the current regulation permits. Postal regulations have authorized the disclosure of information from Form 1583 to government agencies, including law enforcement, in appropriate circumstances for as long as the Postal Service has used the form. This is not something newly proposed in one of the recent notices of proposed rules. While the Postal Service is unaware of any instance in which disclosure of this information to a government agency or law enforcement officer has resulted in harm to a boxholder or other individual, it is nonetheless sympathetic to the concern expressed in these comments. Because of the potential for abuse, it has decided to eliminate the longstanding rule that authorizes disclosure in response to oral requests of law enforcement agencies when conducting criminal investigations. The Postal Service is not, however, persuaded of the necessity to require government agencies to obtain a warrant as a precondition to access in all cases. This would place an undue burden on an agency's performance of legitimate law enforcement or other governmental functions. In the absence of any history of abuse of the provision, the Postal Service believes that the requirement that the requester certify in writing on agency letterhead that the information is required for the performance of official duties provides a reasonable amount of protection against unwarranted invasions of the privacy of most boxholders. For those boxholders who are in particular risk of danger if located, the Postal Service believes that it is not an unreasonable burden for them to obtain an appropriate protective order to be placed on file with the 1093 or the 1583, thus requiring the requesting agency to first obtain a court order.

This commenter also urged the need for security measures to govern the maintenance of Forms 1583 at the local post office and the need for a method by which a victim of abuse could confirm with local postal officials whether the information had been released. The Postal Service already has procedures in place, mandated by the Privacy Act of 1974, that address these last two concerns.

One private corporation claiming to comment ''on behalf of the several million American citizens that choose to receive their mail at private and P.O. boxes'' stated that the underlying CMRA revisions made final on March 25, 1999, ''are in fact the only issue.'' Those revisions are not at issue, however, in the present rulemaking. Principal among its comments regarding the present rule is an objection to the ''changes'' in the August 26 notice that would allow release of information about private or post office boxholders to anyone without a warrant, subpoena, or court order. These ''changes,'' the commenter states, are in conflict with the safeguards of the Privacy Act and violate the Fourth Amendment, which protects against warrantless searches and seizures. The commenter's references to ''changes,'' supposedly made by the August 26 notice, indicate a basic misunderstanding of the Postal Service's regulations in this area. The regulations have long authorized disclosure to government agencies upon written certification and to law enforcement when oral requests are made through the Inspection Service. These objections, therefore, are to regulations that have been in effect for a long time, and not to any recently proposed changes. The Postal Service, moreover, is not persuaded that its regulations are in conflict with the Privacy Act or violate the Fourth Amendment. The Postal Service's routine uses provide sufficient authorization for disclosure of information on Form 1583 to government agencies, consistent with the requirements of the Privacy Act. The safeguards required by the Act have long since been implemented by the Postal Service with respect to the information contained in the 1583. Further, the Postal Service is not aware that any court has extended the protection of the Fourth Amendment to an individual's name or address. The commenter also states that the Privacy Act statement on Form 1583 is ''defective'' because it does not inform the customer how the information will be used or released. The Postal Service intends to amend the statement to bring

it into conformity with the regulations as revised by this final rule, after this rule becomes effective.

Almost all of the remaining commenters, primarily CMRA customers, echoed nearly verbatim the objections discussed in the preceding paragraph. A number of these commenters also took the opportunity to voice their objections to the underlying CMRA regulations, which will not be addressed here.

A nonprofit organization that is interested in rights and responsibilities in the ''electronic world'' objected to the creation of a national database of information from Form 1583, because the existence of such a database would be a ''boon to identity thieves.'' Several other individual commenters stated their concern that the Postal Service will use Forms 1583 to create a national database. In the August 26 notice, the Postal Service addressed this concern by stating that the forms are maintained locally and that it has no intention of creating a national database with the information contained in them. The nonprofit organization stated that although the Postal Service may not intend to create such a database, this will necessarily be the result of storage of the forms in a Federal Records Center and from the maintenance of the forms at each CMRA and local post office. The Postal Service disagrees with this analysis. There is a great deal of difference in terms of risk to personal privacy between a collection of paper records locally maintained in secure conditions, or stored in boxes in a federal records depository, and information collected and maintained in a national electronic database. The secure storage of paper records simply does not pose the same kind of risk of improper data sharing as is posed by maintenance in an electronic database. Moreover, the maintenance of these paper forms over many years has not resulted in any incidents of identity theft so far as the Postal Service is aware. This commenter also complained that the proposal ignores the Fair Information Practices of the Federal Trade Commission. These guidelines, developed specifically in connection with the FTC's work regarding online privacy, are already embedded in the procedures required by the Privacy Act of 1974 and so are addressed elsewhere in the Postal Service's regulations that implement the Act. The regulation at hand is not the appropriate place for their inclusion. See the Postal Service's Privacy Act regulations, 39 CFR Part 266, and the system notice for the system of records titled USPS 010.050, Collection and Delivery Records—Delivery of Mail Through Agents, last published in full at 54 FR 43660 (October 26, 1989), with amendments appearing at 59 FR 22874 (May 3, 1994) and 64 FR 8878 (February 23, 1999). Finally, this commenter claimed that the Postal Service is violating two provisions of the Privacy Act: subsection (e)(1) through the ''over-collection of information,'' namely, the ages of any children who will receive mail at the CMRA address, and subsection (e)(2) by ''coercing'' the CMRA to collect the information rather than collecting the information itself. The Postal Service sees no merit in either contention. Subsection (e)(1) limits an agency's maintenance of information about an individual to that which is ''relevant and necessary to accomplish a [legally required] purpose of the agency.'' The provision permitting the boxholder to list the names and addresses of his or her minor children is an exception to the general requirement that all individuals receiving mail through a private box submit a Form 1583. Ages are necessary to determine when the child no longer qualifies for this exception. Subsection (e)(2) provides for collection of information ''to the greatest extent practicable directly from the subject individual.'' Since the CMRA customer is asked to fill out the Form 1583, the Postal Service believes that it is in compliance with this provision.

Finally, a number of commenters stated that the Postal Service has no authority to collect information about CMRA customers. Others stated that the Postal Service is expressly forbidden to collect the information. No reference to an authority for either proposition was given, and the Postal Service knows of none. The Postal Service believes it has ample authority to require agents for the receipt of mail to prove the bona fides of their agency agreements with postal customers. This cannot be done without submitting the names and addresses of the principals to such agreements.

List of Subjects in 39 CFR Part 265

Administrative practice and procedure, Courts, Freedom of Information, Government employees, Release of information.

For the reasons set forth in this document, the Postal Service is amending 39 CFR Part 265 as follows:

PART 265—RELEASE OF INFORMATION

1. The authority citation for part 265 continues to read as follows:

Authority: 5 U.S.C. 552; 5 U.S.C. App. 3; 39 U.S.C. 401, 403, 410, 1001, 2601.

2. Section 265.6(d)(3) and (d)(8) are revised to read as follows:

§ 265.6 Availability of records.

* * * * *

(d) * * *

(3) *Post office boxholder information.* Information from PS Form 1093, Application for Post Office Box or Caller Service, will be provided as follows:

(i) Except as provided in paragraph (d)(3)(iii) of this section, information from PS Form 1093 will be provided only in those circumstances stated at paragraphs (d)(4)(i) through (d)(4)(iii) of this section.

(ii) Except as provided in paragraph (d)(3)(iii) of this section, copies of PS Form 1093 will be furnished only in those circumstances stated at paragraphs (d)(4)(i) and (d)(4)(iii) of this section.

(iii) When the boxholder files with the postmaster a copy of a protective court order, information from PS Form 1093 will not be disclosed except pursuant to the order of a court of competent jurisdiction.

* * * * *

(8) *Private mailbox information.* Information from PS Form 1583, Application for Delivery of Mail Through Agent, will be provided as follows:

(i) Except as provided in paragraph (d)(8)(iii) of this section, information from PS Form 1583 will be provided only in those circumstances stated at paragraphs (d)(4)(i) and (d)(4)(iii) of this section.

(ii) To the public only for the purpose of identifying a particular address as an address of an agent to whom mail is delivered on behalf of other persons. No other information, including, but not limited to, the identities of persons on whose behalf agents receive mail, may be disclosed to the public from PS Form 1583.

(iii) Information concerning an individual who has filed a protective court order with the postmaster will not be disclosed except pursuant to the order of a court of competent jurisdiction.

* * * * *

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. 00–1668 Filed 1–24–00; 8:45 am]

BILLING CODE 7710–12–U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–300963; FRL–6485–2]

RIN 2070–AB78

Bifenthrin; Pesticide Tolerances for Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes time-limited tolerances for residues of bifenthrin (2-methyl [1,1'-biphenyl]-3-yl)methyl-3-(2-chloro-3,3,3,-trifluoro-1-propenyl)-2,2-dimethylcyclopropanecarboxylate) in or on grapes and peanut nutmeats. This action is in response to EPA's granting of emergency exemptions under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act authorizing use of the pesticide on grapes and peanuts. This regulation establishes maximum permissible levels for residues of bifenthrin in these food commodities. The tolerances will expire and is revoked on December 31, 2001.

DATES: This regulation is effective January 25, 2000. Objections and requests for hearings, identified by docket control number OPP–300963, must be received by EPA on or before March 27, 2000.

ADDRESSES: Written objections and hearing requests may be submitted by mail, in person, or by courier. Please follow the detailed instructions for each method as provided in Unit VII. of the ''SUPPLEMENTARY INFORMATION.'' To ensure proper receipt by EPA, your objections and hearing requests must identify docket control number OPP–300963 in the subject line on the first page of your response.

FOR FURTHER INFORMATION CONTACT: By mail: Andrea Beard, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (703) 308–9356; and e-mail address: beard.andrea@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected categories and entities may include, but are not limited to:

Categories	NAICS codes	Examples of potentially affected entities
Industry	111 112 311 32532	Crop production Animal production Food manufacturing Pesticide manufacturing

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in the table could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether or not this action might apply to certain entities. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

B. How Can I Get Additional Information, Including Copies of This Document and Other Related Documents?

1. *Electronically*. You may obtain electronic copies of this document, and certain other related documents that might be available electronically, from the EPA Internet Home Page at http://www.epa.gov/. To access this document, on the Home Page select ''Laws and Regulations'' and then look up the entry for this document under the ''**Federal Register**--Environmental Documents.'' You can also go directly to the **Federal Register** listings at http://www.epa.gov/fedrgstr/.

2. *In person*. The Agency has established an official record for this action under docket control number OPP–300963. The official record consists of the documents specifically referenced in this action, and other information related to this action, including any information claimed as Confidential Business Information (CBI). This official record includes the documents that are physically located in the docket, as well as the documents that are referenced in those documents. The public version of the official record does not include any information claimed as CBI. The public version of the official record, which includes printed, paper versions of any electronic comments submitted during an applicable comment period is available for inspection in the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall 2, 1921 Jefferson Davis Hwy., Arlington, VA, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The PIRIB telephone number is (703) 305–5805.

II. Background and Statutory Findings

EPA, on its own initiative, in accordance with sections 408(l)(6) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, is establishing tolerances for residues of the insecticide bifenthrin (2-methyl [1,1'-biphenyl]-3-yl)methyl-3-(2-chloro-3,3,3,-trifluoro-2-chloro-3,3,3,-trifluoro-1-propenyl)-2,2-dimethylcyclopropanecarboxylate), in or on grapes at 0.2 part per million (ppm), and in/on peanut nutmeats at 0.05 ppm. These tolerances will expire and are revoked on December 31, 2001. EPA will publish a document in the **Federal Register** to remove the revoked tolerances from the Code of Federal Regulations.

Section 408(l)(6) of the FFDCA requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under section 18 of FIFRA. Such tolerances can be established without providing notice or period for public comment. EPA does not intend for its actions on section 18 related tolerances to set binding precedents for the application of section 408 and the new safety standard to other tolerances and exemptions.

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

Section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizes EPA to exempt any Federal or State agency from any provision of FIFRA, if EPA determines that ''emergency conditions exist which require such exemption.'' This provision was not amended by the Food Quality Protection Act (FQPA). EPA has

established regulations governing such emergency exemptions in 40 CFR part 166.

III. Emergency Exemptions for Bifenthrin on Grapes and Peanuts and FFDCA Tolerances

1. *Bifenthrin on grapes*. The Applicant states that when the special local needs registration for carbofuran was canceled in 1997, the grape growers were left without adequate control for the black vine weevil, a seriously damaging pest in vineyards. Black vine weevil populations build up to damaging levels gradually, tending not to be pests in younger vineyards. Thus, this pest was generally not present at significant levels immediately following loss of carbofuran; however, the applicant states that this year, populations have been reaching damaging levels. The applicant stated that none of the available alternatives provide adequate control to avoid significant economic losses from this pest in grapes.

2. *Bifenthrin on peanuts*. The Applicant states that although spider mite infestations have affected peanut growers for some years, the infestations have exceeded economically significant levels in recent years, and applications of available pesticides did not prevent these populations from rebounding quickly. In 1999, mite populations established earlier than normal, and the registered miticides were ineffective at providing adequate control, particularly with the hot dry weather conditions which are conducive to mite outbreaks. Additionally, it is believed that the mild winter contributed to a high overwintering survival rate, thus infestations were established earlier. With the infestations beginning so early, growers had to make multiple treatments with the alternatives, and were on the verge of using up their legal number of applications of these materials. However, spider mite outbreaks were still occurring at significantly damaging levels, and the Applicant stated that the use of bifenthrin was needed to avert significant economic losses from occurring. EPA has authorized under FIFRA section 18 the uses of bifenthrin on grapes for control of black vine weevil in Washington, and on peanuts for control of spider mites in Oklahoma. After having reviewed the submissions, EPA concurs that emergency conditions exist for these States.

As part of its assessment of this emergency exemption, EPA assessed the potential risks presented by residues of bifenthrin in or on grapes and peanut nutmeats. In doing so, EPA considered the safety standard in FFDCA section 408(b)(2), and EPA decided that the necessary tolerances under FFDCA section 408(l)(6) would be consistent with the safety standard and with FIFRA section 18. Consistent with the need to move quickly on the emergency exemptions in order to address urgent non-routine situations and to ensure that the resulting food is safe and lawful, EPA is issuing these tolerances without notice and opportunity for public comment as provided in section 408(l)(6). Although these tolerances will expire and are revoked on December 31, 2001, under FFDCA section 408(l)(5), residues of the pesticide not in excess of the amounts specified in the tolerances remaining in or on grapes and peanut nutmeats after that date will not be unlawful, provided the pesticide is applied in a manner that was lawful under FIFRA, and the residues do not exceed levels that were authorized by these tolerances at the time of that application. EPA will take action to revoke these tolerances earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

Because these tolerances are being approved under emergency conditions, EPA has not made any decisions about whether bifenthrin meets EPA's registration requirements for use on grapes and peanuts or whether permanent tolerances for these uses would be appropriate. Under these circumstances, EPA does not believe that these tolerances serve as a basis for registration of bifenthrin by a State for special local needs under FIFRA section 24(c). Nor do these tolerances serve as the basis for any State other than Washington or Oklahoma to use this pesticide on these crops under section 18 of FIFRA without following all provisions of EPA's regulations implementing section 18 as identified in 40 CFR part 166. For additional information regarding the emergency exemptions for bifenthrin, contact the Agency's Registration Division at the address provided under **FOR FURTHER INFORMATION CONTACT.**

IV. Aggregate Risk Assessment and Determination of Safety

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. For further discussion of the regulatory requirements of section 408 and a complete description of the risk assessment process, see the final rule on Bifenthrin Pesticide Tolerances (62 FR 62961, November 26, 1997) (FRL–5754–7).

Consistent with section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of bifenthrin and to make a determination on aggregate exposure, consistent with section 408(b)(2), for time-limited tolerances for residues of bifenthrin (2-methyl [1,1'-biphenyl]-3-yl)methyl-3-(2-chloro-3,3,3,-trifluoro-2-chloro-3,3,3,-trifluoro-1-propenyl)-2,2-dimethylcyclopropanecarboxylate) on grapes at 0.2 ppm, and on peanut nutmeats at 0.05 ppm. EPA's assessment of the dietary exposures and risks associated with establishing the tolerances follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. The nature of the toxic effects caused by bifenthrin are discussed in Unit II.A. of the Final Rule on Bifenthrin Pesticide Tolerances published in the **Federal Register** on June 30, 1999 (64 FR 35051) (FRL–6089–9).

B. Toxicological Endpoint

The toxicological endpoints for bifenthrin are discussed in Unit II.B. of the Final Rule on Bifenthrin Pesticide Tolerances published in the **Federal Register** on June 30, 1999.

C. Exposures and Risks

1. *From food and feed uses.* Tolerances have been established (40 CFR 180.442) for the residues of bifenthrin (2-methyl [1,1'-biphenyl]-3-yl)methyl-3-(2-chloro-3,3,3,-trifluoro-2-chloro-3,3,3,-trifluoro-1-propenyl)-2,2-dimethylcyclopropanecarboxylate), in or on a variety of raw agricultural commodities. Tolerances are established on plant commodities ranging from 0.05 ppm on field corn grain to 10 ppm on dried hops. Tolerances are also established on animal commodities including meat, meat byproducts, and fat of cattle, goats, hogs, horses, poultry, sheep, and milk and eggs. Risk assessments were conducted by EPA to assess dietary exposures and risks from bifenthrin as follows:

The acute dietary (food only) risk assessment was conducted by Novigen Science, Inc. In this acute analysis, Monte Carlo analysis (Tier 3) was used. For those foods identified by EPA as

single-serving commodities, Monte Carlo simulation is based on iterative sampling from individual residue values from field trial data reflecting maximum application rates and minimum preharvest intervals. For those considered to be blended or processed, mean field trial residues were calculated, substituting those samples for which residues were reported at or below the limit of detection (LOD) with one-half of the LOD. It was assumed that 100% of the crop was treated for the following tolerances: canola, citrus, snap beans, peas, lima beans, sweet corn, cucurbits, eggplant, and Brassica vegetable. One hundred percent crop treated was also assumed for these section 18 uses for grapes and peanuts. Secondary residues for meat and milk were derived from the total dietary burden and tissue-to-feed ratio, using the highest ratio for meat, and the average ratio for milk.

This analysis evaluates individual food consumption as reported by respondents in the USDA Continuing Surveys of Food Intake by Individuals (CSFII) conducted in 1989 through 1992. The model accumulates exposure to the chemical for each commodity and expresses risk as a function of exposure to residues in food. This is a highly refined assessment since percent of crop treated (PCT) was used (except as indicated above) and anticipated residues for all crops.

In conducting this Dietary Exposure Evaluation Model (DEEM) analysis for chronic food risk assessment, Novigen used anticipated residue values which were determined from field trial data conducted at maximum label conditions of maximum application rates and minimum preharvest intervals. Mean anticipated residue values were calculated, substituting one-half of the LOD for those samples for which residues were reported below the LOD. It was assumed that 100% crop treated for all crops except hops at 43%, cottonseed-oil and cottonseed-meal at 4%. Secondary residues for meat and milk were derived from the total dietary burden and tissue-to-feed ratio, using the average ratio for meat and milk. The analysis evaluates individual food consumption as reported by respondents in the USDA CSFII conducted in 1989 through 1992.

i. *Acute exposure and risk.* Acute dietary risk assessments are performed for a food-use pesticide if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure. The percentages of the acute PAD (aPAD) utilized at the 99.9th percentile of exposure are 60% for the U.S. population, 75% for infants (< 1 year), and 99.7% for children (1 - 6 years old), the most highly exposed population subgroup. An acute dietary exposure (food plus water) of 100% or less of the aPAD is needed to protect the safety of all population subgroups.

ii. *Chronic exposure and risk.* Dietary exposure (food only) for the most highly exposed population subgroup (children 1 - 6 years old), will utilize 8.2% of the chronic PAD (cPAD). The exposure for the U.S. population is 3% of the cPAD. A chronic dietary exposure (food plus water) of 100% or less of the cPAD is needed to protect the safety or all population subgroups.

Section 408(b)(2)(E) authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide chemicals that have been measured in food. If EPA relies on such information, EPA must require that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. Following the initial data submission, EPA is authorized to require similar data on a time frame it deems appropriate. As required by section 408(b)(2)(E), EPA will issue a data call-in for information relating to anticipated residues to be submitted no later than 5 years from the date of issuance of this tolerance.

Section 408(b)(2)(F) states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if the Agency can make the following findings: Condition 1, that the data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain such pesticide residue; Condition 2, that the exposure estimate does not underestimate exposure for any significant subpopulation group; and Condition 3, if data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area. In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of percent crop treated (PCT) as required by section 408(b)(2)(F), EPA may require registrants to submit data on PCT.

The Agency used PCT information as follows. It was assumed that 100% crop was treated for all crops except hops at 43%, and cottonseed-oil and cottonseed-meal at 4%.

The Agency believes that the three conditions listed above have been met. With respect to Condition 1, PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. EPA uses a weighted average PCT for chronic dietary exposure estimates. This weighted average PCT figure is derived by averaging State-level data for a period of up to 10 years, and weighting for the more robust and recent data. A weighted average of the PCT reasonably represents a person's dietary exposure over a lifetime, and is unlikely to underestimate exposure to an individual because of the fact that pesticide use patterns (both regionally and nationally) tend to change continuously over time, such that an individual is unlikely to be exposed to more than the average PCT over a lifetime. For acute dietary exposure estimates, EPA uses an estimated maximum PCT. The exposure estimates resulting from this approach reasonably represent the highest levels to which an individual could be exposed, and are unlikely to underestimate an individual's acute dietary exposure. The Agency is reasonably certain that the percentage of the food treated is not likely to be an underestimated. As to Conditions 2 and 3, regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available information on the regional consumption of food to which bifenthrin may be applied in a particular area.

2. *From drinking water.* A Drinking Water Level of Comparison (DWLOC) is a theoretical upper limit on a pesticide's concentration in drinking water in light of total aggregate exposure to a pesticide in food, drinking water, and through residential uses. A DWLOC will vary depending on the toxic endpoint, drinking water consumption, and body weights. Different populations will have different DWLOCs. The Agency uses DWLOCs internally in the risk assessment process as a surrogate measure of potential exposure associated with pesticide exposure

through drinking water. In the absence of monitoring data for pesticides, it is used as a point of comparison against conservative model estimates of a pesticide's concentration in water. DWLOC values are not regulatory standards for drinking water. They do have an indirect regulatory impact through aggregate exposure and risk assessments. The estimated acute and chronic drinking water concentrations were generated with the EPA's Pesticide Root Zone Model/Exposure Analysis Modeling Systems (PRZM/EXAMS) model using the highest application rate of 0.5 pounds/acre, which is registered for use on cotton.

i. *Acute exposure and risk.* For the purposes of this acute risk assessment, the estimated acute maximum concentration for bifenthrin in surface and ground waters is 0.10 µg/L, which was used for comparison to the back-calculated DWLOCs for the acute endpoint. The DWLOCs for various population categories are 140 µg/L for the U.S. population, 180 µg/L for females 13 years and older, and 0.3 µg/L for children 1 - 6 years old. Acute exposure to bifenthrin in drinking water is below the calculated drinking water levels of concern.

ii. *Chronic exposure and risk.* For the purposes of the chronic risk assessment, the estimated chronic maximum concentration for bifenthrin in surface and ground waters is 0.032 µg/L, which was used for comparison to the back-calculated human health DWLOCs from the chronic (non-cancer) endpoint. These DWLOCs for various population categories are 530 µg/L for the U.S. population, 450 µg/L for females 13 years and older, and 140 µg/L for children 1 - 6 years old. Chronic exposure to bifenthrin in drinking water is below the calculated drinking water levels of concern.

iii. *Short- and intermediate-term exposure and risk (water).* For purposes of short- and intermediate-term risk assessment, the estimated chronic maximum concentration for bifenthrin in surface and ground waters is 0.032 µg/L, which was used for comparison to the back-calculated human health DWLOCs from the short- and intermediate-term endpoints. The DWLOCs for various population categories are 320 µg/L for the U.S. population, 270 µg/L for females 13 years and older, and 77 µg/L for children 1 - 6 years old. Short- and intermediate-term exposure to bifenthrin in drinking water is below the calculated drinking water levels of concern.

3. *From non-dietary exposure.* Bifenthrin is currently registered for use on the following residential non-food sites: outdoor lawn and garden, inside households, and termiticide use. These registered uses constitute short- and/or intermediate and chronic exposure.

i. *Chronic exposure and risk.* Although the registered termiticide use of bifenthrin constitutes a chronic exposure scenario, the exposure from this termiticide use is negligible considering the application technique of the termiticide use (buried underground) and the fact that the vapor pressure of bifenthrin is extremely low.

ii. *Short- and intermediate-term exposure and risk.* This risk assessment is based on post-application to treated lawns (turf use), a worst case scenario estimate of residential exposure. An assessment of applicator exposure was not included since the registered products are primarily limited to commercial use and, therefore, applied by professional lawn care operators. Inhalation, dermal, and oral non-dietary routes of exposure were evaluated by this short- and intermediate-term risk assessment. For adults, the routes of exposure from these registered residential uses include dermal and inhalation, and for infants and children, the routes of exposure include dermal, inhalation, and oral (nondietary). The MOEs for residential exposures are 1,600 for adults, 610 for children (1 - 6 years), and 600 for infants (<≤ 1 year). These MOEs are well above the acceptable short-term aggregate MOE of 100.

4. *Cumulative exposure to substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.'' Bifenthrin is a member of a class of chemicals commonly referred to as ''Synthetic Pyrethroids.'' Other members of the class include cyfluthrin, cypermethrin, lambda-cyhalothrin, zeta-cypermethrin, deltamethrin, esfenvalerate, fenpropathrin, tefluthrin, and tralomethrin.

EPA does not have, at this time, available data to determine whether bifenthrin has a common mechanism of toxicity with other substances or how to include this pesticide in a cumulative risk assessment. Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, bifenthrin does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that bifenthrin has a common mechanism of toxicity with other substances. For more information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the final rule for Bifenthrin Pesticide Tolerances (62 FR 62961, November 26, 1997).

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

1. *Acute risk (food plus water).* Using the Monte Carlo analysis, it is estimated that the acute exposure to bifenthrin from food for the U.S. population subgroup will utilize 60% of the aPAD. Children 1 to 6 years are the most highly exposed population subgroup, with 99.7% of the aPAD utilized. (See discussion in Unit II.E.) An acute dietary exposure (food plus water) of 100% or less of the aPAD is needed to protect the safety of all population subgroups. Despite the potential for exposure to bifenthrin in drinking water, EPA does not expect the aggregate exposure to exceed 100% of the aPAD for adults, infants and children. The estimated maximum concentration of bifenthrin in surface and ground water for acute exposure is below all DWLOCs.

2. *Chronic risk (food plus water plus residential).* Using the exposure assumptions described in this unit, EPA has concluded that aggregate exposure to bifenthrin from food will utilize 3% of the cPAD for the U.S. population. The major identifiable subgroup with the highest aggregate exposure is children 1 to 6 years, with 8.2% of the cPAD utilized. [See discussion in Unit II.E. in the preamble of this document]. EPA generally has no concern for exposures below 100% of the cPAD because the cPAD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. Despite the potential for exposure to bifenthrin in drinking water, EPA does not expect the aggregate exposure to exceed 100% of the cPAD, the estimated maximum concentration of bifenthrin in surface and ground water for chronic exposure is very small compared to the DWLOCs. Although the registered termiticide use of bifenthrin constitutes a chronic exposure scenario, the exposure from this termiticide use is negligible considering the application technique of the termiticide use (buried underground) and the fact that vapor pressure of bifenthrin is extremely low.

3. *Short- and intermediate-term risk.* Short- and intermediate-term aggregate

exposure takes into account chronic dietary food and water (considered to be a background exposure level) plus indoor and outdoor residential exposure.

In the case of bifenthrin, the registered residential use sites include outdoor lawn/gardens, inside households and termiticide. These uses constitute a short- and intermediate-term exposure scenario. The short- and intermediate-term aggregate risk assessment for bifenthrin includes inhalation, dermal, oral non-dietary, chronic food, and water exposure routes. The acceptable MOEs for short- and intermediate-term exposures are all at 100. For adults, the routes of exposure from these registered, residential uses include dermal and inhalation, and for infants and children, the routes of exposure include dermal, inhalation, and oral (non-dietary). The MOEs for food (excluding water) and residential exposures is 1,100 for adults, 420 for children 1 to 6 years, and 500 for infants < 1 year. These MOEs are all above the acceptable short-term aggregate MOE of 100.

Since residue values in drinking water are not available, the DWLOCs have to be back-calculated. The short- and intermediate-term DWLOCs are 290 µg/L for adult males, 250 µg/L for adult females, 77 µg/L for children 1 to 6 years, and 77 µg/L for infants (< 1 year old). The estimated maximum concentration of bifenthrin in surface and ground water for chronic exposure 0.032 µg/L is very small compared to the DWLOCs.

4. *Aggregate cancer risk for U.S. population.* Bifenthrin has been classified as a group C carcinogen, using the Reference Dose (RfD) approach. Based on the recommendation that the RfD approach be used, a quantitative (q*) dietary cancer risk assessment was not performed. Dietary risk concerns due to long-term consumption of bifenthrin are adequately addressed by the DEEM chronic exposure analysis using the cPAD RfD. For the U.S. population, only 3% of the cPAD RfD is occupied by chronic food exposure. As stated previously, based on a comparison of the calculated DWLOCs and the estimated exposure to bifenthrin in drinking water (0.032 µg/L), EPA does not expect the aggregate exposure to exceed 100% of the cPAD RfD for adults.

5. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result from aggregate exposure to bifenthrin residues.

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

1. *Safety factor for infants and children*— i. *In general.* In assessing the potential for additional sensitivity of infants and children to residues of bifenthrin, EPA considered data from developmental toxicity studies in the rat and rabbit and a 2-generation reproduction study in the rat. The developmental toxicity studies are designed to evaluate adverse effects on the developing organism resulting from maternal pesticide exposure during gestation. Reproduction studies provide information relating to effects from exposure to the pesticide on the reproductive capability of mating animals and data on systemic toxicity.

FFDCA section 408 provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the data base unless EPA determines that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments either directly through use of a margin of exposure (MOE) analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans. EPA believes that reliable data support using the standard MOE and uncertainty factor (usually 100 for combined interspecies and intraspecies variability) and not the additional tenfold MOE/uncertainty factor when EPA has a complete data base under existing guidelines and when the severity of the effect in infants or children or the potency or unusual toxic properties of a compound do not raise concerns regarding the adequacy of the standard MOE/safety factor.

ii. *Developmental toxicity studies.* In the rabbit developmental study, there were no developmental effects observed in the fetuses exposed to bifenthrin. The maternal NOAEL was 2.67 mg/kg/day based on head and forelimb twitching at the LOAEL of 4 mg/kg/day. In the rat developmental study, the maternal NOAEL was 1 mg/kg/day, based on tremors at the LOAEL of 2 mg/kg/day. The developmental (pup) NOAEL was also 1 mg/kg/day, based upon increased incidence of hydroureter at the LOAEL 2 mg/kg/day. There were 5 of 23 (22%) litters affected with each litter having only 1 affected pup in the 2 mg/kg/day group, compared with zero in the control, 1 and 0.5 mg/kg/day groups. According to recent historical data (1992-1994) for this strain of rat, incidence of distended ureter averaged 11% with a maximum incidence of 90%.

iii. *Reproductive toxicity study.* In the rat reproduction study, parental toxicity occurred as decreased bwt at 5.0 mg/kg/day with a NOAEL of 3.0 mg/kg/day. There were no developmental (pup) or reproductive effects up to 5.0 mg/kg/day (HDT).

iv. *Prenatal and postnatal sensitivity*— a.*Prenatal.* Since there was not a dose-related finding of hydroureter in the rat developmental study and in the presence of similar incidences in the recent historical control data, the marginal finding of hydroureter in rat fetuses at 2 mg/kg/day (in the presence of maternal toxicity) is not considered a significant developmental finding. Nor does it provide sufficient evidence of a special dietary risk (either acute or chronic) for infants and children which would require an additional safety factor.

b. *Postnatal.* Based on the absence of pup toxicity up to dose levels which produced toxicity in the parental animals, there is no evidence of special postnatal sensitivity to infants and children in the rat reproduction study.

v. *Conclusion.* There is a complete toxicity data base for bifenthrin and exposure data are complete or are estimated based on data that reasonably accounts for potential exposures. Based on the completeness of the toxicity data and prenatal and postnatal toxicity of bifenthrin, no additional safety factor is needed to protect infants and children.

2. *Acute risk (food plus water.)* The percentages of the aPAD utilized at the 99.9th percentile of exposure are 75% for infants (< 1 year) and 99.7% for children (1 to 6 years), the most highly exposed population subgroup. An acute dietary exposure (food plus water) of 100% or less of the aPAD is needed to protect the safety of all population subgroups. Despite the potential for exposure to bifenthrin in drinking water, EPA does not expect the aggregate exposure to exceed 100% of the aPAD for infants and children. The estimated maximum concentration of bifenthrin in surface and ground water for acute exposure is below the DWLOCs.

3. *Chronic risk.* Using the exposure assumptions described in this unit, EPA has concluded that aggregate exposure to bifenthrin from food will utilize 8.2% of the cPAD for children (1 - 6 years old), the most highly exposed subgroup for infants and children. EPA generally has no concern for exposures below 100% of the cPAD because the cPAD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks

to human health. Despite the potential for exposure to bifenthrin in drinking water and from non-dietary, non-occupational exposure, EPA does not expect the aggregate exposure to exceed 100% of the cPAD.

4. *Short- or intermediate-term risk.* The MOEs for food (excluding water) and residential exposures is 430 for children (1 to 6 years), and 500 for infants (< 1 year). These MOEs are well above the acceptable short-term aggregate MOE of 100. The short- and intermediate-term DWLOCs are 77 µg/L for children (1 to 6 years), and 77 µg/L for infants (< 1 year). The estimated maximum concentration of bifenthrin in surface and ground water for chronic exposure (0.032 µg/L) is very small compared to the DWLOCs.

5. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to bifenthrin residues.

V. Other Considerations

A. Metabolism in Plants and Animals

The metabolism of bifenthrin in plants and animals is adequately understood. Studies conducted to delineate the metabolism of radio-labeled bifenthrin in various crops and animals show similar results. The residue of concern is the parent compound only.

B. Analytical Enforcement Methodology

Adequate enforcement methods are available for determination of the regulated bifenthrin residue in plants and animals. Residues of bifenthrin are recoverable under Protocols D and E of the FDA Multiresidue Methods.

C. Magnitude of Residues

Residues of bifenthrin are not expected to exceed 0.2 ppm in/on grapes, and 0.05 ppm in/on peanut nutmeats, as a result of these uses. Since the use on peanuts prohibits the feeding of peanut hay to livestock, the existing tolerances for livestock commodities are considered to be adequate.

D. International Residue Limits

There are no Codex Maximum Residue Levels (MRLs) for these commodities.

E. Rotational Crop Restrictions

Crops with established U.S. tolerances may be rotated at any time. Leafy vegetable and root crops may be rotated 30 days following the final application. All other crops may be rotated 7 months following the final application.

VI. Conclusion

Therefore, the tolerances are established for residues of bifenthrin (2-methyl [1,1'-biphenyl]-3-yl)methyl-3-(2-chloro-3,3,3,-trifluoro-2-chloro-3,3,3,-trifluoro-1-propenyl)-2,2-dimethylcyclopropanecarboxylate) in grapes at 0.2 ppm, and in peanut, nutmeats, at 0.05 ppm.

VII. Objections and Hearing Requests

Under section 408(g) of the FFDCA, as amended by the FQPA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. Although the procedures in those regulations require some modification to reflect the amendments made to the FFDCA by the FQPA of 1996, EPA will continue to use those procedures, with appropriate adjustments, until the necessary modifications can be made. The new section 408(g) provides essentially the same process for persons to ''object'' to a regulation for an exemption from the requirement of a tolerance issued by EPA under new section 408(d), as was provided in the old FFDCA sections 408 and 409. However, the period for filing objections is now 60 days, rather than 30 days.

A. What Do I Need to Do to File an Objection or Request a Hearing?

You must file your objection or request a hearing on this regulation in accordance with the instructions provided in this unit and in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket control number OPP–300963 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before March 27, 2000.

1.*Filing the request.* Your objection must specify the specific provisions in the regulation that you object to, and the grounds for the objections (40 CFR 178.25). If a hearing is requested, the objections must include a statement of the factual issues(s) on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the objector (40 CFR 178.27). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

Mail your written request to: Office of the Hearing Clerk (1900), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. You may also deliver your request to the Office of the Hearing Clerk in Rm. M3708, Waterside Mall, 401 M St., SW., Washington, DC 20460. The Office of the Hearing Clerk is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Office of the Hearing Clerk is (202) 260–4865.

2. *Tolerance fee payment.* If you file an objection or request a hearing, you must also pay the fee prescribed by 40 CFR 180.33(i) or request a waiver of that fee pursuant to 40 CFR 180.33(m). You must mail the fee to: EPA Headquarters Accounting Operations Branch, Office of Pesticide Programs, P.O. Box 360277M, Pittsburgh, PA 15251. Please identify the fee submission by labeling it ''Tolerance Petition Fees.''

EPA is authorized to waive any fee requirement ''when in the judgement of the Administrator such a waiver or refund is equitable and not contrary to the purpose of this subsection.'' For additional information regarding the waiver of these fees, you may contact James Tompkins by phone at (703) 305–5697, by e-mail at tompkins.jim@epa.gov, or by mailing a request for information to Mr. Tompkins at Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

If you would like to request a waiver of the tolerance objection fees, you must mail your request for such a waiver to: James Hollins, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

3. *Copies for the Docket.* In addition to filing an objection or hearing request with the Hearing Clerk as described in Unit VII.A., you should also send a copy of your request to the PIRIB for its inclusion in the official record that is described in Unit I.B.2. Mail your copies, identified by the docket control number OPP–300963, to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person or by courier, bring a copy to the location of the PIRIB described in Unit I.B.2. You may also send an electronic copy of

your request via e-mail to: opp-docket@epa.gov. Please use an ASCII file format and avoid the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 6.1/8.0 file format or ASCII file format. Do not include any CBI in your electronic copy. You may also submit an electronic copy of your request at many Federal Depository Libraries.

B. When Will the Agency Grant a Request for a Hearing?

A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is a genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues(s) in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32).

VIII. Regulatory Assessment Requirements

This final rule establishes time limited tolerances under FFDCA section 408. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). Nor does it require any prior consultation as specified by Executive Order 13084, entitled *Consultation and Coordination with Indian Tribal Governments* (63 FR 27655, May 19, 1998); special considerations as required by Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or require OMB review or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note). Since tolerances and exemptions that are established on the basis of a FIFRA section 18 petition under FFDCA section 408, such as the tolerances in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. In addition, the Agency has determined that this action will not have a substantial direct effect on 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, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that 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.'' This final rule directly regulates growers, food processors, food handlers and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4).

IX. 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 this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: January 7, 2000.

James Jones,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180–[AMENDED]

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

Authority: 21 U.S.C. 321(q), 346(a) and 371.

2. Section 180.442 is amended, by adding and alphabetically inserting the following entries to the table under paragraph (b) to read as follows:

§ 180.442 Bifenthrin; tolerances for residues.

* * * * *

(b) * * *

Commodity	Parts per million	Expiration/ revocation date
* *	* *	*
Grapes	0.2	12/31/01
* *	* *	*
Peanuts, nutmeats	0.05	12/31/01
* *	* *	*

* * * * *

[FR Doc. 00–1667 Filed 1–24–00; 8:45 am]

BILLING CODE 6560–50–F

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AE44

Endangered and Threatened Wildlife and Plants; Endangered Status for the Plant Plagiobothrys hirtus (Rough Popcornflower)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, have determined endangered status pursuant to the Endangered Species Act of 1973 (Act), as amended, for the plant *Plagiobothrys hirtus* (rough popcornflower). This species is restricted to wet swales and meadows in Douglas County, Oregon, where only 17 habitat patches exist for this species. Most populations are small with few individuals. The total

estimated number of plants is about 7,000 individuals within a combined area of about 18 hectares (45 acres). Threats to this species include destruction and/or alteration of habitat by development and hydrological changes (e.g., wetland fills, draining, construction); spring and summer grazing by domestic cattle, horses, and sheep; roadside maintenance; and competition from native and non-native plant species. This rule implements the Federal protection afforded by the Act for this plant.

EFFECTIVE DATE: February 24, 2000.

ADDRESSES: The complete file for this rule is available for inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Oregon State Office, 2600 S.E. 98th Ave., Suite 100, Portland, Oregon 97266.

FOR FURTHER INFORMATION CONTACT: Andrew Robinson, Botanist, at the above address, or by telephone at 503/231–6179.

SUPPLEMENTARY INFORMATION:

Background

Plagiobothrys hirtus is endemic to seasonal wetlands in the interior valley of the Umpqua River in southwestern Oregon (Amsberry and Meinke 1997b). *P. hirtus* was first collected by Thomas Howell in 1887 and described the following year as *Allocarya hirta* (Greene 1888). Subsequent taxonomic classification included *A. scouleri* var. *hirta, P. scouleri* var. *hirtus, A. calycosa,* and *P. hirtus* (Gamon and Kagan 1985). Johnston recognized two varieties of the species, *P. hirtus* var. *hirtus* and *P. hirtus* var. *collaricarpus* (Gamon and Kagan 1985). Later, Chambers (1989) considered the material included in the variety *collaricarpus* to be a variety of *P. figuratus,* which elevated the material assigned to *P. hirtus* var. *hirtus* to the full species *P. hirtus*.

A member of the borage family (Boraginaceae), *Plagiobothrys hirtus* is an annual herb on drier sites or perennial herb on wetter sites (Amsberry and Meinke 1997a). It reaches 30–70 centimeters (cm) (1–2 feet (ft)) in height and has a fairly stout stem with widely spreading, coarse, firm hairs on the upper part. The leaves of the main stem are opposite (paired), and the inflorescence (flower) is paired and without bracts (small leaf). The individual flowers are 1–2 millimeters (mm) (0.04-0.08 inches (in)) wide and white in color (Gamon and Kagan 1985). It grows in scattered groups and reproduces largely by insect-aided cross-pollination and partially by self-pollination. The species is distinguished from other *Plagiobothrys* species by coarse, sparse hairs on the stem and branches (Gamon and Kagan 1985).

Plagiobothrys hirtus grows in open, seasonal wetlands in poorly-drained clay or silty clay loam soils (Gamon and Kagan 1985) at elevations ranging from 30 to 270 meters (m) (98 to 886 ft) (Amsberry and Meinke 1997b). The species appears to be closely associated with the soil type Ruch-Medford-Takilma, and all known naturally-occurring populations occupy this soil type. The taxon is considered dependent on seasonal flooding and/or fire to maintain open habitat and to limit competition with invasive native and non-native plant species, such as Himalayan blackberry (*Rubus discolor*), Oregon ash (*Fraxinus latifolia*), teasel (*Dipsacus fullonum*), and pennyroyal (*Mentha pulegium*) (Gamon and Kagan 1985, Almasi and Borgias 1996). *P. hirtus* occurs in open microsites within the one-sided sedge (*Carex unilateralis*)—meadow barley (*Hordeum brachyantherum*) community type within interior valley grasslands. Other frequently associated species include tufted hairgrass (*Deschampsia cespitosa*), American slough grass (*Beckmannia syzigachne*), great camas (*Camassia leichtlinii* var. *leichtlinii*), water foxtail (*Alopecurus geniculatus*), baltic rush (*Juncus balticus*), wild mint (*Mentha arvensis*), Willamette downingia (*Downingia yina*), and bentgrass (*Agrostis alba*) (Gamon and Kagan 1985).

The species was collected only four times between 1887 and 1961, all at sites within Douglas County, Oregon (Gamon and Kagan 1985). The taxon was considered possibly extinct (Meinke 1982) until it was rediscovered in 1983 as a result of intensive field surveys (Jimmy Kagan, Oregon Natural Heritage Program, pers. comm. 1997). The location of the first specimen, collected by Thomas Howell, was given only as the Umpqua Valley (Greene 1888). The sites of collections from 1932 and 1939 were from 16 kilometers (km) (10 miles (mi)) east of Sutherlin and 3 km (2 mi) north of Yoncalla, respectively (Siddall and Chambers 1978). Both of these sites were surveyed in 1983, but no plants were found (Gamon and Kagan 1985). At the time, the sites were heavily grazed by sheep, which led the botanists to speculate that grazing was the probable cause of extirpation of the species (Gamon and Kagan 1985). In 1961, a collection was made adjacent to Interstate 5 south of Yoncalla, a site which remains in existence today (J. Kagan, pers. comm. 1997).

Despite the few pre-1961 collections, *Plagiobothrys hirtus* was probably widespread historically on the floodplains of the interior valleys of the Umpqua River. Because *P. hirtus* occurs in low-lying areas, seeds were likely dispersed by flood waters, resulting in a patchy, clumped distribution on the floodplains (Gamon and Kagan 1985). Natural processes such as flooding and fire maintained open, wetland habitat (Gamon and Kagan 1985). Draining of wetlands for urban and agricultural uses and road and reservoir construction, however, has altered the original hydrology of the valley to such an extent that the total area of suitable habitat for *P. hirtus* has been significantly reduced. Gamon and Kagan (1985) indicate that fire suppression allows the invasion of woody and herbaceous species into formerly open wetland habitats.

Plagiobothrys hirtus is now limited to 17 isolated patches of habitat in the vicinity of Sutherlin and Yoncalla, Oregon (Oregon Natural Heritage Program 1996). These disjunct habitat patches range in size from 0.04 to 6.9 hectares (ha) (0.1 to 17 acres (ac)) with population sizes for an individual patch ranging from 1 to 3,000 plants. The 17 habitat patches are estimated to have a total of about 7,000 plants and a combined area of less than 18 ha (45 ac). Of the 17 habitat patches, 1 site is 7 ha (17 ac), 3 sites are between 2 and 4 ha (5 and 10 ac), 4 are between 0.4 and 2 ha (1 and 5 ac), and 9 are less than 0.4 ha (1 ac) in size. The size of the habitat patch had no correlation with the number of plants occupying the patch. For example, 3,000 plants occupied a 4 ha (1 ac) habitat patch and the 7 ha (17 ac) habitat patch had only 50 scattered plants.

All existing populations are at risk of extirpation due to a variety of threats (Almasi and Borgias 1996; J. Kagan, pers. comm. 1997; Robert Meinke, Oregon State University, pers. comm. 1997). In addition to the ongoing threat of direct loss of habitat from conversion to urban and agricultural uses, hydrological alterations, and fire suppression, other threats to the species include spring and summer livestock grazing, roadside mowing, spraying, competition with non-native vegetation, and landscaping (Gamon and Kagan 1985; J. Kagan, pers. comm. 1995).

Fifteen of the 17 occupied habitat patches occur on private or commercial land. Three of these parcels are owned and managed by The Nature Conservancy. The other 12 habitat patches have no protective management for the species and are at risk of extirpation from development,

incompatible grazing and farming practices, and recreational activities (J. Kagan, pers. comm. 1997; R. Meinke, pers. comm. 1997). The two remaining known sites occur on public land owned by the Oregon Department of Transportation (ODOT), with a portion of one site partially occurring on private land as well.

Previous Federal Action

Federal action on *Plagiobothrys hirtus* began as a result of section 12 of the Act, which directed the Secretary of the Smithsonian Institution to prepare a report on those plants considered to be endangered, threatened, or extinct in the United States. This report, designated as House Document No. 94–51, was presented to Congress on January 9, 1975. On July 1, 1975, we published a notice in the **Federal Register** (40 FR 27823) of our acceptance of the report as a petition within the context of section 4(c)(2) (now section 4(b)(3) of the Act) and our intention to review the status of the plant species named in the report. As a result of this review, we published a proposed rule in the **Federal Register** on June 16, 1976 (41 FR 24523), to determine approximately 1,700 vascular plant species to be endangered pursuant to section 4 of the Act. This list, which included *P. hirtus*, was assembled on the basis of comments and data received by the Smithsonian Institution and us in response to House Document No. 94–51 and the July 1, 1975, **Federal Register** publication. In 1978, amendments to the Act required that all proposals over 2 years old be withdrawn. A 1-year grace period was given to proposals already over 2 years old. On December 10, 1979, we published a notice in the **Federal Register** (44 FR 70796) of the withdrawal of that portion of the June 16, 1976, proposal that had not been made final, along with four other proposals that had expired.

We published an updated notice of review for plants on December 15, 1980 (50 FR 82480), including *Plagiobothrys hirtus* as a category 1 candidate species. At that time, category 1 candidates (now referred to as candidates) were those for which we believed we had substantial information to support a proposal to list the species as threatened or endangered. We changed the status of *P. hirtus* to category 2 in the November 28, 1983, supplement to the notice (45 FR 53657), and this species remained a category 2 in the September 27, 1985, notice of review (50 FR 39527). Category 2 candidates were those species for which we have enough information suggesting that listing is possibly appropriate, but conclusive data on vulnerability and threat were not available to support a proposed rule. In the February 21, 1990, notice of review (55 FR 6185), we designated *P. hirtus* as a candidate. On February 28, 1996, we published a notice of review in the **Federal Register** (61 FR 7596) that discontinued the designation of category 2 species as candidates. In that notice of review, we retained *P. hirtus* as a candidate species.

Section 4(b)(3)(B) of the Act requires the Secretary to make findings on pending petitions within 12 months of their receipt. Section 2(b)(1) of the 1982 amendments further requires that all petitions pending on October 13, 1982, be treated as having been newly submitted on that date. This provision applied to *Plagiobothrys hirtus* because of the acceptance of the 1975 Smithsonian Report as a petition. On October 13, 1983, we found that the petitioned listing of this species was warranted but precluded by other pending listing actions, in accordance with section 4(b)(3)(B)(iii) of the Act; notice of this finding was published on January 20, 1984 (49 FR 2485). Such a finding requires the petition to be reevaluated annually pursuant to section 4(b)(3)(C)(i) of the Act. The finding was reviewed annually in October of 1984 through 1996. On November 20, 1997, we published a proposed rule (62 FR 61953) for this species, and on January 22, 1998, we announced a notice of public hearing and extension of the comment period (63 FR 3301). Publication of this rule constitutes the final determination for the petitioned action.

The processing of this final rule conforms with our Listing Priority Guidance published in the **Federal Register** on October 22, 1999 (64 FR 57114). The guidance clarifies the order in which we will process rulemakings. Highest priority is processing emergency listing rules for any species determined to face a significant and imminent risk to its well-being (Priority 1). Second priority (Priority 2) is processing final determinations on proposed additions to the lists of endangered and threatened wildlife and plants. Third priority is processing new proposals to add species to the lists. The processing of administrative petition findings (petitions filed under section 4 of the Act) is the fourth priority. The processing of critical habitat determinations (prudency and determinability decisions) and proposed or final designations of critical habitat will no longer be subject to prioritization under the Listing Priority Guidance. This final rule is a Priority 2 action and is being completed in accordance with the current Listing Priority Guidance.

Summary of Comments and Recommendations

In the November 20, 1997, proposed rule (62 FR 61953) and associated notifications, we requested interested parties to submit factual reports or information that might contribute to the development of a final listing decision. We sent announcements of the proposed rule and notice of a public hearing to appropriate State and Federal agencies, county governments, city governments, scientific organizations, private land owners, industrial land owners and other interested parties and requested comments. We also published announcements of the proposed rule in the *Oregonian* on December 8, 1997, and the *Roseburg News-Review* on December 8, 1997. We held a public hearing on February 10, 1998, in Roseburg, Oregon, and extended the public comment period to February 23, 1998 (63 FR 3301).

We received six written comments during the comment period following the publication of the proposed rule. One individual who submitted a set of written comments also testified at the public hearing. Three commenters opposed and three favored the listing of *Plagiobothrys hirtus* as endangered. Several commenters provided information on the status of and threats to various populations of *P. hirtus* that updated the information presented in the proposed rule. We considered all comments and incorporated the information provided into the Background and Summary of Factors sections of this final rule. Comments of a similar nature or point regarding the proposed rule have been grouped into issues and are discussed below.

Issue 1: One commenter stated the Federal regulation of the rough popcornflower under the Act fails to meet the constitutional test of substantial impact upon interstate commerce, and thus the rule should be withdrawn.

Our Response: The Federal government has the authority under the commerce clause of the U.S. Constitution to protect this species, for the reasons given in Judge Wald's opinion and Judge Henderson's concurring opinion in *National Association of Home Builders* v. *Babbitt,* 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied,* 1185 S. Ct. 2340 (1998). That case involved a challenge to application of the Act's prohibitions to protect the listed Delhi Sands flower-loving fly (*Rhaphiomidas terminatus abdominalis*). As with *Plagiobothrys*

hirtus, the Delhi Sands flower-loving fly is endemic to only one State. Judge Wald held that application of the Act's prohibition against taking of endangered species to this fly was a proper exercise of Commerce Clause power to regulate—(1) use of channels of interstate commerce; and (2) activities substantially affecting interstate commerce, because it prevented destructive interstate competition and loss of biodiversity. Judge Henderson upheld protection of the fly because doing so prevents harm to the ecosystem upon which interstate commerce depends and regulates commercial development that is part of interstate commerce.

Moreover, a substantial amount of interstate commerce arises from the efforts of conservation organizations to protect rare species. The Nature Conservancy, a national organization that engages in substantial interstate commerce through fund-raising and sale of its publications, has sought to protect *Plagiobothrys hirtus* through voluntary agreements and land acquisitions.

Issue 2: A second commenter opposed listing *Plagiobothrys hirtus* until a thorough scientific search has been conducted for additional populations in an area east of Sutherlin called the Nonpareil area.

Our Response: We have used previously published soil maps for the State of Oregon (United States Department of Agriculture 1991) as a tool to assess the likelihood of locating additional populations of *Plagiobothrys hirtus* in the Nonpareil area. Although there is a possibility that additional populations of *P. hirtus* occur in the vicinity based on soil types, land use patterns in the Nonpareil area are similar to those found south of Sutherlin. Thus, if additional occupied habitat is found in the Nonpareil area, it probably would be facing similar threats and would not reduce the need for listing *P. hirtus.* The Act requires us to list species based upon the threats facing the species and not on the number of plants or populations, as in this case.

Issue 3: The same commenter suggested captive propagation techniques should be developed and used to prevent the endangerment of *Plagiobothrys hirtus.*

Our Response: We concur that captive propagation may be an important technique used to recover *Plagiobothrys hirtus.* In fact, biologists have initiated monitoring, life history studies, and transplantation experiments using field-collected seed within some habitat patches. However, the Act requires us to conserve the ecosystems upon which endangered and threatened species depend and although these techniques are tools used by us and our cooperators to help reduce the threats to the species, these tools will not remove or reduce the threats to the level that the species will not require the protections of the Act.

Issue 4: The same commenter recommended additional public outreach and education, assuming the public will then come forward with information and locations of populations of *Plagiobothrys hirtus* presently unknown to us.

Our Response: In the proposed rule to designate *Plagiobothrys hirtus* as an endangered species published on November 20, 1997 (62 FR 61953), we requested public comments on ''(2) The location of any additional occurrences of this species . . .''. The comment period was extended on January 22, 1998 (63 FR 3301). We also continually seek information from the public on possible new locations of rare and endangered species. We have developed a public outreach plan to inform the public of this listing concurrent with the publication of this rule.

Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we solicited the expert opinions of appropriate and independent specialists regarding pertinent scientific or commercial data relating to the biological and ecological information for *Plagiobothrys hirtus.* Two individuals responded to our request and supported the listing based upon the scientific data. We incorporated the comments as appropriate in this final rule.

Summary of Factors Affecting the Species

After a thorough review and consideration of all information available, we determine that *Plagiobothrys hirtus* should be classified as an endangered species. We followed procedures found at section 4(a)(1) of the Act and the regulations (50 CFR part 424) implementing the listing provisions of the Act. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1). These factors and their application to *Plagiobothrys hirtus* Greene (rough popcornflower) are as follows:

A. *The present or threatened destruction, modification, or curtailment of habitat or range. Plagiobothrys hirtus* has been, and continues to be, threatened by destruction and modification of its wetland habitat (R. Meinke, pers. comm. 1997). Although the species is believed to have been more abundant in the past throughout the interior valleys of the Umpqua River, it is now limited to 17 small, isolated habitat patches. Direct loss of habitat from hydrological alterations, wetland filling, livestock grazing, or conversion to other uses pose a threat to all 17 occupied habitat patches.

Five habitat patches were recently known to occur on private land within the urban boundary of the town of Sutherlin, but only two populations continue to exist, and they make up about 4.5 percent of the remaining occupied habitat. Since 1997, 34 percent of *P. hirtus* urban populations have been lost to development. Plant populations in both remaining sites have continued to decline in recent years (J. Kagan, pers. comm. 1995, 1997; Amsberry and Meinke 1997b).

Two sites were, at one time, a single large habitat patch of about 5 ha (13 ac) with about 300 to 500 plants growing in openings when discovered in 1983 (J. Kagan, pers. obs. 1983). By 1985, this site had fill dirt dumped in the wetlands, and a series of drainage ditches installed (John Gamon, Washington Natural Heritage Program and J. Kagan, pers. obs. 1985). As a result, the population was divided into two, with the second population occurring a few hundred feet from the first population, just south of a trailer park in a commercially viable vacant lot. In 1997, biologists estimated the total amount of habitat occupied by the 2 populations as 1 ha (2.5 ac). Additionally, in 1997 biologists observed survey markers at the sites, and both sites are frequently mown. A local resident indicated that the property was for sale and that unspecified development plans were being formulated (Kelly Amsberry, Oregon State University and R. Meinke, pers. obs. 1997). In 1998, one population was eliminated by grading and dumping with fill. The other population continues to exist, though only a few plants are left (K. Amsberry, pers. comm. 1998). It is likely that the drainage ditches are contributing to the loss of habitat by changing the hydrology of the sites.

The other existing urban population was found in 1983 with 60 to 100 plants. This undeveloped site is located adjacent to two highways in an area that is considered to be very valuable for commercial development. The population was estimated to have about 40 to 50 plants in 1997 (K. Amsberry and R. Meinke, pers. obs. 1997). The current owner plans to develop the site

eventually into a mall (Danny Lang, landowner, pers. comm. 1997).

A fourth population located in 1986 in a horse pasture with 30 to 40 *Plagiobothrys hirtus* plants no longer exists (J. Kagan, pers. obs. 1986). A visit in 1997 found that the site was now a housing development with a single *P. hirtus* plant residing in a vacant lot that was for sale (K. Amsberry, pers. obs. 1997). This last remaining plant was lost when developers constructed a new house in late 1997 or early 1998 (K. Amsberry, pers. comm. 1998).

A fifth urban population was also known to exist until recently. In 1983, J. Gamon and J. Kagan discovered the site which consisted of 100 to 500 plants in 1985. The presence of sewer and storm drains above ground level at that time suggested there were plans to fill the site by about 1.5 m (3 ft). Construction workers plowed or graded the site and, by 1997, only one plant remained (K. Amsberry and R. Meinke, pers. obs. 1997). In 1998, the remaining plant was lost due to development (K. Amsberry, pers. comm. 1998).

Ten occupied habitat patches are known from private land just south of the town of Sutherlin to just north of Wilbur. Three of these 10 populations (or 56 percent of the remaining occupied habitat) of *Plagiobothrys hirtus* occur on TNC lands, and have exhibited wide variations in numbers of plants over the recent past. The population on TNC land at Popcorn Swale demonstrated a particularly volatile pattern of change in abundance. TNC did their first count in 1995 and estimated more than 16,000 individuals. However, in 1996, the population plummeted to only 394 plants, a drop attributed to an extensive period of standing water on the preserve that year due to a wet spring (Almasi and Borgias 1996). In 1997, TNC estimated a population size of 3,630 individuals. These large fluctuations are not unexpected for a species with a primarily annual life cycle. The dramatic fluctuation over the period from 1995 to 1997 appears to correspond to the variation in spring season precipitation received and subsequent depth and duration of inundation observed on the preserve over that period (Darren Borgias, TNC, *in litt.* 1998). *P. hirtus* prefers shallow, seasonal pools in open grassland (Almasi and Borgias 1996), and all three populations are threatened by shading and competition by non-native and native shrubs and trees.

Four of the 10 *Plagiobothrys hirtus*populations on TNC land occur south of Sutherlin and make up about 21 percent of the remaining occupied habitat. Agricultural land conversion and livestock grazing have degraded the habitat of these populations. All four of these populations occur within fenced livestock pastures and are subjected to heavy grazing pressure (see Factor C).

The remaining 3 out of the 10 habitat patches south of Sutherlin account for approximately 3 percent of occupied habitat. Biologists have documented a decline over time at 1 site from 50 to 60 plants, to 10 to 20 plants. The other two sites tend to fluctuate in numbers. These three sites, as well as the TNC sites, are threatened by competition from invasion of non-native weedy vegetation and succession, which is causing a closure of the forest canopy (see Factor E).

Three other sites are known to occur outside of the town of Sutherlin. Two known habitat patches are located east of Sutherlin on private land. One site, about 2 ha (5.5 ac) in size, is by a road in an agricultural field and is estimated to be about 12.5 percent of the total remaining occupied habitat. The location of the site is in a wet depression in a hayfield. The hayfield was plowed and planted in grass hay, and biologists observed tractor tracks in the depression in which *Plagiobothrys hirtus* occurred after the grass hay was cut and baled. Cattle are turned out into the field in the fall. This population has at least 1,000 individual plants and is threatened by plowing, haying, and livestock grazing. The other site is much smaller, occupying less than 10 square meters (m^2) (108 square feet (ft^2)), and occurs in a seasonally wet roadside ditch along a private driveway. Only four or five individual plants occur at this site. Mowing and herbicide sprays threaten this population (K. Amsberry, pers. comm. 1998).

The third site is located west of Sutherlin, also in a roadside ditch, similar to the second population. This site contains a couple hundred plants, and site totals approximately 10 m^2 (108 ft^2). Threats to this population are also mowing and herbicide spraying.

The last two habitat patches, which contain about 3 percent of the occupied habitat, occur in a marshy area on public and private land about 22 km (14 mi) north of Sutherlin, near the town of Yoncalla. In 1983, the Oregon Department of Agriculture rediscovered the collection made in 1961 at this site (see ''Background'' section). About 200 plants were present in 1988 in 2 separate habitat patches. The northern patch is completely managed by ODOT. The southern patch is partially managed by ODOT, but a portion also occurs on private land. Overall, the population has continued to increase under management by ODOT. Although the population on public land appears vigorous, a portion of the population on the adjacent private land appears to have vanished (J. Kagan, pers. comm. 1997). The northern habitat patch contains 500 plants in a 2 by 20 m (6 by 65 ft) area (Amsberry and Meinke 1997b). The northern population appears stable; however, its small size and precarious location make predictions of its future stability risky (Amsberry and Meinke 1997b). Counts in 1997 estimated the number of plants in the southern patch to be 3,000 (Amsberry and Meinke 1997b).

Alterations in site hydrology pose the primary threat to the plants (R. Meinke, pers. comm. 1997). Right-of-way management also poses a threat to these two populations. For example, in early July of 1995, damage to the marked study plots of transplanted *Plagiobothrys hirtus* plants, established by the Oregon Department of Agriculture, occurred by ODOT maintenance activities. Inspection of the sites documented damage to the plants, revealing a near complete loss of all transplanted material and relevant plot location markers. The naturally occurring population received only superficial impacts (Nicholas Testa, ODOT, pers. comm. 1995). Since then ODOT has taken steps to prevent this situation from reoccurring (see ''Available Conservation Measures'' section and Factor D of this section for additional information).

B. *Overutilization for commercial, recreational, scientific, or educational purposes.* It is not known if the species is currently being collected. However, listing a species can precipitate commercial or scientific interest, both legal and illegal, which can threaten the species through unauthorized and uncontrolled collection for both commercial and scientific purposes. Listing species as threatened or endangered publicizes their rarity and may make them more susceptible to collection or trampling by researchers or plant enthusiasts (Mariah Steenson, Portland Nursery, Inc., pers. comm. 1997; Mark Bosch, U.S. Forest Service, *in litt.* 1997). This species occurs in locations that are easily accessed by road, and the small population sizes make them vulnerable to overcollection by botanical enthusiasts.

Plagiobothrys hirtus is an attractive plant with flowers similar in appearance to forget-me-nots. The species is easily propagated in an artificial setting and transplanted. The species is conspicuous when in massed populations (Amsberry and Meinke 1997b). As a member of the

Boraginaceae, a family which contains numerous traditional medicinal herbs, *P. hirtus* could have pharmaceutical potential, though no research has been conducted on this subject (Amsberry and Meinke 1997b). The species may be sought for collection if its rarity and population locations become well known. Also, many species of *Plagiobothrys* look very much alike, and collectors could confuse *P. hirtus* with other more common *Plagiobothrys* species (Amsberry and Meinke 1997b). Most of the remaining populations of the species are so small that even limited collecting pressure could have significant adverse impacts.

Vandalism seems to be a potential threat for some populations. For example, after *Plagiobothrys hirtus* was listed as endangered by the State of Oregon, a landowner contacted the Oregon Division of State Lands to obtain a permit to develop the wetlands on his property to put in a small housing development. In processing his permit, the State informed the landowner of a *P. hirtus* population occupying that site. State-employed botanists contacted the landowner about protective measures for the population. The landowner allegedly responded by blading the site to level the swale the population was occupying and destroyed the population (J. Kagan, pers. comm. 1997).

Vandalism also occurred at a site near Sutherlin a few years ago. The Nature Conservancy informed a landowner of *Plagiobothrys hirtus* growing on his property and offered to purchase the property. The landowner declined the offer and dumped fill onto a portion of the population (J. Kagan, pers. comm. 1998).

C. *Disease or predation.* Past grazing has likely been a contributing factor to declining *Plagiobothrys hirtus* numbers throughout its historic range (Gamon and Kagan 1985). The timing and intensity of grazing are important factors in the effect of grazing on the plant. Livestock grazing during spring and early summer likely causes the most damage to this species. When herbivores eat the flower or seed head of the plant, the reproductive output for the year for that individual is destroyed. This activity may be more significant at sites where the species functions as an annual (Gamon and Kagan 1985). Biologists believe that sheep grazing may have been the main reason why at least two historical *P. hirtus* locations were extirpated.

Livestock graze in pastures containing four of the known habitat patches (Amsberry and Meinke 1997b). Currently, the grazing pressure is heavy at three of those sites, as evidenced by *Plagiobothrys hirtus* plants being restricted to bare ground between clumps of *Juncus* (Amsberry and Meinke 1997b). One site is grazed by horses, rather than by sheep or cattle, and the grazing pressure appears less intense than at the other sites as evidenced by larger, more vigorous patches of *P. hirtus* (Amsberry and Meinke 1997b).

However, where fires and flooding no longer occur, grazing may benefit the species. This species prefers open canopies and does not compete well with woody and non-native vegetation (Amsberry and Meinke 1997b). Fall grazing, in particular, may benefit the plant because it is dormant at this time and grazing can keep the habitat open by reducing the growth of weedy species (Gamon and Kagan 1985).

Herbivory due to small rodents has been observed on overwintering *Plagiobothrys hirtus* plants, but the long-term effects of this damage is not known (Amsberry and Meinke 1997b). This is particularly a problem in areas that have dense and overgrown vegetation. Amsberry and Meinke (1997b) documented aphids, which appear to prevent normal seed development and dispersal in some cases although rarely causing extensive damage, on scattered shoots and flowers. Amsberry and Meinke observed caterpillars on leaves and flowers of *P. hirtus,* but the effects are not believed to be significant (Amsberry and Meinke 1997b).

D. *Inadequacy of existing regulatory mechanisms.* Under the Oregon Endangered Species Act (ORS 564.100–564.135) and regulations (OAR 603, Division 73), the Oregon Department of Agriculture has listed *Plagiobothrys hirtus* as endangered (OAR 603–73–070). This statute prohibits the ''take'' of State-listed plants on State, county, and city owned or leased lands only. Most occurrences of *P. hirtus* occur on private land and are not subject to any current regulations. An occurrence adjacent to Interstate Highway 5, on lands managed by ODOT, was designated by the agency as a Special Management Area. The ODOT modified its mowing and spraying practices to protect the species at this site where the plant appears to be stable or increasing (N. Testa, pers. comm. 1997).

Section 404 of the Clean Water Act could provide some protection for *Plagiobothrys hirtus* under certain circumstances. Section 404 requires that a person proposing to discharge dredged or fill material into waters of the United States, including wetlands, must first obtain a permit from the U.S. Army Corps of Engineers (Corps). The Corps can deny or restrict such permits where necessary to prevent adverse effects on various resources, including water supplies, fisheries, and wildlife.

Section 404 is not, however, adequate to ensure protection of the wetland habitat upon which *Plagiobothrys hirtus* depends. First, section 404 does not regulate all discharges that may harm wetlands. Section 404 exempts from the permit requirement many farming, ranching, and silvicultural practices; construction of certain farm, forest and mining roads; construction of stock ponds and irrigation ditches; and several other activities. Second, section 404 does not regulate activities that may alter wetland habitats but do not involve discharges of dredged or fill material, such as application of herbicides or introduction of competing vegetation. Third, even where section 404 does apply, many activities are permitted by regulation under ''nationwide permits'' issued by the Corps (December 13, 1996; 61 FR 65873; 63 FR 36040). Under several of these nationwide permits, persons are allowed to fill wetlands without giving prior notice to the Corps, provided the fill is within certain volume or acreage limits. Many of the sites where *P. hirtus* occurs are small wetlands that could fall below these acreage limits. Section 404 would provide greater protection if *P. hirtus* were listed, because nationwide permits are not applicable where a discharge would jeopardize or adversely modify the critical habitat of a listed species (33 CFR 330.4(f)).

E. *Other natural or manmade factors affecting its continued existence.* Five of 10 existing habitat patches of *Plagiobothrys hirtus* occur adjacent to major highways (Interstate 5 and/or State Route 99), and another 2 populations occur in roadside ditches. Herbicide and pesticide spraying and mowing are often a part of routine maintenance of roadways. As with livestock grazing, mowing or pesticide spraying during the spring and summer have a direct effect by reducing seed set, which negatively affects populations of the species. Pesticides and herbicides have an indirect effect on the species because most *P. hirtus* plants rely on insect pollinators to reproduce, and these insect pollinators are vulnerable to pesticides and herbicides (Amsberry and Meinke 1997b). In addition, roadside occurrences are at risk of toxic chemical spills and runoff containing oil and grease (N. Testa, pers. comm. 1997). Vehicle accidents also increase the risk of fuel contamination or fire; such an accident recently occurred adjacent to the ODOT population, but

the species was not affected (N. Testa, pers. comm. 1997).

With the exception of the *Plagiobothrys hirtus* populations in ODOT's Special Management Area and TNC's Popcorn Swale, none of the roadside occurrences are protected from herbicide spraying, landscaping, or early season mowing. Herbicide spraying and mowing has affected and reduced at least one *P. hirtus* population (J. Kagan, pers. comm. 1995). A landowner at another known site reported that the ditch line along the State Route 99 has been sprayed 20 times or more in the last 28 years (James and Florence Klingler, landowners, *in litt.* 1998). Late season mowing has benefited the *P. hirtus* population at the ODOT site, probably by reducing competition from other plants and herbivory by voles (R. Meinke, pers. comm. 1997).

Encroachment by native and non-native plant species increases when natural processes like fire or flooding are altered (J. Kagan, pers. comm. 1997; R. Meinke, pers. comm. 1997). Invasion of vernal pools and wet areas by exotic grasses and herbs, as well as encroachment by native ash that increase shading, has caused the decline of this species in at least two populations. This taxon prefers full exposure to sun, and succession in some locations has increased shading by Oregon ash, willow (*Salix*), and the non-native common pear tree (*Pyrus*) (Amsberry and Meinke 1997b). In an experimental transplanting of this species into two sites on Bureau of Land Management (BLM) lands in 1998, the plants located in an open wet area did well, but the population planted in a wet area in shade died out, indicating that the species does not tolerate shading (K. Amsberry, pers. comm. 1998).

After a 1985 fire at one of the sites in Sutherlin, the plants responded the following year with vigorous growth (J. Kagan, pers. comm. 1997). As with late season grazing or mowing, late season fire is likely to be of benefit to the species by reducing encroaching vegetation. Fire occurring prior to seed set may have negative effects on *Plagiobothrys hirtus.* The encroachment of weedy, and especially woody, species may also alter site hydrology by capturing more of the available water, an alternative explanation for the dramatic collapse of the population at the TNC preserve between 1995 and 1996 (R. Meinke, pers. comm. 1997). The apparent population decline at another habitat patch may be due to trees shading much of the site (Amsberry and Meinke 1997b). However, the dramatic fluctuation in abundance, both up and down, appears to correspond more closely to dramatic annual fluctuation in precipitation and hydrology.

Because of the small, isolated nature of the occurrences and the few individuals present in most of them, *Plagiobothrys hirtus* is also more susceptible to random events, such as fires during the growing season, insect or disease outbreaks, or toxic chemical spills. The rapid, and as yet unexplained, collapse of the population at the TNC preserve argues for the protection of numerous patches to shield the species from random events that could cause the extinction of the species. Small, isolated populations may also have an adverse effect on pollinator activity, seed dispersal, and gene flow. Currently, 58 percent or 9 of the habitat patches are less than 0.4 ha (1 ac). Only the Popcorn Swale population is greater than 4 ha (10 ac). The existence of both annual and perennial populations in *P. hirtus* suggests that some local genetic differentiation may already exist among populations of the species. Genetic drift within small, isolated populations can lead to a loss of genetic variability and a reduced likelihood of long-term viability (Franklin 1980; Soule 1980; Lande and Barrowclough 1987).

We have carefully assessed the best scientific and commercial information available concerning the past, present, and future threats faced by this species in developing this final rule. *Plagiobothrys hirtus* is imperiled by the filling of wetland habitat for development, livestock grazing, invasion by competitive plant species as a result of hydrological alteration and fire suppression, and roadside spraying and mowing, all of which continue to reduce plant numbers and habitat. The small, isolated occurrences, with few individuals, make the species more vulnerable to all threats. Much of the habitat where this species occurs is unprotected from these threats. In addition, continued decreases in the number of occurrences and individuals could result in decreased genetic variability. The varied and cumulative threats to *P. hirtus* indicate the species is in danger of extinction throughout its range and meets the Act's definition of endangered. Because of the high potential for these threats, if realized, to result in the extinction of *P. hirtus,* the preferred action is to list *P. hirtus* as endangered. Threatened status is not appropriate because all of the existing occurrences of *P. hirtus* are small, and 15 of 17 habitat patches have no protection from mowing, herbicide application, imminent urbanization, and grazing threats. In addition, one of the protected occurrences recently suffered a precipitous, and as yet unexplained, reduction in numbers.

Critical Habitat

Critical habitat is defined in section 3 of the Act as: (i) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. ''Conservation'' means the use of all methods and procedures needed to bring the species to the point at which listing under the Act is no longer necessary.

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, we designate critical habitat at the time the species is determined to be endangered or threatened. Our regulations (50 CFR 424.12(a)(1)) state that designation of critical habitat is not prudent when one or both of the following situations exist—(i) the species is threatened by taking or other activity and the identification of critical habitat can be expected to increase the degree of threat to the species or (ii) such designation of critical habitat would not be beneficial to the species. We find that designation of critical habitat is prudent for the for the *Plagiobothrys hirtus.*

In the proposed rule, we indicated that designation of critical habitat was not prudent for *Plagiobothrys hirtus* because of a concern that publication of precise maps and descriptions of critical habitat in the **Federal Register** could increase the vulnerability of this species to incidents of collection and vandalism. We also indicated that designation of critical habitat was not prudent because we believed it would not provide any additional benefit beyond that provided through listing as endangered.

In the last few years, a series of court decisions have overturned Service determinations regarding a variety of species that designation of critical habitat would not be prudent (e.g., *Natural Resources Defense Council* v. *U.S. Department of the Interior,* 113 F. 3d 1121 (9th Cir. 1997); *Conservation Council for Hawaii* v. *Babbitt*, 2 F. Supp.

2d 1280 (D. Hawaii 1998)). Based on the standards applied in those judicial opinions, we have reexamined the question of whether critical habitat for *Plagiobothrys hirtus* would be prudent.

Due to the small number of populations, *Plagiobothrys hirtus* is vulnerable to unrestricted collection, vandalism, or other disturbance. We remain concerned that these threats might be exacerbated by the publication of critical habitat maps and further dissemination of locational information. We have examined the evidence available for *P. hirtus* and have found two documented cases of vandalism to two *P. hirtus* populations when the landowners were informed that the species occurred on their land (see factor B). No other specific evidence of taking, vandalism, collection, or trade of this species or any similarly situated species is available. Consequently, consistent with applicable regulations (50 CFR 424.12(a)(1)(i)) and recent case law, we do not expect that the identification of critical habitat will further increase the degree of threat of taking or other human activity above that of the listing of the species. The two documented cases of vandalism occurred as a result of the listing of the species as endangered by the State of Oregon. We don't expect that a designation of critical habitat will increase the threat of taking by landowners since they are already aware of the species presence on their property.

In the absence of a finding that designation of critical habitat would increase threats to a species, if there are any benefits to critical habitat designation, then a prudent finding is warranted. In the case of this species, there may be some benefits to designation of critical habitat. The primary regulatory effect of critical habitat designation is the section 7 requirement that Federal agencies refrain from taking any action that destroys or adversely modifies critical habitat. While a critical habitat designation for habitat currently occupied by this species would not be likely to change the section 7 consultation outcome because an action that destroys or adversely modifies such critical habitat would also be likely to result in jeopardy to the species, there may be instances where section 7 consultation would be triggered only if critical habitat is designated. Examples could include unoccupied habitat or occupied habitat that may become unoccupied in the future. There may also be some educational or informational benefits to designating critical habitat. Therefore, we find that designation of critical habitat is prudent for *Plagiobothrys hirtus.*

The Final Listing Priority Guidance for FY 2000 (64 FR 57114) states, ''The processing of critical habitat determinations (prudency and determinability decisions) and proposed or final designations of critical habitat will no longer be subject to prioritization under the Listing Priority Guidance. Critical habitat determinations, which were previously included in final listing rules published in the **Federal Register**, may now be processed separately, in which case stand-alone critical habitat determinations will be published as notices in the **Federal Register**. We will undertake critical habitat determinations and designations during FY 2000 as allowed by our funding allocation for that year.'' As explained in detail in the Listing Priority Guidance, our listing budget is currently insufficient to allow us to immediately complete all of the listing actions required by the Act. Deferral of the critical habitat designation for *Plagiobothrys hirtus* has allowed us to concentrate our limited resources on higher priority critical habitat (including court ordered designations) and other listing actions, while allowing us to put in place protections needed for the conservation of *Plagiobothrys hirtus* without further delay. However, because we have successfully reduced, although not eliminated, the backlog of other listing actions, we anticipate in FY 2000 and beyond giving higher priority to critical habitat designation, including designations deferred pursuant to the Listing Priority Guidance, such as the designation for this species, than we have in recent fiscal years.

We plan to employ a priority system for deciding which outstanding critical habitat designations should be addressed first. We will focus our efforts on those designations that will provide the most conservation benefit, taking into consideration the efficacy of critical habitat designation in addressing the threats to the species, and the magnitude and immediacy of those threats. We will develop a proposal to designate critical habitat for the *Plagiobothrys hirtus* as soon as feasible, considering our workload priorities. Unfortunately, for the immediate future, most of Region 1's listing budget must be directed to complying with numerous court orders and settlement agreements, as well as due and overdue final listing determinations (like the one at issue in this case).

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing can encourage and result in public awareness and conservation actions by Federal, State, and local agencies, private organizations, and individuals. The Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required by Federal agencies and the prohibitions against certain activities involving listed plants are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is subsequently listed, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with us.

None of the known naturally occurring populations of *Plagiobothrys hirtus* occurs on Federal lands. Because *P. hirtus* occurs in wetlands, regulatory mechanisms under the Clean Water Act apply to this species. As part of our outreach efforts, we notify the Corps of known populations of *P. hirtus.*

Other Federal agencies' actions that may require consultation include the National Resource Conservation Service projects and Department of Housing and Urban Development and Veterans' Administration mortgage programs (Federal Home Administration loans). The Federal Highway Administration will become involved with *Plagiobothrys hirtus* when highway maintenance is funded, even in part, by the Federal government. Any State highway activity being implemented by ODOT that is partly funded by the

Federal government will be subject to consultation under the Act. In addition, sections 2(c)(1) and 7(a)(1) of the Act require Federal agencies to utilize their authorities in furtherance of the purposes of the Act to carry out conservation programs for endangered and threatened species.

Listing of this plant will provide for development of a recovery plan for the plant. Such a plan will bring together both State and Federal efforts for conservation of the plant. The plan will establish a framework for agencies to coordinate activities and cooperate with each other in conservation efforts. The plan will set recovery priorities, assign responsibilities, and estimate costs of various tasks necessary to accomplish them. It will also describe site-specific management actions necessary to achieve conservation and survival of the plant. Additionally, pursuant to section 6 of the Act, we will be able to grant funds to affected States for management actions promoting the protection and recovery of this species.

Five of the 17 habitat patches currently receive some protective management. Two patches are owned and managed by ODOT and are conserved under State law. The ODOT physically delineated the sites with plastic markers and signs designating them as Special Management Areas (Amsberry and Meinke 1997b). Mowing is restricted to late in the fall when *Plagiobothrys hirtus* is dormant (N. Testa, pers. comm. 1997). Three patches are in private, protective ownership, owned and managed by TNC. These patches, which currently contain about 3,630 individual plants, are being actively managed for the protection and development of *P. hirtus* habitat (Almasi and Borgias 1996) by reducing grazing of sites and eliminating exotic vegetation. The Nature Conservancy and ODOT have initiated monitoring, life history studies, and transplantation experiments using field-collected seed within these five habitat patches. The objectives of these efforts are to increase population sizes, and establish protocols for seed collection, greenhouse propagation, and transplantation techniques (Amsberry and Meinke 1997b).

During the spring of 1998, we assisted the BLM with experimental introductions using 1,000 greenhouse-grown plants that were planted at 2 different sites on BLM lands in suitable wetland habitats. We established the plants on an upland soil type with which *Plagiobothrys hirtus* is not typically associated and in an area that is outside the historic range of the species. One of these populations did well following the transplanting (K. Amsberry, pers. comm. 1998), but the plants need to persist for at least five years before the transplant can be considered a success. During the fall of 1998, the site was found to be under about 0.6 m (2 ft) of water, so the plantings may not survive. Two other transplants occurred at sites on ODOT and TNC properties into established populations to augment them.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered plants. All prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.61, apply. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export, transport in interstate or foreign commerce in the course of a commercial activity, sell or offer for sale in interstate or foreign commerce, or remove and reduce the species to possession from areas under Federal jurisdiction. In addition, for plants listed as endangered, the Act prohibits the malicious damage or destruction on areas under Federal jurisdiction and the removal, cutting, digging up, or damaging or destroying of such plants in knowing violation of any State law or regulation, including State criminal trespass law. Certain exceptions to the prohibitions apply to our agents and State conservation agencies.

As published on July 1, 1994 (59 FR 34272), our policy is to identify, to the maximum extent practicable, those activities that would or would not constitute a violation of section 9 of the Act at the time of listing. The intent of this policy is to increase public awareness of the effect of the listing on proposed and ongoing activities within a species' range. Collection, damage, or destruction of this species on Federal land is prohibited, although in appropriate cases, we may issue a Federal endangered species permit for scientific or recovery purposes. We believe that, based upon the best available information, you can take the following actions without resulting in a violation of section 9, only if these activities are carried out in accordance with existing regulations and permit requirements:

(1) Activities authorized, funded, or carried out by Federal agencies (*e.g.,* wetland modification; powerline construction, maintenance, and improvement; highway construction, maintenance, and improvement; and permits for mineral exploration and mining) when such activity is conducted in accordance with any reasonable and prudent measures given by us according to section 7 of the Act.

(2) Normal agricultural and silvicultural practices, including pesticide and herbicide use, that are carried out in accordance with any existing regulations, permit and label requirements, and best management practices.

(3) Normal landscape activities around your own personal residence.

We believe that the following might potentially result in a violation of section 9; however, possible violations are not limited to these actions alone:

(1) Removal, cutting, digging up, damaging, or destroying endangered plants on non-Federal land if conducted in knowing violation of Oregon State law or regulations or in violation of State criminal trespass law.

(2) Interstate or foreign commerce and import/export without previously obtaining an appropriate permit.

Questions regarding whether specific activities will constitute a violation of section 9 should be addressed to the State Supervisor of the Oregon State Office (see **ADDRESSES** section).

The Act and 50 CFR 17.62 and 17.63 also provide for the issuance of permits to carry out otherwise prohibited activities involving endangered plants under certain circumstances. Such permits are available for scientific purposes and to enhance the propagation or survival of the species. Requests for copies of the regulations concerning listed plants and animals and general inquiries regarding prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Ecological Services, Endangered Species Permits, 911 N.E. 11th Avenue, Portland, Oregon 97232–4181 (telephone 503/231–2063; facsimile 503/231–6243).

National Environmental Policy Act

We have determined that Environmental Assessments and Environmental Impact Statements, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Paperwork Reduction Act

This rule does not contain any new collections of information other than those already approved under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and assigned Office of Management and Budget clearance

number 1018–0094. 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 control number. For additional information concerning permit and associated requirements for endangered species, see 50 CFR 17.62.

References Cited

A complete list of all references cited herein is available upon request from the Oregon State Fish and Wildlife Office (see **ADDRESSES** section).

Author

The primary author of this final rule is Dr. Andrew F. Robinson, Jr., U.S. Fish and Wildlife Service, Oregon State Office (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 17—[AMENDED]

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

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. Amend § 17.12(h) by adding the following, in alphabetical order under FLOWERING PLANTS, to the List of Endangered and Threatened Plants:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
*	*	*	*	*	*		*
Flowering plants							
*	*	*	*	*	*		*
Plagiobothrys hirtus.	Rough popcornflower	U.S.A. (OR)	Boraginaceae	E	678	NA	NA
*	*	*	*	*	*		*

Dated: November 30, 1999.

Jamie Rappaport Clark,

Director, Fish and Wildlife Service.

[FR Doc. 00–1562 Filed 1–24–00; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AE53

Endangered and Threatened Wildlife and Plants; Endangered Status for ''Erigeron decumbens'' var. ''decumbens'' (Willamette Daisy) and Fender's Blue Butterfly (''Icaricia icarioides fenderi'') and Threatened Status for ''Lupinus sulphureus'' ssp. ''kincaidii'' (Kincaid's Lupine)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service (''Service'' or ''we'') determines endangered status pursuant to the Endangered Species Act (Act) of 1973, as amended, for a plant and a butterfly, *Erigeron decumbens* var. *decumbens* (Willamette daisy) and Fender's blue butterfly (*Icaricia icarioides fenderi*), and determines threatened status for a plant, *Lupinus sulphureus* ssp. *kincaidii* (Kincaid's lupine). These species are restricted primarily to native prairie in the Willamette Valley of Oregon and are known currently from a few small remnants of a formerly widespread distribution. In addition to its Oregon occurrences, *L. sulphureus* ssp. *kincaidii* is known also from two small sites in southern Washington. Commercial and/or residential development, agriculture, silvicultural practices, road improvement, over-collection, herbicide use, and naturally occurring demographic and random environmental events threaten these three taxa. This final rule invokes the Federal protection and recovery provisions of the Act, as applicable for these plant and butterfly species.

EFFECTIVE DATES: February 24, 2000.

ADDRESSES: You may inspect the complete file for this rule, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Oregon State Office, 2600 SE 98th Ave, Suite 100, Portland, Oregon 97266.

FOR FURTHER INFORMATION CONTACT: Dr. Andrew F. Robinson, Jr., Botanist; or Diana Hwang, Fish and Wildlife Biologist, U.S. Fish and Wildlife Service (see **ADDRESSES** section or telephone 503–231–6179, Facsimile 503–231–6195).

SUPPLEMENTARY INFORMATION:

Background

Fender's blue butterfly (*Icaricia icarioides fenderi*), *Lupinus sulphureus* ssp. *kincaidii* (Kincaid's lupine), and *Erigeron decumbens* var. *decumbens* (Willamette daisy) are restricted primarily to the Willamette Valley of Oregon. The valley is a 209-kilometer (km) (130 miles (mi)) long and 32–64-km (20–40-mi) wide alluvial floodplain with an overall northward gradient (Orr *et al.* 1992). The valley is narrow and flat at its southern end, widening and becoming hilly near its northern end at the confluence of the Willamette and Columbia Rivers. We know of four sites containing *L. sulphureus* ssp. *kincaidii* approximately 60 km (38 mi) south of the Willamette Valley and within the Umpqua Valley of Douglas County, Oregon. In addition to its Oregon occurrences, *L. sulphureus* ssp. *kincaidii* is known from two small sites in Lewis County, southern Washington, 70 km (40 mi) north of the Willamette Valley.

The alluvial soils of the Willamette Valley and southern Washington host a mosaic of grassland, woodland, and forest communities. Fender's blue butterfly, *Lupinus sulphureus* ssp. *kincaidii*, and *Erigeron decumbens* var. *decumbens* occupy native grassland habitats within the Willamette Valley. Based on the limited available evidence, most Willamette Valley grasslands are early seral (one stage in a sequential

progression) habitats, requiring natural or human-induced disturbance for their maintenance (Franklin and Dryness 1973). The vast majority of Willamette Valley grasslands would likely be forested if left undisturbed (Johannessen *et al.* 1971). Important exceptions to this successional pattern are grass balds on valley hillsides that may be climax grasslands due to the presence of deep, fine-textured, self-mulching soils or xeric (very dry) lithosoils (Franklin and Dryness 1973).

Two native prairie types occur in the Willamette Valley, wet prairie and upland prairie. Fender's blue butterfly and *Lupinus sulphureus* ssp. *kincaidii* are typically found in native upland prairie with the dominant species being *Festuca rubra* (red fescue) and/or *Festuca idahoensis* (Idaho fescue) and *Calochortus tolmiei* (Tolmie's mariposa), *Silene hookeri* (Hooker's catchfly), *Fragaria virginiana* (broadpetal strawberry), *Sidalcea virgata* (rose check-mallow), and *Lomatium* spp. (common lomatium) serving as herbaceous indicator species (Hammond and Wilson 1993). These dry, fescue prairies make up the majority of habitat for Fender's blue butterfly and *L. sulphureus* ssp. *kincaidii.* Although Fender's blue butterfly and *L. sulphureus* ssp. *kincaidii* are occasionally found on steep, south-facing slopes and barren rocky cliffs, neither of these species are capable of occupying the most xeric oatgrass communities on these south-facing slopes.

The primary habitat for *Erigeron decumbens* var. *decumbens is native wetland prairie.* This habitat is characterized by the seasonally wet *Deschampsia caespitosa* (tufted hairgrass) community that occurs in low, flat regions of the Willamette Valley where flooding creates anaerobic and strongly reducing soil conditions. This wet prairie community includes *Juncus* spp. (rush) and *Danthonia californica* (California oatgrass) as co-dominant native species, as well as the introduced species *Festuca arundinaceae* (tall fescue), *Bromus japonicus* (Japanese brome) and *Anthoxanthum odoratum* (sweet vernal grass) (USFWS 1993). Another endangered species, *Lomatium bradshawii* (Bradshaw's lomatium) also grows in wet prairie habitat. Atypically, two populations of *E. decumbens* var. *decumbens* occur on top of a dry, stony butte in an upland prairie.

The impact of humans on the botanical communities of the Willamette Valley dates back several centuries to the Kalapooya Indians, who cleared and burned lands used for hunting and food gathering. Early accounts by David Douglas in 1826 indicate extensive burning of the valley floor, from its northern end at the falls of the Willamette River to its southern extremities near Eugene. Burned areas were documented by Douglas as being so complete as to limit the forage available for his horse and to reduce game availability (Douglas 1972). Accounts by other early explorers support Douglas' observations and suggest a pattern of annual burning by the Kalapooya resulted in the maintenance of extensive wet and dry prairie grasslands (Johannessen *et al.* 1971). Although much of the woody vegetation was prevented from becoming established on the grasslands by this treatment, the random survival of young fire-resistant species such as *Quercus garryana* (Oregon white oak) accounted for the widely spaced trees on the margins of the valley (Habeck 1961). After 1848, burning decreased sharply through the efforts of settlers to suppress large-scale fires. Consequently, the open, park-like nature of the valley floor was lost, replaced by agricultural fields, dense oak and fir forests, and scrub lands following logging.

The Willamette basin covers approximately 2,600,000 hectares (ha) (6,400,000 acres (ac)), which Lang (1885) estimated to consist of one-sixth prairie and five-sixths forest. We can analyze the extent of the prairie component through historical information from land survey records. Natural grasslands described by Federal land surveyors in the 1850s were broken down into three distinct types—oak savannah, upland prairie, and wet prairie (Habeck 1961). Of the estimated 409,000 ha (1,010,000 ac) of historic native grasslands extant prior to 1850, approximately 277,000 ha (685,000 ac) appears to have consisted of upland prairie and 132,000 ha (325,000 ac) of wet prairie (E. Alverson, The Nature Conservancy, Eugene, pers. comm., 1994).

This extensive resource was rapidly depleted through the conversion of native prairie to agricultural use during European settlement. Within 30 years of passage of the Donation Land Act of 1850, European-American settlers, who quickly subdivided their original land grants to accommodate the rapid increase in population, occupied most prairie lands (Lang 1885). Settlers first plowed the level, open tracts of prairie (Lang 1885) and only boggy, flood-prone areas prevented complete conversion of the native grassland community to cropped monocultures. After 1936, the U.S. Army Corps of Engineers (Corps) overcame limitations on development that had been imposed by seasonal flooding and a high water table by initiating water projects to provide flood control and security for expanded agricultural activity.

Fender's blue butterfly, *Lupinus sulphureus* ssp. *kincaidii*, and *Erigeron decumbens* var. *decumbens* likely once occurred over a large distribution throughout the historic native prairie. Native prairie vegetation in the Willamette Valley was decimated by the rapid expansion of agriculture during the 140-year period from the 1850s to the present. Humans also began suppressing the fire disturbance regime on native prairie habitat. Fire suppression allowed shrub and tree species to overtake grasslands, while agricultural practices hastened the decline of native prairie species through habitat loss and increased grazing (Johannessen *et al.* 1971; Franklin and Dyrness 1973). Fence rows and intervening strips of land along agricultural fields and roadsides served as the only refugia from these forces of change.

Although large prairie expanses dominated by native species had been lost by the early 1900's, many remnant grasslands with a large native species component have been recently identified. These remnants, often dominated by nonnative species, also support the only remaining occurrences of native prairie species in the Willamette Valley. Current estimates of the remaining native upland prairie in the Willamette Valley are less than 400 ha (988 ac) (Alverson, pers. comm. 1994). This estimate represents only one-tenth of one percent of the original upland prairie once available to Fender's blue butterfly and *Lupinus sulphureus* ssp. *kincaidii*. Fender's blue butterfly and/or *L. sulphureus* ssp. *kincaidii* and/or *Erigeron decumbens* var. *decumbens* currently occupy slightly more than one-half of this upland prairie habitat (62 sites, 210 ha (112.8 ac)). Within the remnant prairie habitat, *E. decumbens* var. *decumbens* occupies 28 sites across 116 ha (286 ac), *L. sulphureus* ssp. *kincaidii* occupies 54 sites across 158 ha (370 ac), while Fender's blue butterfly occupies 32 sites across 165 ha (408 ac). Similar losses have occurred for wet prairie habitats, but estimates of current acreage are not available.

Fender's Blue Butterfly

Fender's blue butterfly is one of about a dozen subspecies of Boisduval's blue butterfly (*Icaricia icariodes*). *Icaricia icarioides* is found in western North America; subspecies *fenderi* is restricted to the Willamette Valley (Dornfeld 1980;

R. H. T. Mattoni, University of California, pers. comm. to C. Nagano 1997; J. Emmel, Hemet, California, pers. comm. to C. Nagano 1997). Fender's blue butterfly was described by Ralph W. Macey (1931) as *Plebejus maricopa fenderi* based on specimens he had collected in Yamhill County, Oregon. The species *maricopa* is currently considered to be a synonym of the species *icarioides* (Miller and Brown 1981). The species *icaricia* has been determined to be a member of the genus *Icaricia*, rather than the genus *Plebejus* (Miller and Brown 1981; R. H. T. Mattoni, pers. comm. to C. Nagano 1997). Some researchers considered subspecies *fenderi* to be a synonym of the pardalis blue butterfly (*Icaricia icarioides pardalis*), an inhabitant of the central California Coast Range near San Francisco (Downey 1975; Miller and Brown 1981). We consider Fender's blue butterfly as a distinct taxon based on adult characters and geographic distribution (Dornfeld 1980; Hammond and Wilson 1993; R. H. T. Mattoni and J. Emmel, pers. comm. to C. Nagano 1997).

Fender's blue butterfly is small with a wingspan of approximately 2.5 centimeters (cm) (1 inch (in)). The upper wings of the males are brilliant blue in color, and the borders and basal areas are black. The upper wings of the females are completely brown colored. The undersides of the wings of both sexes are creamish tan, with black spots surrounded with a fine white border or halo. The dark spots on the underwings of male Fender's blue butterflies are small. In contrast, the dark spots on the underwings of the pembina blue butterfly (*Icaricia icariodes pembina*) are surrounded with wide white haloes, and the underside of the hindwings of Boisduval's blue butterfly (*Icaricia icariodes*) is very pale whitish gray with broad haloes around the black spots.

We do not know the precise historic distribution of Fender's blue butterfly due to the limited information collected on this subspecies prior to its description in 1931 (Macy 1931). Although Ralph W. Macy collected the type specimens for this butterfly in 1929, only a limited number of collections were made between the time of the subspecies' discovery and Macy's last observation on May 23, 1937, in Benton County, Oregon (Hammond and Wilson 1992a). A lack of information on the identity of the butterfly's host plant caused researchers to focus their survey efforts on common lupine species known to occur in the vicinity of Macy's collections. As a result, no Fender's blue butterflies were observed during 20 years of widespread investigation. Finally, Dr. Paul Hammond rediscovered Fender's blue butterfly in 1989 at McDonald Forest, Benton County, Oregon, on an uncommon species of lupine, *Lupinus sulphureus* ssp. *kincaidii*. Recent surveys have indicated that the insect is confined to the Willamette Valley and currently occupies 32 sites in Yamhill, Polk, Benton, and Lane Counties (Hammond and Wilson 1993; Schultz 1996). One population at Willow Creek is found in wet, *Deschampsia*-type prairie, while the remaining sites are found on drier upland prairies characterized by *Festuca* spp. Fender's blue butterflies occupy sites located almost exclusively on the western side of the valley, within 33 km (21 mi) of the Willamette River.

Although researchers have made only limited observations of the early life stages of Fender's blue butterfly, the life cycle of the species likely is similar to other subspecies of *Icaricia icarioides* (R. H. T. Mattoni, pers. comm. to C. Nagano 1997; G. Pratt, Riverside, California, pers. comm. to C. Nagano 1997; Hammond and Wilson 1993). Adult butterflies lay their eggs on perennial *Lupinus* sp. (Ballmer and Pratt 1988), the food plant of the caterpillar during May and June. Newly hatched larvae feed for a short time, reaching their second instar in the early summer, at which point they enter an extended diapause (maintaining a state of suspended activity). Diapausing larvae remain in the leaf litter at or near the base of the host plant through the fall and winter and may become active again in March or April of the following year. Some larvae may be able to extend diapause for more than one season depending upon the individual and environmental conditions (R. H. T. Mattoni pers. comm. to C. Nagano 1997). Once diapause is broken, the larvae feed and grow through three to four additional instars, enter their pupal stage, and then emerge as adult butterflies in April and May. Behavioral observations of Fender's blue butterfly indicate the larvae are alert to potential predators, with individuals dropping from their feeding position on lupine leaves to the base of the plant at the slightest sign of disturbance (C. Schultz, University of Washington, pers. comm. 1994). A Fender's blue butterfly may complete its life cycle in 1 year.

The larvae of many species of lycaenid butterflies, including *Icaricia icarioides*, possess specialized glands that secrete a sweet solution sought by some ant species who may actively ''tend'' and protect them from predators and parasites (Ballmer and Pratt 1988; G. Pratt, pers. comm. to C. Nagano 1997). Although ants tend other subspecies of Boisduval's blue butterfly during their larval stage (Downey 1962, 1975; Thomas Reid Associates 1982; R. H. T. Mattoni and G. Pratt, pers. comm. to C. Nagano 1997), limited observations of Fender's blue butterfly larvae in the field have failed to document such a mutualistic association (Hammond 1994). However, this situation may be due to the nocturnal activity patterns of the *Icaricia icarioides* larvae, because it appears that this species has an obligate relationship with ants (G. Pratt, pers. comm. to C. Nagano 1997). Schultz (pers. comm. 1994) has observed nonnative Argentine ants (*Iridomyrmex humilis*) tending Fender's blue butterfly larvae during indoor rearing trials.

Of the 32 sites where Fender's blue butterfly occurs, *Lupinus sulphureus* ssp. *kincaidii* co-occurs as a larval host plant at 27 of these. The near absence of the Fender's blue butterfly at sites without *Lupinus sulphureus* ssp. *kincaidii* suggests that *L. laxiflorus* (spurred lupine) and *L. albicaulis* (sickle keeled lupine) may be secondary food plants used by the insect (Hammond and Wilson 1993). Occurrences where Fender's blue butterfly apparently does not rely on *L. sulphureus* ssp. *kincaidii* as its primary host plant have been noted at Coburg Ridge where *L. laxiflorus* is the sole host plant across greater than 95 percent of the site (Schultz in litt. 1998), two other sites where *L. laxiflorus* is the primary food plant (Schultz 1996), and an additional two sites where *L. laxiflorus* co-occurs with *L. sulphureus* ssp. *kincaidii* (Hammond and Wilson 1993). Fender's blue butterfly also occupies six sites where *L. albicaulis* is the primary food plant; however, the butterfly is declining at two of these sites.

At this time we have no information to suggest that *Lupinus albicaulis* and/or *L. laxiflorus* are inferior host plants either physically or biochemically, or that the oviposition behavior of the Fender's blue butterfly prefers *L. sulphureus* ssp. *kincaidii.* It is possible that the co-occurrence of these two species is due to environmental factors favoring *L. sulphureus* ssp. *kincaidii* that also favor Fender's blue butterfly. However, this phenomenon of food plant specificity has been documented in other species of butterflies and moths (Longcore *et al.* 1997). We may say, however, that at the majority of sites where Fender's blue butterfly occurs, *L. sulphureus* ssp. *kincaidii* serves as the sole source for larval food and oviposition sites and native wildflowers for adult nectar. Research in collaboration with Katrina Dlugosh (Schultz *in litt.* 1998) indicates that native wildflowers in the Willamette

Valley prairies provide more nectar than nonnative flowers and that Fender's blue butterfly population density is positively correlated with the density of native wildflowers. In Lane County, key native flowers include *Allium amplectans*, *Calachortus tolmiei*, *Camassia quamash*, *Eriophyllum lanatum*, and *Sidalcea virgata* (Schultz *in litt.* 1998).

Lupinus Sulphureus ssp. Kincaidii

In 1924, C.P. Smith first described *Lupinus sulphureus* ssp. *kincaidii* as *L. oreganus* var. *kincaidii* from a collection made in Corvallis, Oregon (Kuykendall and Kaye 1993a). Phillips (1955) transferred the taxon to a subspecies status as *L. sulphureus* ssp. *kincaidii.* Hitchcock *et al.* (1961) retained the position noted by Phillips (1955), but preferred the combination as a varietal rank, *L. sulphureus* var. *kincaidii.*

Lupinus sulphureus ssp. *kincaidii* occupies 48 sites throughout the Willamette Valley. Four sites are in the Umpqua Valley of Douglas County, Oregon, and two sites are in southern Washington. The latitudinal range of the 54 sites of *L. sulphureus* ssp. *kincaidii* spans from Lewis County, Washington, south to Douglas County, Oregon, and a distance of 400 km (320 mi). This distribution implies a close association with native upland prairie sites that are characterized by heavier soils with mesic to slightly xeric soil moisture levels. At the southern limit of its range, the subspecies occurs on well-developed soils adjacent to serpentine outcrops where the plant is often found under scattered oaks (Kuykendall and Kaye 1993a).

Lupinus sulphureus ssp. *kincaidii* is easily distinguished from other sympatric members of the genus *Lupinus* with its low-growing habit and unbranched inflorescence. Its aromatic flowers have a slightly reflexed, distinctly ruffled banner, and are yellowish-cream colored, often showing shades of blue on the keel. The upper calyx lip is short, yet not obscured by the reflexed banner when viewed from above. The leaflets tend to a deep green with an upper surface that is often glabrous (smooth). The plants are 4 to 8 decimeters (dm) (16 to 32 in) tall, with single to multiple unbranched flowering stems and basal leaves that remain after flowering (Kuykendall and Kaye 1993a).

Lupinus sulphureus ssp. *kincaidii* is a long-lived perennial species, with a maximum reported age of 25 years (M. Wilson, Oregon State University, *in litt.*, 1993). Individual plants are capable of spreading by rhizomes (horizontal stems), producing clumps of plants exceeding 20 meters (m) (66 feet (ft)) in diameter (P. Hammond, independent consultant, pers. comm. 1994). The long rhizomes do not produce adventitious roots (secondary roots growing from stem tissue), apparently do not separate from the parent clump, and the clumps may be short-lived, regularly dying back to the crown (Kuykendall and Kaye 1993a). *L. sulphureus* ssp. *kincaidii* is pollinated by solitary bees and flies (P. Hammond, pers. comm. 1994). Seed set and seed production are low, with few (but variable) numbers of flowers producing fruit from year to year, and each fruit containing an average of 0.3–1.8 seeds (Liston *et al.* 1994). Seeds are dispersed from fruits that open explosively upon drying.

Erigeron Decumbens var. Decumbens

Thomas Nuttall (1840) based his description of *Erigeron decumbens* on a specimen he collected in the summer of 1835. The autonym *E. decumbens* var. *decumbens* was automatically established by Cronquist (1947) when he described *E. decumbens* var. *robustior*. Recent revisions of the *Erigeron* genus (Strother and Ferlatte 1988, Nesom 1989) treat the plant as a variety, *E. decumbens* var. *decumbens.*

According to Strother and Ferlatte (1988), *Erigeron decumbens* var. *decumbens* is geographically limited to the Willamette Valley and the morphologically similar *E. decumbens* var. *robustior* is restricted to Humboldt and western Trinity Counties, California. Intermediate specimens of *Erigeron* from southern Oregon are considered by Strother and Ferlatte (1988) to be robust specimens of *E. eatonii* var. *plantagineus.*

Clark *et al.* (1993) reviewed herbarium specimens and found a historical distribution of *Erigeron decumbens* var. *decumbens* throughout the Willamette Valley. He found frequent collections from the period between 1881 and 1934, yet no collections or observations from 1934 to 1980 (Clark *et al.* 1993). The species was rediscovered in 1980 in Lane County, Oregon, and has since been identified at 28 sites in Polk, Marion, Linn, Benton, and Lane Counties, Oregon. With only 28 occurrences and 116 ha (286 ac) of occupied habitat, *E. decumbens* var. *decumbens* has the most restricted range of the species being listed herein.

Erigeron decumbens var. *decumbens* is a perennial herb, 15 to 60 mm (0.6 to 2.4 in) tall, with erect to sometimes prostrate stems at the base. The basal leaves often wither prior to flowering and are mostly linear, 5 to 12 cm (2 to 5 in) long and 3 to 4 mm (0.1 to 0.2 in) wide. Flowering stems produce two to five heads, each of which is daisy-like, with pinkish to pale blue ray flowers and yellow disk flowers. Ray flowers often fade to white with age (Siddall and Chambers 1978). The morphologically similar *E. eatonii* occurs east of the Cascade Mountains, while the sympatric species *Aster hallii* flowers later in the summer. In its vegetative state, *Erigeron decumbens* var. *decumbens* can be confused with *A. hallii*, but close examination reveals the reddish stems of *A. hallii* in contrast to the green stems of *E. decumbens* var. *decumbens* (Clark *et al.* 1993).

As with many species in the family Asteraceae, *Erigeron decumbens* var. *decumbens* produces large quantities of wind-dispersed seed. Flowering typically occurs in June and July with pollination carried out by syphrid flies and solitary bees. Seeds are released in July and August. Although the seeds are wind-dispersed, the short stature of this species likely prevents the long-distance travel of many of these seeds. *Erigeron decumbens* var. *decumbens* is capable of vegetative spreading and is commonly found in large clumps scattered throughout a site (Clark *et al.* 1993).

Previous Federal Action

Erigeron decumbens var. *decumbens* was initially included as a category 2 candidate in a Notice of Review (NOR) published by us on December 15, 1980 (45 FR 82506). At that time, category 2 candidates were those species for which we had information indicating that listing may be appropriate, but for which additional information was needed to support the preparation of a proposed rule. On November 28, 1983, we published an NOR upgrading this species to category 1 status (48 FR 53649). At that time, category 1 taxa were those for which we had sufficient data to support preparation of listing proposals. Subsequently, *E. decumbens* var. *decumbens* was reassigned category 2 candidacy in an NOR published on September 27, 1985 (50 FR 39527). On February 21, 1990, we published an NOR (55 FR 6202) that reinstated *E. decumbens* var. *decumbens* as a category 1 candidate and also designated *Lupinus sulphureus* ssp. *kincaidii* as a category 2 candidate (55 FR 6121). We published an NOR on February 28, 1996 (61 FR 7596), which updated the candidate species list and discontinued the use of categories. *Erigeron decumbens* var. *decumbens* was retained as a candidate species (a candidate was defined as any taxa meeting the definition of former category 1 species). *Lupinus sulphureus* ssp. *kincaidii* and other former category 2 candidates were not retained as

candidates. Since that NOR was published, we have reevaluated the available information and determined that listing is warranted for *L. sulphureus* ssp. *kincaidii.*

Fender's blue butterfly was initially assigned to category 3A taxa in the NOR published on January 6, 1989 (54 FR 572). The best available information at that time indicated that this butterfly was likely extinct because the subspecies had last been observed in 1937. Category 3A taxa were taxa for which we had pervasive evidence of extinction, however, if rediscovered, such taxa might be reconsidered for listing. The rediscovery of this butterfly in May 1989 prompted us to change the status of the subspecies to a category 2 candidate in the NOR published on November 21, 1991 (56 FR 58830). In the NOR published on February 28, 1996 (61 FR 7596), we retained Fender's blue butterfly as a candidate for listing. On January 27, 1998, we published a proposed rule (63 FR 3863) to list the Fender's blue butterfly (*Icaricia icarioides fenderi*), *Lupinus sulphureus* ssp. *kincaidii* (Kincaid's lupine), and *Erigeron decumbens* var. *decumbens* (Willamette daisy) under the Act.

The processing of this final rule conforms with our Listing Priority Guidance published in the **Federal Register** on October 22, 1999 (64 FR 57114). The guidance clarifies the order in which we will process rulemakings. Highest priority is processing emergency listing rules for any species determined to face a significant and imminent risk to its well-being (Priority 1). Second priority (Priority 2) is processing final determinations on proposed additions to the lists of endangered and threatened wildlife and plants. Third priority is processing new proposals to add species to the lists. The processing of administrative petition findings (petitions filed under section 4 of the Act) is the fourth priority. The processing of critical habitat determinations (prudency and determinability decisions) and proposed or final designations of critical habitat will no longer be subject to prioritization under the Listing Priority Guidance. This final rule is a Priority 2 action and is being completed in accordance with the current Listing Priority Guidance.

Summary of Comments and Recommendations

In the January 27, 1998, proposed rule (63 FR 3863) and associated notifications, all interested parties were requested to submit factual reports or information that might contribute to the development of a final listing decision. Appropriate State agencies, county governments, city governments, Federal agencies, scientific organizations, private landowners, industrial landowners and other interested parties were contacted and requested to comment. Newspaper notices inviting public comments were published in the *Oregonian* on February 25–27, 1998, and the *Eugene Register Guard* on February 26–27, 1998. Following the publication of the proposed rule, we received 29 written comments during the comment period.

Five commenters opposed, and 24 favored the listing of *Erigeron decumbens* var. *decumbens* and *Icaricia icarioides fenderi* as endangered and *Lupinus sulphureus* ssp. *kincaidii* as threatened. Several commenters provided information on the status of, and threats to, various populations of *Erigeron decumbens* var. *decumbens*, *Icaricia icarioides fenderi*, and *Lupinus sulphureus* ssp. *kincaidii* that updated the information presented in the proposed rule. We incorporated that information into the Background and Summary of Factors Affecting the Species sections of this final rule, and we took it into consideration in the listing determination. We grouped comments questioning or opposing the proposed rule into issues that are discussed below.

Issue 1: One commenter stated that the information presented in the proposed rule was not accurate for his area and raised questions regarding the accuracy of data in other areas.

Our Response: We reviewed all the data concerning information regarding the area in question. On March 10, 1998, we sent three detailed maps depicting the location of *Lupinus sulphureus* ssp. *kincaidii* at the site and information we had on this locality to the commenter. These maps showed the historical locations of butterflies and *L. sulphureus* ssp. *kincaidii* in the area in question.

In our letter to the landowner, we sought clarification on the status of the population that is/was apparently on the commenter's land. Upon receipt of the letter, the landowner called us and informed us that he did not know the status of the population in question but could check later that summer.

On November 24, 1998, we contacted the landowner. The landowner informed us that a fence in the area where *Lupinus sulphureus* ssp. *kincaidii* occurred had been moved approximately 15 feet north. The area between the old fence and the new fence where *L. sulphureus* ssp. *kincaidii* had occurred was plowed. However, he thought that a couple *L. sulphureus* ssp. *kincaidii* plants occurred along the new fenceline but that the tall grass would probably eliminate them very shortly.

Issue 2: Two commenters opposed listing the Fender's blue butterfly because the butterfly has 360 acres to live on and all food they need if *Lupinus sulphureus* ssp. *kincaidii* is protected by listing.

Our Response: About 30 percent of the Fender's blue butterfly occurs at seven sites across 52 ha (128 ac) of habitat where *Lupinus sulphureus* ssp. *kincaidii* is not present and thus a substantial portion of the butterflies would not be protected by listing the plant. Although one purpose of the Act is to conserve ecosystems upon which endangered and threatened species depend, its listing provisions apply only to species rather than ecosystems (16 U.S.C. 1533).

Issue 3: Two commenters opposed the listing of the three species because it was not stated how much of the 2,600,000 ha (6,400,000 ac) of the Willamette Basin would be affected by this listing action. Commenters expressed concern that farm acreage would be taken out of production through this listing action and farm profits would be lost.

Our Response: The listing of the two plants and the butterfly will impact only those habitat hectares (acres) currently occupied by the species. Within this available habitat, *Erigeron decumbens* var. *decumbens* occupies 28 sites across 116 ha (286 ac), *L. sulphureus* ssp. *kincaidii* occupies 54 sites across 158 ha (370 ac), while Fender's blue butterfly occupies 32 sites across 165 ha (408 ac). The Fender's blue butterfly and *L. sulphureus* ssp. *kincaidii* co-occur at 25 sites across 113 ha (279 ac), and the *E. decumbens* var. *decumbens* co-occurs with both the butterfly and *L. sulphureus* ssp. *kincaidii* on 1 upland site across 49.5 ha (122 ac). Thus, the total area that would be impacted by the listing of these three species is 276 ha (684 ac), not 2,600,000 ha (6,400,000 ac).

Recovery planning for the species may include recommendations for land acquisition or easements involving private landowners. Some of these areas may be unoccupied prairie habitat. These efforts would be undertaken only with the voluntary cooperation of the landowner. In the majority of cases, private landowners are not prevented from using their land in the manner originally intended. Within the Willamette Valley wetland prairies, there are 26 sites across 116 ha (286 ac) where *Erigeron decumbens* var. *decumbens* occurs and that would require Federal regulatory agencies,

primarily the Corps, to ensure that certain actions on these sites, including the issuance of wetland permits under section 404 of the Clean Water Act, are not likely to jeopardize the continued existence of this species. In some cases, the Corps may require that private landowners who apply for permits reduce the scope or extent of their proposed fill project if the fill would adversely affect *E. decumbens* var. *decumbens.*

Landowners will be able to use occupied Fender's blue butterfly habitat (165 ha (407 ac)) as long as the use does not involve the take of the butterfly. The Act and its implementing regulations set forth a series of prohibitions and exceptions that apply to endangered wildlife, including prohibition of take (16 U.S.C. 1538). Take includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these (16 U.S.C. 1532). Permits may be issued to carry out otherwise prohibited activities involving endangered wildlife under certain circumstances. If certain requirements are met, these permits are available for incidental take in connection with otherwise lawful activities.

Executive Order 12630, Government Actions and Interference with Constitutionally Protected Property Rights, require that a Taking Implication Assessment (TIA) be conducted ''as a part of the final rulemaking to evaluate the risk of and strategies for avoidance of the taking of private property.'' However, the Attorney General's guidelines state that TIAs used to analyze the potential for Fifth Amendment ''taking claims'' are to be prepared after, rather than before, an agency makes a restricted discretionary decision. In enacting the Act, Congress required the Department to list a species based solely upon scientific and commercial data indicating whether or not the species is in danger of extinction. We may not withhold a listing based upon economic concerns. Therefore, even though a TIA may be required, a TIA for a listing action is finalized only after the final determination is made regarding whether to list the species.

Peer Review

In accordance with interagency policy published on July 1, 1994 (59 FR 34270), we solicited the expert opinions of appropriate and independent specialists regarding pertinent scientific or commercial biological and ecological data for *Erigeron decumbens* var. *decumbens,* Fenders blue butterfly, and *Lupinus sulphureus* ssp. *kincaidii.* We solicit such a review to ensure that listing decisions are based upon scientifically sound data, assumptions, and analyses, including input of appropriate experts and specialists.

Comments provided by Cathy L. Maxwell, Dr. Robert Michael Pyle, Cheryl B. Schultz, and Dr. Mark Wilson, Associate Professor of Botany and Plant Pathology at Oregon State University were incorporated into the final rule. Cathy L. Maxwell; Dr. Robert Michael Pyle; Cheryl B. Schultz; Dr. Mark Wilson; David Brittell, Assistant Director, Wildlife Management Program, Washington Department of Fish and Wildlife; and Diane S. Doss, Conservation Chair, Washington Native Plant Society, supported our position that *Erigeron decumbens* var. *decumbens* and Fender's blue butterfly were endangered and *Lupinus sulphureus* ssp. *kincaidii* was threatened throughout their limited range in the Willamette Valley of western Oregon and Boistfort Valley, Lewis County, Washington.

Summary of Factors Affecting the Species

Section 4 of the Endangered Species Act and regulations (50 CFR Part 424) issued to implement the listing provisions of the Act set forth the procedures for adding species to the Federal lists. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1). These factors and their application to Fender's blue butterfly (*Icaricia icarioides fenderi), Lupinus sulphureus* ssp. *kincaidii* (Kincaid's lupine), and *Erigeron decumbens* var. *decumbens* (Willamette daisy) are as follows:

A. *The present or threatened destruction, modification, or curtailment of its habitat or range.* Over the last 140 years, humans have extensively altered native prairie in the Willamette Valley (see Background section of this final rule), which has resulted in a loss of greater than 99 percent of the only known habitat area for the Fender's blue butterfly, *Lupinus sulphureus* ssp. *kincaidii,* and *Erigeron decumbens* var. *decumbens* (E. Alverson, pers. comm. 1994).

Within the 88 remnants of native prairie occupied by these species in the Willamette Valley, the Fender's blue butterfly occurs at 32 sites (Hammond and Wilson 1993, Schultz 1996), *Lupinus sulphureus* ssp. *kincaidii* occurs at 54 sites (Kuykendall and Kaye 1993a), and *Erigeron decumbens* var. *decumbens* occurs at 28 sites (Clark *et al.* 1993). Fender's blue butterfly and *L. sulphureus* ssp. *kincaidii* are found in close association, occurring together at a total of 26 sites. *Erigeron decumbens* var. *decumbens* co-occurs with *L. sulphureus* ssp. *kincaidii* at only one site and with Fender's blue butterfly at only this same site, Baskett Butte. Typically these sites are small, with extirpation likely in the near future. Activities that destroy, modify, or curtail the habitat of *L. sulphureus* ssp. *kincaidii, E. decumbens* var. *decumbens,* and Fender's blue butterfly are discussed below.

The immediacy of the threat of habitat loss in the last remaining 88 remnants of native prairie occupied by these species has been well documented. Habitat at 80 percent of the sites (68 sites) is rapidly disappearing due to agriculture practices, development activities, forestry practices, grazing, roadside maintenance, and commercial Christmas tree farming.

Agricultural Activities

Agricultural activities likely impact at least 12 prairie remnants. Five of these remnants are wetland prairies occupied by *Erigeron decumbens* var. *decumbens,* seven are upland prairies of which six are occupied by *Lupinus sulphureus* ssp. *kincaidii,* and two are occupied by Fender's blue butterfly. In one case, a wheat field boundary adjustment near Buell in Polk County (Mill Creek Road South) is likely to lead to loss of a population of Fender's blue butterfly and *L. sulphureus* ssp. *kincaidii* (Hammond 1994). By 1996, this boundary adjustment was implemented with a diminished population of *L. sulphureus* ssp. *kincaidii* and Fender's blue butterfly still present. No Fender's blue butterflies, however, were observed at this site in 1997 (Hammond, pers. comm. 1997). The majority of the habitat supporting populations of each of these species are habitat remnants, such as small habitat patches remaining after other habitat loss has occurred. Small habitat patches that occur along State and county roadsides face greater threats from agriculture than those occurring along non-roadside areas. In past decades, many roadside habitats were less disturbed, but today roadside stretches of habitats adjoining grass seed farms are now being disked and/or sprayed with herbicides to kill all roadside vegetation (A. Robinson, U.S. Fish and Wildlife Service, pers. obs. 1997). Grass seed farms commonly use herbicide spraying to create bare soil to prevent the spread of weeds from roadsides into the grass seed fields. Many of these roadside areas are inhabited by populations of *E. decumbens* var. *decumbens.*

Development

Urban development has caused additional loss of prairie habitat (Clark *et al.* 1993; Hammond and Wilson 1992a, 1992b 1992c, 1994, 1996; Kuykendall and Kaye 1993a; Liston *et al.* 1994; Schultz, 1996; Sidall and Chambers 1978). Destruction of upland prairie habitat occupied by Fender's blue butterfly and *Lupinus sulphureus* ssp. *kincaidii* at several sites since 1992 has caused the butterflies at these sites to either completely die out or to be reduced to low, non-viable numbers. Future losses for 47 prairie remnants are projected as a result of urban development (Hammond 1994, 1996), which is the largest single factor currently threatening the survival of these prairie species. Nineteen of these remnants are wetland prairies supporting *Erigeron decumbens* var. *decumbens,* and the other 28 are upland prairie remnants supporting populations of Fender's blue butterfly and/or *L. sulphureus* ssp. *kincaidii.*

Examples of this type of threat are the Dallas-Oakdale Avenue sites 1 and 2 covering about 2 ha (5 ac) occupied by Fender's blue butterfly and *Lupinus sulphureus* ssp. *kincaidii* near the town of Dallas in Polk County. These sites are expected to be lost due to planned housing development (Hammond 1996). The loss of native prairie habitat is further exemplified by the destruction of a site supporting 6,000 plants in Lane County, formerly the largest occurrence of *Erigeron decumbens* var. *decumbens,* plowed under in 1986 prior to the development of an industrial and residential site (Kagan and Yamamoto 1987). Construction of a single driveway resulted in the loss of one site occupied by Fender's blue butterfly and *L. sulphureus* ssp. *kincaidii* in Kings Valley (Hammond 1994). Future highway construction potentially threatens the Nielson Road site of *E. decumbens* var. *decumbens* located in a highway expansion corridor in Lane County (USFWS 1994). The populations of Fender's blue butterfly and *L. sulphureus* ssp. *kincaidii* at Wren in Benton County occur at 2 sites and cover about 9 ha (22 ac). Only a portion of the populations (7.4 ha) (18 ac) occur on land owned by The Nature Conservancy (TNC). Heavy clearing and mowing activities on private lands adjacent to the TNC property has caused the decline of the lupine and is reducing the butterfly population at the Wren site to a non-viable state (Hammond and Wilson 1993). At the Willow Creek Main site, owned by TNC, Fender's blue butterfly and *L. sulphureus* ssp. *kincaidii* occur together. This site is actively managed for the benefit of the species, and the lands are considered relatively secure from development threats. Although this TNC site is considered a secure habitat area, extensive damage to habitat occupied by Fender's blue butterfly and *L. sulphureus* ssp. *kincaidii* occurred in 1996 during high-voltage power-line repair work conducted on a utility corridor easement. Two other moderately sized habitat patches occupied by *E. decumbens* var. *decumbens* face habitat loss from trash dumping (at the Grande Ronde site) and urbanization (at the west Eugene site) (Clark *et al.* 1993).

Forestry Practices

Silvicultural activities for timber production have threatened 6 percent (5 sites) of the remaining 88 prairie occurrences. The Coburg Ridge area-2 site in Lane County is the largest site occupied by Fender's blue butterfly and is among the best examples of remnant upland native prairie in the Willamette Valley (Hammond 1994). Native species were severely damaged, however, by the application of grass-specific herbicide that eliminated grasses and severely damaged other herbaceous species prior to tree planting activities. Approximately 4 ha (10 ac) were sprayed with herbicide. The saddle section of Coburg Ridge (area-2) that received aerial application of the herbicide is used by Fender's blue butterfly due to the presence of *Lupinus laxiflorus,* an alternate host plant, but this site does not contain *L. sulphureus* ssp. *kincaidii* (Schultz 1996). Loss of such alternate host plant sites further limits the habitat that is available to support Fender's blue butterfly. Additional tree-planting efforts by an adjacent Coburg Ridge landowner threaten to alter a different portion of the grassland in area-2, which has displayed the highest levels of butterfly activity on Coburg Ridge in previous years (Schultz 1996). This site received spot herbicide application during the planting efforts, rather than the aerial broadcast method of the first case; therefore, the immediate effects to the habitat were not as severe. However, tree saplings were planted and as the trees grow they will eventually shade out the native prairie species, resulting in the loss of butterfly habitat.

Herbicide spraying associated with reforestation, after logging, has also altered habitat and caused a decline of a *Lupinus sulphureus* ssp. *kincaidii* population on Bureau of Land Management (BLM) properties. At the BLM Letitia Creek Site, *L. sulphureus* ssp. *kincaidii* is located within a timber sale unit proposed for future harvest at the beginning of year 2020. The Callahan Ridge BLM site is located on the boundary between timber available for harvest and a non-commercial rocky area that has been withdrawn from the timber base. No timber harvest has been scheduled for the timber portion of this site for the next 30 years. The Letitia Creek area, where plants of *L. sulphureus* ssp. *kincaidii* are located, was impacted when the jeep trail running along the ridge was renovated and the surrounding forest selectively logged. Renovation of the jeep road destroyed most of the plants along the road and only a small portion of the original population remains. The other large occurrence of the butterfly and *L. sulphureus* ssp. *kincaidii* is in Benton County on McDonald State Forest and adjacent private lands that could be similarly affected by surrounding silvicultural operations.

Grazing

Grazing currently impacts 13 of the occupied habitat patches, with 5 of these being wetlands occupied by *Erigeron decumbens* var. *decumbens*. Most of the habitat at the Oak Ridge south site, in Yamhill County, occupied by Fender's blue butterfly and *Lupinus sulphureus* ssp. *kincaidii,* has been lost due to heavy grazing (Hammond 1996). Another site of *L. sulphureus* ssp. *kincaidii,* covering about 4.6 ha (11 ac) at Crabtree Hill in Lane County, is being damaged by extensive livestock grazing. The Crabtree Hill population of 6,000 plants is the largest known *L. sulphureus* ssp. *kincaidii* population. At Boistfort Cemetery, cattle grazing remains as a threat to the *L. sulphureus* ssp. *kincaidii* population on the cemetery hill. Cattle at the Boistfort site had full access to the cemetery hill in the mid-1980s when cattle trails criss-crossed the hill and few lupines were observed (Maxwell *in litt.* 1998). In 1986, Maxwell estimated the plants on the cemetery hill to be 50 to 60 individuals (Maxwell *in litt.* 1998). In 1991, after cattle were removed from the site, Maxwell inventoried the cemetery hill and estimated 1,685 individuals of *L. sulphureus* ssp. *kincaidii*, with 58 plants located on the west-facing side of the hill where there was no evidence of cattle grazing, but where horses occurred (Maxwell *in litt.* 1998). Subsequent inventories at the cemetery site recorded similar numbers of individuals as the 1991 data, with minimal increases and decreases that could be accounted for by sampling error and environmental fluctuation. These data suggest that the removal of cattle from the hillside has helped to

increase the size of the *L. sulphureus* ssp. *kincaidii* population (Maxwell *in litt.* 1998). *Lupinus sulphureus* ssp. *kincaidii* on the west-facing part of the hill where horses continue to occur, however, show evidence of trampling, and populations have not experienced a similar upward trend (Maxwell *in litt.* 1998).

Roadside Maintenance

Another common threat to these species is roadside maintenance activities. At least 34 sites occur along roadsides and are impacted by maintenance activities. Five of these are wetland areas supporting *Erigeron decumbens* var. *decumbens.* Twenty-nine are upland sites (*Lupinus sulphureus* ssp. *kincaidii* occurs at 27 sites and Fender's blue butterfly occurs at 11 sites). Populations of Fender's blue butterfly and *L. sulpheureus* ssp. *kincaidii* were recently lost due to road maintenance activities at the Oak Ridge north site. When planned developments are completed on the Oak Ridge south site, the butterfly and lupine will essentially be extirpated from the Oak Ridge area (Hammond 1996). Two sites on Oregon Department of Transportation (ODOT) property and one site on land owned by the City of Corvallis receive only limited protection and could potentially be impacted by future development and highway maintenance activities. Publicly owned roadside sites receive varying degrees of protection on a district-by-district basis. Although some roadside sites have been marked as no-spray zones by the Native Plant Society of Oregon, this protective measure is not always effective. The roadside portion of a *L. sulphureus* ssp. *kincaidii* population in Kings Valley continues to receive herbicide application during roadside weed control activities, despite efforts to restrict spraying. Other roadside sites receive only sporadic protection during herbicide application. Privately managed roadside occurrences are also impacted by maintenance activities. Extensive mowing at the Wren sites in Benton County and Fir Butte Road roadside sites in Lane County have caused declines in Fender's blue butterfly and *L. sulphureus* ssp. *kincaidii* populations (Hammond 1994).

With frequent weed control efforts ongoing, as well as highway and driveway construction, small roadside occurrences of Fender's blue butterfly, *Lupinus sulphureus* ssp. *kincaidii*, and *Erigeron decumbens* var. *decumbens* are unlikely to persist. For example, another sensitive species, *Delphinium leucophaeum,* in Boistfort Valley, Lewis County, Washington, has been damaged by roadside herbicide spraying by the County. The spraying swath is sometimes 0.9 to 1.2 m (3 to 4 ft.) wide. Several *D. leucophaeum* plants were damaged by spray in 1991 (Maxwell *in litt.* 1998). Botanists met with the roadside management crew in May of 1991 to point-out and discuss no-spray zones where *D. leucophaeum* occur. Since then, *D. leucophaeum* plants have been lost twice because of landowners spraying the roadsides to control weedy nonnative species that invade their pastures and fields (Maxwell *in litt.* 1998). The *L. sulphureus* ssp. *kincaidii* population within the Boistfort Valley does not occur along the roadsides, but along a path that leads up to a pioneer cemetery. Since monitoring began in 1991, a 3-m (1-ft) wide strip has been sprayed with herbicides along the path and steps leading up to the cemetery. Some of the *Lupinus sulphureus* ssp. *kincaidii* plants are damaged by the annual spraying (Maxwell *in litt.* 1998).

Between 1994 and 1996, Fender's blue butterfly populations disappeared from (or were considered no longer viable) at least seven small roadside sites (Liberty Road, Monmouth Falls City Road, Fern Corner, Grant Creek, and McTimmonds Valley in Polk County, and two sites at Wren), and populations at many of the remaining roadside sites continue to decline. Between 1990 and 1992, three sites occupied by both Fender's blue butterfly and *L. sulphureus* ssp. *kincaidii* were lost in the McTimmond's Valley to the expansion of Christmas tree farming operations (Hammond 1994). Conversion of these three sites destroyed approximately 3 ha (7 ac) of habitat along roadside and private land that comprised the nucleus of two Fender's blue butterfly populations and a substantial number of *L. sulphureus* ssp. *kincaidii* plants. The two roadside occurrences of the butterfly that remain nearby are no longer considered viable due to the loss of the source butterfly populations and considerable numbers of *L. sulphureus* ssp. *kincaidii* plants. We do not know if the two roadside occurrences still exist, but if they do, they are not expected to persist for more than a few additional years (Hammond 1994).

In summary, habitat loss from a wide variety of causes (e.g., urbanization, agriculture, silvicultural practices, and roadside maintenance) is a severe problem faced by Fender's blue butterfly, *Lupinus sulphureus* ssp. *kincaidii,* and *Erigeron decumbens* var. *decumbens* at a majority of occupied sites. Land development and alteration in the Willamette Valley has been so extensive that almost all of the occurrences of the three species on the valley floor have essentially been relegated to small patches of habitat. Agricultural and urban development activities occurring on the valley floor have not affected three hilltop areas (Baskett Slough National Wildlife Refuge, Coburg Ridge, and McDonald State Forest) because of their topography. Only 20 of the 88 remnant prairie sites that are occupied by 1 or more of these species are currently not threatened with habitat destruction. However, these 20 sites are threatened by herbivory, competition by nonnative weedy species, and/or plant succession (see Factor E of this final rule for additional discussion). As habitat loss continues on these prairie remnants, populations of all 3 species in these 68 areas are likely to be extirpated. At least 14 of 32 sites occupied by Fender's blue butterfly, 49 of 54 sites occupied by *L. sulphureus* ssp. *kincaidii,* and 24 of 28 sites occupied by *E. decumbens* var. *decumbens* occur on private lands and are expected to be lost in the near future unless conservation actions are implemented. The threat of extinction for these species is high, given the expected continuing extirpation of small populations, the continued habitat loss on moderate and large sites, and the continuing degradation of habitat, even on secure sites.

B. *Overutilization for commercial, recreational, scientific, or educational purposes.* Rare butterflies, such as Fender's blue butterfly are highly prized by insect collectors. We know of no studies of the impact of such removal of individuals from natural populations of Fender's blue butterfly. However, studies of another lycaenid butterfly (Duffey 1968) and an endangered nymphalid butterfly (Gall, 1984a and 1984b) suggest it is likely that Fender's blue butterfly could be adversely affected by collection because of its small and isolated populations. An international commercial trade of butterfly species that are proposed for listing, as well as other imperiled or rare butterflies, exists (C. Nagano, J. Mendoza, and C. Schroeder, USFWS, pers. obs., 1992–1997), and we know of specimens of Fender's blue butterfly that have recently been offered for trade (C. Nagano, pers. obs.). Some collectors and dealers closely monitor our listing activities, and have stockpiled rare butterflies in anticipation of their designation as endangered or threatened species (C.D. Nagano and J. Mendoza, pers. obs., 1992). Collecting from small colonies or repeated handling and marking (particularly of females and in years of low abundance) could seriously

damage the populations through loss of individuals and genetic variability (Gall 1984b; Murphy 1988; Singer and Wedlake 1981). Collection of females dispersing from a colony also can reduce the probability that new colonies will be founded. Butterfly collectors pose a threat because they may be unable to recognize when they are depleting butterfly colonies below the thresholds of survival or recovery, especially when they lack appropriate biological training or the area is visited for a short period of time (Collins and Morris 1985).

The 1989 rediscovery of this insect generated a great deal of publicity and interest, which in turn increased demand by collectors. Therefore, remaining populations of Fender's blue butterfly face strong pressure from some members of the collecting community. Collectors who highly prize rare butterflies often take all wild specimens obtainable for use in trade (U.S. Department of Justice, *in litt.* 1993). Because many of the Fender's blue butterfly populations occur along public roadsides, the species is easily acquired. The extremely limited numbers and distribution of many of the remaining populations makes this species vulnerable to extinction due to collection.

No current evidence exists of horticultural collection or other overutilization for scientific purposes for either *Erigeron decumbens* var. *decumbens* or *Lupinus sulphureus* ssp. *kincaidii.* However, the potential threat posed by collecting for personal herbarium specimens may be significant, particularly where populations are small, due to the species' rarity and the relative accessibility of roadside populations.

C. *Disease or predation.* Although most lepidopteran larvae suffer significant mortality from parasitoid attack, no instances of parasitism (Hammond and Wilson 1993) or disease (R.H.T. Mattoni, pers. comm. to C. Nagano 1997) have been documented for Fender's blue butterfly. Predation of adult Fender's blue butterflies by crab spiders has been observed on at least two occasions (Schultz *in litt.* 1998). The white and/or yellow crab spiders hide in the flowers of *Lupinus sulphureus* ssp. *kincaidii,* and in a variety of species that the Fender's blue butterfly uses for nectar, such as *Allium amplectans* (Schultz *in litt.* 1998). Under normal circumstances, predation likely was not a significant threat, but because the species has been reduced to such low levels, predation may significantly impact the persistence of remaining populations.

Lupinus sulphureus ssp. *kincaidii* evidently hosts a number of herbivorous and parasitic insect species. Gall-forming insects attack unopened flowers and the bases of woody stems. Weevils lay eggs in the developing floral embryos, and their offspring stimulate the fruit to produce callous tissue as a food source. Misdirection of the developing fruit by weevil larvae effectively prevents viable seed formation in the parasitized fruits (Kuykendall and Kaye 1993b). Weevil damage at some sites (e.g., Willow Creek) can be high, with some plants suffering 90 percent loss of mature fruits (E. Alverson, pers. comm. 1994). Herbivory has been documented at all three Fern Ridge Reservoir sites. Loss of floral parts through herbivory can also significantly reduce reproduction. Larvae of the silvery blue butterfly (*Glaucopsyche lygdamus*) graze flowers for pollen and in doing so effectively destroy them. At the Fir Butte site, silvery blue butterfly larvae cause significant seed damage, as well as pollen damage to *L. sulphureus* ssp. *kincaidii.* They often chew through maturing pods, devour some or all of the seeds, then move on to the next pod (Schultz *in litt.* 1998). Silvery blue larvae can reach high population densities at some of the sites and may reduce the fecundity of *L. sulphureus* ssp. *kincaidii*, but do not appear to cause the death of mature individual plants (C. Schultz, pers. comm. 1994). On July 14, 1991, at the Boistfort Prairie site, pods of *L. sulphureus* ssp. *kincaidii* were observed with larvae feeding on them, and ants were feeding on the juices excreted from the larvae (Maxwell *in litt.* 1998). In a sample of 10 *L. sulphureus* ssp. *kincaidii* plants, 5 damaged pods were observed (Maxwell *in litt.* 1998). In 1992, adult silvery blue butterflies were positively identified as being present, and the caterpillars of the blues were observed feeding on *L. sulphureus* ssp. *kincaidii.* In 1993, damage to *L. sulphureus* ssp. *kincaidii* pods was observed again, but less than in the previous 2 years (Maxwell *in litt.* 1998). Under normal circumstances, insect herbivory likely was not a significant threat, but because the species has been reduced to such low levels, herbivory may significantly impact the persistence of remaining populations.

Evidence of insect herbivory on *Erigeron decumbens* var. *decumbens* is limited. Insect species collected on *E. decumbens* var. *decumbens* in 1993 included sap-sucking insects (Hemiptera), a bruchid beetle, thrips, and mites (Clark *et al.* 1993). Other threats from herbivory include consumption of *E. decumbens* var. *decumbens* by cattle. However, no plants were found in areas currently or recently grazed during surveys conducted in 1986 (Kagan and Yamamoto 1987), and only one site was observed to support *E. decumbens* var. *decumbens* in the presence of cattle in 1993 (Clark *et al.* 1993).

D. *The inadequacy of existing regulatory mechanisms.* In 1963, the protection of natural botanical resources by the State of Oregon was initiated with the passage of the Oregon Wildflower Law (ORS 564.010–564.040). This law was designed to protect specific showy botanical groups including lilies, shooting stars, orchids, and rhododendrons from collection and trade by horticulturists interested in the cultivation of these species. It also prohibits the collection of wildflowers from ''within 500 feet of the centerline of any public highway'' (ORS 564.020 (2)). Although protective in spirit, the Oregon Wildflower Law carries minimal penalties and is rarely enforced. We doubt that this law is effective in protecting *Lupinus sulphureus* ssp. *kincaidii* and *Erigeron decumbens* var. *decumbens* populations.

In 1987, Oregon Senate Bill 533 was passed to augment the legislative actions available for the protection of the State's threatened and endangered species, both plant and animal. This bill, known as the Oregon Endangered Species Act, mandates responsibility for threatened and endangered species in Oregon to two State agencies—the Oregon Department of Agriculture (ODA) for plant species (ORS 564.105) and the Oregon Department of Fish and Wildlife (ODFW) for ''wildlife'' species (ORS 496.172). As re-authorized in 1995 (HB 2120), the Oregon Endangered Species Act does not include invertebrate animals in the definition of ''wildlife.'' Therefore, Fender's blue butterfly receives no protection under the Oregon Endangered Species Act. The Oregon Natural Heritage Program is the only State agency ''which tracks locations of and works to protect the rare, threatened and endangered invertebrates of Oregon'' (Oregon Natural Heritage Program 1993). The Heritage program has created a Sensitive Species invertebrate list, which includes Fender's blue butterfly as a ''priority 1 species.'' Priority 1 species are ''taxa that are threatened or endangered throughout their range'' (Oregon Natural Heritage Program 1993). The program can assist planning agencies in managing lands for the benefit of rare invertebrate taxa, but it has no regulatory authority over rare

invertebrates (Jimmy Kagan, Oregon Natural Heritage Program, pers. comm. 1997).

The Oregon Endangered Species Act directs the ODA to maintain a strong program to conserve and protect native plant species classified by the State as threatened or endangered. *Erigeron decumbens* var. *decumbens,* as a State-listed endangered species, and *Lupinus sulphureus* ssp. *kincaidii*, as a State-listed threatened species, receive protection on State-managed lands under the Oregon Endangered Species Act. The ODA is able to regulate the import, export, or trafficking of State-listed plant species when they are in transit (under ORS 564.1200). The ODA's ability to protect plant populations, by restricting take under the Oregon Endangered Species Act, is limited to ''land owned or leased by the state, or for which the state holds a recorded easement'' (ORS 564.115). ''Nothing in ORS 564.100 to 564.130 is intended . . . to require the owner of any commercial forest land or other private land to take action to protect a threatened species or endangered species'' on their lands (ORS 564.135 (1)). As a result, populations of *L. sulphureus* ssp. *kincaidii* and *E. decumbens* var. *decumbens* on private lands receive minimal protection from their State status as endangered or threatened.

ODOT owns and manages roadside habitat where *Lupinus sulphureus* ssp. *kincaidii* and *Erigeron decumbens* var. *decumbens* are present. The Oregon Endangered Species Act requires the protection of these State-listed species on this State-managed land. In conjunction with Oregon State University researchers and the Native Plant Society of Oregon, ODOT has responded by providing road crews with maps of these areas and instructions to avoid herbicide use in these areas.

Lupinus sulphureus ssp. *kincaidii, Erigeron decumbens* var. *decumbens*, and Fender's blue butterflies receive protection within the boundaries of the Service's National Wildlife Refuges. All three species occur together only at Baskett Slough National Wildlife Refuge, where habitat for the benefit of these species is actively managed.

The BLM and the Forest Service (FS) manage lands occupied by *Lupinus sulphureus* ssp. *kincaidii*. On lands managed by the BLM, this species receives some protection through a general conservation agreement that applies to all Federal candidate species on BLM properties. The population of *L. sulphureus* ssp. *kincaidii* that occurs in the Umpqua National Forest is not covered under any conservation agreement.

On Corps lands, discretion for the protection and management of State-listed and Federal candidate species lies at the local level. Funds may be available in some years to proactively manage these species. *Lupinus sulphureus* ssp. *kincaidii, Erigeron decumbens* var. *decumbens*, and Fender's blue butterfly have received habitat protection, as well as support for research activity from the Corps through allocation of personnel and supplies to these projects. This protection and cooperation is voluntary for candidate species and is dependent on the continuation of sufficient funding.

Populations of *Erigeron decumbens* var. *decumbens* occur in seasonally flooded wet prairies with hydric soils (Clark *et al.* 1993). Under section 404 of the Clean Water Act (CWA), the Corps regulates the discharge of fill into waters of the United States, including navigable waters, wetlands (e.g., wet prairies), and other waters (33 CFR parts 320–330). The CWA requires project proponents to obtain a permit from the Corps prior to undertaking many activities (e.g., grading, discharge of soil or other fill material) that would result in the filling of wetlands subject to the Corps' jurisdiction. The Corps published nationwide permit number 26 (NWP 26) to address fill of isolated or headwater wetlands. Under the 1996 reauthorization of NWP 26 (61 FR 65873), the Corps may automatically approve project proposals that involve the fill of wetlands less than 0.13 ha (0.33 ac) in size. Filling areas between 0.13 ha and 0.4 ha (0.33–1 ac) requires only notification to the Corps. When placement of fill would adversely modify between 0.4 and 1.2 ha (1 and 3 ac) of wetland, the Corps circulates a pre-discharge notification to us and other interested parties for comment to determine whether an individual permit should be required for the proposed fill activity and associated impacts.

Individual Corps permits are required for discharge of material that would fill or adversely modify greater than 1.2 ha (3 ac) of wetlands. The review process for individual permits is more rigorous than for nationwide permits. Unlike nationwide permits, a cumulative analysis of wetland impacts is required for individual permit applications. Resulting permits may include special conditions that require potential avoidance or mitigation for environmental impacts. On nationwide permits, the Corps has discretionary authority to require an individual permit if the Corps believes that resources are sufficiently important, regardless of the wetland's size. In practice, however, the Corps generally does not require an individual permit when a project qualifies for a nationwide permit unless a threatened or endangered species or other significant resources would be adversely affected by the proposed activity. When a listed species may be affected, consultation requirements of section 7 of the Act do pertain to the Corps' regulatory process.

Disking and some other farming, ranching, and silvicultural practices can degrade or destroy wetland habitat without a permit from the Corps because these activities are exempt from regulation under the CWA (33 CFR 323.4(a)). The discontinuous configuration of the existing wet prairies further obscures these wetland losses. Occurrences of *Lupinus sulphureus* ssp. *kincaidii* and Fender's blue butterfly in upland (non-wetland) areas receive no protection under section 404 of the CWA.

The primary inadequacies in existing regulatory mechanisms pertain to populations of Fender's blue butterflies, *Lupinus sulphureus* ssp. *kincaidii*, and *Erigeron decumbens* var. *decumbens* that occur on private lands. Privately owned lands where populations of these species occur constitute a significant portion of the range of these species and play a substantial role in their continued existence.

E. *Other natural or manmade factors affecting its continued existence.* The small and fragmented populations characteristic of the remaining Fender's blue butterfly, *Lupinus sulphureus* ssp. *kincaidii*, and *Erigeron decumbens* var. *decumbens* constitute a factor in affecting the continued existence of these taxa. Small populations are more vulnerable to all the natural and manmade factors that would not likely negatively influence relatively large and contiguous populations. Generally, the direct and indirect effects of small population size on most species, plant and animal, include loss of connectivity for dispersal, a decrease in genetic exchange, a resultant loss of population viability and vigor, and a hastening towards extinction (Gilpin and Soule 1986).

Although few large sites (greater than 10 ha (25 ac)) are secure from habitat loss, large sites currently support relatively stable populations of Fender's blue butterflies, *Lupinus sulphureus* ssp. *kincaidii*, and *Erigeron decumbens* var. *decumbens* and provide the greatest potential for long-term persistence of the species if the current condition of these sites can be sustained or improved. The only large site occupied

by all of the species and that is considered relatively secure from habitat loss is Baskett Slough National Wildlife Refuge in Polk County, although the habitat condition is declining from invasion by nonnative weedy species (Hammond 1994, 1996; Hammond and Wilson 1993; Schultz 1994). The two remaining large butterfly sites (Coburg Ridge area-1 and 2, and McDonald State Forest 1) and the one remaining large *L. sulphureus* ssp. *kincaidii* site (McDonald State Forest 1) are not considered secure because these sites face loss or degradation of habitat through adjacent silviculture operations, ecological succession to shrub and forest, and competition from nonnative weedy species (Hammond 1994, Kuykendall and Kaye 1993a).

Erigeron decumbens var. *decumbens* occupies three large sites. One site on Corps property and another on TNC property are being managed to benefit native prairie species and are relatively secure. The third site occurs on private land and is not managed for native prairie species and is not protected from habitat loss.

The sites with small acreage where these three taxa occur, such as roadside and fence line/boundaries, face an immediate threat of destruction from a variety of disturbances. These disturbances include development, agriculture, silvicultural practices, roadside maintenance, and herbicide application. Of the 54 sites occupied by *Lupinus sulphureus* ssp. *kincaidii,* 45 occur on less than 3.4 ha (8.3 ac). On sites where Fender's blue butterflies are found to co-occur with *L. sulphureus* ssp. *kincaidii,* a similar pattern is suggested, with 24 of the 32 populations occurring on parcels of 3.4 ha (8.3 ac) or less. Of the 28 sites occupied by *Erigeron decumbens* var. *decumbens,* 20 are less than 3.4 ha (8.3 ac).

Given the impact of such habitat losses on these small habitat patches, the extirpation of most of the small Fender's blue butterfly populations is anticipated within the next 5 years. *Lupinus sulphureus* ssp. *kincaidii* may, however, survive for a longer time in these small sites. Nonetheless, because of the extensive habitat loss caused by development and agriculture, the extirpation of *L. sulphureus* ssp. *kincaidii* on the 45 small sites is also anticipated in the future. Similarly, these habitat losses are expected to also cause the extirpation of the 20 small populations of *Erigeron decumbens* var. *decumbens.* Should these smaller populations disappear, only large habitat sites will be left. Only eight sites of Fender's blue butterfly (75 percent reduction), nine sites of *L. sulphureus* ssp. *kincaidii* (74 percent reduction), and eight sites of *E. decumbens* var. *decumbens* (72 percent reduction) will remain.

The importance of these small populations, particularly for the Fender's blue butterfly, lies in their potential to serve as stepping stones between larger neighboring populations. The loss of these populations and the accompanying potential habitat would severely compromise the ability of *Lupinus sulphureus* ssp. *kincaidii* and *Erigeron decumbens* var. *decumbens* or the Fender's blue butterfly to disperse from larger sites (Hammond and Wilson 1993, Schultz 1996). Larger populations would become more isolated and extinction-prone as opportunities for migration and/or recolonization are limited.

A less visible threat to the smaller populations is a decrease in vigor and viability. For the Fender's blue butterfly, small numbers and localized populations increase the risk of loss through random genetic or demographic factors. (Gilpin and Soule 1986, Kuykendall and Kaye 1993b, Lacy 1992, Hammond and Wilson 1993). Nineteen of the 32 Fender's blue butterfly sites contain an estimated 50 or fewer individuals. The threat of extinction due to naturally occurring genetic or demographic events can play a significant role in the instability of the species as a whole. The isolation of these small populations due to habitat fragmentation limits the potential for dispersal and migration and the resultant exchange of genetic material. Small, isolated populations with no opportunity of rescue from neighboring populations more easily become non-viable and/or extirpated.

This pattern of extinction and re-colonization of connected colonies of butterflies has been disrupted by the extensive fragmentation of remaining habitat and the disruption of the disturbance regimes that have maintained them. The remnant populations, now small in numbers, are either unconnected or exchange individuals to a very limited degree. With their limited dispersal abilities, low numbers, and dwindling habitat, a majority of the remaining populations of Fender's blue butterfly likely face permanent extirpation.

The effects of random environmental events are magnified in small populations. For instance, one small population of *Erigeron decumbens* var. *decumbens* previously found on Finley National Wildlife Refuge was lost due to erosion from a natural change in a waterway course (Meinke 1980). Large fluctuations in Fender's blue butterfly populations have been correlated with random variations in weather conditions from year to year (Shultz 1996). These large fluctuations make Fender's blue butterfly extremely susceptible to loss of habitat and host plants due to human-caused disturbance or invasive nonnative plants. Maxwell (*in litt.* 1998) observed fluctuations in the inventory counts for both *Lupinus sulphureus* ssp. *kincaidii* and *Delphinium leucophacum* over a 4-year period on the Boistfort Prairie. *Lupinus sulphureus* ssp. *kincaidii* counts ranged from 742 to 2,266 plants and strong evidence existed that these fluctuations in numbers were closely tied to weather patterns (Maxwell *in litt.* 1998). The timing of spring rains is very critical for production of above-ground biomass for these two species. In years with lower than average precipitation, these plant species may not even appear.

A serious long-term threat to all Fender's blue butterfly, *Lupinus sulphureus* ssp. *kincaidii,* and *Erigeron decumbens* var. *decumbens* sites is the change in community structure due to plant succession. Continuing plant succession has been documented on 70 of the 88 relic prairie sites occupied by 1 or more of these species. Invasion by alien plant species has been documented at 37 of these 88 prairie sites. The natural transition of grassland to forest in the absence of disturbance such as fire will lead to the eventual loss of these prairie sites unless they are actively managed (Clark *et al.* 1993; Franklin and Dyrness 1973; Hammond and Wilson 1993; Johannsesen *et al.* 1971; Kuykendall and Kaye 1993a). The presence of tall, fast-growing nonnative species speeds the conversion of upland native prairie to dense, rank grasslands and shrub lands. Invasive woody species of concern include nonnative plants such as *Rubus discolor* (Himalayan blackberry) and *Cytisus scoparius* (Scotch broom), and the native species *Toxicodendron diversiloba* (poison oak). Nonnative weedy herbaceous species include *Cirsium arvense* (Canada thistle). Nonnative grass species aggressive enough to suppress *L. sulphureus* ssp. *kincaidii* and *E. decumbens* var. *decumbens* include *Holcus lanatus* (velvet grass), *Dactylis glomerata* (orchard grass), *Brachypodium sylvaticum* (false-brome), and *Arrhenatherum elatius* (tall oat-grass) (Hammond 1996).

At prairie remnant roadside sites, the degree of the threat of succession varies, depending on the vegetation control employed by each county. Many Fender's blue butterfly populations are close to local extinction at small

roadside sites. Populations along the roadside generally have low numbers of individuals because habitat, often degraded, can be invaded by nonnative grasses. This situation usually leads to succession by shrubs and trees (Hammond 1996). For instance, one roadside site at Oak Ridge previously considered stable has declined since 1992 because large thickets of *Rubus* ssp. (blackberry) and *Cytisus scoparius* have invaded the site (Hammond 1996).

Non-roadside prairie remnant sites in general face the greatest threat from succession/weed expansion and invasion due to a lack of disturbance that disrupts successional progress. For instance, otherwise secure habitat on one Corps site has been heavily invaded by the nonnative plant *Arrhenatherum elatius.* The Fender's blue butterfly population on this site is becoming extremely small (Schultz 1996). Prime habitat occupied by *Erigeron decumbens* var. *decumbens* at the Baskett Butte site is rapidly being overtaken by native woody plants, nonnative grasses and trees (Hammond 1996). Approximately 25 percent of the large Coburg Ridge site occupied by Fender's blue butterfly and *Lupinus sulphureus* ssp. *kincaidii* is threatened by the profuse shrub growth of *Cytisus scoparius* (Hammond 1996). Regardless of the size of the site, invasion by nonnative plants is a threat at all sites occupied by any of the three species addressed in this rule.

Compounding the threat of nonnative plant species is the control of weedy nonnative species by herbicides. Twenty-three *Lupinus sulphureus* ssp. *kincaidii* plants on the west side of the Boistfort Cemetery hill site were damaged by herbicide spray applied by a helicopter to eradicate Scotch broom and Canada thistle (Maxwell *in litt.* 1998). The application of pesticides and biological control agents to control insect pests, such as gypsy moths, is also a threat to Fender's blue butterfly. The potential threat from use of gypsy moth control agents on habitats occupied by the Fender's blue butterfly should not be dismissed even though the sensitivity of Fender's blue butterfly larvae to specific insecticides is not known (Hammond 1994). The use of microbial insecticides, such as *Bacillus thuringiensis* (Bt), has been shown to have significant residual toxic impacts on native butterflies. This negative impact is evident under field conditions, even with heavy rain and ultraviolet light exposure (Scriber and Gage 1995).

Summary

Natural and human-caused factors threaten the remaining populations of Fender's blue butterflies, *Lupinus sulphureus* ssp. *kincaidii,* and *Erigeron decumbens* var. *decumbens.* As a result of their small size, nearly all of the populations are threatened by either nonnative species, natural succession, or demographic and genetic factors. Populations of Fender's blue butterfly at all 32 sites currently are threatened by at least 1 of these factors. All 28 sites of *E. decumbens* var. *decumbens* and all 54 sites of *L. sulphureus* ssp. *kincaidii* are threatened by these factors. The encroachment of nonnative plants, the successional advance of tree and shrub species, and other naturally occurring random events will, if unchecked, lead to further reductions in population size and number leading to reduced population viability and, ultimately, the extinction of these three native prairie species.

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by these species in developing this final rule. Threats to Fender's blue butterfly are more imminent than threats to *Lupinus sulphureus kincaidii* because the butterfly has a unique biology and shorter lifespan. Fender's blue butterfly will exhibit more rapid declines in numbers and in the face of threats will be extirpated more quickly at any one location than either of the two plant species. Because of the longer lifespan of a perennial plant, small numbers of *L. sulphureus* ssp. *kincaidii* plants are likely to persist longer in any given habitat than are small numbers of butterflies. The threats to *Erigeron decumbens* var. *decumbens* are more imminent than threats to *L. sulphureus* ssp. *kincaidii* because of the small number of *E. decumbens* var. *decumbens* populations. Also, many of the *E. decumbens* var. *decumbens* populations grow along roadsides adjacent to agricultural development (especially grass seed farms) where herbicide spraying to create bare soil is common practice. Based on our evaluation of all the available information, Fender's blue butterfly and *E. decumbens* var. *decumbens* are presently in danger of extinction throughout all or a significant portion of their respective ranges, while *L. sulphureus* ssp. *kincaidii* is likely to become endangered within the foreseeable future. Therefore, we find that listing of Fender's blue butterfly (*Icaricia icarioides fenderi*) and *E. decumbens* var. *decumbens* (Willamette daisy) as endangered is appropriate, and listing of *L. sulphureus* ssp. *kincaidii* (Kincaid's lupine) as threatened is appropriate.

Critical Habitat

Critical habitat is defined in section 3(5)(A) of the Act as (i) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. The term ''conservation'' means the use of all methods and procedures needed to bring the species to the point at which listing under the Act is no longer necessary (16 U.S.C. 1532(3)(5)(A)).

Our regulations (50 CFR 424.12(a)(1)) state that designation of critical habitat is not prudent when one or both of the following situations exist—(1) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of threat to the species, or (2) such designation of critical habitat would not be beneficial to the species.

In the proposed rule, we indicated that designation of critical habitat was not prudent for Fender's blue butterfly (*Icaricia icarioides fenderi*), *Lupinus sulphureus* ssp. *kincaidii* (Kincaid's lupine), and *Erigeron decumbens* var. *decumbens* (Willamette daisy) because of a concern that publication of precise maps and descriptions of critical habitat in the **Federal Register** could increase the vulnerability of these species to incidents of collection and/or vandalism. We also indicated that designation of critical habitat was not prudent because we believed the limited benefit provided by designation was outweighed by the increase in threats from collection and/or vandalism.

In the last few years, a series of court decisions have overturned our determinations regarding a variety of species that designation of critical habitat would not be prudent (e.g., *Natural Resources Defense Council* v. *U.S. Department of the Interior* 113 F. 3d 1121 (9th Cir. 1997); *Conservation Council for Hawaii* v. *Babbitt*, 2 F. Supp. 2d 1280 (D. Hawaii 1998)). Based on the standards applied in those judicial opinions, we have reexamined the question of whether critical habitat for Fender's blue butterfly (*Icaricia*

icarioides fenderi), *Lupinus sulphureus* ssp. *kincaidii* (Kincaid's lupine), and *Erigeron decumbens* var. *decumbens* (Willamette daisy) would be prudent.

Due to the small number of populations, Fender's blue butterfly (*Icaricia icarioides fenderi*), *Lupinus sulphureus* ssp. *kincaidii* (Kincaid's lupine), and *Erigeron decumbens* var. *decumbens* (Willamette daisy) are vulnerable to unrestricted collection, vandalism, or other disturbance. We remain concerned that these threats might be exacerbated by the publication of critical habitat maps and further dissemination of locational information. However, we have examined the evidence available for Fender's blue butterfly (*Icaricia icarioides fenderi*), *Lupinus sulphureus* ssp. *kincaidii* (Kincaid's lupine), and *Erigeron decumbens* var. *decumbens* (Willamette daisy) and have not found specific evidence of taking, vandalism, collection, or trade of these species or any similarly situated species. Consequently, consistent with applicable regulations (50 CFR 424.12(a)(1)(i)) and recent case law, we do not expect that the identification of critical habitat will increase the degree of threat to these species of taking or other human activity.

In the absence of a finding that critical habitat would increase threats to a species, if there are any benefits to critical habitat designation, then a prudent finding is warranted. In the case of these species, there may be some benefits to designation of critical habitat. The primary regulatory effect of critical habitat is the section 7 requirement that Federal agencies refrain from taking any action that destroys or adversely modifies critical habitat. While a critical habitat designation for habitat currently occupied by these species would not be likely to change the section 7 consultation outcome because an action that destroys or adversely modifies such critical habitat would also be likely to result in jeopardy to the species, there may be instances where section 7 consultation would be triggered only if critical habitat is designated. Examples could include unoccupied habitat or occupied habitat that may become unoccupied in the future. There may also be some educational or informational benefits to designating critical habitat. Therefore, we find that critical habitat designation is prudent for Fender's blue butterfly (*Icaricia icarioides fenderi*), *Lupinus sulphureus* ssp. *kincaidii* (Kincaid's lupine), and *Erigeron decumbens* var. *decumbens* (Willamette daisy).

The Final Listing Priority Guidance for FY 2000 (64 FR 57114) states that the processing of critical habitat determinations (prudency and determinability decisions) and proposed or final designations of critical habitat will no longer be subject to prioritization under the Listing Priority Guidance. Critical habitat determinations, which were previously included in final listing rules published in the **Federal Register**, may now be processed separately, in which case stand-alone critical habitat determinations will be published as notices in the **Federal Register**. We will undertake critical habitat determinations and designations during FY 2000 as allowed by our funding allocation for that year. As explained in detail in the Listing Priority Guidance, our listing budget is currently insufficient to allow us to immediately complete all of the listing actions required by the Act. Deferral of the critical habitat designation for Fender's blue butterfly (*Icaricia icarioides fenderi*), *Lupinus sulphureus* ssp. *kincaidii* (Kincaid's lupine), and *Erigeron decumbens* var. *decumbens* (Willamette daisy) will allow us to concentrate our limited resources on higher priority critical habitat and other listing actions, while allowing us to put in place protections needed for the conservation of Fender's blue butterfly (*Icaricia icarioides fenderi*), *Lupinus sulphureus* ssp. *kincaidii* (Kincaid's lupine), and *Erigeron decumbens* var. *decumbens* (Willamette daisy) without further delay. However, because we have successfully reduced, although not eliminated, the backlog of other listing actions, we anticipate in FY 2000 and beyond giving higher priority to critical habitat designation, including designations deferred pursuant to the Listing Priority Guidance, such as the designation for these species, than we have in recent fiscal years.

We plan to employ a priority system for deciding which outstanding critical habitat designations should be addressed first. We will focus our efforts on those designations that will provide the most conservation benefit, taking into consideration the efficacy of critical habitat designation in addressing the threats to the species, and the magnitude and immediacy of those threats. We will develop a proposal to designate critical habitat for the Fender's blue butterfly (*Icaricia icarioides fenderi*), *Lupinus sulphureus* ssp. *kincaidii* (Kincaid's lupine), and *Erigeron decumbens* var. *decumbens* (Willamette daisy) as soon as feasible, considering our workload priorities. Unfortunately, for the immediate future, most of Region 1's listing budget must be directed to complying with numerous court orders and settlement agreements, as well as due and overdue final listing determinations (like the one at issue in this case).

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain activities. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required of Federal agencies and the prohibitions against taking and harm of animals and certain activities involving listed plants are discussed, in part, below.

Section 7(a)(2) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR Part 402. If a species is listed, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out, are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action is likely to adversely affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with us.

The Federal Highway Administration provides partial funding for State highway maintenance. Therefore, any roadside habitat supporting *Erigeron decumbens* var. *decumbens, Lupinus sulphureus* ssp. *kincaidii*, and/or Fender's blue butterfly populations would be subject to section 7 consultation on any federally funded maintenance activities. Also, if the U.S. Department of Housing and Urban Development, a Federal agency, is involved in the issuance of housing loans on private property supporting occurrences of *E. decumbens* var. *decumbens, L. sulphureus* ssp. *kincaidii*, or Fender's blue butterfly, such loans would be subject to review under section 7 of the Act. The BLM, FS, and Corps manage lands that are

known to contain existing populations of *E. decumbens* var. *decumbens, L. sulphureus* ssp. *kincaidii*, and Fender's blue butterfly. In these cases, consultation requirements placed upon Federal agencies by the Act would be required for actions that may affect these species. Furthermore, opportunities for land acquisition, conservation agreements, and other recovery strategies would be bolstered by listing these species as endangered or threatened.

Active management of native prairie remnants is being carried out by the Portland District Corps, our Western Oregon National Wildlife Refuge complex, Eugene District BLM, and the Washington and Oregon field offices of TNC. In 1997, the Corps initiated an attempt to create two new *Lupinus sulphureus* ssp. *kincaidii* populations from seed collected from five areas around Fern Ridge Reservoir. One site was adjacent to the Green Oaks site at Fern Ridge, and the other is at Row Point at Dorena Reservoir. Both are on Corps lands and both are protected. Thirty-nine seedlings resulted at Row Point and 200 seedlings survived at Green Oak in 1998.

We have conducted research at Baskett Slough National Wildlife Refuge on the effects of prescribed fire, fire suppression, mowing, and herbicide on native and nonnative prairie species including *Lupinus sulphureus* ssp. *kincaidii* and *Erigeron decumbens* var. *decumbens* and Fender's blue butterflies. We have also controlled tall oatgrass in Fender's blue butterfly habitat and completed demographic studies of *E. decumbens* var. *decumbens*. In addition to efforts directed at managing and rehabilitating the remnant prairie habitat on Baskett Butte, we have been involved in projects to restore prairie habitat in former farm fields on Baskett Slough and William L. Finley National Wildlife Refuges. At the William L. Finley Refuge, the population of *E. decumbens* var. *decumbens* that was lost to erosion during the 1980s along a cut bank of Muddy Creek was located less than 0.5 km (0.3 mi) from a field that was retired from cultivation for the purpose of a prairie restoration project. The current intent is to reestablish *Erigeron decumbens* var. *decumbens* on this restored prairie. Also, Bald Top Knoll of the William L. Finley National Wildlife Refuge has been identified as a potential restoration site for the Willamette Valley dry prairie ecotype.

Management of the six prairie remnants in the west Eugene wetlands of Lane County on BLM lands includes control of nonnative invasive species, primarily blackberry, tansy ragwort, meadow knapweed, and Scotch broom. BLM will use methods such as tractor mowing, hand pulling or cutting, and will remove native hardwoods and/or conifers needed to maintain these prairie remnants. As part of the West Eugene Wetlands Acquisition Program, BLM will acquire additional habitat supporting sensitive Willamette Valley prairie species as opportunities occur.

At the Boistfort Cemetery, extensive Canada thistle patches at the base of the south side of the hill near *Lupinus sulphureus* ssp. *kincaidii* were pulled by TNC volunteers in 1993. On June 25, 1994, TNC volunteers pulled Canada thistle and cut scotch broom on the north side of the hill. Volunteers did weed control by hand at this private site to aid the landowner and in turn reduce herbicide use thus helping to preserve rare plant populations.

On the TNC Willow Creek Natural Area, seedlings of *Lupinus sulphureus* ssp. *kincaidii* were introduced initially in 1995, then again in the fall of 1996, the spring of 1997, and the spring of 1998. TNC plans to continue monitoring through the year 2000 to evaluate how successful these efforts were.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered and threatened plants. The prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.61 for endangered plants and 50 CFR 17.71 for threatened plants, apply. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export, transport in interstate or foreign commerce in the course of a commercial activity, sell or offer for sale in interstate or foreign commerce, or remove and reduce the species to possession from areas under Federal jurisdiction. In addition, for plants listed as endangered, the Act prohibits the malicious damage or destruction of the plants on areas under Federal jurisdiction and the removal, cutting, digging up, or damaging or destroying of such plants in knowing violation of any State law or regulation, or in the course of a violation of State criminal trespass law (see 16 U.S.C. 1538 (a)(2)(B)). Section 4(d) of the Act allows for the provision of such protection to threatened species through regulation. This protection may apply to *Lupinus sulphureus* ssp. *kincaidii* in the future if a special regulation is issued after opportunity for public notice and comment. Seeds from cultivated specimens of threatened plants are exempt from these prohibitions provided that their containers are marked ''Of Cultivated Origin.'' Certain exceptions to the prohibitions apply to agents of the Service and State conservation agencies.

The Act and 50 CFR 17.62, 17.63, and 17.72 also provide for the issuance of permits to carry out otherwise prohibited activities involving endangered and threatened plants under certain circumstances. Such permits are available for scientific purposes and to enhance the propagation or survival of the species. For threatened plants, permits also are available for botanical or horticultural exhibition, educational purposes, or special purposes consistent with the purposes of the Act. It is anticipated that few trade permits would ever be sought or issued because *Lupinus sulphureus* ssp. *kincaidii* and *Erigeron decumbens* var. *decumbens* are not common in cultivation or in the wild.

The Act and implementing regulations also set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect; or to attempt any of these), import or export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

Permits may be issued to carry out otherwise prohibited activities involving endangered wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22 and 17.23. Such permits are available for scientific purposes, to enhance the propagation or survival of the species, and/or for incidental take in connection with otherwise lawful activities.

Our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), is to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of the listing on proposed and ongoing activities within the range of a species. *Erigeron decumbens* var. *decumbens* and *Lupinus sulphureus* ssp. *kincaidii* are known to occur on Federal lands under the jurisdiction of the Service, Corps, BLM, or FS. With issuance of this final rule, these species

on Federal lands are protected from collection. *Erigeron decumbens* var. *decumbens* is protected from malicious damage or destruction on Federal land under section 9 of the Act. In appropriate cases, collection of these species could be allowed through the issuance of a Federal permit. We are not aware of any otherwise lawful activities being conducted or proposed on private land that will be affected by this listing and result in a violation of section 9 for these plants.

With issuance of this final rule, Fender's blue butterfly receives more extensive protection under the Act than described for *Erigeron decumbens* var. *decumbens*, and *Lupinus sulphureus* ssp. *kincaidii*. Section 9 prohibits the take of any listed wildlife species by any person subject to the jurisdiction of the United States. We believe that, based on the best available information, the following actions would not be violations of section 9:

(1) Possession, delivery, or movement, including interstate transport involving no commercial activity, dead specimens of Fender's blue butterfly that were collected prior to the date of publication in the **Federal Register** of this final regulation adding this taxon to the list of endangered species;

(2) Actions that may affect Fender's blue butterfly and are authorized, funded, or carried out by a Federal agency when the action is conducted in accordance with incidental take statements included in biological opinions issued under section 7 of the Act;

(3) Land actions or management carried out under a habitat conservation plan approved by us pursuant to section 10(a)(1)(B) of the Act; and

(4) Scientific research carried out under a permit issued by us pursuant to section 10(a)(1)(A) of the Act.

Potential activities involving Fender's blue butterfly that would likely be considered a violation of section 9 include, but are not limited to, the following:

(1) Take of Fender's blue butterfly without a permit pursuant to section 10(a)(1)A) or an incidental take permit pursuant to section 10(a)(1)(B) of the Act (this includes harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting, or attempting any of these actions);

(2) Possessing, selling, delivering, carrying, transporting, or shipping illegally taken specimens of Fender's blue butterfly;

(3) Release of chemical or biological control agents that attack, damage, or kill any stage of this taxon, if not approved through section 7 consultation;

(4) In areas where Fender's blue butterfly occurs, the removal or destruction of the food plants being utilized by Fender's blue butterfly, defined as *Lupinus sulphureus* ssp. *kincaidii, Erigeron decumbens* var. *decumbens, Lupinus. albicaulis*, and *Lupinus. laxiflorus*; and

(5) Destruction or alteration of Fender's blue butterfly habitat by grading, leveling, plowing, mowing, burning, herbicide or pesticide spraying, intensively grazing, or otherwise disturbing grasslands that result in the death or injury of adult Fender's blue butterflies and/or their larvae or eggs, through significant impairment of the species' essential breeding, foraging, sheltering, or other essential life functions.

You may direct questions regarding whether specific activities risk a violation of section 9 to the State Supervisor of our Oregon State Office (see **ADDRESSES** section). Requests for copies of the regulations concerning listed plant and animal species and general inquiries regarding prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Endangered Species Permits, 911 N.E. 11th Avenue, Portland, Oregon 97232–4181 (telephone 503–231–2063; FAX 503–231–6243).

National Environmental Policy Act

We have determined that Environmental Assessments and Environmental Impact Statements, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining our reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

Paperwork Reduction Act

This rule does not contain any new collections of information other than those already approved under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and assigned Office of Management and Budget clearance number 1018–0094. An agency may not conduct or sponsor, and a person is not required to respond to, collection of information, unless it displays a currently valid control number. For additional information concerning permit and associated requirements for endangered plant species, see 50 CFR 17.62 and 17.63.

Executive Order 12866

This rule has not been reviewed by the Office of Management and Budget under Executive Order 12866.

References Cited

You may request a complete list of all references cited herein, as well as others, from the Oregon State Office (see **ADDRESSES** above).

Author

The primary author of this final rule is Dr. Andrew F. Robinson, Jr., Fish and Wildlife Biologist (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Final Regulation Promulgation

For the reasons outlined in the preamble, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

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

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500, unless otherwise noted.

2. Amend § 17.11(h) by adding the following, in alphabetical order under INSECTS, to the List of Endangered and Threatened Wildlife:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
INSECTS							

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	
Butterfly, Fender's blue.	*Icaricia icarioides fenderi.*	U.S.A. (OR)	NA	E		NA	NA
*	*	*	*	*	*	*	

3. Amend § 17.12(h) by adding the following, in alphabetical order, under FLOWERING PLANTS, to the List of Endangered and Threatened Plants:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
*	*	*	*	*	*	*	
Erigeron decumbens var. decumbens.	Willamette daisy	U.S.A. (OR)	Asteraceae	E		NA	NA
*	*	*	*	*	*	*	
Lupinus sulphureus ssp. kincaidii. *Lupinus oreganus var. kincaidii = synonym.* *Lupinus sulphureus var. kincaidii = synonym.*	Kincaid's lupine	U.S.A. (OR, WA)	Fabaceae	T		NA	NA
*	*	*	*	*	*	*	

Dated: January 5, 2000.

Rowan W. Gould,

Acting Director, Fish and Wildlife Service.

[FR Doc. 00–1561 Filed 1–24–00; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 991229356–9356–01; 121799F]

RIN 0648–AN36

Fisheries off West Coast States and in the Western Pacific; Coastal Pelagic Species Fisheries; Annual Specifications

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

ACTION: Final harvest guidelines.

SUMMARY: NMFS announces the annual harvest guidelines for Pacific sardine and Pacific mackerel in the exclusive economic zone (EEZ) off the Pacific coast. The Coastal Pelagic Species Fishery Management Plan (FMP) and its implementing regulations require NMFS to establish annual harvest guidelines for Pacific sardine and Pacific mackerel based on a formulas appearing in the FMP. The intended effect of this action is to establish allowable harvest levels for coastal pelagic species off the Pacific coast.

DATES: Effective January 1, 2000. Comments are invited until February 24, 2000.

ADDRESSES: Submit comments on the annual specifications to Rodney R. McInnis, Acting Regional Administrator, Southwest Region, (Regional Administrator), NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213. The reports *Stock Assessment of Sardine for 1999 with Management Recommendations for 2000* and *Status of the Pacific Mackerel Resource and Fishery in 1999* are available from this same address.

FOR FURTHER INFORMATION CONTACT: James J. Morgan, Southwest Region, NMFS, (562) 980–4030.

SUPPLEMENTARY INFORMATION: The FMP, which was partially approved by the Secretary of Commerce on June 10, 1999, and implemented by publication of a final rule in the **Federal Register** on December 15, 1999 (64 FR 69888), divides managed species into the categories of *actively managed* and *monitored*. Harvest guidelines of actively managed species (Pacific sardine and Pacific mackerel) are based on formulas applied to current biomass estimates. Harvest guidelines for monitored species (jack mackerel, northern anchovy, and market squid), which are underutilized or managed primarily by California, are not based on current biomass estimates. Nonetheless, the FMP includes a constant allowable biological catch (ABC) for each monitored species based on long-term yields. If an ABC for a monitored species is reached, it would be designated an actively managed species; at that time, the Pacific Fishery Management (Council) would review the condition of the resource and recommend necessary management action. Except for northern anchovy, this is the first year of managing coastal pelagic species under this FMP.

At a public meeting each year, the biomass for each actively managed species is presented by the Council's Coastal Pelagic Species Management Team (Team) to the Council's Coastal Pelagic Species Advisory Subpanel (Subpanel). At that time, the biomass,

the harvest guideline, and the status of the fisheries is reviewed. This information is also reviewed by the Council's Scientific and Statistical committee. Following review by the Council and after hearing all public comments, NMFS publishes the annual harvest guidelines in the *Federal Register* before the beginning of the appropriate fishing season. The Pacific sardine season begins on January 1 of each year and ends on December 31. The Pacific mackerel season begins on July 1 of each year and ends on June 30. Normally, the Pacific mackerel harvest guideline would be announced in June; however, the first harvest guidelines for both species will be effective on January 1, 2000, as this will be the first year of managing these species.

The FMP allows the Administrator, Southwest Region, NMFS to announce harvest guidelines before review by the Council if there is insufficient time for review. At its meeting in September 1999, the Council decided to use this procedure during the first year of managing Pacific sardine and Pacific mackerel because the sardine assessment would not be completed by its November 1999 Meeting. The Council plans to complete its review at its March 2000 meeting, when the stock assessment and fishery evaluation report for Pacific sardine will be presented. At the November meeting, the Team presented the Council with the Pacific mackerel assessment to establish a harvest guideline for the season that began on July 1, 1999. The Council adopted the Team's recommendations, including the necessary procedure to subtract the estimated harvest of Pacific mackerel from July 1, 1999, to December 31, 1999, to establish a harvest guideline beginning January 1, 2000, consistent with the beginning of the fishing season.

On December 9, 1999, consistent with the procedures of the FMP, the biomass report and attendant harvest guidelines for Pacific sardine and Pacific mackerel were reviewed at a public meeting of the Team at the NMFS Southwest Fisheries Science Center in La Jolla, California. A public meeting between the Team and the Subpanel was held on December 14, 1999, at the Southwest Region, NMFS, in Long Beach, California. No significant comments regarding the harvest guidelines were received.

The sardine population was estimated using a modified version of the integrated stock assessment model called Catch at Age Analysis of Sardine–Two Area Model (CANSAR–TAM). CANSAR is a forward-casting, age-structured analysis using fishery dependent and fishery independent data to obtain annual estimates of sardine abundance, year-class strength, and age-specific fishing mortality for 1983 through 1999. The modification of CANSAR was developed to account for the expansion of the Pacific sardine stock northward to include waters off the northwest Pacific coast. Documentation of the 1999 estimate is described in the Council report *Stock Assessment of Sardine for 1999 with Management Recommendations for 2000* (see **ADDRESSES**).

The formula in the FMP uses the following factors to determine the harvest guideline for Pacific sardine:

1. *The biomass of age one sardine and above*. For 1999, this estimate is 1,581,346 metric tons (mt).

2. *The cutoff*. This is the biomass level below which no commercial fishery is allowed. The FMP established this level at 150,000 mt.

3. *The portion of the sardine biomass that is in U.S. waters*. For 1999, this estimate is 87 percent, based on the average of larval distribution obtained from scientific cruises and the distribution of the resource obtained from logbooks of fish-spotters.

4. *The harvest fraction*. This is the percentage of the biomass above 150,000 mt that may be harvested. The fraction used varies (5–15 percent) with current ocean temperatures, a higher fraction for warmer ocean temperatures and a lower fraction for cooler temperatures. Warm ocean temperatures favor the production of Pacific sardine. For 1999, the fraction used was 15 percent, based on three seasons of sea surface temperature at Scripps Pier, California.

Based on the estimated biomass of 1,581,346 mt and the formula in the FMP, a harvest guideline of 186,791 mt was calculated for the fishery beginning on January 1, 2000. The harvest guideline is allocated one third for Subarea A, which is north of 35° 40' N. lat. to the Canadian border, and two thirds for Subarea B, which is south of 35° 40' N. lat. to the Mexican border. Any unused resource in either area will be reallocated between areas to help ensure that optimum yield will be achieved. The northern allocation is 62,264 mt; the southern allocation is 124,527 mt.

The size of the Pacific mackerel population was estimated using a modified virtual population analysis stock assessment model, which employs both fishery dependent and fishery independent data to estimate abundance. The model was used to calculate biomass estimates through the end of 1998 and then project an estimate of biomass for July 1, 1999, based on the number of Pacific mackerel estimated to comprise each year class at the beginning of 1999, estimates of fishing mortality during 1998, assumptions of natural and fishing mortality through the first half of 1999, and estimates of age-specific growth. Documentation of the 1999 estimate is described in the Council report *Status of the Pacific Mackerel Resource and Fishery in 1999* (see **ADDRESSES**).

The formula in the FMP uses the following factors to determine the harvest guideline for Pacific mackerel:

1. *The biomass of Pacific mackerel*. For 1999, this estimate is 239,286 mt.

2. *The cutoff*. This is the biomass level below which no commercial fishery is allowed. The FMP established the cutoff level at 18,200 mt.

3. *The portion of the Pacific mackerel biomass that is in U.S. waters*. This estimate is 70 percent, based on the average of larval distribution obtained from scientific cruises and the distribution of the resource obtained from logbooks of fish-spotters.

4. *The harvest fraction*. This is the percentage of the biomass above 18,200 mt that may be harvested. The FMP established the harvest fraction at 30 percent.

Based on the estimated biomass of 239,286 mt and the formula in the FMP, a harvest guideline of 46,428 was calculated for the fishery beginning on July 1, 1999. To determine a harvest guideline for the period beginning January 1, 2000, the estimated harvest of Pacific mackerel between July 1, 1999, through December 31, 1999, was subtracted from the harvest guideline. The amount harvested is 3,609 mt; therefore, the harvest guideline available to the fishery beginning on January 1, 2000, is 42,819 mt.

Classification

This action is authorized by 50 CFR 660.509 and is exempt from review under Executive Order 12866.

The Assistant Administrator for Fisheries, NOAA (AA) finds for good cause under 5 U.S.C. § 553(b)(B) that providing prior notice and an opportunity for public comment on this action is unnecessary because establishing the harvest guidelines is a ministerial act, determined by applying formulas in the FMP. Accordingly, providing prior notice and an opportunity for public comment would serve no useful purpose.

Because this rule merely announces the result of harvest guideline calculations and does not require any participants in the fishery to take action or to come into compliance, the AA finds for good cause under 5 U.S.C. § 553(d)(3) that delaying the effective

date of this rule for 30 days is unnecessary.

Because prior notice and opportunity for public comment are not required for this action by 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 not applicable.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: January 18, 2000.

Andrew R. Rosenberg,

Deputy Assistant Administrator, National Marine Fisheries Service.

[FR Doc. 00–1700 Filed 1–24–00; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 000119015–0015–01; I.D. 010500A]

RIN 0648–AM32

Fisheries of the Exclusive Economic Zone Off Alaska; Steller Sea Lion Protection Measures for the Pollock Fisheries Off Alaska

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

ACTION: Emergency interim rule; revision to 2000 interim harvest specifications; request for comments.

SUMMARY: NMFS issues an emergency interim rule implementing reasonable and prudent alternatives (RPAs) to avoid the likelihood that the pollock fisheries off Alaska will jeopardize the continued existence of the western population of Steller sea lions or adversely modify its critical habitat. This emergency rule implements three types of management measures for the pollock fisheries of the Bering Sea and Aleutian Islands Management Area (BSAI) and Gulf of Alaska (GOA): Measures to temporally disperse fishing effort; measures to spatially disperse fishing effort; and measures to provide sufficient protection from fisheries competition for prey in waters adjacent to rookeries and important haulouts. These emergency measures are necessary to avoid jeopardy and adverse modification.

DATES: Effective January 20, 2000, through July 19, 2000. Comments must be received by February 24, 2000.

ADDRESSES: Comments may be sent to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, P.O. Box 21668, Juneau, AK, 99802, Attn: Lori Gravel, or delivered to the Federal Building, 709 West 9th Street, Juneau, AK. Copies of the Biological Opinion (BiOp) on the pollock fisheries of the BSAI and GOA and the Atka mackerel fishery of the Aleutian Islands subarea, the Revised Final Reasonable and Prudent Alternatives (RFRPAs), and the Environmental Assessment/Regulatory Impact Review (EA/RIR) prepared for the emergency interim rule may be obtained from the same address. The BiOp and the RFRPAs are also available on the Alaska Region home page at *http://www.fakr.noaa.gov.* Comments will not be accepted if submitted via e-mail or Internet.

FOR FURTHER INFORMATION CONTACT: Shane Capron, 907–586–7228 or shane.capron@noaa.gov

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fisheries in the exclusive economic zone off Alaska under the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area and the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMPs). The North Pacific Fishery Management Council (Council) prepared the FMPs under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1801 *et seq.* Regulations governing U.S. fisheries and implementing the FMPs appear at 50 CFR parts 600 and 679.

Background

In 1990, NMFS designated the Steller sea lion as a threatened species under the Endangered Species Act of 1973 (ESA). The designation followed severe declines throughout much of the GOA and Aleutian Islands region. In 1993, NMFS defined critical habitat for the species to include (among other areas), the marine areas within 20 nautical miles (nm) of major rookeries and haulouts of the species west of 144° W long. In 1997, NMFS recognized two separate populations, and reclassified the western population (west of 144° W long.) as endangered.

NMFS first began collecting information on the abundance of Steller sea lions during the 1950s and 1960s. However, the first counts based on reliable data were not available until the late 1970s; these counts reported approximately 109,800 animals. During the 1980s, a precipitous decline of Steller sea lions was observed. By 1996, counts declined to only 22,000 animals, a decline of 80 percent from the late 1970s. Counts of adult and juvenile Steller sea lions have continued to decline over the last few years, but at a lower rate. Due to the small population size, these recent reductions may be a serious obstacle to the recovery of the western population of Steller sea lions.

Multiple factors have contributed to the decline, but considerable evidence indicates that lack of available prey is a serious problem. Foraging studies confirm that Steller sea lions depend on pollock as a major prey source, and that they may be particularly sensitive to any reduced availability of prey during the winter. The significance of pollock in the diet of sea lions may have increased since the 1970s due to shifts in the Bering Sea ecosystem related to atmospheric and oceanographic changes. Pollock are also the target of the largest commercial fisheries in Alaska, fisheries that have grown increasingly concentrated in time and area. This concentration of effort occurs largely in areas designated as Steller sea lion critical habitat and may reduce prey availability during critical times in the life history of sea lions. Additional information on Steller sea lions and the pollock fisheries of the BSAI and GOA is contained in the BiOp and in the EA/RIR prepared for this action (see **ADDRESSES**).

Purpose and Need for Action

In accordance with the requirements of the ESA, the NMFS Office of Protected Resources issued a BiOp dated December 3, 1998, revised December 16, 1998, on the pollock fisheries of the BSAI and GOA and the Atka mackerel fishery of the Aleutian Islands subarea. The BiOp concluded that the BSAI and GOA pollock trawl fisheries, as projected for 1999 through 2002, were likely to jeopardize the endangered western population of Steller sea lions and destroy or adversely modify critical habitat designated for this population. ''To jeopardize'' means ''to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species'' (50 CFR 402.02). The clause ''adversely modify its critical habitat'' means ''a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to

be critical'' (50 CFR 402.02). The BiOp also concluded that the Atka mackerel fishery, as modified by recent regulatory changes (64 FR 3446; January 22, 1999), was not likely to jeopardize the endangered western population of Steller sea lions or destroy or adversely modify its critical habitat.

The BiOp did not prescribe a single set of RPAs for the BSAI and GOA pollock fisheries but rather established a framework to avoid the likelihood of jeopardizing the continued existence of the western population of Steller sea lions or adversely modifying its critical habitat. The framework consisted of three principles: (1) Temporal dispersion of fishing effort, (2) spatial dispersion of fishing effort, and (3) protection from fisheries competition for Steller sea lion prey in waters adjacent to rookeries and important haulouts. For each of these principles, the BiOp provided guidance on the development of management measures to meet the objectives and, ultimately, to avoid jeopardy and adverse modification. The BiOp stated that certain conservation measures could be phased in over a 2-year period.

In December 1998, NMFS staff briefed the Council on the BiOp. The Council then prepared recommendations for alternative management measures based on the RPA guidelines to avoid jeopardy and adverse modification. The Council's recommendation did not contain Bering Sea subarea (BS) B and C season specifications. However, the Council planned to recommend B and C season measures prior to the second half of 1999. The Council also recommended closing all but nine of the haulout zones specified by the BiOp in the BSAI and GOA. NMFS determined these recommendations to be acceptable as part of a 2-year phase-in strategy, in which equivalent or better protections would be extended for those areas for 2000 and beyond.

On December 16, 1998, NMFS adopted the measures recommended by the Council (with modifications) into the BiOp as part of an RPA for the fisheries. NMFS published an emergency interim rule implementing RPAs in the **Federal Register** on January 22, 1999 (64 FR 3437), amended on February 17, 1999 (64 FR 7814) and on February 25, 1999 (64 FR 9375), which was effective through July 19, 1999. The preamble to the emergency rule provides a detailed description of the purpose and need for the implementation of emergency measures in 1999.

The Council met again in February, April, and June 1999, to consider recommendations for extending the emergency rule for the second half of 1999, and, at its June meeting, voted to extend the emergency rule. Using the Council's recommendation, NMFS extended the emergency rule through December 31, 1999 (64 FR 39087, July 21, 1999; technical amendment 64 FR 43297, August 10, 1999), with revisions to include specifications for the B and C seasons in the BS.

In June 1999, the Council also deliberated on various management measures to implement permanently the RPA guidelines as described in the BiOp for 2000 and beyond. After significant debate and public comment, the Council voted to recommend a series of conservation measures to protect Steller sea lions.

Greenpeace, the American Oceans Campaign, and the Sierra Club challenged the BiOp in the U.S. District Court for the Western District of Washington. In an Order issued on July 9, 1999 (and amended on July 13, 1999), the Court upheld NMFS' no-jeopardy conclusion for the Atka mackerel fishery and the jeopardy conclusion for the pollock fisheries. However, the Court also found that ''the Reasonable and Prudent Alternatives * * * were arbitrary and capricious * * * because they were not justified under the prevailing legal standards and because the record does not support a finding that they were reasonably likely to avoid jeopardy.'' On August 6, 1999, the Court remanded the BiOp back to NMFS for further analysis and explanation.

To comply with the Court's Order, NMFS conducted additional analyses and developed revised final RPAs (RFRPAs, October 15, 1999). The RFRPAs describe management measures that will avoid the likelihood that the pollock fisheries authorized by NMFS' regulations will jeopardize the continued existence of the endangered western population of Steller sea lions or adversely modify its critical habitat.

NMFS has determined that the Council's recommended measures, with certain modifications to season dates, haulout protections, and spatial dispersion in the Bering Sea, achieve the principles identified in the BiOp and the RFRPAs. The Council's recommendation, modified as necessary to avoid jeopardy and adverse modification, therefore forms the basis for the management measures contained in this emergency interim rule.

Elements of the Emergency Rule

Pollock Trawl Exclusion Zones

Under this emergency interim rule, directed fishing for pollock is prohibited within either 10 or 20 nm of rookeries and haulouts in the BS and GOA. The location, size, and period of each exclusion zone are set out in Tables 12, 13, and 20 of 50 CFR part 679. Table 20 for the Aleutian Islands subarea (AI), is reprinted to be consistent in format with Tables 12 and 13, however, no substantive changes were made (see the following discussion).

NMFS approved these exclusion zones on the basis of 10 Steller sea lion counts conducted since 1979, during the reproductive season (summer) and non-reproductive season (winter). NMFS used the following criteria to identify sites that require exclusion zones and to determine the period of the closure and the radius of the zone:

1. *Rookeries* If the site is a rookery, a 10 or 20-nm year-round pollock trawl exclusion zone.

2. *Summer haulouts* If the site is a summer haulout, with greater than 200 sea lions in a summer survey since 1979, and less than 75 sea lions in winter surveys since 1979, a 10 or 20-nm pollock trawl exclusion zone from June 1 through November 1.

3. *Winter haulouts* If the site is a winter haulout, with less than 200 sea lions in summer surveys since 1979, and greater than 75 sea lions in a winter survey since 1979, a 10 or 20-nm pollock trawl exclusion zone from November 1 through June 1.

4. *Year-round haulouts* If the site is a year-round haulout with greater than 200 sea lions in a summer survey since 1979, and greater than 75 sea lions in a winter survey since 1979, a 10 or 20 nm year-round pollock trawl exclusion zone.

The size of the exclusion zones in each area reflects the relative widths of the continental shelf. In the BS, the shelf is relatively wide and exclusion zones have radii of 20 nm. In the GOA, the shelf is narrower and exclusion zones have radii of 10 nm.

The BiOp allowed for a 2-year phase-in schedule for certain RFRPA measures including rookeries and haulout trawl exclusion zones. In the BSAI, under the emergency rule provisions for 1999, all exclusion zones had a 20-nm radius except for the Cape Sarichef zone, which had only a 10-nm raduis. For 2000 and beyond, the Council has recommended that the Cape Sarichef zone have a 20-nm radius, consistent with the BiOp. Therefore, under the emergency interim rule, all 25 exclusion zone sites in the BS are closed to trawling for pollock for a radius of 20 nm.

In the GOA, 53 sites qualified for closure to 10 nm, under criteria in the BiOp. However, in recommending management measures for 2000 and

beyond, the Council recommended no closure for the eight sites exempted under the previous emergency rule, and recommended an additional site, Spitz Island, be exempted. The Council's recommendation included no closures around Cape Barnabas, Gull Point, and Cape Ikolik, and modified trawl exclusion zones around Rugged Island, Point Elrington, The Needles, Mitrofania Island, Spitz Island, and Sea Lion Rocks. NMFS has reviewed these sites in the RFRPAs and determined that they require additional protection, and therefore is implementing an alternative suite of management measures.

Sites around Point Elrington and The Needles meet the criteria for pollock trawl exclusion zones but are not established as exclusion zones under this emergency interim rule. The sites lie entirely within Alaska State waters. Pollock fisheries in these areas are not managed under Federal regulations implementing FMPs. The State of Alaska has indicated its intent to develop equivalent protection measures for these haulouts in 2000. However, if the State fails to develop adequate protection measures for these two sites, NMFS will implement additional protection measures in these areas in 2001 under the authority of the ESA.

This emergency interim rule closes Sea Lion Rocks for a radius of 10 nm to all vessels greater than 60 ft (18.3 m) length overall (LOA). Due to safety concerns for small boats in the region and the relatively lower levels of harvests by these vessels, the area is not closed to vessels less than or equal to 60 ft (18.3 m) LOA. Historically, from 1994 through 1998, vessels longer than 60 ft (18.3 m) LOA have accounted for 72 percent of total harvests in this area. The RFRPAs concluded that excluding vessels greater than 60 ft (18.3 m) LOA from fishing within 10 nm of Sea Lion Rocks, and the subsequent harvest reductions under this closure, would provide sufficient protection against localized depletions of pollock.

Cape Barnabas, Gull Point, Rugged Island, Cape Ikolik, Spitz Island, and Mitrofania Island were proposed by the Council to be included as pollock trawl exclusion zones for 2000 and beyond with a variety of exemptions. However, this emergency rule closes these areas because they have been determined to be critical to the recovery of the western population of Steller sea lions.

In the Bering Sea, the Walrus Island rookery also meets the requirements under the RPA guidelines for closure to 20 nm. However, because this site falls entirely within the Pribilof Island Area Habitat Conservation Zone (see § 679.22(a)(6)), which is closed to trawling year-round, a 20-nm closure of this area would be redundant and is not necessary.

Aleutian Islands Closure

The RFRPA guidelines require that the AI be closed to directed fishing for pollock to protect the waters surrounding rookeries and major haulouts of Steller sea lions. This closure was implemented in 1999, by a reduction in TAC allocated to this subarea that provided for incidental catch only, and then by emergency interim rule. The closure of the AI is continued by this emergency interim rule.

Bering Sea Management Measures

Steller sea lion conservation area (SCA). This emergency interim rule establishes a conservation area to regulate total removals of pollock. This area was previously referred to as the combined Critical Habitat/Catcher Vessel Operation Area in previous emergency rulemaking and in supporting documents. The SCA includes the portion of Bering Sea critical habitat known as the Bogoslof foraging area and the portion of the Catcher Vessel Operational Area (CVOA) that extends eastward from the Bogoslof foraging area. This eastern block of the CVOA overlaps with the pollock trawl exclusion zone for Sea Lion Rocks (Amak Island). Inclusion of this eastern block in the SCA is necessary to provide sufficient protection from concentrated fishing and resulting localized depletions of sea lion prey in (1) the narrow corridor between the Bogoslof foraging area and the Sea Lion Rocks (Amak Island) trawl exclusion zone and (2) these adjacent portions of critical habitat.

The SCA consists of the area of the BS between 170°00′ W long. and 163°00′ W long., south of straight lines connecting the following points in the order listed: 55°00′ N lat. 170°00′ W long.; 55°00′ N lat. 168°00′ W long.; 55°30′ N lat. 168°00′ W long.; 55°30′ N lat. 166°00′ W long.; 56°00′ N lat. 166°00′ W long.; 56°00′ N lat. 163°00′ W long.

This emergency interim rule restricts pollock harvests within the SCA to a percentage of each sector's seasonal directed fishing allowance (DFA) according to the percentages set forth in Table 2 of the preamble. In the Bering Sea, the DFA is the amount of pollock available for harvest by each industry sector after subtracting the incidental catch allowance (ICA).

NMFS will monitor catch by each industry sector and close the SCA to directed fishing for pollock by sector when NMFS determines that the specified SCA limit has been reached. In accordance with the Council's intent, inshore catcher vessels less than or equal to 99 ft (30.2 m) LOA are exempt from SCA closures during the fall and winter months unless the cap for the inshore sector has been reached. Under the authority of the American Fisheries Act (AFA), NMFS will separate the inshore fishery into cooperative and non-cooperative sector allocations. For each sector, NMFS will announce the closure of the SCA to catcher vessels over 99 ft (30.2 m) LOA before the inshore sector SCA limit is reached. NMFS will implement the closure in a manner intended to leave remaining quota within the SCA that is sufficient to support directed fishing for pollock by vessels less than or equal to 99 ft (30.2 m) LOA for the duration of the inshore sector opening. This measure will be implemented during the fall and winter seasons only because of vessel safety concerns during these time periods of severe weather.

Fishing seasons. This emergency interim rule establishes new fishing seasons for the four sectors of the Bering Sea pollock fishery that are defined in the AFA. These new fishing seasons are summarized in Table 1 or the preamble. This emergency rule also repeals existing ''fair start'' provisions that required vessels fishing for pollock in the BS to cease fishing for groundfish during the week preceding each pollock season or face a mandatory stand-down period during the first week of the pollock season. The Council has determined that these fair start requirements are no longer necessary and has recommended an exclusive seasonal system (see Table 1 in the preamble).

The Council recommended a complex suite of seasons, stand-downs, and SCA limits. Under the RFRPAs, NMFS determined that stand-downs between the A/B and C/D seasons were unnecessary outside the SCA. However, NMFS also determined that the SCA was of special concern and that lengthening the seasons to attain spatial and temporal dispersion was a priority in this area. Therefore, the season dates as proposed by the Council have been altered to reflect these requirements. All sectors now have the same fishing season dates as described in the following Table 1.

TABLE 1.—BERING SEA SUBAREA POLLOCK FISHING SEASONS FOR ALL SECTORS

Bering Sea Subarea	Season [1]			
	A	B	C	D
Outside the SCA [2]	January 20—June 10 (combined A/B season)		June 10—November 1 (combined C/D season)	
Inside the SCA	Jan. 20–April 1	April 1–June 10	June 10–Aug. 20	Aug. 20–Nov. 1

[1] The time of all openings and closures of fishing seasons, other than the beginning and end of the calendar fishing year, is 1200 hours, A.l.t.
[2] For the area outside the SCA, there will be two seasonal pairs, A/B and C/D, that are allocated the annual Bering Sea subarea directed fishing allowance by sector. Fishing inside the SCA is authorized as a limit of the directed fishing allowance allocated to the area outside the SCA.

Temporal and Spatial Apportionment of DFA. The pollock DFA allocated to each industry sector is apportioned to the fishing seasons previously identified according to the formula set out in Table 2 of the preamble. The RFRPAs specify the amount of the total annual pollock TAC that can be taken from the SCA in each season: A season, 15 percent; B season, 5 percent; C season, 4.5 percent; D season, 7.5 percent. These limits are expressed as percentages of each sector's seasonal allocation of its DFA.

For example, if the inshore sector received an annual DFA allocation of 100,000 mt, 40 percent (40,000 mt) would be apportioned to the combined A/B season for the inshore sector. Of this amount, 42 percent (16,800 mt) could be taken within the SCA during the A season, and 14 percent could be taken within the SCA during the B season (5,600 mt).

Overages and underages of SCA amounts may be ''rolled over'' from the A season SCA limit to the B season SCA limit so that no single season exceeds 15 percent of the annual TAC, and that the combined A/B limit inside the SCA of 20 percent is not exceeded.

TABLE 2.—BS APPORTIONMENTS OF POLLOCK DFA IN PERCENT BY SEASON AND AREA

Industry sector	Seasonal DFA apportionment and harvest limits within the SCA (in percent)			
	A/B (40% of annual DFA)		C/D (60% of annual DFA)	
	A-SCA limit	B-SCA limit	C-SCA limit	D-SCA limit
Inshore	42	14	13.5	22.5
C/P	24.75	8.25	0	0
Mothership	37.5	12.5	0	0
CDQ	62	20.5	14	23

Definition of Directed Fishing for Pollock CDQ

This emergency interim rule adds a definition for ''directed fishing for pollock CDQ'' that is necessary to enforce directed fishing closures that apply to both the CDQ and non-CDQ pollock fisheries. The CDQ groups are prohibited from exceeding any of their groundfish CDQ allocations and are required to manage the catch of vessels fishing on their behalf within these CDQ allocations. Therefore, NMFS does not use maximum retainable amounts, prohibited species catch status, and announcements of directed fishing closures to manage the CDQ fisheries, as is done to manage the non-CDQ fisheries. The definition of directed fishing for pollock CDQ implemented in this emergency interim rule is based on the percent pollock in each CDQ haul using the 60-percent threshold recommended by the Council at its June 1999 meeting. NMFS is preparing proposed rulemaking that would permanently implement a definition of directed fishing for pollock CDQ. However, that regulatory amendment will not be in place in time for the start of the trawl fisheries in January 2000. Under the definition added by this emergency interim rule, vessels fishing for the CDQ groups in any areas closed to directed fishing for pollock CDQ are prohibited from bringing onboard their vessel any trawl hauls in which pollock is equal to or greater than 60 percent of the total groundfish in the haul. Species composition collected by the observer onboard the vessel will be used to determine the percent pollock in each CDQ trawl haul.

Gulf of Alaska Management Measures

Fishing seasons and TAC apportionments. This emergency interim rule establishes new fishing seasons and pollock TAC apportionments in the Western and Central (W/C) Regulatory Areas of the GOA. These new fishing seasons are summarized in Table 3 of the preamble. The TAC for pollock in the combined W/C Regulatory Areas would continue to be apportioned among Statistical Areas 610, 620, and 630 in proportion to the distribution of the pollock biomass as determined by the most recent NMFS surveys. Consistent with current regulations, pollock fishing seasons are not implemented for the Eastern Regulatory Area.

TABLE 3.—POLLOCK FISHING SEASONS AND TAC APPORTIONMENTS FOR THE WESTERN AND CENTRAL REGULATORY AREAS OF THE GULF OF ALASKA

Season	TAC Apportionment	Season Dates [1]
A	30%	January 20–March 1.
B	15%	March 15–May 31.
C	30%	August 20–September 15.
D	25%	October 1–November 1.

[1] The time of all openings and closures of fishing seasons, other than the beginning and end of the calendar fishing year, is 1200 hours, A.l.t.

2. *Pollock TAC apportionment within the Shelikof Strait conservation area.* Prior to 1999, pollock TAC within the W/C GOA was apportioned on the basis of biomass distribution as determined from triennial bottom trawl surveys. Bottom trawl surveys have been conducted in summer months, and additional hydroacoustic surveys have been conducted in winter months. These winter surveys indicate an extensive and relatively predictable spawning aggregation of pollock in the

winter period in Shelikof Strait. Under the emergency rule in 1999, a cap was set for the harvest from Shelikof Strait based on previous hydroacoustic surveys, and the GOA TAC was distributed to areas 610, 620, and 630 based on the trawl surveys. The cap in Shelikof Strait was determined using the estimated biomass from the most recent hydroacoustic survey divided by the estimated total GOA biomass from population modeling, and the quotient then multiplied by the GOA TAC for the A season.

In the GOA, overall pollock fishery harvest rates have varied from about 5 percent of the total biomass to about 10 percent since 1990. Since 1994, the estimated harvest rate in Shelikof Strait has been on the order of 1 percent to 3 percent of the total biomass, well below the overall harvest rate for the GOA. This discrepancy suggests that the biomass of pollock in Shelikof Strait is under-utilized relative to the biomass of pollock outside the Strait and, relative to the overall harvest rate, pollock biomass outside the Strait must be over-utilized. This relative over-utilization of pollock outside Shelikof Strait may have a detrimental effect on the availability of pollock to Steller sea lions in those outer regions.

The Shelikof Strait conservation area is defined as the area bounded by straight lines and shoreline connecting the following coordinates in the following order:

58°51′ N lat. 153°15′ W long.;

58°51′ N lat. 152°00′ W long.; and, the intersection of 152°00′ W long. with Afognak Island; aligned counterclockwise around the shoreline of Afognak, Kodiak, and Raspberry Islands to 57°00′ N lat. 154°00′ W long.; 56°30′ N lat. 154°00′ W long.; 56°30′ N lat. 155°00′ W long.; 56°00′ N lat. 155°00′ W long.; 56°00′ N lat. 157°00′ W long.; and the intersection of 157°00′ W long. with the Alaska Peninsula.

The Shelikof Strait conservation area TAC apportionment will be determined annually for the A and B seasons during the specification process. A separate TAC will be determined for this area based on winter hydroacoustic survey data. The GOA TAC for areas 610, and areas 620 and 630 outside of the Shelikof Strait conservation area, will be reduced proportionally by this amount. When NMFS determines that the A or B season pollock TAC from within the Shelikof Strait conservation area has been reached, NMFS will prohibit directed fishing for pollock within Shelikof Strait.

GOA Trip limits. The Council recommended that NMFS establish a 300,000-lb (136-mt) trip limit for catcher vessels harvesting pollock in the directed pollock fisheries of the GOA to support the temporal dispersion objectives of the RPAs. This emergency interim rule prohibits a catcher vessel fishing for groundfish in the GOA from retaining on board more than 300,000-lb (136-mt) of pollock harvested in the GOA. This trip limit does not exempt vessels from existing regulations that require 100-percent retention of pollock when directed fishing for pollock is open. A vessel would have to stop fishing for pollock during a fishing trip before the 300,000-lb (136-mt) trip limit is reached to avoid a violation of either the 300,000 lb (136-mt) trip limit or the 100-percent retention requirement for pollock.

In addition, to prevent the large scale use of tender vessels to avoid the trip limit restriction, this emergency interim rule also prohibits vessels from operating as tenders in the GOA east of 157°00′ W long. Vessels operating as tenders in the GOA west of 157°00′ W long. are prohibited from retaining on board more that 600,000 lb (272 mt) (the equivalent of two fishing trips) of unprocessed pollock that was harvested in the GOA. The Council recommended that tendering west of 157°00′ W long. is necessary because smaller vessels delivering to Sand Point and King Cove may be more dependent on tenders than the larger vessels that operate east of 157°00′ W long. and deliver primarily to Kodiak.

Catcher Vessel Exclusive Fishing Seasons

The Council recommended that catcher vessels be prohibited from participating in directed fishing for pollock in both the BS and GOA in concurrent seasons, except for catcher vessels less than 125 ft (38.1 m) LOA in area 620 east of 157°00′ W long. and area 630. For example, if a catcher vessel chose to participate in the combined BS A/B season, it would not be eligible to participate in the W/C GOA until the start of the GOA C season. Similarly, if a catcher vessel chose to participate in the GOA A season, it would not be eligible to participate in the BS until the start of the next BS season, which would be the C/D season. The existing 3-day stand-down requirement at § 679.23(h) is revised to remove directed fishing for pollock from stand-down requirements, which would be redundant. However, a 3-day stand-down will remain in effect for vessels directed fishing for Pacific cod.

Revised Interim 2000 Harvest Specifications for Pollock in the BS and GOA

The regulatory changes in this emergency interim rule require revision of the 2000 interim harvest specifications for pollock in the BS and GOA. Existing regulations at 50 CFR 679.20(c)(2) do not require that interim harvest specifications for pollock in the BS and GOA be temporally or spatially dispersed. However, the BiOp concluded that the current program for managing the BS and GOA pollock fisheries could jeopardize Steller sea lions or their critical habitat. Therefore, to allow the Bering Sea and GOA pollock fisheries to commence on January 20, 2000, this emergency interim rule also adjusts the 2000 interim harvest specifications for pollock to comport with the RFRPA management measures outlined above.

The specifications for Bering Sea Subarea pollock in Table 1 of the BSAI 2000 interim harvest specifications (65 FR 60; January 3, 2000) are replaced by the following Table 4 in the preamble. This rule changes the interim specifications for pollock for two reasons: (1) To comport with the temporal and spatial dispersions required by the BiOp; and (2) to incorporate the Council's final 2000 TAC recommendations for pollock, which are increased from the 2000 proposed specifications.

TABLE 4.—REVISED INTERIM 2000 HARVEST AMOUNTS FOR POLLOCK IN THE BERING SEA SUBAREA

Species & Component	Area	A/B Season (mt)		
		Interim TAC	A–SCA Limit	B–SCA Limit
Pollock: [1]				
CDQ	BS	45,560	28,247	9,339
Incidental Catch Allowance (ICA)	BS	51,255	n/a	n/a
Inshore [2]	BS	194,769	81,803	27,268

TABLE 4.—REVISED INTERIM 2000 HARVEST AMOUNTS FOR POLLOCK IN THE BERING SEA SUBAREA—Continued

Species & Component	Area	A/B Season (mt)		
		Interim TAC	A–SCA Limit	B–SCA Limit
Offshore catcher/processor [3]	BS	155,815	38,564	12,855
Mothership	BS	38,954	14,608	4,869

[1] The AFA requires that 10 percent of the annual pollock TAC be allocated as a directed fishing allowance for the CDQ sector. Then, NMFS is subtracting 5 percent of the remainder as an incidental catch allowance for pollock, which is not apportioned by season or area. The remainder of this amount is further allocated by sector as follows: inshore, 50 percent; catcher/processor, 40 percent; and motherships, 10 percent.

[2] Under the emergency rule, NMFS will close the SCA to inshore vessels greater than 99 ft (30.2 m) LOA while maintaining a sufficient SCA allowance to support fishing activities by inshore catcher vessels under 99 ft (30.2 m) LOA for the duration of the current opening. However, once the specified SCA limit is reached, all inshore vessels will be prohibited from engaging in directed fishing for pollock inside the SCA.

[3] Section 210(c) of the AFA requires that not less than 8.5 percent of the directed fishing allowance allocated to listed catcher/processors shall be available for harvest only by eligible catcher vessels delivering to listed catcher/processors.

The first seasonal allowances for W/C GOA pollock in Table 1 of the GOA 2000 interim harvest specifications (65 FR 65; January 3, 2000) are replaced by the following Table 5.

TABLE 5.—REVISED FIRST SEASONAL ALLOWANCES OF POLLOCK IN THE WESTERN (W) AND CENTRAL (C) REGULATORY AREAS OF THE GULF OF ALASKA (GOA)

Species and area	A season interim TAC (mt)
Pollock:	
W (610)	5,465
C (620 outside Shelikof Strait)	3,252
C (630 outside Shelikof Strait)	4,278
Shelikof Strait	14,366
Total	27,361

[1] The pollock catch limit for the Shelikof Strait conservation zone is determined by calculating the ratio of the most recent estimate of pollock biomass in Shelikof Strait (489,900 mt) divided by the most recent estimate of total pollock biomass in the GOA (933,000 mt). This ratio is then multiplied by the pollock TAC in the A season for the Western and Central areas of the GOA (27,361 mt).

Technical Amendment to Steller Sea Lion No-Trawl Zones in the Aleutian Islands Area

This emergency interim rule also makes technical changes to the existing no-trawl zones set out in Table 5 of 50 CFR part 679 by suspending it and by adding Table 20 to 50 CFR part 679. This is due to the availability of new information on the location of haulout sites as determined by NMFS during recent surveys.

Classification

The Assistant Administrator for Fisheries, NOAA (AA), has determined that this emergency interim rule is necessary to respond to an emergency situation and that it is consistent with the Magnuson-Stevens Act and other applicable laws.

Pursuant to the National Environmental Policy Act an EA/RIR was developed for this action. It was determined that this action would not have a significant impact on the human environment. The EA/RIR may be obtained in hard copy from the Alaska Regional Office (see **ADDRESSES)** or via the internet at www.fakr.noaa.gov. NMFS is specifically requesting comments on the EA/RIR. NMFS will respond to those comments in the proposed rule to implement permanent Steller sea lion protection measures in the BSAI and GOA pollock fisheries.

This emergency action has been determined to be significant for purposes of E.O. 12866. This rule contains no reporting, recordkeeping, or compliance requirements, and no relevant Federal rules exist which may duplicate, overlap, or conflict with this rule.

Failure to have the measures contained in this rule in place by January 20, 2000, would force delay of the start of the pollock fisheries of the BS and GOA, with significant costs to industry. As such, NMFS finds that the immediate need to effect the provisions of this emergency interim rule by January 20, 2000, in order to avoid unecessary closures that would cause extensive economic disruption to the pollock fisheries, constitutes good cause to waive the requirement to provide prior notice and an opportunity for public comment pursuant to authority set forth at 5 U.S.C. 553(b)(B), as such procedures would be impracticable and contrary to the public interest. The need for these measures to be in place by January 20, 2000, also constitutes good cause under authority set forth at 5 U.S.C. 553(d)(3) not to delay the effective date of this emergency interim rule for 30 days.

Because prior notice and opportunity for public comment are not required for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, are inapplicable.

The President has directed Federal agencies to use plain language in their communications with the public, including regulations. These regulations have been drafted to comply with that directive. We seek public comment on any ambiguity or unnecessary complexity arising from the language used in this emergency interim rule.

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Recordkeeping and reporting requirements.

Dated: January 19, 2000.

Andrew A. Rosenberg,

Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

For reasons set out in the preamble, 50 CFR part 679 is amended as follows:

50 CFR CHAPTER VI

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

1. The authority citation for part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.*, 1801 *et seq.*, and 3631 *et seq.*

2. In § 679.2, the definition ''Directed fishing for pollock CDQ'' is added in alphabetical order to read as follows:

§ 679.2 Definitions.

* * * * *

Directed fishing for pollock CDQ means, for purposes of enforcing closures to directed fishing for pollock CDQ elsewhere in this part, retrieving onboard a vessel a haul in which pollock represents 60 percent or more of the total groundfish catch by weight, as determined by the observer's species composition sample for each haul. The groundfish species used to calculate total catch include all the species and

species categories defined in Table 1 of the annual BSAI specifications.

* * * * *

3. In § 679.7, paragraph (b) is suspended and paragraph (j) is added to read as follows:

§ 679.7 Prohibitions.

* * * * *

(j) *Prohibitions specific to the GOA (applicable through July 19, 2000)*—(1) *Southeast Outside trawl closure.* Use any gear other than non-trawl gear in the GOA east of 140° W long.

(2) *Catcher vessel trip limit for pollock.* Retain on board a catcher vessel at any time, more than 300,000 pounds (136 mt) of unprocessed pollock.

(3) *Tender vessel restrictions for pollock.*—(i) Operate as a tender vessel east of 157°00′ W long. for pollock harvested in the GOA.

(ii) Operate as a tender vessel west of 157°00′ W long. while retaining on board at any time more than 600,000 lb (272 mt) of unprocessed pollock.

* * * * *

4. In § 679.20, paragraphs (a)(5)(i)(A) and (a)(5)(ii)(B) are suspended, and new paragraphs (a)(5)(i)(C) and (a)(5)(ii)(C) are added to read as follows:

§ 679.20 General limitations.

* * * * *

(a) * * *

(5) * * *

(i) * * *

(C) *BSAI seasonal allowances (applicable through July 19, 2000)*—(*1*) *General.* Within any fishing year, the Regional Administrator may add or subtract the under harvest or over harvest of a seasonal allowance, by component, according to the harvest limitations here. The Steller Sea Lion Conservation Area (SCA) is defined at § 679.22(a)(11)(iv).

Bering Sea subarea	Combined A/B season, maximum overall harvest of 40% of annual vcxvccpollock TAC.	Combined C/D season, maximum overall harvest of 60% of annual pollock TAC.		
Inside SCA	Maximum harvest limit of 20% of annual pollock TAC for A+B combined, and 15% for A or B singly.	Maximum harvest limit of 4.5% of annual pollock TAC.	Maximum harvest limit of 7.5% of annual pollock TAC.	
Season	AB	C	D	

(*2*) *Inshore, catcher/processor, mothership, and CDQ components.* The portion of the Bering Sea subarea pollock directed fishing allowance allocated to each component under sections 206(a) and 206(b) of the American Fisheries Act will be divided into two seasonal allowances corresponding to the two fishing seasons set out at § 679.23(e)(4)(i), as follows: A/B Season, 40 percent; C/D Season, 60 percent.

* * * * *

(ii) * * *

(C) *GOA seasonal allowances (applicable through July 19, 2000).* Each apportionment established under paragraph (a)(5)(ii)(A) of this section will be divided into four seasonal allowances corresponding to the four fishing seasons set out at § 679.23(d)(3) as follows: A Season, 30 percent; B Season, 15 percent; C Season, 30 percent; D Season, 25 percent. Within any fishing year, underharvest or overharvest of a seasonal allowance may be added to or subtracted from subsequent seasonal allowances in a manner to be determined by the Regional Administrator, provided that a revised seasonal allowance does not exceed 30 percent of the annual TAC apportionment.

* * * * *

5. In § 679.22, paragraphs (a)(7) and (b)(2) are suspended, and new paragraphs (a)(8)(iv), (a)(11) and (b)(3) are added to read as follows:

§ 679.22 Closures.

(a) * * *

(8) * * *

(iv) *Pollock closure* (applicable through July 19, 2000). Directed fishing for pollock is prohibited at all times within the Aleutian Islands subarea.

* * * * *

(11) *Steller sea lion protection areas, Bering Sea subarea and Bogoslof District (applicable through July 19, 2000)*—(i) *Year-round trawl closures.* Trawling is prohibited within 10 nm of each of the Steller sea lion rookeries shown in Table 12 to this part.

(ii) *Seasonal trawl closures.* During January 1 through June 10, or a date earlier than June 10 if directed fishing for pollock is prohibited for all sectors under § 679.20, trawling is prohibited within 20 nm of each of the Steller sea lion rookeries shown in Table 12 to this part.

(iii) *Pollock closures.* Directed fishing for pollock, including pollock CDQ, is prohibited within 10 or 20 nm of each of the sea lion haulout and rookery sites shown in Table 12 to this part. The radius in nm and time period that each closure is in effect are shown in Table 12 to this part.

(iv) *Steller sea lion conservation area (SCA)*—(A) *General.* Directed fishing for pollock by vessels catching pollock for processing by the inshore component, catcher/processors in the offshore component, motherships in the offshore component, or directed fishing for pollock CDQ is prohibited within the SCA for the duration of a fishing season when the Regional Administrator announces, by notification in the **Federal Register**, that the harvest of a seasonal limit of pollock within the SCA by an industry component reaches the applicable percentage specified in the table following paragraph (a)(11)(iv)(D) of this section.

(B) *Boundaries.* The SCA consists of the area of the Bering Sea subarea between 170’00’ W long. and 163’00’ W long., south of straight lines connecting the following points in the order listed: 55°00″ N lat. 170°00″ W long.; 55°00″ N lat. 168°00″ W long.; 55°30″ N lat. 168°00″ W long.; 55°30″ N lat. 166°00″ W long.; 56°00″ N lat. 166°00″ W long.; and 56°00″ N lat. 163°00″ W long.

(C) *Seasons*—Subject to other provisions of this part, directed fishing for pollock within the SCA is authorized only during the following seasons:

(*1*) *A season.* From 1200 hours, A.l.t., January 20, through 1200 hours, A.l.t., April 1;

(*2*) *B season.* From 1200 hours, A.l.t., April 1, through 1200 hours, A.l.t., June 10;

(*3*) *C season.* From 1200 hours, A.l.t., June 10, through 1200 hours, A.l.t., August 20;

(*4*) *D season.* From 1200 hours, A.l.t., August 20, through 1200 hours, A.l.t., November 1.

(D) *Criteria for closure*— (*1*) *General.* A directed fishing closure identified in paragraph (a)(11)(iv)(A) of this section will take effect when the Regional

Administrator determines that the harvest of a seasonal limit of pollock within the SCA by an industry component reaches the applicable percentage specified in the following table:

Industry sector	Seasonal directed fishing allowance limits within the SCA by industry component (in percent)			
	A/B season		C/D season	
	A–SCA limit	B–SCA limit	C–SCA limit	D–SCA limit
Inshore	42	14	13.5	22.5
Catcher/processor	24.75	8.25	0	0
Mothership	37.5	12.5	0	0
CDQ	62	20.5	14	23

(*2*) *Inshore catcher vessels greater than 99 ft (30.2 m) LOA*. The Regional Administrator will prohibit directed fishing for pollock by vessels greater than 99 ft (30.2 m) LOA catching pollock for processing by the inshore component before reaching the inshore SCA harvest limit during the A and D seasons to accommodate fishing by vessels less than or equal to 99 ft (30.2 m) inside the SCA for the duration of the inshore seasonal opening. The Regional Administrator will estimate how much of the inshore seasonal allowance is likely to be harvested by catcher vessels less than or equal to 99 ft (30.2 m) LOA and reserve a sufficient amount of the inshore SCA allowance to accommodate fishing by such vessels after the closure of the SCA to inshore vessels greater than 99 ft (30.2 m) LOA. The Regional Administrator will prohibit directed fishing for all inshore catcher vessels within the SCA when the inshore limit specified in paragraph (a)(7)(iv)(D)(*1*) of this section has been met.

(b) * * *

(3) *Steller sea lion protection areas (applicable through July 19, 2000)*—(i) *Year-round trawl closures*. Trawling is prohibited in the GOA within 10 nm of the Steller sea lion rookeries shown in Table 13 to this part.

(ii) *Pollock closures*. Directed fishing for pollock is prohibited within 10 nm of each of the sea lion haulout and rookery sites shown in Table 13 to this part. The radius in nm and time period that each closure is in effect are shown in Table 13 to this part.

(iii) *Shelikof Strait conservation area*.—(A) *General*. Directed fishing for pollock is prohibited within the Shelikof Strait conservation area during the A and B seasons, defined at § 679.23(d)(3) of this part, when the Regional Administrator announces through notification in the **Federal Register** that the A or B season catch of pollock from within the Shelikof Strait conservation area reaches the amount determined by paragraph (b)(3)(iii)(C) of this section.

(B) *Boundaries*. The Shelikof Strait conservation area consists of the area bound by straight lines and shoreline connecting the following coordinates in the following order: 58°51′ N lat. 153°15′ W long.; 58°51′ N lat. 152°00′ W long. and the intersection of 152°00′ W long. with Afognak Island; aligned counterclockwise around the shoreline of Afognak, Kodiak, and Raspberry Islands to 57°00′ N lat. 154°00′ W long.; 56°30′ N lat. 154°00′ W long.; 56°30′ N lat. 155°00′ W long.; 56°00′ N lat. 155°00′ W long.; 56°00′ N lat. 157°00′ W long.; and the intersection of 157°00′ W long. with the Alaska Peninsula.

(C) *Determination of TAC*. NMFS will publish the pollock TAC for the Shelikof Strait conservation area in the annual specifications pursuant to § 679.20(c). The TAC is determined by calculating a ratio equal to the most recent estimate of pollock biomass in Shelikof Strait divided by the total pollock biomass in the GOA. NMFS will multiply this ratio by the overall pollock TAC for the GOA and then multiply that sum by the seasonal TAC apportionment to determine the Shelikof Strait apportionment.

* * * * *

6. In § 679.23, paragraphs (d)(2) and (e)(2) are suspended, and new paragraphs (d)(3), (e)(5), and (i) are added to read as follows:

§ 679.23 Seasons.

* * * * *

(d) * * *

(3) *Directed fishing for pollock (applicable through July 19, 2000)*. Subject to other provisions of this part, directed fishing for pollock in the Western and Central Regulatory Areas is authorized only during the following four seasons:

(i) *A season*. From 1200 hours, A.l.t., January 20, through 1200 hours, A.l.t., March 1;

(ii) *B season*. From 1200 hours, A.l.t., March 15, through 1200 hours, A.l.t., May 31;

(iii) *C season*. From 1200 hours, A.l.t., August 20, through 1200 hours, A.l.t., September 15.

(iv) *D season*. From 1200 hours, A.l.t., October 1, through 1200 hours, A.l.t., November 1.

(e) * * *

(5) *Directed fishing for pollock in the Bering Sea subarea (applicable through July 19, 2000)*.—(i) *Inshore, offshore catcher/processor, and mothership components and Pollock CDQ fisheries*. Subject to other provisions of this part, directed fishing for pollock by vessels catching pollock for processing by the inshore component, catcher/processors in the offshore component, and motherships in the offshore component in the Bering Sea subarea or directed fishing for pollock CDQ in the Bering Sea subarea is authorized only during the following two seasons:

(A) *A/B season*. From 1200 hours, A.l.t., January 20, through 1200 hours, A.l.t., June 10;

(B) *C/D season*. From 1200 hours, A.l.t., June 10, through 1200 hours, A.l.t., November 1;

(ii) [Reserved]

* * * * *

(i) *Catcher vessel exclusive fishing seasons for pollock (applicable through July 19, 2000)*. Catcher vessels are prohibited from participating in directed fishing for pollock under the following conditions. Vessels less than 125 ft (38.1 m) LOA are exempt from this restriction in area 620 east of 157°00' W. long. and area 630. BS and GOA seasons are provided at § 679.23(d)(3) and § 679.23(e)(4).

If you own or operate a catcher vessel and engage in directed fishing for pollock in the—	During the—	Then you are prohibited from subsequently engaging in directed fishing for pollock in the—
Bering Sea subarea	A/B season	GOA until the following C season.
	C/D season	GOA until the A season of the next year.
GOA	A season	BSAI until the following C/D season.
	B season	BSAI until the following C/D season.
	C season	BSAI until the A/B season of the following year.
	D season	BSAI until the A/B season of the following year.

7. In 50 CFR part 679 Tables 16 through 19 are reserved; Tables 4, 5, and 6 are suspended; and Tables 12, 13, and 20 to 50 CFR part 679 are added to read as follows:

TABLE 12 TO 50 CFR PART 679—STELLER SEA LION PROTECTION AREAS IN THE BERING SEA SUBAREA

Management area/island/site [1, 2, 3]	Boundaries to				Directed fishing for pollock prohibited within * * * (nm)		Trawling prohibited within (nm)	
	Latitude (N)	Longitude (W)	Latitude (N)	Longitude (W)	Nov. 1 through June 1	June 1 through November 1	Jan. 1 through April 15	Year-round
Walrus	57 11.00 N	169 56.00 W			20	20		10
Uliaga	53 04.00 N	169 47.00 W	53 05.00 N	169 46.00 W		20		
Chuginadak	52 46.70 N	169 41.90 W				20		
Kagamil	53 02.50 N	169 41.00 W				20		
Samalga	52 46.00 N	169 15.00 W				20		
Adugak	52 55.00 N	169 10.50 W			20	20		10
Umnak/Cape Aslik	53 25.00 N	168 24.50 W			20	20		
Ogchul	52 59.71 N	168 24.24 W			20	20		10
Bogoslof/Fire Island	53 55.69 N	168 02.05 W			20	20		10
Emerald	53 17.50 N	167 51.50 W				20		
Unalaska/Cape Izigan	53 13.64 N	167 39.37 W			20	20		
Unalaska/Bishop Pt	53 58.40 N	166 57.50 W			20	20		
Akutan/Reef-lava	54 08.10 N	166 06.19 W	54 09.10 N	166 05.50 W	20	20		
Old Man Rocks	53 52.20 N	166 04.90 W			20	20		
Akutan/Cape Morgan	54 03.39 N	165 59.65 W	54 03.70 N	166 03.68 W	20	20	20	10
Rootok	54 03.90 N	165 31.90 W	54 02.90 N	165 29.50 W		20		
Akun/Billings Head	54 17.61 N	165 32.06 W	54 17.57 N	165 31.71 W	20	20	20	10
Tanginak	54 12.00 N	165 19.40 W			20			
Tigalda/Rocks NE	54 09.60 N	164 59.00 W	54 09.12 N	164 57.18 W	20	20		
Unimak/Cape Sarichef	54 34.30 N	164 56.80 W			20	20		
Aiktak	54 10.99 N	164 51.15 W			20			
Ugamak	54 13.50 N	164 47.50 W	54 13.00 N	164 47.00 W	20	20	20	10
Round	54 12.05 N	164 46.60 W				20		
Sea Lion Rock (Amak)	55 27.79 N	163 12.24 W			20	20	20	10
Amak and rocks	55 24.20 N	163 09.60 W	55 25.90 N	163 09.90 W	20	20		

[1] Three nm NO TRANSIT ZONES are described at 50 CFR 227.12(a)(2) of this title.
[2] Closure zones around many of these sites also extend into statistical area 610 of the Gulf of Alaska Management Area.
[3] Where two sets of coordinates are given, the baseline extends in a clock-wise direction from the first set of geographic coordinates along the shoreline at mean lower-low water to the second set of coordinates. Where only one set of coordinates is listed, that location is the base point.

TABLE 13 TO 50 CFR PART 679—STELLER SEA LION PROTECTION AREAS IN THE GULF OF ALASKA

Management area/island/site [1, 2, 3]	Boundaries to				Directed fishing for pollock prohibited within . . . (nm)		Trawling prohibited within . . . (nm) (year-round)
	Latitude (N)	Longitude (W)	Latitude (N)	Longitude (W)	Nov. 1 through June 1	June 1 through November 1	
Bird	54 40.16 N	163 17.57 W			10	10	
South Rocks	54 18.14 N	162 41.52 W			10	10	
Clubbing Rocks	54 41.98 N	162 26.74 W	54 42.00 N	162 26.50 W	10	10	10
Pinnacle Rock	54 46.06 N	161 45.85 W			10	10	10
Sushilnoi Rocks	54 49.30 N	161 42.73 W				10	
Olga Rocks	55 00.45 N	161 29.81 W	54 59.09 N	161 30.89 W	10	10	
Jude	55 15.75 N	161 06.27 W			10	10	
Sea Lion Rocks (Shumagins) [4]	55 04.70 N	160 31.04 W			10	10	

TABLE 13 TO 50 CFR PART 679—STELLER SEA LION PROTECTION AREAS IN THE GULF OF ALASKA—Continued

Management area/island/site [1, 2, 3]	Boundaries to				Directed fishing for pollock prohibited within . . . (nm)		Trawling prohibited within . . . (nm) (year-round)
	Latitude (N)	Longitude (W)	Latitude (N)	Longitude (W)	Nov. 1 through June 1	June 1 through November 1	
The Whaleback	55 16.82 N	160 05.04 W			10	10	
Chernabura	54 45.18 N	159 32.99 W	54 44.87 N	159 35.74 W	10	10	10
Castle Rock	55 16.47 N	159 29.77 W				10	
Atkins	55 03.50 N	159 18.50 W			10	10	10
Spitz	55 46.80 N	158 53.20 W				10	
Mitrofania	55 50.00 N	158 42.00 W			10	10	
Kak	56 17.30 N	157 50.10 W				10	
Lighthouse Rocks	55 46.79 N	157 24.89 W			10	10	
Sutwik	56 31.05 N	157 20.47 W	56 32.00 N	157 21.00 W		10	
Chowiet	56 00.54 N	156 41.42 W	56 00.30 N	156 41.60 W	10	10	10
Nagai Rocks	55 50.00 N	155 46.00 W			10	10	
Chirikof	55 46.50 N	155 39.50 W	55 46.44 N	155 43.46 W	10	10	10
Puale Bay	57 40.60 N	155 23.10 W			10	10	
Kodiak/Point Ikolik	57 17.12 N	154 48.29 W			10		
Takli	58 01.75 N	154 31.25 W				10	
Cape Gull	58 11.50 N	154 09.60 W	58 12.50 N	154 10.50 W		10	
Sitkinak/Cape Sitkinak	56 34.30 N	153 50.96 W	56 34.20 N	153 51.05 W	10	10	
Kodiak/Cape Ugat	57 52.41 N	153 50.97 W			10	10	
Kodiak/Cape Barnabas	57 10.20 N	152 53.05 W			10	10	
Kodiak/Gull Point	57 21.45 N	152 36.30 W			10	10	
Shakun Rock	58 32.80 N	153 41.50 W			10	10	
Twoheaded Island	56 54.50 N	153 32.75 W	56 53.90 N	153 33.74 W	10	10	
Cape Douglas (Shaw Island)	59 00.00 N	153 22.50 W				10	
Latax Rocks	58 40.10 N	152 31.30 W			10	10	
Ushagat/SW	58 54.75 N	152 22.20 W				10	
Ugak	57 23.60 N	152 17.50 W	57 21.90 N	152 17.40 W		10	
Sea Otter Island	58 31.15 N	152 13.30 W			10	10	
Long	57 46.82 N	152 12.90 W			10		
Kodiak/Cape Chiniak	57 37.90 N	152 08.25 W			10	10	
Sugarloaf	58 53.25 N	152 02.40 W			10	10	10
Sea Lion Rocks (Marmot)	58 20.53 N	151 48.83 W			10	10	
Marmot	58 13.65 N	151 47.75 W	58 09.90 N	151 52.06 W	10	10	10
Perl	59 05.75 N	151 39.75 W			10	10	
Outer (Pye) Island	59 20.50 N	150 23.00 W	59 21.00 N	150 24.50 W	10	10	10
Steep Point	59 29.05 N	150 15.40 W				10	
Chiswell Islands	59 36.00 N	149 34.00 W			10	10	
Rugged Island	59 49.80 N	149 23.30 W	59 51.00 N	149 25.30 W	10		
Point Elrington [4]	59 56.00 N	148 15.20 W					
Wooded Island (Fish)	59 52.90 N	147 20.65 W			10	10	
The Needles [4]	60 06.64 N	147 36.17 W					
Glacier Island	60 51.30 N	147 14.50 W			10	10	
Seal Rocks	60 09.78 N	146 50.30 W			10	10	
Cape Hinchinbrook	60 14.00 N	146 38.50 W				10	
Hook Point	60 20.00 N	146 16.50 W				10	
Cape St. Elias	59 48.00 N	144 35.50 W			10	10	

[1] Three nm NO TRANSIT ZONES are described at 50 CFR 227.12(a)(2) of this title.
[2] Additional closures along the Aleutian Island chain that extend into statistical area 610 of the Gulf of Alaska are displayed in Table 13 to this part.
[3] Where two sets of coordinates are given, the baseline extends in a clock-wise direction from the first set of geographic coordinates along the shoreline at mean lower-low water to the second set of coordinates. Where only one set of coordinates is listed, that location is the base point.
[4] Vessels less than or equal to 60 ft. (18.3m) LOA are exempt from the 20 nm closure at Sea Lion Rocks.
[5] Restrictions at Point Elrington and The Needles will be considered by the Alaska Board of Fisheries because these areas fall completely within the State of Alaska management area of Prince William Sound.

TABLE 20 TO 50 CFR PART 679—STELLER SEA LION PROTECTION AREAS IN THE ALEUTIAN ISLANDS SUBAREA

Management area/island/site [1, 2, 3]	Boundaries to				Trawling prohibited within—(nm) year-round
	Latitude (N)	Longitude (W)	Latitude (N)	Longitude (W)	
Yunaska Island	52 41.40 N	170 36.35 W			10
Kasatochi Island	52 11.11 N	175 31.00 W			10
Adak Island	51 35.50 N	176 57.10 W	51 37.50 N	176 59.60 W	10
Gramp Rock	51 28.87 N	178 20.58 W			10
Tag Island	51 33.50 N	178 34.50 W			10
Ulak Island	51 18.90 N	178 58.90 W	51 18.70 N	178 59.60 W	10

TABLE 20 TO 50 CFR PART 679—STELLER SEA LION PROTECTION AREAS IN THE ALEUTIAN ISLANDS SUBAREA—Continued

Management area/island/site [1, 2, 3]	Boundaries to				Trawling prohibited within—(nm) year-round
	Latitude (N)	Longitude (W)	Latitude (N)	Longitude (W)	
Semisopochnoi/Pochnoi Point	51 57.30 N	179 46.00 E	.....	.....	10
Semisopochnoi/Petrel Point	52 01.40 N	179 36.90 E	52 01.50 N	179 39.00 E	10
Amchitka Island/East Cape	51 22.26 N	179 27.93 E	51 22.00 N	179 27.00 E	10
Amchitka Is/Column Rocks	51 32.32 N	178 49.28 E	.....	.....	10
Ayugadak Point	51 45.36 N	178 24.30 E	.....	.....	10
Kiska Island/Lief Cove	51 57.19 N	177 20.41 E	51 57.24 N	177 20.49 E	10
Kiska Island/Cape St. Stephen	51 52.50 N	177 13.00 E	51 53.50 N	177 12.00 E	10
Buldir Island	52 20.38 N	175 53.85 E	52 20.25 N	175 54.03 E	10
Agattu Island/Cape Sabek	52 22.50 N	173 43.30 E	52 21.80 N	173 41.40 E	10
Agattu Island/Gillon Pt	52 24.13 N	173 21.31 E	.....	.....	10
Attu Island/Caper Wrangell	52 55.36 N	172 27.22 E	52 55.34 N	172 27.55 E	10
Seguam Island	52 21.05 N	172 34.40 W	52 21.02 N	172 33.06 W	20
Agligadak Island	52 06.09 N	172 54.23 W	.....	.....	20

[1] Three nm NO TRANSIT ZONES are described at 50 CFR 227.12(a)(2) of this title.
[2] Closure zones around many of these sites also extend into statistical area 610 of the Gulf of Alaska Management Area.
[3] Where two sets of coordinates are given, the baseline extends in a clock-wise direction from the first set of geographic coordinates along the shoreline at mean lower-low water to the second set of coordinates. Where only one set of coordinates is listed, that location is the base point.

[FR Doc. 00–1708 Filed 1–20–00; 3:26 pm]

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Proposed Rules

Federal Register
Vol. 65, No. 16
Tuesday, January 25, 2000

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–100163–00]

RIN 1545–AX73

Applying Section 197 To Partnerships

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations relating to the amortization of certain intangible property to partnership transactions involving sections 732(b) and 734(b). The proposed regulations interpret the provisions of section 197(f)(9), reflecting changes to the law made by the Omnibus Budget Reconciliation Act of 1993 (OBRA '93) and affect taxpayers who acquired intangible property after August 10, 1993, or made a retroactive election to apply OBRA '93 to intangibles acquired after July 25, 1991. This document also provides a notice of public hearing on these proposed regulations.

DATES: Written comments must be received by April 24, 2000. Outlines of topics to be discussed at the public hearing scheduled for May 24, 2000, at 10 a.m. must be received by May 3, 2000.

ADDRESSES: Send submissions to: CC:DOM:CORP:R (REG–100163–00), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:DOM:CORP:R (REG–100163–00), Courier's desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the ''Tax Regs'' option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at http://www.irs.ustreas.gov/prod/tax__regs/regslist.html. The public hearing will be held in Room 2615, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Robert G. Honigman, (202) 622–3050; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Guy Traynor, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION: This document proposes to amend section 197 of the Income Tax Regulations (26 CFR Part 1) to provide additional rules regarding the application of section 197(f)(9) to partnership transactions under sections 732(b) and 734(b).

Background

On January 16, 1997, the IRS published proposed regulations (REG–209709–94) in the **Federal Register** (62 FR 2336) inviting comments under sections 167(f) and 197, including the anti-churning rules in section 197(f)(9). Commentators requested that the final regulations provide additional guidance on how the special anti-churning rule of section 197(f)(9)(E) applies to increases in the basis of partnership property under sections 732, 734, and 743. In accordance with these comments, these proposed regulations provide rules for determining the amount of a basis adjustment under sections 732(b) and 734(b) that will be subject to the anti-churning rules. Final regulations being issued at the same time as these proposed regulations provide rules for determining the amount of a basis adjustment under sections 732(d) and 743(b) that will be subject to the anti-churning rules.

Explanation of Provisions

A. In General

Section 197(f)(9)(E) provides that, in applying the anti-churning rules for basis adjustments under sections 732, 734, and 743, determinations are made at the partner level, and each partner is treated as having owned and used such partner's proportionate share of the partnership's assets. With respect to basis adjustments under sections 732(b) and 734(b), this rule requires taxpayers and the IRS to analyze transactions that actually involve a distribution of property from the partnership to a partner as deemed transactions involving transfers of property directly among the partners.

B. Two-Step Analysis

The proposed regulations embody a two-step analysis in determining whether the anti-churning rules apply to the deemed transfer of intangibles in transactions giving rise to basis adjustments under sections 732(b) and 734(b). First, it is necessary to determine whether the portion of an intangible that a partner is deemed to transfer is treated, immediately prior to the deemed transfer, as being subject to the anti-churning rules for purposes of applying these provisions. Second, if the partner's share of the intangible is treated, immediately prior to the deemed transfer, as being subject to the anti-churning rules for purposes of applying these provisions, it is necessary to determine whether the deemed transferor and transferee are related so that the anti-churning rules will continue to apply to the intangible after the deemed transfer.

For purposes of applying the first prong of the analysis, when a partner acquires an interest in a partnership, the proposed regulations treat the partner as acquiring an undivided interest in all section 197(f)(9) intangibles held by a partnership at the time that the partner acquires an interest in the partnership. If a partner acquires an interest in a partnership from an unrelated person after August 10, 1993 (or, in certain cases, after July 25, 1991), the partner's share of any intangible held by the partnership as of August 10, 1993 (or, in certain cases, after July 25, 1991) is treated as no longer subject to the anti-churning rules for purposes of analyzing subsequent deemed transfers of intangibles in transactions that give rise to the basis adjustments under sections 732(b) and 734(b). With respect to intangibles acquired by the partnership after August 10, 1993, that are subject to the anti-churning rules in the hands of the partnership, a partner's share of the intangible is treated as not subject to the anti-churning rules for purposes of analyzing these basis adjustments if the partner acquired the interest in the partnership from an unrelated person after the partnership acquired the tainted intangible. Once a partner's

share of an intangible is treated as no longer subject to the anti-churning rules for purposes of analyzing subsequent deemed transfers, that share of the intangible will remain untainted even if the partner transfers the interest to the original transferor or a person who is related to the original transferor, so long as the transfers are not part of the same transaction or series of related transactions. Special rules are provided where a partner acquires a partnership interest in exchange for property contributed to a partnership.

For purposes of applying the anti-churning rules to basis adjustments under section 732(b), the distributee partner is deemed to acquire the distributed intangible directly from the continuing partners of the distributing partnership. The proposed regulations contain a favorable stacking rule that treats the distributee partner as acquiring the intangible first from the continuing partners for whom transfers would not be subject to the anti-churning rules (either because the continuing partner's share of the intangible is treated, for purposes of this rule, as not being subject to the anti-churning rules or the distributee partner is not related to the continuing partner) to the extent of such partners' share of appreciation in the intangible.

The proposed regulations contain a special rule to ensure that, in analyzing subsequent transfers, a partner cannot treat the entire intangible as no longer subject to the anti-churning rules simply because the full basis of the intangible (which may be significantly less than the intangible's fair market value) becomes amortizable as a result of the favorable stacking rule that applies to section 732(b) basis adjustments.

For purposes of applying the anti-churning rules to basis adjustments under section 734(b), the continuing partners are deemed to acquire interests in the intangible that remains in the partnership from the partner who received a distribution (giving rise to the section 734(b) basis adjustment) of property other than the intangible. To the extent that the distributee partner could transfer the intangible directly to a continuing partner (who may be the distributee partner) and the transfer would not be subject to the anti-churning rules (either because the distributee partner's share of the intangible is treated (for purposes of this rule) as not being subject to the anti-churning rules or the continuing partner is not related to the distributee (except in certain circumstances)), the basis adjustment will be amortizable with respect to the continuing partner.

The proposed regulations contain a special rule which provides that if a distribution that gives rise to an increase in the basis under section 734(b) of a section 197(f)(9) intangible held by the partnership is undertaken as part of a series of related transactions that include a contribution of the intangible to the partnership by a continuing partner, the continuing partner is treated as related to the distributee partner to the extent that the continuing partner's partnership interest was received in exchange for the intangible.

In addition to issues relating to determining the amount of a basis adjustment that is subject to the anti-churning rules, the Treasury Department and the IRS also recognize that certain problems may arise in maintaining capital accounts where a portion of a section 734(b) adjustment is allocated to an intangible that is subject to the anti-churning rules with respect to one or more partners. In some situations, the failure to allocate deductions for amortization to any partner whose allocable share of a section 734(b) adjustment is subject to the anti-churning rules will distort the partners' economic agreement. For example, where partners agree to share depreciation and amortization deductions equally, if one partner's share of a section 734(b) adjustment allocable to an intangible asset is subject to the anti-churning rules, the capital accounts of the partners will not reflect an equivalent sharing of the economic amortization from the asset absent special adjustments to account for the disparity between the allocation of tax amortization and the intended allocation of economic amortization. Furthermore, divergence of book and tax accounts with respect to an intangible that may result from such special adjustments can cause problems in allocating the correct amount of taxable gain or loss to the appropriate parties upon disposition of the intangible. Similar problems may arise as a result of allowing remedial allocations for intangibles that otherwise are subject to the anti-churning rules and are addressed in § 1.197–2(h)(12)(vii)(B). These regulations are not intended to create such distortions. Nevertheless, a general rule that resolves these distortions in all situations (including different allocations of gain and depreciation or amortization) would be extremely complicated and, perhaps, unduly narrow.

Therefore, the proposed regulations provide that taxpayers may use any reasonable method to determine amortization for book purposes in these situations, provided that the method used does not contravene the purposes of the anti-churning rules under section 197 (i.e., the effect of the book adjustments will not be such that a partner who is subject to the anti-churning rules will receive, directly or indirectly, deductions for amortization, for Federal income tax purposes, attributable to the section 734(b) adjustment). The Treasury Department and IRS may consider providing guidance with respect to this issue in the future and request comments relating thereto.

C. Effective Date

These regulations are proposed to apply to distributions occurring on or after the date final regulations are published in the **Federal Register**.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in EO 12866. It also has been determined that section 533(b) of the Administrative Procedures Act (5 U.S.C. chapter 5) does not apply to these regulations, and because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) that are submitted timely to the IRS. All comments will be available for public inspection and copying. The Treasury Department and IRS specifically request comments on the clarity of the proposed regulations and how they may be made easier to understand.

A public hearing has been scheduled for May 24, 2000, at 10 a.m. in Room 2615, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the 10th Street entrance, located between Constitution and Pennsylvania Avenues, NW. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 15 minutes before the hearing starts. For

information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons that wish to present oral comments at the hearing must submit written comments and an outline of the topics to be discussed and the time devoted to each topic (signed original and eight (8) copies) by April 24, 2000.

A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these proposed regulations is Robert G. Honigman, Office of the Assistant Chief Counsel (Passthroughs & Special Industries). However, other personnel from the Treasury Department and IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.197–2 is amended by:

1. Revising paragraphs (h)(12)(ii), (h)(12)(iv), and (h)(12)(vi).
2. Adding *Examples 28, 29,* and *30* to paragraph (k).
3. Adding a sentence at the end of paragraph (l)(1).

The additions and revisions read as follows:

§ 1.197–2 Amortization of goodwill and other intangibles.

* * * * *

(h) * * *

(12) * * *

(ii) *Section 732(b) adjustments*—(A) *In general.* The anti-churning rules of this paragraph (h) apply to any increase in the adjusted basis of a section 197(f)(9) intangible under section 732(b) to the extent that the basis increase exceeds the total unrealized appreciation from the intangible allocable to—

(*1*) Partners other than the distributee partner or persons related to the distributee partner;

(*2*) If the distributed intangible is a section 197(f)(9) intangible acquired by the partnership on or before August 10, 1993, the distributee partner and persons related to the distributee partner to the extent that—

(*i*) They acquired an interest or interests in the partnership after August 10, 1993; and

(*ii*) Such interest or interests were held after August 10, 1993, by a person or persons other than the distributee partner or persons who were related to the distributee partner, and the acquisition of such interest or interests by such person or persons was not part of a transaction or series of related transactions in which the distributee partner or persons related to the distributee partner subsequently acquired such interest or interests; and

(*3*) If the distributed intangible is a section 197(f)(9) intangible that is acquired by the partnership after August 10, 1993, and that is not amortizable with respect to the partnership, the distributee partner and persons related to the distributee partner to the extent that—

(*i*) They acquired an interest or interests in the partnership after the partnership acquired the distributed intangible; and

(*ii*) Such interest or interests were held after the partnership acquired the distributed intangible, by a person or persons other than the distributee partner or persons who were related to the distributee partner, and the acquisition of such interest or interests by such person or persons was not part of a transaction or series of related transactions in which the distributee partner or persons related to the distributee partner subsequently acquired such interest or interests.

(B) *Effect of retroactive elections.* For purposes of paragraph (h)(12)(ii)(A) of this section, references to August 10, 1993, are treated as references to July 25, 1991, if the relevant party made a valid retroactive election under § 1.197–1T.

(C) *Intangible still subject to anti-churning rules.* Notwithstanding paragraph (h)(12)(ii) of this section, in applying the provisions of this paragraph (h) with respect to subsequent transfers, the distributed intangible remains subject to the provisions of this paragraph (h) in a percentage (determined at the time of the distribution) equal to—

(*1*) The sum of—

(*i*) The amount of the distributed intangible's basis that is nonamortizable under paragraph (g)(2)(ii)(B) of this section; and

(*ii*) The total unrealized appreciation inherent in the intangible reduced by the amount of the increase in the adjusted basis of the distributed intangible under section 732(b) to which the anti-churning rules do not apply; over—

(*2*) The fair market value of such intangible.

(D) *Partner's allocable share of unrealized appreciation from the intangible.* The amount of unrealized appreciation from an intangible that is allocable to a partner is the amount of taxable gain that would have been allocated to that partner if the partnership had sold the intangible immediately before the distribution for its fair market value in a fully taxable transaction.

(E) *Acquisition of partnership interest by contribution.* Solely for purposes of paragraphs (h)(12)(ii)(A)(*2*) and (*3*) of this section, a partner who acquires an interest in a partnership in exchange for a contribution of property to the partnership is deemed to acquire a pro rata portion of that interest in the partnership from each person who is a partner in the partnership at the time of the contribution based on each such partner's proportionate interest in the partnership. However, if the partner contributed the distributed section 197(f)(9) intangible to the partnership, the interest acquired by such partner in exchange for the intangible is treated as not being described in paragraphs (h)(12)(ii)(A)(*2*) or (*3*) of this section.

* * * * *

(iv) *Section 734(b) adjustments*—(A) *In general.* The anti-churning rules of this paragraph (h) do not apply to a continuing partner's share of an increase in the basis of a section 197(f)(9) intangible held by a partnership under section 734(b) to the extent that the continuing partner is an eligible partner.

(B) *Eligible partner.* For purposes of this paragraph (h)(12)(iv), eligible partner means—

(*1*) A continuing partner that is not the distributee partner or a person related to the distributee partner;

(*2*) With respect to any section 197(f)(9) intangible acquired by the partnership on or before August 10, 1993, a continuing partner that is the distributee partner or a person related to the distributee partner to the extent that—

(*i*) The distributee partner's interest in the partnership was acquired after August 10, 1993; and

(*ii*) Such interest was held after August 10, 1993 by a person or persons who were not related to the distributee partner, and the acquisition of such interest by such person or persons was not part of a transaction or series of related transactions in which the distributee partner or persons related to the distributee partner subsequently acquired such interest; or

(*3*) With respect to any section 197(f)(9) intangible acquired by the partnership after August 10, 1993, that is not amortizable with respect to the partnership, a continuing partner that is the distributee partner or a person related to the distributee partner to the extent that—

(*i*) The distributee partner's interest in the partnership was acquired after the partnership acquired the relevant intangible; and

(*ii*) Such interest was held after the partnership acquired the relevant intangible by a person or persons who were not related to the distributee partner, and the acquisition of such interest by such person or persons was not part of a transaction or series of related transactions in which the distributee partner or persons related to the distributee partner subsequently acquired such interest.

(C) *Effect of retroactive elections.* For purposes of paragraph (h)(12)(iv)(A) of this section, references to August 10, 1993, are treated as references to July 25, 1991, if the distributee partner made a valid retroactive election under § 1.197–1T.

(D) *Partner's share of basis increase.* For purposes of this paragraph (h)(12)(iv), a continuing partner's share of a basis increase is equal to—

(*1*) The total basis increase allocable to the intangible; multiplied by

(*2*) A fraction equal to—

(*i*) The unrealized appreciation from the intangible that would have been allocated to the continuing partner if the partnership had sold the intangible immediately before the distribution for its fair market value in a fully taxable transaction; over

(*ii*) The total unrealized appreciation from the intangible that would have been realized by the partnership if the partnership had sold the intangible immediately before the distribution for its fair market value in a fully taxable transaction.

(E) *Interests acquired by contribution*—(1) *Application of paragraphs (h)(12)(iv)(B)(2) and (3) of this section.* Solely for purposes of paragraphs (h)(12)(iv)(B)(2) and (3) of this section, a partner who acquires an interest in a partnership in exchange for a contribution of property to the partnership is deemed to acquire a pro rata portion of that interest in the partnership from each person who is a partner in the partnership at the time of the contribution based on each such partner's proportionate interest in the partnership. However, if the partner contributed the distributed section 197(f)(9) intangible to the partnership, the interest acquired by such partner in exchange for the intangible is treated as not being described in paragraphs (h)(12)(iv)(B)(*2*) or (*3*) of this section.

(*2*) *Special rule with respect to paragraph* (h)(12)(iv)(B)(*1*) of this section. Solely for purposes of paragraph (h)(12)(iv)(B)(1) of this section, if a distribution that gives rise to an increase in the basis under section 734(b) of a section 197(f)(9) intangible held by the partnership is undertaken as part of a series of related transactions that include a contribution of the intangible to the partnership by a continuing partner, the continuing partner is treated as related to the distributee partner to the extent that the continuing partner's partnership interest was received in exchange for the intangible.

(F) *Effect of section 734(b) adjustment on partners' capital accounts.* If one or more partners are subject to the anti-churning rules under this paragraph (h) with respect to a section 734(b) adjustment allocable to an intangible asset, taxpayers may use any reasonable method to determine amortization of the asset for book purposes, provided that the method used does not contravene the purposes of the anti-churning rules under section 197 and this paragraph (h). A method will be considered to contravene the purposes of the anti-churning rules if the effect of the book adjustments resulting from the method is such that any portion of the tax deduction for amortization attributable to the section 734 adjustment is allocated, directly or indirectly, to a partner who is subject to the anti-churning rules with respect to such adjustment.

* * * * *

(vi) *Partner is or becomes a user of partnership intangible*— (A) *General rule.* If, as part of a series of related transactions that includes a transaction described in paragraph (h)(12)(ii), (iii), (iv), or (v) of this section, an anti-churning partner becomes (or remains) a user of an intangible that is treated as transferred in the transaction (as a result of the partners being treated as having owned their proportionate share of partnership assets), the anti-churning rules shall apply to the proportionate share of such intangible that is treated as transferred by the anti-churning partner, notwithstanding the application of paragraph (h)(12)(ii), (iii), (iv), or (v) of this section.

* * * * *

(k) * * *

Example 28. Distribution of section 197(f)(9) intangible to partner who acquired partnership interest prior to the effective date.

(i) In 1990, A, B, and C each contribute $150 cash to form general partnership ABC for the purpose of engaging in a consulting business and a software manufacturing business. The partners agree to share partnership profits and losses equally. In 2000, the partnership distributes the consulting business to A in liquidation of A's entire interest in ABC. The only asset of the consulting business is a nonamortizable intangible, which has a fair market value of $180 and a basis of $0. At the time of the distribution, the adjusted basis of A's interest in ABC is $150. A is not related to B or C.

(ii) Under section 732(b), A's adjusted basis in the intangible distributed by ABC is $150, a $150 increase over the basis of the intangible in ABC's hands. In determining whether the anti-churning rules apply to any portion of the basis increase, A is treated as having owned and used A's proportionate share of partnership property. Thus, A is treated as holding an interest in the intangible during the transition period. Because the intangible was not amortizable prior to the enactment of section 197, the section 732(b) increase in the basis of the intangible may be subject to the anti-churning provisions. Paragraph (h)(12)(ii) of this section provides that the anti-churning provisions apply to the extent that the section 732(b) adjustment exceeds the total unrealized appreciation from the intangible allocable to partners other than A or persons related to A, as well as certain other partners whose purchase of their interests meet certain criteria. Because B and C are not related to A, and A's acquisition of its partnership interest does not satisfy the necessary criteria, the section 732(b) basis increase is subject to the anti-churning provisions to the extent that it exceeds B and C's proportionate share of the unrealized appreciation from the intangible. B and C's proportionate shares of the unrealized appreciation from the intangible is $120 (2/3 of $180). This is the amount of gain that would be allocated to B and C if the partnership sold the intangible immediately before the distribution for its fair market value of $180. Therefore, $120 of the section 732(b) basis increase is not subject to the anti-churning rules. The remaining $30 of the section 732(b) basis increase is subject to the anti-churning rules. Accordingly, A is

treated as having two intangibles, an amortizable section 197 intangible with an adjusted basis of $120 and a new amortization period of 15 years and a nonamortizable intangible with an adjusted basis of $30.

(iii) In applying the anti-churning rules to future transfers of the distributed intangible, under paragraph (h)(12)(ii)(C) of this section, one-third of the intangible will continue to be subject to the anti-churning rules, determined as follows: The sum of the amount of the distributed intangible's basis that is nonamortizable under paragraph (g)(2)(ii)(B) of this section ($0) and the total unrealized appreciation inherent in the intangible reduced by the amount of the increase in the adjusted basis of the distributed intangible under section 732(b) to which the anti-churning rules do not apply ($180 − $120 = $60), over the fair market value of the distributed intangible ($180).

Example 29. Distribution of section 197(f)(9) intangible to partner who acquired partnership interest after the effective date.

(i) The facts are the same as in example 28, except that B and C form ABC in 1990. A does not acquire an interest in ABC until 1995. In 1995, A contributes $150 to ABC in exchange for a one-third interest in ABC. At the time of the distribution, the adjusted basis of A's interest in ABC is $150.

(ii) As in *Example 28*, the anti-churning rules do not apply to the increase in the basis of the intangible distributed to A under section 732(b) to the extent that it does not exceed the unrealized appreciation from the intangible allocable to B and C. Under paragraph (h)(12)(ii) of this section, the anti-churning provisions also do not apply to the section 732(b) basis increase to the extent of A's allocable share of the unrealized appreciation from the intangible because A acquired the ABC interest from an unrelated person after August 10, 1993, and the intangible was acquired by the partnership before A acquired the ABC interest. Under paragraph (h)(12)(ii)(E) of this section, A is deemed to acquire the ABC partnership interest from an unrelated person because A acquired the ABC partnership interest in exchange for a contribution to the partnership of property other than the distributed intangible and, at the time of the contribution, no partner in the partnership was related to A. Consequently, the increase in the basis of the intangible under section 732(b) is not subject to the anti-churning rules to the extent of the total unrealized appreciation from the intangible allocable to A, B, and C. The total unrealized appreciation from the intangible allocable to A, B, and C is $180 (the gain the partnership would have recognized if it had sold the intangible for its fair market value immediately before the distribution). Because this amount exceeds the section 732(b) basis increase of $150, the entire section 732(b) basis increase is amortizable.

(iii) In applying the anti-churning rules to future transfers of the distributed intangible, under paragraph (h)(12)(ii)(C) of this section, one-sixth of the intangible will continue to be subject to the anti-churning rules, determined as follows: The sum of the amount of the distributed intangible's basis that is nonamortizable under paragraph (g)(2)(ii)(B) of this section ($0) and the total unrealized appreciation inherent in the intangible reduced by the amount of the increase in the adjusted basis of the distributed intangible under section 732(b) to which the anti-churning rules do not apply ($180 − $150 = $30), over the fair market value of the distributed intangible ($180).

Example 30. Distribution of section 197(f)(9) intangible contributed to the partnership by a partner. (i) The facts are the same as in *Example 29*, except that C purchased the intangible used in the consulting business in 1988 for $60 and contributed the intangible to ABC in 1990. At that time, the intangible had a fair market value of $150 and an adjusted tax basis of $60. When ABC distributes the intangible to A in 2000, the intangible has a fair market value of $180 and a basis of $60.

(ii) As in *Examples 28* and *29*, the adjusted basis of the intangible in A's hands is $150 under section 732(b). However, the increase in the adjusted basis of the intangible under section 732(b) is only $90 ($150 adjusted basis after the distribution compared to $60 basis before the distribution). Pursuant to paragraph (g)(2)(ii)(B) of this section, A steps into the shoes of ABC with respect to the $60 of A's adjusted basis in the intangible that corresponds to ABC's basis in the intangible and this portion of the basis is nonamortizable. B and C are not related to A, A acquired the ABC interest from an unrelated person after August 10, 1993, and the intangible was acquired by ABC before A acquired the ABC interest. Therefore, under paragraph (h)(12)(ii) of this section, the section 732(b) basis increase is amortizable to the extent of A, B, and C's allocable share of the unrealized appreciation from the intangible. The total unrealized appreciation from the intangible that is allocable to A, B, and C is $120. If ABC had sold the intangible immediately before the distribution to A for its fair market value of $180, it would have recognized gain of $120, which would have been allocated $10 to A, $10 to B, and $100 to C under section 704(c). Because A, B, and C's allocable share of the unrealized appreciation from the intangible exceeds the section 732(b) basis increase in the intangible, the entire $90 of basis increase is amortizable by A. Accordingly, after the distribution, A will be treated as having two intangibles, an amortizable section 197 intangible with an adjusted basis of $90 and a new amortization period of 15 years and a nonamortizable intangible with an adjusted basis of $60.

(iii) In applying the anti-churning rules to future transfers of the distributed intangible, under paragraph (h)(12)(ii)(C) of this section, one-half of the intangible will continue to be subject to the anti-churning rules, determined as follows: The sum of the amount of the distributed intangible's basis that is nonamortizable under paragraph (g)(2)(ii)(B) of this section ($60) and the total unrealized appreciation inherent in the intangible reduced by the amount of the increase in the adjusted basis of the distributed intangible under section 732(b) to which the anti-churning rules do not apply ($120 − $90 = $30), over the fair market value of the distributed intangible ($180).

* * * * *

(l) * * *

(1) *In general.* * * * Paragraphs (h)(12)(ii), (iv) and (vi) of this section apply to partnership distributions occurring on or after the date final regulations are published in the **Federal Register**.

* * * * *

David Mader,

Acting Deputy Commissioner of Internal Revenue Service.

[FR Doc. 00–1381 Filed 1–20–00; 1:19 pm]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[AD–FRL–6523–8]

RIN 2060–AH74

National Emission Standards for Hazardous Air Pollutants for Source Category: Pulp and Paper Production

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule amendments and notice of public hearing.

SUMMARY: Under the Clean Air Act (Act), EPA issued a final rule (63 FR 18504, April 15, 1998) to reduce hazardous air pollutant (HAP) emissions from the pulp and paper production source category. That rule (known as the Pulp and Paper national emission standard for hazardous air pollutants (NESHAP) or pulp and paper NESHAP) is the air component of the integrated air and water rules for the pulp and paper industry (known as the Pulp and Paper Cluster Rules). In this action, we are proposing to amend certain passages

of regulatory text in the 1998 pulp and paper NESHAP by adding equivalent compliance alternatives. These proposed amendments do not change the level of control or compromise the environmental protection achieved by the 1998 pulp and paper NESHAP. We are reopening the public comment period for comment only on the amendments proposed in today's action. We are proposing amendments to the pulping process vent standards and the biological treatment system standards to address technical issues identified after promulgation. Also, drafting errors identified after promulgation are being corrected in today's action.

DATES: *Comments.* The EPA will accept comments regarding these proposed amendments on or before March 10, 2000.

*Public Hearing.*A public hearing regarding the proposed amendments will be held if requests to speak are received by the EPA by February 7, 2000. If a public hearing is requested, the hearing will be held on February 11, 2000.

ADDRESSES: *Comments.* Submit written comments (in duplicate, if possible) to Docket No. A–92–40 at the following address: U.S. Environmental Protection Agency, Air and Radiation Docket and Information Center (MC–6102), 401 M Street SW, Washington, DC 20460. The EPA requests that a separate copy of the comments also be sent to Mr. Stephen Shedd at the address listed below.

Docket. Docket No. A–92–40 contains supporting information for this proposed action and the prior promulgated and proposed amendments to the 1998 NESHAP and is available for inspection and copying between 8:00 a.m. and 5:30 p.m., Monday through Friday except for Federal holidays, at the following address: U.S. Environmental Protection Agency, Air and Radiation Docket and Information Center (MC–6102), 401 M Street SW, Washington, DC 20460, or by calling (202) 260–7548. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Mr. Stephen Shedd, Emission Standards Division (MD–13), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone (919) 541–5397, and e-mail at ''shedd.steve@epa.gov''. For questions on compliance and applicability determinations, contact Mr. Seth Heminway, Office of Enforcement and Compliance Assessment (2223A), U.S. Environmental Protection Agency, 401 M Street SW, Washington, DC 20460; telephone (202) 564–7017 and e-mail at ''heminway.seth@epa.gov'.

SUPPLEMENTARY INFORMATION: *Regulated Entities.* Entities potentially regulated by this proposed action include:

Category	SIC code	NAICS code	Examples of regulated entities
Industry	26	3221	Pulp mills and integrated mills (mills that manufacture pulp and paper/paperboard) that chemically pulp wood fiber.

This list is not intended to be exhaustive. It provides a guide regarding the types of entities that we expect to regulate by this proposed action. To determine whether your facility would be regulated by this action, you must carefully examine the applicability criteria in part 63, subparts A and S of title 40 of the Code of Federal Regulations.

Technology Transfer Network. The Technology Transfer Network (TTN) is a network of electronic bulletin boards for the EPA. The TTN provides information and technology exchange in various areas of air pollution control. Information regarding the basis and purpose of this proposed action, the rule, and other relevant documents can be found on the pulp and paper page of EPA's TTN Unified Air Toxics World Wide Web site (UATW) at ''http://www.epa.gov/ttn/uatw/pulp/pulppg.html''. For more information on the TTN, call the HELP line at (919) 541–5384.

Public Hearing. If a public hearing is requested by the required date (see **DATES** section in this document), the public hearing will be held at the EPA Office of Administration Auditorium, Research Triangle Park, NC. Persons interested in presenting oral testimony or inquiring as to whether a hearing will be held should contact Ms. JoLynn Collins, Waste and Chemical Processes Group, Emission Standards Division (MD–13), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, telephone number (919) 541–5671. The record for the hearing will remain open for 30 days after the hearing date to provide an opportunity for submittal of rebuttal and additional information.

In accordance with section 307(d)(5) of the Act, EPA will hold a public hearing, if requested, to discuss the proposed amendments. If a public hearing is held, the EPA may ask clarifying questions during the oral presentations but will not respond to the presentations or comments. To provide an opportunity for all who may wish to speak, oral presentations will be limited to 15 minutes each. Any member of the public may file a written statement (see **DATES** and **ADDRESSES**). The EPA will consider written statements and supporting information with equivalent weight as any oral statement and supporting information subsequently presented at a public hearing, if held.

Docket. The docket is an organized and complete file of all the information considered by EPA in the development of this rulemaking. The docket is a dynamic file because material is added throughout the rule development. The docketing system is intended to allow members of the public and industries involved to readily identify and locate documents so that you can effectively participate in the rulemaking process. Along with the proposed and promulgated standards and their preambles, the contents of the docket except for certain interagency documents will serve as the record in case of judicial review. (See section 307(d)(7)(A) of the Act.)

Outline. Information on the proposed amendments is organized as follows:

I. Description of the Proposed Amendments

A. Introduction
B. Is a performance test required for boilers that introduce HAP emission streams with the combustion air (§ 63.443(d))?
C. Biological Treatment System Standards
1. Introduction for Proposed Amendments
2. Can a finite list of HAPs be used in demonstrating compliance for biological treatment systems (§ 63.457(l))?
3. Given the finite number of HAPs in regulated condensates, what is the appropriate emission standard for biological treatment systems (§ 63.446(e))?
4. What minimum measurement level should be used in analyzing total HAPs in liquid streams (§ 63.457(c))?
D. Biological Treatment System Performance Test Requirements
1. Introduction
2. Given the proposed changes, how do I conduct a performance demonstration for a biological treatment system (§ 63.457(l))?
3. What procedures must be followed to determine the fraction of compounds degraded in nonthoroughly mixed open biological treatment systems (§ 63.457(l))?
E. Open Biological Treatment System Monitoring Requirements
1. Introduction

2. May a mill use site-specific monitoring parameters for open biological treatment systems instead of the parameters specified in the final rule (§ 63.453(j))?
3. In the event of a parameter excursion, must I conduct in-zone sampling of nonthoroughly mixed open biological treatment systems when unsafe conditions exist (§ 63.453)?
4. Are the biological treatment system monitoring requirements applicable to both open and closed biological treatment systems (§ 63.453)?
5. Given the proposed changes, how do I conduct daily compliance monitoring for open biological treatment systems (§ 63.453(j))?
6. Do I still have to conduct the first quarter compliance tests for total HAPs (§ 63.453(j))?
7. May I use monitoring parameter values recorded during a compliance monitoring test to expand the established parameter operating range (§ 63.455(e))?

F. Drafting Error Corrections

II. Administrative Requirements

A. Paperwork Reduction Act
B. Executive Order 12866: Regulatory Planning and Review
C. Executive Order 13084: Consultations and Coordination With Indian Tribal Governments
D. Regulatory Flexibility Act
E. Unfunded Mandates Reform Act
F. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
G. National Technology Transfer and Advancement Act
H. Executive Order 13132 (Federalism)

I. Description of the Proposed Amendments

A. Introduction

The Pulp and Paper NESHAP was promulgated on April 15, 1998 (63 FR 18504) and was codified as 40 CFR part 63, subpart S. Since promulgation, the rule has been amended by four **Federal Register** notices (63 FR 42238, 63 FR 49455, 63 FR 71385, and 64 FR 17555) to correct minor drafting errors and inadvertent omissions, clarify the intent of the final rule, and provide technical amendments. The above promulgated rule and amendments are hereafter referred to as the ''final rule'' in this preamble. Today, we are proposing additional changes to the final rule that affect the compliance demonstration for combustion devices used to control pulping vent gases and for biological treatment systems used to treat pulping condensates. The equivalent compliance alternatives proposed in today's amendments do not change the level of control or compromise the environmental protection achieved by the final rule. We are reopening the comment period for comments only on the amendments proposed in today's action.

Following promulgation, we received comments from the industry regarding the pulping process vent and condensate standards. The comments focused on performance testing requirements for combustion devices used to control HAP vent gas streams, and the monitoring and test methods used for demonstrating initial and continuous compliance using biological treatment systems.

We have evaluated the comments and decided to propose amendments to the final rule to address the issues raised by the commenters. For the pulping process vent standards for kraft, soda, and semi-chemical mills, we are proposing to remove the requirement, in some cases, to conduct an initial performance test or continuous temperature monitoring of the control device.

For biological treatment systems, we are proposing several changes. Under the proposed amendments, you would be allowed to use an optional format of the emission limit, expressed as a minimum HAP mass removal, and to use four specific HAPs as a surrogate for total HAPs. We are also proposing to allow you to determine site-specific monitoring parameters for open biological treatment systems as an alternative to using the parameters specified in the final rule. Additionally, we are proposing new test procedures, including special monitoring procedures, for nonthoroughly mixed biological treatment systems.

The rationale for the proposed amendments is presented in the following sections. The rationale for each change is presented in a question and answer format.

B. Is a Performance Test Required for Boilers That Introduce HAP Emission Streams With the Combustion Air (§ 63.443(d))?

We are proposing to remove the requirement for conducting an initial performance test in some cases. The pulping process vent requirement being proposed today (§ 63.443(d)(4)) eliminates the initial performance test and continuous temperature monitoring if HAP vent gases are introduced with the combustion air into a boiler or recovery furnace with a heat input capacity greater than or equal to 44 megawatts (MW)(150 million British thermal units per hour, Btu/hr).

In the final rule, one option for controlling HAP emission streams from kraft, soda, and semi-chemical pulping systems is to route the streams to a boiler, lime kiln, or recovery furnace (§ 63.443(d)(4)). The final rule does not require you to conduct an initial performance test or continuously monitor the operating temperature of the combustion unit if the HAP emission stream enters the unit with the primary fuel or enters directly into the flame zone.

Following promulgation, we received comments indicating that pulping vent gases are typically controlled in boilers and recovery furnaces by mixing the vent gases with the combustion air (not introduced directly into the flame zone). The commenters stated that conducting an initial performance test on these combustion devices to demonstrate compliance with the standard would not be reasonable due to the large volume of air flow through these devices. The commenters requested that the initial performance test requirement for these boilers be removed from the final rule.

We have reviewed the performance of combustion devices used to control HAP emissions and found that many standards allow boilers with heat input capacities greater than or equal to 44 MW (150 million Btu/hr) to control HAP emission streams without conducting an initial performance test. The supporting information (''Reactor Processes in the Synthetic Organic Chemical Manufacturing Industry—Background Information for Promulgated Standards,'' EPA–450/3–90–016b, March 1993) shows that ''large'' boilers with heat input capacities greater than or equal to 44 MW (150 million Btu/hr) are typically operated at temperatures and residence times exceeding the levels needed to achieve at least 98 percent reduction of HAPs (as required in the final rule (§ 63.443(d)(1))) when the HAP gases are introduced with the combustion air. In contrast, boilers with heat input capacities less than 44 MW are generally not operated at levels that would ensure at least 98 percent HAP reduction unless the HAP emission stream is introduced with the primary fuel or into the flame zone. Using this same rationale, the National Emission Standard for Organic HAP from Process Vents, Storage Vessels, Transfer Operations, and Wastewater (subpart G of part 63), the NESHAP for Petroleum Refineries (subpart CC of part 63), and several other NESHAP allow these large boilers to be used to control HAP emission streams without conducting an initial performance test and without monitoring operating temperature if the HAP emission streams are introduced with the combustion air, with the primary fuel, or into the flame zone.

Consequently, we are proposing to amend the vent control requirements for kraft, soda, and semi-chemical pulping mills to eliminate the initial performance test and continuous monitoring requirements if you

introduce the regulated HAP emission streams with the combustion air into a boiler or recovery furnace with a heat input capacity greater than or equal to 44 MW (150 million Btu/hr). However, an initial performance test and continuous monitoring of the operating temperature are required if you introduce the HAP emission streams with the combustion air into a boiler or recovery furnace with a heat input capacity less than 44 MW. Lime kilns must demonstrate compliance with the final rule by introducing HAP emission streams with the primary fuel or into the flame zone because we do not have any data that show lime kilns can achieve 98 percent destruction by introducing the HAP emission streams by any other means.

Although an initial performance test and continuous monitoring are not required for these large boilers, you must design and operate the closed-vent system according to the requirements specified in the final rule (§ 63.450) and conduct the periodic visual inspections and leak detection tests (§ 63.453) of the closed-vent system components. You must record the results of these inspections and tests and comply with the reporting requirements (§ 63.455) of the final rule. Also, you must keep records of the boiler or recovery furnace downtime (§ 63.10(c)(8)) to demonstrate compliance with the excess emission allowance standards (§ 63.443(e)).

C. Biological Treatment System Standards

1. Introduction for Proposed Amendments

One of the options for complying with the pulping condensate standards in the final rule is to discharge the applicable condensates below the liquid surface of a biological treatment system that achieves 92 percent reduction of total HAPs. Following promulgation, commenters raised several compliance issues associated with using biological treatment systems to comply with the condensate standards. The commenters were concerned that they would have difficulty demonstrating a 92 percent reduction of total HAPs in biological treatment systems. Therefore, they requested the flexibility to use the mass removal option, which is allowed for other treatment devices. The commenters also stated that their analytical labs were having difficulty using Method 305 to evaluate condensate samples for total HAP compounds. The commenters stated their belief that the number of measurable HAPs in the regulated condensate streams is very limited, and that testing for a specific list of HAPs would reduce the complexity and cost compliance testing. The commenters recommended a specific list of HAPs to measure in biological treatment systems. Additionally, in meetings with industry representatives after promulgation, it was identified that some biological treatment systems used in the industry were not thoroughly mixed. Therefore, the performance tests procedures in the final rule, which were established for thoroughly mixed systems, are not appropriate in all cases for nonthoroughly mixed systems.

Since promulgation, several meetings between the EPA and industry representatives were held to discuss these issues. We have reviewed the comments and information obtained during these meetings and decided to propose amendments to the final rule to address these concerns.

2. Can a Finite List of HAPs be Used in Demonstrating Compliance for Biological Treatment Systems (§ 63.457(l))?

We have found that the regulated condensate streams contain a finite number of measurable HAPs. Today's proposed action amends the test methods and procedures section (§ 63.457(l)) to specify that only four HAP compounds (acetaldehyde, methanol, methyl ethyl ketone, and propionaldehyde) are to be measured to determine compliance with all biological treatment standards, instead of measuring for all 188 HAP compounds.

The final rule (§ 63.457(g)) requires measurement of the total HAPs for mills that comply with the condensate standards using a biological treatment system. At promulgation of the final rule, we had limited data on the speciation profile of total HAPs in regulated condensate streams. We needed additional data to establish a specific list of the 188 HAPs for compliance testing.

To support the development of a specific list of HAPs, the National Council of the Paper Industry for Air and Stream Improvement, Inc. (NCASI), submitted to EPA a study (Hazardous Air Pollutants Present in Kraft Mill Condensates and Their Significance for the Hard-piping Option Under Maximum Achievable Control Technology (MACT), December 1998) (Docket No. A–92–40) of the condensate streams contained in steam stripper feed tanks at eight mills. They sampled condensates in steam stripper feed tanks since these are the same condensates that the final rule regulates. We gave NCASI a list of 108 volatile HAPs to be evaluated in the study. This list specifies the HAPs that volatilize most readily from biological treatment systems. The NCASI used a test method with a nominal detection limit between 0.5 and 1 part per million by weight (ppmw) to analyze the steam stripper feed tank contents. This detection limit was selected because the final rule (§ 63.457(j)(4)) specifies those HAP compounds with concentrations at the point of determination that are either below 1 ppmw or below the detection limit are not required to be included in the total HAP compliance demonstrations.

The NCASI data report that the HAP compounds with concentrations greater than 1 ppmw in regulated condensate streams are methanol, methyl ethyl ketone, acetaldehyde, and propionaldehyde. Methanol accounts for approximately 98.5 percent of the total HAP mass with acetaldehyde, methyl ethyl ketone, and propionaldehyde accounting for the remaining 1.5 percent.

We have reviewed the test methods and sampling procedures used in the NCASI study and concur that the methods and procedures were appropriate. We have also reviewed the criteria used by NCASI for selecting the condensate streams to be analyzed, and we agree that the condensate streams sampled are representative of the range of condensate streams found at kraft mills. Therefore, we agree that acetaldehyde, methanol, methyl ethyl ketone, and propionaldehyde account for the total of HAP compounds in the regulated condensate streams. Identifying a specific list of HAPs will achieve the EPA's and industry's goal of reducing the performance testing and monitoring burden without reducing the emission reductions achieved by the final rule. Today's proposal amends the test methods and procedures section (§ 63.457(l)) of the final rule to specify that the HAPs in the regulated condensate streams are determined by measuring acetaldehyde, methanol, methyl ethyl ketone, and propionaldehyde.

3. Given the Finite Number of HAPs in Regulated Condensates, What is the Appropriate Emission Standard for Biological Treatment Systems (§ 63.446(e))?

In today's action, we are proposing to amend the test methods and procedures section of the final rule to add a mass standard and two alternative compliance procedures for biological treatment systems. The two alternative procedures require sending additional condensates to the biological treatment

system by calculating the standards on an individual HAP or methanol basis. These proposed revisions to the emission standards and test methods and procedures sections of the final rule are necessary to implement the reduced list of HAPs in condensates, discussed earlier in section I.C.2 of this preamble, and to simplify the testing and monitoring procedures for biological treatment systems.

Since promulgation, we held several meetings with industry representatives to discuss ways to simplify the testing and monitoring procedures for demonstrating compliance of biological treatment systems, considering the condensate speciation data submitted after promulgation (see section I.C.2 of this preamble). Industry representatives suggested that mills be allowed to conduct the initial performance and subsequent compliance monitoring tests only for the major HAP constituent of the regulated condensates, methanol. Industry representatives also requested that they be allowed to comply with the mass removal standard, kilograms of total HAPs per megagram of oven-dried pulp, which is allowed for steam strippers.

We have considered the data and industry comments and decided to propose a mass standard and two alternative compliance procedures in today's action. We believe a mass removal standard is appropriate (as an alternative to the current percent reduction standard) for biological systems since we established one for steam strippers and it provides equivalent environmental protection. To establish the level of the mass standard for biological treatment units to be equivalent to steam strippers, adjustments needed to be made to the proposed mass and current percent reduction standards for biological treatment units. We believe that the mass standard should be set at the current level of the standard and the test procedures should be adjusted to address the proposed list of HAPs (only four HAPs instead of all 188 HAP compounds). In meetings following promulgation, the industry representatives recommended only testing for methanol which is the major HAP constituent in the regulated condensates. During those meetings, we reiterated that steam strippers operating at a 92 percent efficiency to remove methanol, also removed nearly all of the other volatile HAP compounds (see the preamble to the final rule, 63 FR 18524). However, in biological treatment units, the amount of biodegradation of those nonmethanol HAP compounds is less than for methanol. To balance this difference, we are proposing two alternative procedures that require additional condensate to be sent to the biological treatment system. These two procedures require you to measure the four HAPs and comply with the current percent reduction or proposed mass standard on either an individual HAP or methanol basis, as discussed in the following sections.

A. *Individual HAP procedure.* The condensate control options in the final rule were developed based on the performance of a steam stripper achieving 92 percent reduction of methanol. We have determined that a steam stripper operating at 92 percent reduction of methanol achieves at least 99 percent reduction of the other HAP compounds (acetaldehyde, methyl ethyl ketone, and propionaldehyde) in the regulated condensates (determination contained in Docket No. A–92–40). Thus, we are setting the percent reduction standard at 92 percent for methanol and 99 percent for acetaldehyde, methyl ethyl ketone, and propionaldehyde.

For the mass standard, we calculated the required mass removal that is equivalent to those percent reduction levels. To set the mass standard for each compound, we used the required mass removal of methanol (10.2 and 6.6 pounds of methanol per oven-dried ton of pulp (lb/ODTP)) and the average composition of the four HAP compounds found in the NCASI testing discussed earlier in section I.C.2 of this preamble. For mills that perform bleaching, the mass standard is 10.2 lb/ODTP for methanol, 0.104 lb/ODTP for acetaldehyde, 0.052 lb/ODTP for methyl ethyl ketone, and 0.010 lb/ODTP for propionaldehyde. For mills that do not perform bleaching, the mass standard is 6.6 lb/ODTP for methanol, 0.067 lb/ODTP for acetaldehyde, 0.034 lb/ODTP for methyl ethyl ketone, and 0.0067 lb/ODTP for propionaldehyde.

B. *Methanol procedure.* Industry requested the second procedure proposed in today's action to simplify testing requirements and reduce the complications in analyzing HAP compounds which are present in low concentrations in the regulated condensates. As discussed earlier, this is an alternative approach to balance the difference in HAP removal efficiencies between steam strippers and biological treatment systems while allowing mills to demonstrate compliance by measuring only methanol. Sending additional condensate to the biological treatment system achieves this balance. In meetings following promulgation, industry representatives suggested a procedure for determining an estimate of the required amount of additional condensate HAP mass that you must send to the biological treatment system. Under this concept, you would assume that a steam stripper complying with the condensate standards is achieving 92 percent reduction of methanol and 100 percent reduction of all other HAP compounds present in the regulated condensates.

For example, assume that a hypothetical bleached kraft mill determines that the regulated condensates contain 90 percent methanol. If the mill sends 12 lb/ODTP of methanol to a steam stripper, then the mill is also sending 1.3 lb/ODTP of nonmethanol HAPs. If the steam stripper achieves 92 percent reduction of methanol and 100 percent removal of nonmethanol HAPs, then the steam stripper would be achieving a total HAP removal of 12.3 lb/ODTP. If you make the conservative assumption that biological treatment systems do not achieve any degradation of nonmethanol HAP compounds, then the mill using a biological treatment system would need to remove 12.3 lb/ODTP of methanol. Under this concept, we would require a mill using a steam stripper to remove 10.2 lb/ODTP of methanol to comply with the standard, while we would require a mill using a biological treatment system to remove 11.4 lb/ODTP of methanol to comply with the standard.

We agree with the industry representatives that this approach provides an alternative to the individual HAP approach discussed earlier (section I.C.3.A of this preamble). Under this second alternative procedure in today's proposed action, you measure the mass of the four HAPs in the regulated condensates entering the biological treatment system and determine the ratio of nonmethanol HAP mass to methanol mass. Compliance with the percent reduction or proposed mass removal standard is then determined using that ratio and the appropriate procedures in appendix C of part 63, using methanol measurements instead of measurements for all four HAPs in the condensate streams.

In today's action, we are proposing to amend the kraft pulping process condensate standards (§ 63.446(e)(2)) to specify that biological treatment systems may be used to comply with the proposed mass removal and percent reduction requirements, using either the individual HAP or methanol procedure. Additionally, we are proposing to revise the test methods and procedures section (§ 63.457(g) and (l)) of the final rule to include the alternative procedures for

demonstrating compliance for biological treatment systems.

4. What Minimum Measurement Level Should Be Used in Analyzing Total HAPs in Liquid Streams (§ 63.457(c))?

You must use the procedure proposed in today's action to determine the minimum measurement level (MML) of a specific HAP for the liquid stream test method that you select to demonstrate compliance. Also, you must use this MML value in all compliance calculations if the test method does not detect a value at or below the MML. Today's proposed action amends the test methods and procedures section (§ 63.457(c)) of the final rule to add two alternative procedures to determine the MML.

The final rule and the amendments proposed in today's action require kraft mills to determine the HAP or methanol concentration in liquid streams (*e.g.,* steam stripper outlet or biological treatment system inlet or outlet) to demonstrate compliance with the condensate standards. Following promulgation, commenters stated that there could be some cases where the concentration of a particular HAP may be too low to quantify using a given test method. Consequently, the commenters stated that because the compliance demonstration calculations for the percent reduction, mass removal, and control device outlet concentration treatment options require a HAP concentration, an MML was needed.

We have evaluated the comments and decided to propose in today's action two alternative procedures to determine the MML that you must use in compliance calculations. Also, a quality assurance procedure is being proposed in today's action that must be followed for either alternative, in addition to the quality assurance procedures required in § 63.7(c) of the NESHAP general provisions. These procedures were developed by EPA's testing group and industry representatives to provide you with flexibility in determining the appropriate MML. The two alternative procedures are: (1) a procedure for each analytical laboratory to follow to determine the MML for each test method setup, and (2) a procedure to follow if a group chooses to collect sufficient data to determine the MML for a given test method.

In the first procedure for determining the MML of a particular HAP using one of the test methods specified in the § 63.457(c)(3) of the final rule, you must perform the following procedures each time that the analytical equipment for the test method is set up: (1) assume a concentration that you believe represents the MML; (2) measure the concentration in a minimum of three replicate samples that contain the target HAP at the MML concentration, using the selected test method; and (3) calculate the relative standard deviation (RSD) and the upper confidence limit at the 95 percent confidence level of the resulting concentration values, using the assumed MML as the mean.

In the first step of this procedure, you must assume a concentration value for the particular HAP in question (*e.g.,* acetaldehyde, methanol, methyl ethyl ketone, or propionaldehyde) that you believe represents the MML. However, the MML chosen must not be below the calibration standard of the selected test method.

In the second step of this procedure, you must measure the concentration of the target HAP in a minimum of three replicate condensate samples, using the selected test method. All replicate condensate samples must be run through the entire analytical procedure. Spiking of the liquid samples with a known concentration of the target HAP may be necessary to ensure that the HAP concentration in the three samples is at the MML.

In the final step of this procedure, you must calculate the RSD and the upper confidence limit at the 95 percent confidence level, using the measured HAP concentrations determined in step 2 of the procedure. If the upper confidence limit of the RSD is less than 30 percent, then the selected MML is acceptable, and this MML value would be established for the laboratory's analytical equipment setup and procedure used in this analysis. If the upper confidence limit of the RSD is greater than or equal to 30 percent, then the selected MML is too low and a higher MML must be selected.

In the second procedure proposed in today's action, a group (*e.g.,* company or trade association) would determine the MML and present supporting data to demonstrate, to the EPA's satisfaction, that the selected MML is appropriate. To support the selected MML, enough data would need to be collected from different laboratories to demonstrate that the appropriate MML for a particular test method and specific HAP was determined. Once EPA approval is obtained, then the MML value would be established, and this value would be used in compliance demonstration calculations. Also, any laboratory may use the MML value provided that the proper quality assurance procedures are followed, including the quality assurance procedures discussed in the following paragraph.

Once the MML has been determined using one of the alternative procedures, the analytical laboratory that you choose to conduct the initial performance test analysis must also follow the quality assurance procedure proposed in today's action to demonstrate that they are performing the test method correctly. The proposed quality assurance procedure specifies that the analytical laboratory must measure the concentration of the target HAP in a minimum of three replicate condensate samples using the selected test method. The upper confidence limit of the RSD at the 95 percent confidence level determined using the measured HAP concentrations must be less than 30 percent. If the upper confidence limit of the RSD is greater than or equal to 30 percent, then the test method is not being performed correctly. If you have not met the quality assurance procedure, then the analytical equipment must be corrected, and you must repeat the quality assurance procedure until met.

Today's action proposes to amend the test methods and procedures section (§ 63.457(c)) of the final rule to (1) specify that the MML must be used in compliance demonstrations if the selected test method indicates nondetect for a specific HAP, and (2) to include the procedures for determining the MML. In today's proposed action, we are also amending the delegation of authority section (§ 63.458) of the final rule to specify that the procedure for obtaining EPA approval of the demonstrated MML is not delegated to the States.

D. Biological Treatment System Performance Test Requirements

1. Introduction

At promulgation, the only treatment option available for biological treatment systems was the percent reduction option. Today's proposed amendments allow mills to use biological treatment systems to comply with the condensate standard mass removal requirements and to use four specific HAPS as a surrogate for total HAPS. Consequently, these proposed amendments alter the procedures for conducting performance tests of biological treatment systems.

2. Given the proposed changes, how do I conduct a performance demonstration for a biological treatment system (§ 63.457(l))?

To conduct a performance test of an open or closed biological treatment system, you would first measure the mass of the four specific HAPs entering the biological treatment system. The

subsequent compliance procedures would differ depending on if you are complying with the proposed percent reduction or mass removal treatment options.

For biological treatment systems, table 1 presents a summary of the proposed performance test requirements including those in today's action. Briefly, to conduct a performance test of a biological treatment system, you would measure the mass of the four HAPs in the regulated condensates entering the biological treatment system. Then you determine the fraction of compounds that are biodegraded (f_{bio}) in the biological treatment system, using the appropriate procedures in appendix C of part 63. Using the inlet mass of the four HAP compounds and the value of f_{bio}, you would demonstrate compliance with the percent reduction or mass removal treatment options on an individual HAP or methanol basis using the procedures specified in § 63.457(l).

TABLE 1.—SUMMARY OF THE PERFORMANCE TEST PROCEDURES FOR BIOLOGICAL TREATMENT SYSTEMS

Determine the inlet and outlet HAP mass flow rates by—	Determine the fraction of HAP compounds degraded in the biological treatment system using—	Demonstrate compliance with the condensate standards using—
Measuring the volumetric flow rate of the liquid streams entering and exiting the treatment system using the procedures specified in § 63.457(c)(2),	The inlet and outlet concentration procedure (procedure 3) in appendix C of part 63, for thoroughly mixed systems, or	The individual HAP percent reduction or mass removal procedures specified in § 63.457(l) (1) and (2), or
Measuring the concentration of acetaldehyde, methanol, methyl ethyl ketone, and propionaldehyde in the liquid streams using one of the test methods specified in § 63.457(c)(3), and	The multiple zone concentration measurements procedure (procedure 5) in appendix C of part 63, for nonthoroughly mixed systems.	The methanol percent reduction or mass removal procedures specified in § 63.457(l) (3) and (4).
Calculating the individual HAP mass flow rates using the equations specified in § 63.457(j).		

After promulgation of the final rule, a few mills said that they intended to use closed biological treatment systems (both aerobic and anaerobic systems) to comply with the kraft pulping process condensate standards. The mill representatives have mentioned multiple types of systems, however, we have not received any specific information detailing system designs or how they would conduct the performance demonstration for a closed biological treatment system. Consequently, we cannot amend the final rule to specifically address closed biological treatment systems, and we believe that setting one procedure for a few systems with varying designs would be impractical. Typically, closed biological treatment systems would need to test all inlets and outlets and demonstrate compliance with the applicable emission standard and demonstrate appropriate continuous compliance monitoring procedures. Appendix C of part 63 contains test procedures that can be used for most known designs of closed systems. If the design of the systems mentioned by industry representatives meets the calculation procedures of appendix C, then you could use appendix C procedures. For other designs, you must present for EPA approval the design of the system and a test and monitoring plan. The above information is provided for discussion purposes only, and we are not requesting or taking comment or planning to propose test procedures for all designs of closed biological treatment systems in this proposal or comment period.

3. What Procedures Must Be Followed To Determine the Fraction of Compounds Degraded in Nonthoroughly Mixed Open Biological Treatment Systems (§ 63.457(1))?

We plan to propose in the near future a new procedure for calculating the site-specific fraction of organic compounds biodegraded in nonthoroughly mixed open biological treatment systems (or units) under a separate action. This new procedure, called the Multiple Mixing Zone Concentration Measurements Procedure, will be proposed as an addition to appendix C of part 63.

The performance test and monitoring procedures in the final rule for open biological treatment systems were developed under the presumption that all biological treatment systems at kraft mills would be thoroughly mixed systems, and that the Inlet and Outlet Concentration Measurement Procedure in appendix C of part 63 would be the most appropriate procedure for you to use to determine the performance of the open biological treatment system at pulp mills. However, the Inlet and Outlet Concentration Measurement Procedure is not appropriate for evaluating the performance of nonthoroughly mixed biological treatment systems. In meetings with industry representatives following promulgation, it was identified that the biological treatment systems at most mills do not meet the criteria (uniform biomass distribution and organic compound concentrations) for thoroughly mixed systems. Consequently, another procedure is needed because appendix C of part 63 does not contain a concentration measurement procedure for modeling nonthoroughly mixed systems.

The soon-to-be proposed amendments to appendix C of part 63 will include a concentration measurement procedure for determining f_{bio} in nonthoroughly mixed biological treatment systems. A draft copy of these soon-to-be proposed procedures is contained in the docket for today's proposed action (see the **ADDRESSES** and **SUPPLEMENTARY INFORMATION** sections at the beginning of this preamble for docket information). In developing the new procedure, we worked with industry representatives, including NCASI. The new procedure, Multiple Zone Concentration Measurements—Procedure 5, specifies the biological treatment system information that you must have to use the new procedure.

Additionally, there are two documents (''Technical Support Document for Evaluation of Thoroughly Mixed Biological Treatment Units'' and the ''Technical Support Document for the Evaluation of Aerobic Biological Treatment Units with Multiple Mixing Zones'') that provide technical information on how to determine if a biological treatment system is thoroughly mixed and how to evaluate the performance of a nonthoroughly mixed biological treatment system using multiple mixing zones. The first document is available from the public

docket and from the pulp and paper page of EPA's TTN UATW at ''http://www.epa.gov/ttn/uatw/pulp/pulppg.html''. The second document is near completion and will also be available at the pulp and paper page of the UATW at the address listed above, and a copy of the latest draft is contained in the public docket.

E. Open Biological Treatment System Monitoring Requirements

1. Introduction

The monitoring requirements (§ 63.453(j)) in the final rule require mills using an open biological treatment system to conduct daily parameter monitoring and quarterly performance tests. The parameter values must be established during a performance test. Whenever a parameter excursion occurs, you can conduct a performance test of the open biological treatment system to demonstrate that the system is in compliance with the applicable emission limit even though a parameter exceedance occurred. Quarterly performance tests must be conducted for total HAPs in the first quarter, however the tests may be conducted for methanol in the remaining quarters.

After promulgation, several issues were identified regarding the monitoring requirements for open biological treatment systems. In today's action, we are proposing the following changes to address the issues:

- Allowing you to determine site-specific monitoring parameters for biological treatment systems;
- Providing an alternative procedure for estimating the fraction of organic compounds degraded in a nonthoroughly mixed biological treatment system during unsafe sampling conditions;
- Clarifying the monitoring requirements for open versus closed biological treatment systems;
- Removing the requirement to test for total HAPs in the first quarter performance test; and
- Specifying the period for notifying the Administrator if you intend to use data collected during a performance test to expand the allowable range of a monitoring parameter.

The proposed amendments are discussed in sections I.E.2 through I.E.7 of this preamble.

2. May a Mill Use Site-Specific Monitoring Parameters for Open Biological Treatment Systems Instead of the Parameters Specified in the Final Rule (§ 63.453(j))?

Today's action proposes to amend the final rule to specify that mills may establish site-specific monitoring parameters for open biological treatment systems. The mill must conduct a performance test to demonstrate that the monitoring parameters are appropriate to determine continuous compliance with the applicable emission standard. The monitoring parameters and the operating ranges that demonstrate continuous compliance must be approved by the permit authority.

The final rule (§ 63.453(j)) requires daily monitoring of outlet soluble biochemical oxygen demand (BOD_5) concentration and other system operating parameters. Additionally, you must collect and archive inlet and outlet grab samples. The grab samples must be used to demonstrate compliance if the soluble (BOD_5), mixed liquor volatile suspended solids (MLVSS), or the aerator horsepower monitoring parameters fall outside the range established during the initial performance test.

After promulgation, commenters indicated that the monitoring parameters in the final rule might not be appropriate for all open biological treatment systems, especially for nonthoroughly mixed systems. The commenters requested that the final rule be revised to give mills the flexibility to monitor different parameters for open biological treatment systems on a case-by-case basis.

We agree that in some circumstances operating parameters other than those specified in the final rule may provide assurance that continuous compliance with the emission limits is being achieved for nonthoroughly mixed systems. The monitoring requirements in the final rule were established under the presumption that all biological treatment systems in the pulp and paper industry were thoroughly mixed and would, therefore, use the inlet and outlet procedure in appendix C of part 63 to determine the performance of the system. However, for nonthoroughly mixed biological treatment systems, the treatment unit must be divided into mixing zones, and concentration monitoring must be conducted within each zone.

In today's action, we are proposing to add a new paragraph to the open biological treatment system monitoring requirements (§ 63.453(j)(2)) that would allow mills the option to determine site-specific monitoring parameters. The site-specific monitoring parameters must be developed based on a performance test and must be approved by the Administrator using the procedures specified in the final rule (§ 63.453(n)). In § 63.453(n), the final rule specifies that you must conduct a performance test to determine the appropriate parameters to be monitored continuously and corresponding parameter values. The rationale and supporting documentation for the parameter selection must also be provided for the Administrator's approval. The Administrator in this case is the delegated implementation and enforcement State authority.

3. In the Event of a Parameter Excursion, Must I Conduct In-Zone Sampling of Nonthoroughly Mixed Open Biological Treatment Systems When Unsafe Conditions Exist (§ 63.453)?

No. Today's proposed amendments contain a modeling procedure that can be used until such time as the unsafe conditions pass and in-zone sampling and a full performance test can be conducted. The alternative modeling procedure is proposed as appendix E of part 63—Test Procedure for Nonthoroughly Mixed Biological Treatment Units at Kraft Pulp Mills Under Unsafe Sampling Conditions. In addition, today's action proposes conforming amendments to the monitoring requirements section (§ 63.453(p)(1)). An amendment to the recordkeeping requirements (§ 63.454(e)) section of the final rule is also being proposed to require you to maintain descriptions of the unsafe conditions that would warrant the use of the modeling procedure.

The kraft pulping process condensate standards of the final rule require periodic performance testing of open biological treatment systems that are used as control devices. During discussions following promulgation, industry representatives noted that there are times when sampling and monitoring of multizone biological treatment systems would expose workers to unsafe conditions. Examples of unsafe conditions provided by industry representatives include: weather conditions (e.g., high wind, fog, lightning, heavy rain, hail storm, sleet, and snow); lack of outdoor lighting; availability of boats; personnel availability; heavy foam layer; and high hydrogen sulfide concentration.

Industry representatives requested that when unsafe conditions occur they be able to use a modeling approach (proposed as appendix E of part 63) developed by NCASI that approximates the total HAP or methanol concentrations within the mixing zones of a biological treatment system. The approach consists of three components: (1) Confirmation that the open biological treatment system can be represented by Monod kinetics, (2) data collection to characterize the

performance of the open biological treatment system, and (3) data collection during unsafe conditions.

Under the first component of the modeling approach, the value of the saturation coefficient, Ks, must be determined. The determination that the value of Ks is a constant is used to demonstrate that the mill's open biological treatment system being tested can be represented by Monod kinetics. Under the second component of the modeling approach, you would determine the number and characteristics of each mixing zone in the open biological treatment system, and the recycle ratio of the internal recirculation between the mixing zones. Technical information on how to evaluate open biological treatment systems with multiple mixing zones can be found in the ''Technical Support Document for the Evaluation of Aerobic Biological Treatment Units with Multiple Mixing Zones'' (discussed in section I.D.3 of this preamble). Under the third component, inlet and outlet concentration data are collected during conditions when conducting in-zone sampling is determined to be unsafe. These data are used with the characterization data developed under the first component to estimate the HAP concentrations in each of the mixing zones. The industry representatives noted that collection of inlet and outlet samples would not be affected by unsafe conditions.

We analyzed the above industry concerns, and we agree that in rare circumstances there may be conditions when sampling in each zone of an open biological treatment system could expose workers to dangerous, hazardous, or otherwise unsafe conditions. During these conditions, we believe that the above modeling procedure proposed in appendix E of part 63 is a reasonable procedure to follow until the full in-zone sampling and performance test can be conducted to determine the system's compliance with the applicable emission limit. If the mass removal or percent reduction calculations using the value of f_{bio} determined from the procedures in appendix E of part 63 show that the open biological treatment system is not achieving the applicable emission limit, then this is considered a violation of the applicable emission standard. However, if the compliance demonstration calculations using the value of f_{bio} derived from the appendix E of part 63 procedures show a mass removal or percent reduction greater than or equal to that required by the final rule, then the mill is in compliance with the daily monitoring procedures. When conditions permit, a full performance test using the procedures specified in § 63.457 must be performed to demonstrate compliance with the applicable emission standard.

Further, we believe the conditions that warrant the use of the proposed calculations will be limited to those conditions that are beyond the mill's control, such as extreme weather conditions and presence of high and heavy foam or high concentrations of hydrogen sulfide. The mill operator should use remote and automated sampling systems wherever possible to decrease the number and frequency of possible unsafe conditions. We believe that unsafe conditions do not include conditions that are within the control of the mill, such as unavailability of outdoor lighting, boats, or mill personnel. If these later types of conditions cannot be addressed by the mill and made safe for mill personnel, then this will severely limit the ability of the mill and control agency to determine compliance and allow use of an open biological treatment system as a control device. We believe that those conditions are within the control of the operator and that unless they are addressed and fixed by the operator, the other NESHAP control options (recycling, steam stripping, or closed biological systems) must be used to meet the kraft pulping process condensate standards.

The proposed amendments (§ 63.453(p)) specify that if performing the sampling and test procedures for nonthoroughly mixed systems would expose a worker to dangerous, hazardous, or otherwise unsafe conditions, the proposed appendix E of part 63 calculation can be used to estimate compliance of biological treatment systems instead of the full multiple mixing zone performance test procedures specified in the test methods and procedures section (§ 63.457(l)) of the final rule. The proposed amendments to § 63.457(l) also specify that the value of the biorate constant must be determined during the initial performance test (§ 63.457(l)(4)).

The proposed amendments also specify that as soon as practical (but within 24 hours) after the dangerous, hazardous, or otherwise unsafe conditions have passed, you must conduct the full multiple mixing zone performance test procedures (§ 63.457(l)). The performance test is required, regardless of whether or not the monitoring parameter values are within the approved range, following the period of unsafe conditions. The purpose of the test is to confirm that the dangerous, hazardous, or otherwise unsafe conditions did not alter the performance of the system and to confirm that the treatment system operation is achieving the required removal through biodegradation and not through volatilization.

Amendments to the recordkeeping requirements section (§ 63.454) of the final rule are being proposed that would require you to maintain onsite a written record identifying the specific conditions under which sampling of the open biological treatment system would expose a worker to dangerous, hazardous, or otherwise unsafe conditions. The proposed amendments specify that this written record must include a written explanation of why the in-zone sampling cannot be performed under those conditions. The proposed amendments also specify that whenever dangerous, hazardous, or otherwise unsafe conditions prevent you from conducting the sampling and test requirements for nonthoroughly mixed open biological treatment systems, you must notify the Administrator (the delegated permit authority) as soon as practicable of the onset of the dangerous, hazardous, or otherwise unsafe conditions. The notification must include the reason why the specified sampling and test requirements could not be performed.

4. Are the Biological Treatment System Monitoring Requirements Applicable To Both Open and Closed Biological Treatment Systems (§ 63.453)?

The biological treatment system monitoring and test procedures specified in the final rule are applicable only to open biological treatment systems. Following promulgation, commenters questioned if closed aerobic and anaerobic biological treatment systems would be required to comply with the monitoring procedures specified in § 63.453(j) and (p). Today's action proposes to add the word ''open'' to citations in the monitoring requirements section of the final rule where the term ''biological treatment system'' is used.

In the final rule, we intended that the reference to ''biological treatment system'' in the monitoring requirements section meant open biological treatment systems. Although the test methods and procedures specified in § 63.457(l) refer to open biological treatment systems, we inadvertently omitted the word ''open'' in the § 63.453(j) and (p) of the final rule. Today's action proposes amendments to the sections mentioned above to clarify that these requirements are applicable only to open biological treatment systems.

If you choose to comply using a closed biological treatment system, you must determine appropriate monitoring parameters and establish the parameter values or ranges during the performance test using the procedures specified in § 63.453(m) and (n). Both the monitoring parameters and the parameter values or ranges must be approved by the Administrator (see section I.D.2 of this preamble for additional discussion).

5. Given the Proposed Changes, How Do I Conduct Daily Compliance Monitoring for Open Biological Treatment Systems (§ 63.453(j))?

The flow diagram shown in figure 1 summarizes the daily monitoring requirements for open biological treatment systems. In figure 1, today's proposed changes are depicted by dashed lines and rounded boxes.

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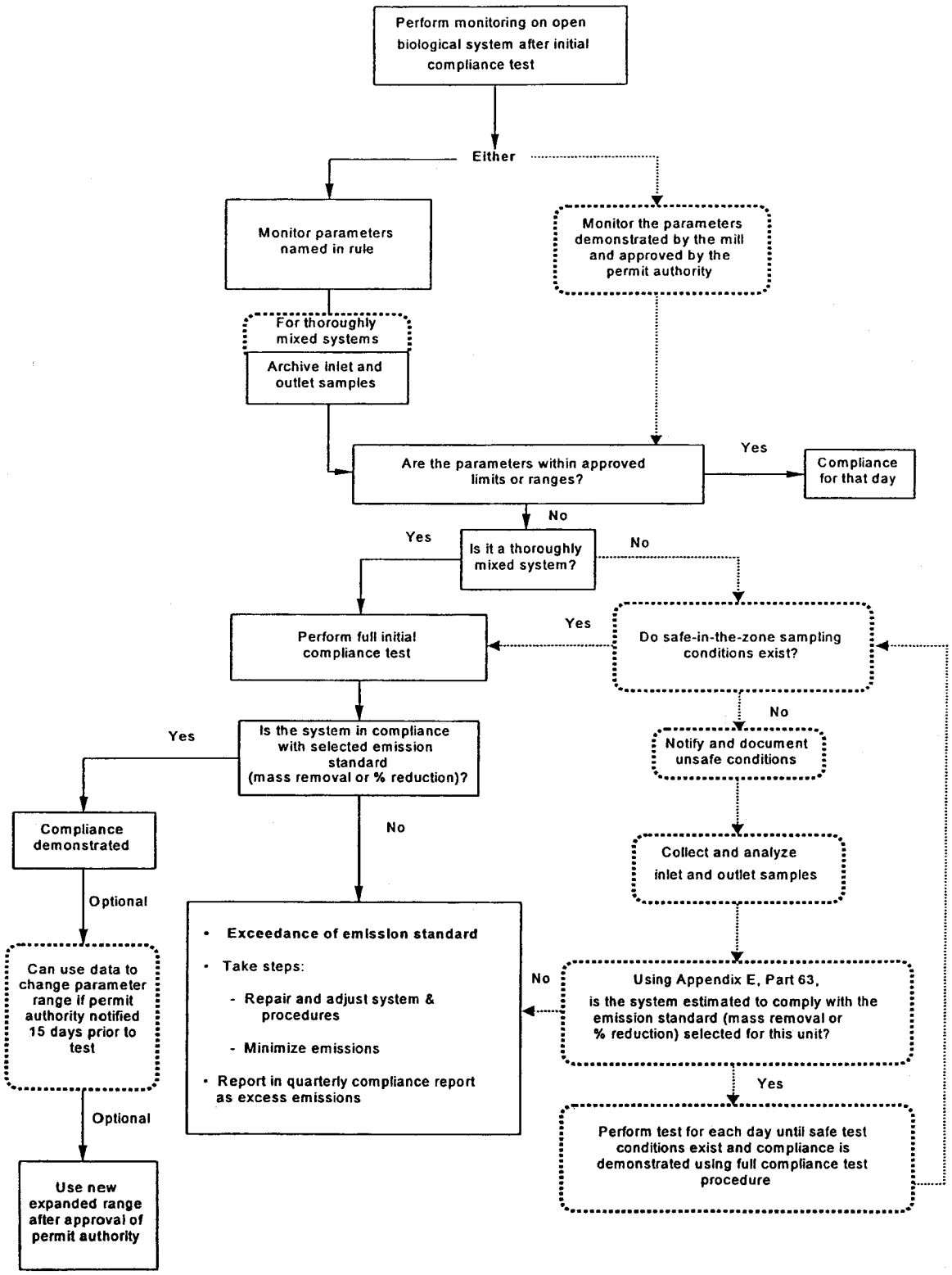
Figure 1. Proposed Changes to Daily Monitoring Requirements for Open Biological Treatment Systems

(Dotted lines denote proposed changes)



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Mills must monitor on a daily basis either the parameters specified in the final rule (§ 63.453(j)(1)) or site-specific parameters that have been approved (proposed § 63.453(j)(2), see section I.E.2 of this preamble). If the monitoring parameters are within the values or ranges established during the initial performance test, compliance with the applicable emission standard is demonstrated for that day. If the monitoring parameters are outside the established values or ranges, you must conduct a performance test to confirm compliance of the open biological treatment system. The performance test must be performed using the same procedures (*i.e.,* the appropriate procedures in appendix C of part 63) that were followed during the initial performance test.

During periods of monitoring parameter excursions, you must take steps to repair or adjust the process operation to end the parameter excursion, and you must take steps to minimize the total HAP emissions to the atmosphere (§ 63.453(p)(4)). However, the samples for the optional performance test to confirm compliance with the applicable emission limit must be collected before these repair steps are implemented (§ 63.453(p)(2)) since the steps taken to end the parameter excursion or minimize total HAP emissions would influence the results of the performance test.

The final rule (§ 63.453(p)(3)) provides a special procedure to model the fraction of compounds that are biodegraded in nonthoroughly mixed systems. This modeling procedure applies whenever unsafe conditions would prevent mill personnel from conducting in-zone sampling. After the unsafe conditions have passed, you must confirm compliance of the nonthoroughly mixed biological treatment system by conducting a full performance test using the initial performance test procedures.

6. Do I Still Have To Conduct the First Quarter Compliance Tests for Total HAPs (§ 63.453(j))?

Yes. The requirement for quarterly performance tests of open biological treatment systems is retained in the final rule. However, in today's action, we are proposing to allow you to initially demonstrate compliance with the condensate standards by testing for four specific HAPs. Additionally, in today's action we are proposing amendments to the condensate standards that allow you to comply with a percent reduction or mass removal standard using the individual HAPs or using methanol under certain conditions. Consequently, we are proposing to amend the quarterly performance test requirements in the final rule to incorporate these proposed changes.

The final rule (§ 63.453(j)(2)(ii)) requires you to conduct quarterly performance tests to confirm the performance of open biological treatment systems. The first quarter test is performed for total HAPs while the remaining quarterly tests may be performed for methanol or total HAPs. Also, in the final rule, mills that use a biological treatment system to comply with the condensate standards were limited to the percent reduction standard (§ 63.446(e)(2)).

As discussed in section I.C.2 of this preamble, we are proposing to allow you to measure total HAPs as acetaldehyde, methanol, methyl ethyl ketone, and propionaldehyde since these four compounds represent the majority of the HAPs present in the regulated condensate streams. No changes were necessary to the monitoring section (§ 63.453(j)) text in the final rule to address limiting the analysis to four HAP compounds. The rule text references the test methods and procedures section (§ 63.457(g)) that has already been corrected for this change. Also, in section I.C.3 of this preamble, we are proposing to add a mass removal standard for biological treatment systems. Because the monitoring section of the final rule, as written, does not mention a mass removal standard, we are proposing in today's action to amend the monitoring rule text to include this proposed treatment option.

In today's proposed action, we are specifically requesting comment on the requirement to test for the four HAPs in the first quarter of each year. Industry representatives suggested that testing for the four HAPs in the first quarter of each year was unnecessary because the majority of HAPs in the regulated condensates is one compound (methanol). Also, because the contribution from the other nonmethanol HAPs is small, variations in the composition of these nonmethanol HAPs would be insignificant. The industry representatives suggested that testing for the four HAPs is only necessary if new or modified pulping process condensates are generated, or when changes occur in the annual bleached and unbleached oven-dried ton of pulp production rates used to prorate the mass removal standards. At this time, we do not have data that address the variability of the HAP composition of the regulated condensates. Therefore, in today's action, we are proposing to retain the requirement for annual testing of the four HAPs in the first quarter. However, if data are submitted with public comments on this proposal, we will consider removing the requirement and allowing you to conduct the quarterly performance tests after the initial first quarter test for methanol only.

7. May I Use Monitoring Parameter Values Recorded During a Compliance Monitoring Test To Expand the Established Parameter Operating Range (§ 63.455(e))?

Yes. You may use monitoring parameter values recorded during a compliance test to expand the established parameter operating range, after approval from your permit authority. Under the general provisions to the final rule, you must notify the permit authority 60 days prior to conducting the initial and subsequent performance tests. However, for the reasons set forth below, we are proposing to change the timing of the notification for certain compliance monitoring performance tests from 60 days to 15 days with a 24-hour confirmation notification.

The final rule (§ 63.457(n)) specifies that you must establish the value or range of values parameter required to be monitored. After promulgation, commenters stated that some open biological treatment system operating parameters (*e.g.,* liquid temperature, biomass concentration, dissolved oxygen concentration) vary with seasonal changes. Because of a limited time period in which to characterize the performance of their open biological treatment system and establish appropriate monitoring parameter values, the commenters noted that they might not see the full range of operating conditions before the compliance date of the final rule. The commenters noted that a monitoring parameter could be outside its established range even though the open biological treatment system continued to achieve compliance with the applicable emission limit. Therefore, the commenters requested that they be allowed to use monitoring parameter values recorded during the compliance monitoring test (*i.e.,* post-initial performance test) required to be conducted due to a parameter excursion (§ 63.453(p)) to change the established operating range for that parameter. To do this, the commenters requested that the notification be reduced from 60 days to 24 hours or the same day as the compliance test.

We agree with the commenters that they should be allowed to change their allowable monitoring parameter ranges

or values using data recorded during any valid subsequent compliance tests required in the monitoring requirements section (§ 63.453(p)) of the final rule. Our intent is evident since the final rule (§ 63.457(n)(1)), as written, specifies that the appropriate value for a monitoring parameter must be established during the initial performance test and any subsequent performance tests, such as compliance tests required by § 63.453(p). Subsequent compliance tests are those tests used to expand the monitoring parameter value or range of values that have been previously selected by the mill and approved by the permit authority. However, the NESHAP general provisions (§ 63.7(b)) specify that the Administrator must be notified at least 60 days before the compliance test is scheduled to begin.

Because these subsequent compliance tests are triggered by monitoring parameter excursions or by conditions that cannot be manipulated by the owner or operator, the performance tests are not scheduled months in advance. Therefore, the 60-day period for notifying the permit authority is not appropriate in all cases. However, a short-term notification (24 hours or the same day) as suggested by the industry representatives would not provide permitting agencies with sufficient time to have an observer present during the subsequent performance test.

We believe that the 15-day notification is the minimum period that is appropriate to allow permit authorities time to plan and attend the subsequent compliance test and given that the exact time of the compliance test may not be known at the time of the 15-day notification, the 24-hour confirmation notification is reasonable. We also agree that all biological treatment system operating conditions cannot be anticipated due to rare circumstances that are outside the control of the mill operator. In these limited cases, shorter notification periods may be necessary and are appropriate with prior approval by the permit authority and properly recorded.

In today's action, we are proposing an amendment to the reporting requirements section (§ 63.455(e)) of the final rule that requires a 15-day notification of intent to conduct a subsequent performance test followed by a 24-hour confirmation notification. The purpose of the 15-day notification is to give permitting agencies an early indication of a possible subsequent performance testing, and the 24-hour confirmation notification would establish the exact date and time for conducting the subsequent performance test.

F. Drafting Error Corrections

Minor drafting errors were identified in the final rule after promulgation. Today's action makes the following corrections:

- Corrects the citations for the condensate segregation requirements in § 63.446(i) of the final rule from (c)(2) to (c)(2) and (3).
- Adds the word ''mills'' between the words ''unbleached'' and ''specified'' in the condensate standards (§ 63.446(i)) of the final rule.
- Removes the comma after the word ''reestablish'' in § 63.453(n) of the final rule.
- Replaces the word ''shall'' with the word ''may'' in the biological treatment system monitoring requirements (§ 63.453(p)) of the final rule.
- Corrects the liquid sampling procedures reference in § 63.457(c)(1) of the final rule from ''specified in Method 305 of part 60, appendix A'' to ''of the test method selected to determine liquid stream total HAP or methanol concentrations.''
- Corrects the citation in the condensate segregation procedures (§ 63.457(m)(1) and (m)(1)(iii)) of the final rule from § 63.446(c)(1) to § 63.446(c)(2).
- Corrects the citation in the condensate segregation procedures (§ 63.457(m)(2) and (m)(2)(ii)) of the final rule from § 63.446(c)(2) to § 63.446(c)(3).
- Removes the spaces between the ''degree'' symbol (°) and the abbreviations for Celsius (C) and Fahrenheit (F) in § 63.457(n) of the final rule.

II. Administrative Requirements

A. Paperwork Reduction Act

The EPA submitted the information requirements of the previously promulgated NESHAP for approval to the Office of Management and Budget (OMB) on April 27, 1998 under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The EPA prepared an Information Collection Request (ICR) document (ICR No. 1657.03), and a copy may be obtained from Sandy Farmer, Office of Policy, Regulatory Information Division, U.S. Environmental Protection Agency (2137), 401 M Street SW., Washington, DC 20460 or by calling (202) 260–2740. You may also request a copy by e-mail at: ''farmer.sandy@epa.gov'' or from the Office of Policy website at: ''http://www.epa.gov/icr''. The information requirements are not effective until OMB approves them.

Today's proposed amendments to the NESHAP will have no impact on the information collection burden estimates made previously. Consequently, EPA has not revised the ICR.

B. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51375, October 4, 1993), EPA must determine whether the proposed regulatory action is ''significant'' and, therefore, subject to OMB review and the requirements of the Executive Order. The order defines ''significant'' regulatory action as one that is likely to lead to a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The NESHAP published on April 15, 1998 was considered significant under Executive Order 12866. Accordingly, EPA prepared a regulatory impact analysis (RIA). The amendments proposed today make technical revisions and correct inadvertent omissions. The OMB evaluated this action and determined it to be nonsignificant; thus, it did not require OMB review.

C. Executive Order 13084: Consultations and Coordination With Indian Tribal Governments

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

13084 requires EPA to develop an effective process permitting elected 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 proposed action does not significantly or uniquely affect the communities of Indian tribal governments. The final rule published on April 15, 1998 (1998 NESHAP) does not create mandates upon tribal governments. Today's proposed action does not create a mandate on tribal governments. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this action.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. The EPA determined that it is not necessary to prepare a regulatory flexibility analysis in connection with today's action. These proposed amendments would not result in increased impacts to small entities, and the changes to the final rule in today's proposed action provide additional flexibility to the final rule by adding equivalent treatment alternatives.

E. Unfunded Mandates Reform Act

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

The EPA has determined that today's action does not contain a Federal mandate that may result in expenditures of $100 million or more to either State, local, or tribal governments in the aggregate or to the private sector in any 1 year. The amendments proposed in today's action provide additional flexibility to the final rule and reduce compliance costs. Therefore, today's proposed rule amendments are not subject to the requirements of sections 202 and 205 of the UMRA.

F. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045 applies to any rule that EPA determines (1) is 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 proposed regulatory action meets both criteria, EPA must evaluate the environmental health or safety effects of the proposed rule on children and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, so that the analysis required under section 5–501 of the order has the potential to influence the regulation. This proposed rule falls into that category only in part: the minimum rule stringency is set according to a congressionally mandated, technology-based lower limit called the ''floor,'' while a decision to increase the stringency beyond this floor can be partly based on risk considerations.

No children's risk analysis was performed for the 1998 NESHAP rulemaking because no alternative technologies exist that would provide greater stringency at a reasonable cost, and therefore the results of any such analysis would have no impact on the stringency decision. Today's proposed action 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 (NTTAA) directs all Federal agencies to use voluntary consensus standards instead of government-unique standards in their 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) that are developed or adopted by one or more voluntary consensus standards bodies. Examples of organizations generally regarded as voluntary consensus standards bodies include the American Society for Testing and Materials (ASTM), the National Fire Protection Association (NFPA), and the Society of Automotive Engineers (SAE). The NTTAA requires Federal agencies like EPA to provide Congress, through the OMB, with explanations when an agency decides not to use available and applicable voluntary consensus standards.

Today's proposed action does not establish new or modify existing technical standards. Therefore, consideration of voluntary consensus standards is not relevant to this action.

H. Executive Order 13132 (Federalism)

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that 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.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

If EPA complies by consulting, Executive Order 13132 requires EPA to provide to the Office of Management and Budget (OMB), in a separately identified section of the preamble to the rule, a federalism summary impact statement (FSIS). The FSIS must include a description of the extent of EPA's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met. Also, when EPA transmits a draft final rule with federalism implications to OMB for review pursuant to Executive Order 12866, EPA must include a certification from the agency's Federalism Official stating that EPA has met the requirements of Executive Order 13132 in a meaningful and timely manner.

These proposed amendments to a final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. While the final rule published on April 15, 1998 (1998 NESHAP) does not create mandates upon State, local, or tribal governments EPA involved State and local governments in its development. Thus, the requirements of section 6 of the Executive Order do not apply to this rule. Today's proposed action does not create a mandate upon State, local, or tribal governments, and they have been briefed on the proposed amendments.

List of Subjects in 40 CFR Part 63

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations.

Dated: January 10, 2000.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble, title 40, chapter I 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: 42 U.S.C. 7401 *et seq.*

Subpart S—National Emission Standards for Hazardous Air Pollutants from the Pulp and Paper Industry

2. Amend § 63.443 by revising paragraph (d)(4) to read as follows:

§ 63.443 Standards for the pulping system at kraft, soda, and semi-chemical processes.

* * * * *

(d) * * *

(4) Reduce total HAP emissions using one of the following:

(i) A boiler, lime kiln, or recovery furnace by introducing the HAP emission stream with the primary fuel or into the flame zone; or

(ii) A boiler or recovery furnace with a heat input capacity greater than or equal to 44 megawatts (150 million British thermal units per hour) by introducing the HAP emission stream with the combustion air.

* * * * *

3. Amend § 63.446 by revising paragraphs (e)(2) and (i) to read as follows:

§ 63.446 Standards for kraft pulping process condensates.

* * * * *

(e) * * *

(2) Discharge the pulping process condensate below the liquid surface of a biological treatment system and treat the pulping process condensates to meet the requirements specified in paragraph (e)(2)(i) or (ii) of this section.

(i) On an individual HAP basis, using the procedures specified in § 63.457(l)(1) or (2), either:

(A) Reduce methanol by 92 percent or more by weight and reduce acetaldehyde, methyl ethyl ketone, and propionaldehyde each by 99 percent or more by weight; or

(B) At mills that do not perform bleaching, remove 3.3 kilograms or more of methanol per megagram (6.6 pounds per ton) of ODP, remove 0.034 kilograms or more of acetaldehyde per megagram (0.067 pounds per ton) of ODP, remove 0.017 kilograms or more of methyl ethyl ketone per megagram (0.034 pounds per ton) of ODP, and remove 0.003 kilograms or more of propionaldehyde per megagram (0.0067 pounds per ton) of ODP; or

(C) At mills that perform bleaching, remove 5.1 kilograms or more of methanol per megagram (10.2 pounds per ton) of ODP, remove 0.052 kilograms or more of acetaldehyde per megagram (0.104 pounds per ton) of ODP, remove 0.026 kilograms or more of methyl ethyl ketone per megagram (0.052 pounds per ton) of ODP, and remove 0.005 kilograms or more of propionaldehyde per megagram (0.010 pounds per ton) of ODP.

(ii) On a methanol basis, using the test procedures in § 63.457(l)(3) or (4) to determine the additional condensates to be treated, either:

(A) Reduce methanol by 92 percent or more by weight; or

(B) At mills that do not perform bleaching, remove 3.3 kilograms or more of methanol per megagram (6.6 pounds per ton) of ODP; or

(C) At mills that perform bleaching, remove 5.1 kilograms or more of methanol per megagram (10.2 pounds per ton) of ODP.

* * * * *

(i) For the purposes of meeting the requirements in paragraph (c)(2), (c)(3), (e)(4), or (e)(5) of this section at mills producing both bleached and unbleached pulp products, owners and operators may meet a prorated mass standard that is calculated by prorating the applicable mass standards (kilograms of total HAP per megagram of ODP) for bleached and unbleached mills specified in paragraph (c)(2), (c)(3), (e)(4), or (e)(5) of this section by the ratio of annual megagrams of bleached and unbleached ODP.

4. Amend § 63.453 by revising paragraphs (j), (n), and (p) to read as follows:

§ 63.453 Monitoring requirements.

* * * * *

(j) Each owner or operator using an open biological treatment system to comply with § 63.446(e)(2) shall perform the daily monitoring procedures specified in either paragraph (j)(1) or (j)(2) of this section and shall conduct a performance test each quarter using the procedures specified in paragraph (j)(3) of this section.

(1) Comply with the monitoring and sampling requirements specified in paragraphs (j)(1)(i) and (j)(1)(ii) of this section.

(i) On a daily basis, monitor the following parameters for each open biological treatment unit:

(A) Composite daily sample of outlet soluble BOD_5 concentration to monitor for maximum daily and maximum monthly average;

(B) Mixed liquor volatile suspended solids;

(C) Horsepower of aerator unit(s);

(D) Inlet liquid flow; and

(E) Liquid temperature.

(ii) If the Inlet and Outlet Concentration Measurement Procedure (Procedure 3) in appendix C of part 63 is used to determine the fraction of HAP compounds degraded in the biological treatment system as specified in § 63.457(l), conduct the sampling and archival requirements specified in paragraphs (j)(1)(ii)(A) and (j)(1)(ii)(B) of this section.

(A) Obtain daily inlet and outlet liquid grab samples from each biological treatment unit to have HAP data available to perform quarterly compliance tests specified in paragraph (j)(3) of this section and the compliance tests specified in paragraph (p) of this section.

(B) Store the samples as specified in § 63.457(n) until after the results of the soluble BOD_5 test required in paragraph (j)(1)(i)(A) of this section are obtained. The storage requirement is needed since the soluble BOD_5 test requires 5 days or more to obtain results. If the results of the soluble BOD_5 test are outside of the range established during the initial performance test, then the archive sample shall be used to perform the mass removal or percent reduction determinations.

(2) As an alternative to the monitoring requirements of paragraph (j)(1) of this section, conduct daily monitoring of the site-specific parameters established according to the procedures specified in paragraph (n) of this section.

(3) Conduct a performance test as specified in § 63.457(l) within 45 days after the beginning of each quarter and meet the applicable emission limit in § 63.446(e)(2) (i) or (ii).

(i) The performance test conducted in the first quarter (annually) shall be performed for total HAP and the percent reduction or mass removal obtained from the test shall be at least as great as the total HAP percent reduction or mass removal specified in § 63.446(e)(2) (i) or (ii).

(ii) The remaining quarterly performance tests shall be performed for either methanol or total HAP and the percent reduction or mass removal obtained from the test shall be at least as great as the methanol or total HAP percent reduction or mass removal determined in the previous first-quarter test specified in paragraph (j)(3)(i) of this section.

* * * * *

(n) To establish or reestablish the value for each operating parameter required to be monitored under paragraphs (b) through (j), (l), and (m) of this section or to establish appropriate parameters for paragraphs (f), (i), (j)(2), and (m) of this section, each owner or operator shall use the following procedures:

* * * * *

(p) Each owner or operator of an open biological treatment system complying with paragraph (j) of this section may perform the procedures specified in this paragraph and record the results as soon as practicable whenever the monitoring parameters specified in paragraphs (j)(1)(i) (A) through (C) of this section or any of the monitoring parameters specified in paragraph (j)(2) are below minimum operating parameter values or above maximum operating parameter values established in paragraph (n) of this section.

(1) Determine compliance with § 63.446(e)(2) using the test procedures specified in § 63.457(l) and the monitoring data specified in paragraph (j)(1) or (j)(2) of this section that coincide with the time period of the parameter excursion except as provided in paragraph (p)(3) of this section.

(2) A parameter excursion is not a violation of the applicable emission standard if the results of the compliance test conducted under paragraph (p)(1) of this section demonstrate compliance with § 63.446(e)(2), and no maintenance or changes have been made to the process or control device after the beginning of a parameter excursion that would influence the results of the determination.

(3) If an owner or operator determines that performing the required procedures under paragraph (p)(1) of this section for a nonthoroughly mixed open biological system would expose a worker to dangerous, hazardous, or otherwise unsafe conditions, all of the following procedures shall be performed:

(i) Calculate the mass removal or percent reduction value using the procedures specified in § 63.457(l) except the value for f_{bio} shall be determined using the procedures in appendix E of this part.

(ii) Repeat the procedures in paragraph (p)(3)(i) of this section for every day until the unsafe conditions have passed.

(iii) If the percent reduction or mass removal determined in paragraph (p)(3)(i) of this section is less than the percent reduction or mass removal values specified in § 63.446(e)(2), as appropriate, then this is a violation of the applicable standard.

(iv) The determination that there is a condition that exposes a worker to dangerous, hazardous, or otherwise unsafe conditions shall be documented according to requirements in § 63.454(e) and reporting in § 63.455(f).

(v) The requirements of paragraphs (p)(1) and (2) of this section shall be performed and met as soon as practical but no later than 24 hours after the conditions have passed that exposed a worker to dangerous, hazardous, or otherwise unsafe conditions.

(4) During periods of monitoring parameter excursions, the following requirements shall be met:

(i) Steps shall be taken to repair or adjust the operation of the process to end the parameter excursion period;

(ii) Steps shall be taken to minimize total HAP emissions to the atmosphere during the parameter excursion period.

5. Amend § 63.454 by revising paragraph (a) and adding paragraph (e) to read as follows:

§ 63.454 Recordkeeping requirements.

(a) The owner or operator of each affected source subject to the requirements of this subpart shall comply with the recordkeeping requirements of § 63.10, as shown in table 1 of this subpart, and the requirements specified in paragraphs (b) through (e) of this section for the monitoring parameters specified in § 63.453.

* * * * *

(e) The owner or operator of an open nonthoroughly mixed biological treatment system complying with § 63.453(p)(3) instead of § 63.453(p)(1) shall prepare a written record identifying the specific conditions that would expose a worker to dangerous, hazardous, or otherwise unsafe conditions. The record must include a written explanation of the specific reason(s) why a worker would not be able to perform the sampling and test procedures specified in § 63.457(l).

6. Amend § 63.455 by adding paragraphs (e) and (f) to read as follows:

§ 63.455 Reporting requirements.

* * * * *

(e) If the owner or operator uses the results of the compliance test required in § 63.453(p)(1) to revise the approved values or ranges of the monitoring parameters specified in § 63.453(j)(1) or (2), the owner or operator shall submit an initial notification of the subsequent compliance test to the Administrator as soon as practicable, but no later than 15

days, before the compliance test required in § 63.453(p)(1) is scheduled to be conducted. The owner or operator shall notify the Administrator as soon as practicable, but no later than 24 hours, before the performance test is scheduled to be conducted to confirm the exact date and time of the performance test.

(f) To comply with the open biological treatment system monitoring provisions of § 63.453(p)(3), the owner or operator shall notify the Administrator as soon as practicable of the onset of the dangerous, hazardous, or otherwise unsafe conditions that did not allow a compliance determination to be conducted using the sampling and test procedures in § 63.457(l). The notification shall occur no later than 24 hours after the onset of the dangerous, hazardous, or otherwise unsafe conditions and shall include the specific reason(s) that the sampling and test procedures in § 63.457(l) could not be performed.

7. Amend § 63.457 by revising paragraphs (c)(1) introductory text and (c)(4) introductory text, (g), (l), (m)(1) introductory text, (m)(1)(iii), (m)(2) introductory text, (m)(2)(ii), and (n), and add paragraphs (c)(5) and (6) to read as follows:

§ 63.457 Test methods and procedures.

* * * * *

(c) * * *

(1) Samples shall be collected using the sampling procedures of the test method listed in paragraph (c)(3) of this section selected to determine liquid stream HAP concentrations;

* * * * *

(4) To determine soluble BOD_5 in the effluent stream from an open biological treatment unit used to comply with § 63.446(e)(2) and § 63.453(j), the owner or operator shall use Method 405.1 of part 136 of this chapter with the following modifications:

* * * * *

(5) If the test method used to determine HAP concentration indicates that a specific HAP is not detectable, the value determined as the minimum measurement level (MML) of the selected test method for the specific HAP shall be used in the compliance demonstration calculations. To determine the MML for a specific HAP using one of the test methods specified in paragraph (c)(3) of this section, one of the procedures specified in paragraphs (c)(5)(i) and (ii) of this section shall be performed.

(i) To determine the MML for a specific HAP, the following procedures shall be performed each time the method is used.

(A) Select a concentration value for the specific HAP in question to represent the MML. The selected value of the MML selected shall not be below the calibration standard of the selected test method.

(B) Measure the concentration of the specific HAP in a minimum of three replicate samples using the selected test method. All replicate samples shall be run through the entire analytical procedure. The samples must contain the specific HAP at the selected MML concentration and should be representative of the liquid streams to be analyzed in the compliance demonstration. Spiking of the liquid samples with a known concentration of the target HAP may be necessary to ensure that the HAP concentration in the three replicate samples is at the selected MML.

(C) Calculate the relative standard deviation (RSD) and the upper confidence limit at the 95 percent confidence level using the measured HAP concentrations determined in paragraph (c)(5)(i)(B) of this section. If the upper confidence limit of the RSD is less than 30 percent, then the selected MML is acceptable. If the upper confidence limit of the RSD is greater than or equal to 30 percent, then the selected MML is too low and the procedures specified in paragraphs (c)(5)(i)(A) through (C) of this section must be repeated.

(ii) Provide for the Administrator's approval the selected value of the MML for a specific HAP and the rationale for selecting the MML including all data and calculations used to determine the MML. The approved MML must be used in all applicable compliance demonstration calculations.

(6) When using the MML determined using the procedures in paragraph (c)(5)(i) or (ii) of this section, the analytical laboratory conducting the analysis must perform and meet the following quality assurance procedures.

(i) Measure the concentration of the specific HAP in a minimum of three replicate samples using the selected test method.

(ii) Calculate the RSD and the upper confidence limit at the 95 percent confidence level using the measured HAP concentrations determined in paragraph (c)(6)(i) of this section. If the upper confidence limit of the RSD is less than 30 percent, then the test method is being performed correctly. The upper confidence limit of the RSD must be less than or equal to 30 percent.

* * * * *

(g) *Condensate HAP concentration measurement.* For purposes of complying with the kraft pulping condensate requirements in § 63.446, the owner or operator shall measure the total HAP concentration as methanol except as specified in § 63.446(e)(2).

* * * * *

(1) *Biological treatment system percent reduction and mass removal calculations.* To demonstrate compliance with the condensate treatment standards specified in § 63.446(e)(2) and the monitoring requirements specified in § 63.453(j)(3) using a biological treatment system, the owner or operator shall use one of the procedures specified in paragraphs (l)(1) through (4) of this section. Owners or operators using a nonthoroughly mixed open biological treatment system shall also comply with paragraph (l)(5) of this section.

(1) *Percent reduction individual HAP procedure.* For the purposes of complying with the condensate treatment requirements specified in § 63.446(e)(2)(i)(A), the percent reduction due to destruction in the biological treatment system shall be calculated using the following equation:

$$R = f_{bio} \times 100$$

Where:

R=Destruction of each individual HAP specified in § 63.446(e)(2)(i)(A) in the biological treatment system (percent).

f_{bio}=The fraction of each individual HAP removed in the biological treatment system. The site-specific biorate constants shall be determined using the procedures specified and as limited in Appendix C of part 63.

(2) *Mass removal individual HAP procedure.* For the purposes of complying with the condensate treatment requirements specified in § 63.446(e)(2)(i)(B) or (C), the mass removal in the biological treatment system shall be calculated using the following equation:

$$E = (F) * (f_{bio})$$

Where:

E=mass of each individual HAP specified in § 63.446(e)(2)(i)(B) or (C) removed in the biological treatment system (kg/Mg ODP).

F=mass of each individual HAP entering the biological treatment system determined using the procedues specified in paragraph (j)(2) of this section(kg/Mg ODP).

(3) *Percent reduction methanol procedure.* For the purposes of complying with the condensate treatment requirements specified in § 63.446(e)(2)(ii)(A), the methanol

percent reduction shall be calculated using the following equation:

$$R = \frac{f_{bio}(MeOH)}{(1+1.087(r))} * 100$$

Where:
R=percent destruction.
r=ratio of the sum of acetaldehyde, methyl ethyl ketone, and propionaldehyde mass to methanol mass determined using the procedures in paragraph (j)(2) of this section.
f_{bio}(MeOH)=the fraction of methanol removed in the biological treatment system. The site-specific biorate constants shall be determined using the appropriate procedures specified in appendix C of part 63.

(4) *Mass removal methanol procedure*. For the purposes of complying with the condensate treatment requirements specified in § 63.446(e)(2)(ii)(B) or (C), the methanol mass removal shall be calculated using the following equation:

$$E=Eb*(f_{bio}(MeOH)/(1+1.087(r)))$$

Where:
E=methanol mass removal (kg/Mg ODP);
Eb=inlet mass flow rate of methanol (kg/Mg ODP) determined using the procedures in paragraph (j)(2) of this section;

(5) The owner or operator of a nonthoroughly mixed open biological treatment system using the monitoring requirements specified in § 63.453(p)(3) shall follow the procedures specified in appendix E of this part during the initial and any subsequent performance tests.

* * * * *

(m) * * *

(1) To demonstrate compliance with the percent mass requirements specified in § 63.446(c)(2), the procedures specified in paragraphs (m)(1)(i) through (iii) of this section shall be performed.

* * * * *

(iii) Compliance with the segregation requirements specified in § 63.446(c)(2) is demonstrated if the condensate stream or streams from each equipment system listed in § 63.446(b)(1) through (3) being treated as specified in § 63.446(e) contain at least as much total HAP mass as the target total HAP mass determined in paragraph (m)(1)(ii) of this section.

(2) To demonstrate compliance with the percent mass requirements specified in § 63.446(c)(3), the procedures specified in paragraphs (m)(2)(i) through (ii) of this section shall be performed.

* * * * *

(ii) Compliance with the segregation requirements specified in § 63.446(c)(3) is demonstrated if the total HAP mass determined in paragraph (m)(2)(i) of this section is equal to or greater than the appropriate mass requirements specified in § 63.446(c)(3).

(n) *Open biological treatment system monitoring sampling storage*. The inlet and outlet grab samples required to be collected in § 63.453(j)(2) shall be stored at 4°C (40°F) to minimize the biodegradation of the organic compounds in the samples.

8. Amend § 63.458 by adding paragraph (b)(5) to read as follows:

§ 63.458 Delegation of authority.

* * * * *

(b) * * *

(5) Section 63.457(c)(5)(ii)—Determination of the minimum measurement level in liquid streams for a specific HAP using the selected test method.

9. Add appendix E to part 63 to read as follows:

Appendix E to Part 63—Monitoring Procedure for Nonthoroughly Mixed Open Biological Treatment Units or Systems at Kraft Pulp Mills Under Unsafe Sampling Conditions

I. Purpose

This procedure is required to be performed in subpart S of this part, entitled National Emission Standards for Hazardous Air Pollutants from the Pulp and Paper Industry. Subpart S requires this procedure in § 63.453(p)(3) to be followed during unsafe sampling conditions when it is not practicable to obtain representative samples of hazardous air pollutant (HAP) concentrations from an open biological treatment unit. It is assumed that inlet and outlet HAP concentrations from the open biological treatment unit may be obtained during the unsafe sampling conditions. The purpose of this procedure is to estimate the concentration of HAPs within the open biological treatment unit based on information obtained at inlet and outlet sampling locations in units that are not thoroughly mixed and therefore have different concentrations of HAPs at different locations within the unit.

II. Definitions

Biological treatment unit = wastewater treatment unit designed and operated to promote the growth of bacteria to destroy organic materials in wastewater.

f_{bio} The fraction of organic compounds in the wastewater biodegraded in a biological treatment unit.
Fe=The fraction of applicable organic compounds emitted from the wastewater to the atmosphere.
K1=First-order biodegradation rate constant, L/g mixed liquor volatile suspended solids (MLVSS)-hr
KL=Liquid-phase mass transfer coefficient, m/s
Ks=Monod biorate constant at half the maximum rate, g/m^3

III. Test Procedure for Determination of f_{bio} for Nonthoroughly Mixed Open Biological Treatment Units Under Unsafe Sampling Conditions

This test procedure is used under unsafe sampling conditions that do not permit practicable sampling of open biological treatment units within the unit itself, but rather relies on sampling at the inlet and outlet locations of the unit. This procedure may be used only under unsafe sampling conditions to estimate f_{bio}. Once the unsafe conditions have passed, then the formal compliance demonstration procedures of f_{bio} based upon measurements within the open biological treatment unit must be completed.

A. Overview of Estimation Procedure

The steps in the estimation procedure include data collection, the estimation of concentrations within the unit, and the use of Form 1 to estimate f_{bio}. The data collection procedure consists of two separate components. The first data collection component demonstrates that the open biological treatment unit can be represented by Monod kinetics and characterizes the effectiveness of the open biological treatment unit as part of the initial performance test, and the second data collection component is used when there are unsafe sampling conditions. These two data collection components are used together in a data calculation procedure based on a Monod kinetic model to estimate the concentrations in each zone of the open biological treatment unit. After the first two components of data collection are completed, the calculation procedures are used to back estimate the zone concentrations, starting with the last zone in the series and ending with the first zone.

B. Data Collection Requirements

This method is based upon: modeling the nonthoroughly mixed open biological treatment unit as a series of well-mixed zones with internal recycling between the units; and assuming that two Monod biological kinetic parameters can be used to characterize the biological removal rates in each unit. The data collection procedure consists of two separate components. The first data collection component is part of the initial performance test, and the second data collection component is used during unsafe sampling conditions.

1. Initial Performance Test

The objective of the first data collection component is to demonstrate that the open biological treatment unit can be represented by Monod kinetics and to characterize the performance of the open biological treatment unit. An appropriate value of the biorate constant, Ks, is determined using actual sampling data from the open biological treatment unit. This is done during the initial performance test when the open biological treatment unit is operating under normal conditions. This specific Ks value obtained during the initial performance test is used in the calculation procedure to characterize the open biological treatment unit during unsafe sampling conditions. The following open biological treatment unit characterization information is obtained from the first component of the data collection procedure:

(1) The value of the biorate constant, Ks;

(2) The number and characteristics of each zone in the open biological treatment unit (depth, area, characterization parameters for surface aeration, submerged aeration rates, biomass concentration, concentrations of organic compounds, dissolved oxygen (DO), dissolved solids, temperature, and other relevant variables); and

(3) The recycle ratio of internal recirculation between the zones.

The number of zones and the above characterization of the zones are also used to determine the performance of the unit under the unsafe sampling conditions of concern.

2. Data Collected Under Unsafe Sampling Conditions

In the second data collection component, obtained under unsafe sampling conditions, the measured inlet and outlet HAP concentrations and the biomass concentration are obtained for the open biological treatment unit. After the site specific data collection is completed on the day a parameter excursion occurs, the inlet and outlet concentrations are used with the prior open biological treatment unit characterization to estimate the concentrations of HAPs in each zone. The following information on the open biological treatment unit must be available in the second data collection component:

(1) Basic unit variables such as inlet and recycle wastewater flow rates, type of agitation, and operating conditions;

(2) The value of the inlet and outlet HAP concentrations; and

(3) The biomass concentration in the open biological treatment unit.

C. One Time Determination of a Single Value of Ks (Initial Performance Test)

A single value of Ks is calculated using Form 3 for each data set that is collected during the initial performance test. A single composite value of Ks, deemed to be representative of the biological unit, is subsequently selected so that the f_{bio} values calculated by the procedures in this appendix (using this single value of Ks) for the data sets collected during the initial performance test are within 10 percent of the f_{bio} value determined by using Form 1 with these same data sets. The value of Ks meeting these criteria is obtained by the following steps:

(1) Determine the median of the Ks values calculated for each data set;

(2) Estimate f_{bio} for each data set using the selected Ks value (Form 1 and Form 2);

(3) Calculate f_{bio} for each data set using Form 1; and

(4) Compare the f_{bio} values obtained in steps (2) and (3); if the f_{bio} value calculated using step (2) differs from that calculated using step (3) by more than 10 percent, adjust Ks (decrease Ks if the f_{bio} value is lower than that calculated by Form 1 and vice versa) and repeat this procedure starting at step (2). If a negative value is obtained for the values of Ks, then this negative kinetic constant may not be used with the Monod model. If a negative value of Ks is obtained, this test procedure cannot be used for evaluating the performance of the open biological treatment unit.

D. Confirmation of Monod Kinetics (Initial Performance Test)

i. Confirmation that the unit can be represented by Monod kinetics is made by identifying the following two items:

(1) The zone methanol concentrations measured during the initial performance test; and

(2) The zone methanol concentrations estimated by the Multiple Zone Concentrations Calculations Procedure based on inlet and outlet concentrations (Column A of Form 2). For each zone, the concentration in item 1 is compared to the concentration in item 2.

ii. For each zone, the estimated value of item 2 must be:

(1) Within 25 percent of item 1 when item 1 exceeds 8 mg/L; or

(2) Within 2 mg/L of item 1 when item 1 is 8 mg/L or less.

iii. Successful demonstration that the calculated zone concentrations meet these criteria must be achieved for 80 percent of the performance test data sets.

iv. If negative values are obtained for the values of K1 and Ks, then these negative kinetic constants may not be used with the Monod model, even if the criteria are met. If negative values are obtained, this test procedure cannot be used for evaluating the performance of the open biological treatment unit.

E. Determination of KL for Each Zone (Unsafe Sampling Conditions)

i. A site-specific liquid-phase mass transfer coefficient (KL) must be obtained for each zone during the unsafe sampling conditions. Do not use a default value for KL. The KL value for each zone must be based on the site-specific parameters of the specific unit. The first step in using this procedure is to calculate KL for each zone in the unit using Form 4. Form 4 outlines the procedure to follow for using mass transfer equations to determine KL. Form 4 identifies the appropriate form to use for providing the detailed calculations to support the estimate of the value of KL. Forms 5 and 6 are used to provide individual compound estimates of KL for quiescent and aerated impoundments, respectively. A computer model may be used to perform the calculations. If the WATER8 model or the most recent update to this model is used, then report the computer model input parameters that you used as an attachment to Form 4. In addition, the Bay Area Sewage Toxics Emission (BASTE) model version 3.0 or equivalent upgrade and the TOXCHEM (Environment Canada's Wastewater Technology Centre and Environmega, Ltd.) model version 1.10 or equivalent upgrade may also be used to determine KL for the open biological treatment unit with the following stipulations:

(1) The programs must be altered to output a KL value that is based on the site-specific parameters of the unit modeled; and

(2) The Henry's law value listed in Form 4 must be substituted for the existing Henry's law values in the models.

ii. The Henry's law value listed in Form 4 may be obtained from the following sources:

(1) Values listed by EPA with temperature adjustment if needed;

(2) Measured values for the system of concern with temperature adjustment; or

(3) Literature values of Henry's law values for methanol, adjusted for temperature if needed.

iii. Input values used in the model and corresponding output values shall become part of the documentation of the f_{bio} determination. The owner or operator should be aware that these models may not provide equivalent KL values for some types of units. To obtain an equivalent KL value in this situation, the owner or operator shall either use the appropriate procedure on Form 4 or adjust the KL value from the model to the equivalent KL value as described on Form 4.

iv. Report the input parameters that you used in the computer model on Forms 5 and 6 as an attachment to Form 4. If you have submerged air flow in your unit, you must correct the value of KL estimated on Form 4 with the correction factor determined using Form 7 before using the value of KL with Form 2.

F. Estimation of Zone Concentrations (Unsafe Sampling Conditions)

Form 2 is used to estimate the zone concentrations of HAPs based on the inlet and outlet data. The value of Ks entered on the form is that single composite value of Ks discussed in section III.C of this appendix. This value of Ks is calculated during the Initial Performance Test (and subsequently updated, if necessary). A unique value of the biorate K1 is entered on line 4 of Form 4, and the inlet concentration is estimated in Column A of Form 4. The inlet concentration is located in the row of Form 2 corresponding to zone 0. If there are three zones in the system, n-3 equals 0 for the inlet concentration row. These estimated zone concentrations are then used in Form 1 to estimate f_{bio} for the treatment unit.

G. Quality Control/Quality Assurance (QA/QC)

A QA/QC plan outlining the procedures used to determine the measured inlet and outlet concentrations during unsafe conditions and how the zone characterization data were obtained during the initial performance test shall be prepared and submitted with the initial performance test report. The plan should include, but may not be limited to:

(1) A description of each of the sampling methods that were used (method, procedures, time, method to avoid losses during sampling and holding, and sampling procedures) including simplified schematic drawings;

(2) A description of how that biomass was sampled from the activated sludge unit, including methods, locations, and times;

(3) A description of what conditions (DO, temperature, etc.) are important, what the target values are in the zones, how the factors were controlled, and how they were monitored. These conditions are primarily used to establish that the conditions of the initial performance test correspond to the conditions of the day in question;

(4) A description of how each analytical measurement was conducted, including preparation of solutions, dilution procedures, sampling procedures, monitoring of conditions, etc;

(5) A description of the analytical instrumentation used, how the instruments were calibrated, and a summary of the accuracy and precision for each instrument;

(6) A description of the test methods used to determine HAP concentrations and other measurements. Section 63.457 (c)(3) specifies the test methods that must be used to determine HAP concentrations;

(7) A description of how data are captured, recorded, and stored; and

(8) A description of the equations used and their solutions for sampling and analysis, including a reference to any software used for calculations and/or curve-fitting.

IV. Calculation of Individual f_{bio} (Unsafe Sampling Conditions)

Use Form 1 with your zone concentration information to estimate the value of f_{bio} under unsafe sampling conditions. Form 1 uses measured concentrations of HAPs in the unit inlet and outlet, and Form 1 also uses the estimated concentrations in each zone of the unit obtained from Form 2. This procedure may be used on an open biological treatment unit that has well-defined zones within the unit. Use Form 1 to determine f_{bio} for each open biological treatment unit as it exists under subpart S of part 63. The first step in using Form 1 is to calculate KL for each zone in the unit using Form 4. Form 7 must also be used if submerged aeration is used. After KL is determined using field data, measure the concentrations of the HAPs in each zone. In this alternative procedure for unsafe sampling conditions, the actual measured concentrations of the HAPs in each zone are replaced with the zone concentrations that are estimated with Form 2. After KL and the zone concentrations are determined, Form 1 is used to estimate the overall unit Fe and f_{bio} for methanol.

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Form 1

DATA FORM FOR THE ESTIMATION OF MULTIPLE ZONE BIODEGRADATION FROM UNIT CONCENTRATIONS

NAME OF THE FACILITY for site specific biorate determination		
COMPOUND for site specific biorate determination		Methanol
Number of zones in the biological treatment unit	1	
VOLUME of full-scale system (cubic meters)	2	
Average DEPTH of the full-scale system (meters)	3	
FLOW RATE of wastewater treated in the unit (m3/s)	4	
Recycle flow of wastewater added to the unit, if any (m3/s)	5	
Concentration in the wastewater treated in the unit (mg/L)	6	
Concentration in the recycle flow, if any (mg/L)	7	
Concentration in the effluent (mg/L).	8	

TOTAL INLET FLOW (m3/s) line 4 plus the number on line 5	9	
TOTAL RESIDENCE TIME (s) line 2 divided by line 9.	10	
TOTAL AREA OF IMPOUNDMENT (m2) line 2 divided by line 3	11	

Zone number	Concentration for zone, Ci (mg/L)		Area of the zone, A (m2)	Estimate of KL in the zone (m/s) from Form 4		AIR STRIPPING KL A Ci (g/s)
1						
2						
3						
4						
5						
6						
7						
8						
9						
10						
TOTALS sum for each zone.		12			13	

Removal by air stripping (g/s). Line 13.	14	
Loading in effluent (g/s). Line 8 times line 9.	15	
Total loading (g/s). (Line 5 * line 7) + (line 4* line 6).	16	
Removal by biodegradation (g/s) Line 16 minus (line 14 + line 15).	17	
Fraction biodegraded: Divide line 17 by line 16..	18	
Fraction air emissions: Divide line 14 by line 16.	19	
Fraction remaining in unit effluent: Divide line 15 by line 16.	20	

Form 2

DATA FORM FOR THE DETERMINATION OF ZONE CONCENTRATIONS FROM KS AND INLET/OUTLET DATA

COMPOUND for site specific biorates determination	methanol	
Influent Flow (m3/s)	1	
Inlet Concentration (g/m3)	2	
Outlet Concentration (g/m3) - Use value from line 3 as Ci value in column A for final Zone (zone n) in table below	3	
Saturation Coefficient, Ks (g/m3) From Form XIV	4	
Biorate K1 (1/s) - Estimate	5	
Number of Zones	6	

Adjust K1 value (line 5) until Column A, Row (n - line 6) is within +/- 5% of line 2.

Instructions for completion of table: (1) Transfer value from line 3 into row n, column A. (2) Enter data for all zones into columns B, D, E, G, H, & K. (3) Beginning with row n, perform calculations for columns F. I, J, L, M, N, & O for that zone only. (4) Calculate row n-1, column A using results from previous row (i.e., J_{i-1}, M_{i-1}, N_{i-1}). (5) Repeat steps (3) and (4) until a row of calculations has been completed for each zone. (6) row n - line 6, column A is the calculated inlet concentration.

	A	B	C	D	E	F	G	H
Zone Number	C_i $(J_{i-1} + N_{i-1})/O_{i-1}$ g/m3	Temp C	(1.045)^(B-25)	biomass g/m3	Volume m3	line 5 * A*C*D *E/(line 4+ A) g/s	KL m/s	Area m2
n								
n-1								
n-2								
n-3								
n-4								

	I	J	K	L	M	N	O
Zone Number	A*G*H g/s	Reaction F+I g/s	Backmix BMi	$(1+BM_i + BM_{i+1})$ $*C_i$ * line 1 g/s	$BM_{i+1} * C_{i+1}$ * line 1 g/s	Flux L-M g/s	$(1+BM_i)$ * line 1 g/s
n							
n-1							
n-2							
n-3							
n-4							

Form 3

Form XIV **DATA FORM FOR THE DETERMINATION OF MONOD CONSTANTS FROM ZONE CONCENTRATIONS WITH BACKMIXING**

COMPOUND for site specific biorates determination		
Influent Flow (m3/s)		
Inlet Concentration (g/m3) - Use value from line 2 as Ci-1 value in column D for Zone 1 in table below		

	A	B	C	D	E			H
Zone Number	Ci g/m3	Backmix (BMi)	$(1+BM_i+BM_{i+1})*C_i$ g/m3	$(1+BM_i)*C_{i-1}$ g/m3	$BM_{i+1} * C_{i+1}$ g/m3	m/s	m2	A*F*G g/s
1								
2								
3								
4								
5								

	I	J	K	L	M	N	O
Zone Number	Volume m3	Temp C	(1.045)^(J-25)	biomass g/m3	I*K*L gm	M/[line 1*(D+E-C)-H] s	1/A m3/g
1							
2							
3							
4							
5							

Plot values in column N on y axis, and values in column O on x axis, up to, and including first row where Ci is equal to MDL or to last zone.

Y intercept from plot. (g-s/m3)	3	
K1 (1/s). 1/line 3	4	
Slope of line	5	
Ks (g/m3). Line 5 times line 4	6	

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Form 4

PROCEDURES FORM FOR THE ESTIMATION OF THE KL FROM UNIT SPECIFICATIONS

NAME OF THE FACILITY for site specific biorate determination	
NAME OF UNIT for site specific biorate determination	
NAME OF COMPOUND	
HENRY'S LAW constant for the compound (mole fraction in gas per mole fraction in water at 25 degrees Celsius)	

IDENTIFY THE TYPE OF UNIT (check one box below)

Quiescent impoundment	1	
Surface agitated impoundment	2	
Surface agitated impoundment with submerged air	3	
Unit agitated by submerged aeration gas	4	

PROCEDURES BASED UPON THE TYPE OF UNIT

1. Use the quiescent impoundment model to determine KL. Use Kq as KL as determined from Form 5.
2. Use the quiescent impoundment model to determine KL for the quiescent zone, Form 5. Use the aerated impoundment model to determine KL for the agitated surface, Form 6.
3. Use the quiescent impoundment model to determine Kq for the quiescent zone, Form 5. Use the aerated impoundment model to determine KL for the agitated surface, Form 6. The total system KL is the sum of the KL from Form 6 and the equivalent KL from Form 7
4. Use the aerated impoundment model to determine KL if the surface is agitated. Use the quiescent impoundment model if the surface is not agitated. KL includes the effect of volatilization in the air discharge, the equivalent KL from Form 7. See section 4.6.1 in the EMISSION MODEL REPORT

Estimate of KL obtained from above procedures (m/s)	5	

Form 5

FORM FOR CALCULATING THE MASS TRANSFER COEFFICIENT FOR A QUIESCENT SURFACE IMPOUNDMENT

FACILITY NAME for site specific biorate determination	
COMPOUND for site specific biorate determination	Methanol

Input values

Enter the following:

F - Impoundment fetch (m)	
D - Impoundment depth (m)	
U10 - Windspeed 10 m above liquid surface (m/s)	
Dw - Diffusivity of compound in water (cm2/s)	
Dether - Diffusivity of ether in water (cm2/s)	
μG - Viscosity of air, (g/cm-s)	
G - Density of air, (g/cm3)	
Da - Diffusivity of compound in air, (cm2/s)	
A - Area of impoundment, (m2)	
H - Henry's law constant, (atm-m3/g mol)	
R - Universal gas constant, (atm-m3/g mol. K)	
μL - Viscosity of water, (g/cm-s)	
L - Density of liquid, (g/cm3)	
T - Impoundment temperature, (C)	

Calculate the following:

Calculate F/D: [ ]

A. Calculate the liquid phase mass transfer coefficient, kL, using one of the following procedures, (m/s)

1 Where F/D < 14 and U10 > 3.25 m/s, use the following procedure from MacKay and Yeun:

Calculate the Schmidt number on the liquid side, ScL, as follows:
ScL = μL/ LDw [ ]

Calculate the friction velocity, U*, as follows, (m/s):
U* = 0.01 x U10(6.1 + 0.63 U10)^0.5 [ ]

Where U* is > 0.3, calculate kL as follows:
kL = (1.0 x 10^-6) + (34.1 x 10^-4)U* x ScL^-0.5 [ ]

Where U* is < 0.3, calculate kL as follows:
kL = (1.0 x 10^-6) + (144 x 10^-4)(U*)^2.2 x ScL^-0.5 [ ]

2 For all other values of F/D and U10, calculate kL using the following procedure from Springer:

Where U10 is < 3.25 m/s, calculate kL as follows:

Form 5

kL = 2.78 x 10^-6(Dw/Dether)^2/3

Where U10 is > 3.25 and 14 < F/D < 51.2, Calculate kL as follows:
kL = [2.605 x 10^-9(F/D) + 1.277 x 10^-7] U10^2 (Dw/Dether)^2/3

Where U10 > 3.25 m/s and F/D > 51.2, calculate kL as follows:
kL = (2.611 x 10^-7)U10^2 (Dw/Dether)^2/3

B. Calculate the gas phase mass transfer coefficient, kG, using the following procedure from MacKay and Matsasugu, (m/s):

Calculate the Schmidt number on the gas side, ScG, as follows: ScG =μG/ GDa

Calculate the effective diameter of the impoundment, de, as follows, (m):
de = (4A/3.14)^0.5

Calculate kG as follows, (m/s): kG = 4.82 x 10^-3 U10^.78 ScG^-0.67 de^-0.11

C. Calculate the partition coefficient, Keq, as follows: Keq = H/[R(T+273)]

D. Calculate the overall mass transfer coefficient, Kq, as follows, (m/s):
1/Kq = 1/kL + 1/(Keq-kG)

Where the total impoundment surface is quiescent:
KL = Kq

Where a portion of the impoundment surface is turbulent, continue with Form 6.

Form 6

DATA FORM FOR CALCULATING THE MASS TRANSFER COEFFICIENT FOR AN AERATED SURFACE IMPOUNDMENT

Facility Name:	
Waste Stream Compound:	Methanol

Enter the following:

J - Oxygen transfer rating of surface aerator, (lb O2/hr-hp)	
POWR - Total power to aerators, (hp)	
T - Water temperature, (C)	
Ot - Oxygen transfer correction factor	
MWL - Molecular weight of liquid	
At - Turbulent surface area of impoundment, (ft2)	
(If unknown, use values from Table 1)	
A - Total surface area of impoundment, (ft2)	
rho L - Density of liquid, (lb/ft3)	
Dw - Diffusivity of constituent in water, (cm2/s)	
Do - Diffusivity of oxygen in water, (cm2/s)	
d - Impeller diameter, (cm)	
w - Rotational speed of impeller, (rad/s)	
a - Density of air, (gm/cm3)	
N - Number of aerators	
gc - Gravitation constant, (lbm-ft/s2/lbf)	
d* - Impeller diameter, (ft)	
Da - Diffusivity of constituent in air, (cm2/s)	
MWa - Molecular weight of air	
R - Universal gas constant, (atm-m3/g mol. C)	
H = Henry's law constant, (atm-m3/g mol)	

Calculate the following:

A. Calculate the liquid phase mass transfer coefficient, kL, using the following Equation from Thibodeaux:,

kL =[8.22 x 10^-9 J (POWR)(1.024)^(T-20) Ot 10^6 MWL/(At x rhoL/62.37)] (Dw/Do)^0.5, (m/s)

B. Calculate the gas phase mass transfer coefficient, kG, using the following procedure from Reinhardt:,

Calculate the viscosity of air, μa, as follows, (g/cm.s):
μa = 4.568 x 10^-7 T + 1.7209 x 10^-4

Calculate the Reynold's number as follows:
Re = d^2 w a/μa

Calculate power to impeller, PI, as follows, (ft.lbf/s):
PI = 0.85 (POWR) 550/N

Form 6

Calculate the power number, p, as follows:
p = PI gc/(rho d^5 w^3)

Calculate the Schmidt number, ScG, as follows:
ScG = μa/ aDa

Calculate the Fronde number, Fr, as follows:
Fr = d*w^2/gc

Calculate kG as follows:
kG = 1.35 x 10^-7 Re ^1.42 p^0.4 ScG^0.5 Fr^-0.21 Da MWa/d, (m/s)

C. Calculate the partition coefficient, Keq, as follows:
Keq = H/[R(T+273)]

D. Calculate the overall turbulent mass transfer coefficient, Kt, as follows, (m/s):
1/Kt = 1/kL + 1/(Keq*kG)

E. Calculate the quiescent mass transfer coefficient, Kq, for the impoundment using Form 5.

F. Calculate the overall mass transfer coefficient, KL, for the impoundment as follows:
KL = (A-At)/A *Kq + At*Kt/A

(identical to Form VIII, Appendix C to Part 63)

Form 6 Table 1

PROCEDURES FORM FOR THE ESTIMATION OF THE KL FROM WATER8 a.b

Motor horsepower	At, Turbulent area,		Effective depth	V, Agitated volume	aV, Area per volume
hp	ft2	m2	ft	ft3	ft2/ft3
5	177	16.4	10	1,767	0.1002
7.5	201	18.7	10	2,010	0.1000
10	227	21	10.5	2,383	0.0953
15	284	26.4	11	3,119	0.0911
20	346	32.1	11.5	3,983	0.0869
25	415	38.6	12	4,986	0.0832
30	491	45.7	12	5,890	0.0834
40	661	61.4	13	8,587	0.0770
50	855	79.5	14	11,970	0.0714
60	1075	100	15	16,130	0.0666
75	1452	135	16	23,240	0.0625
100	2206	205	18	39,710	0.0556

a Data for a high speed (1,200) rpm) aerator with 60 cm propeller diameter (d).

b This table provides information potentially useful for the value of At.

Form 7

DATA FORM FOR THE ESTIMATION OF THE EQUIVALENT KL FROM AIR STRIPPING DUE TO SUBMERGED AERATION.

NAME OF THE FACILITY for site specific biorate determination		
COMPOUND for site specific biorate determination		Methanol
VENT RATE of total gas leaving the unit (G, m3/s)	1	
TEMPERATURE of the liquid in the unit (deg. C)	2	
ESTIMATE OF Henry's law constant (H, g/m3 in gas / g/m3 in liquid). Corrected for the temperature on line 3.	3	
AREA OF REACTOR (m2)	4	

CALCULATION OF THE ESTIMATE OF EQUIVALENT KL

[H G] ESTIMATE (m3/s) Multiply the number on line 1 by the number on line 3. Enter the results here.	5	
EQUIVALENT KL. Divide the number on line 5 by the number on line 4. Enter the results on line 6.	6	

[FR Doc. 00–1058 Filed 1–24–00; 8:45 am]
BILLING CODE 6560–50–C

Notices

Federal Register

Vol. 65, No. 16

Tuesday, January 25, 2000

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.

AGENCY FOR INTERNATIONAL DEVELOPMENT

Malaria Vaccine Development Program, Federal Advisory Committee; Notice of Meeting

Pursuant to the Federal Advisory Committee Act, notice is hereby given of a meeting of the USAID Malaria Vaccine Development Program (MVDP) Federal Advisory Committee. The meeting will be held from 9 a.m. to 5 p.m. on February 2, 2000 and from 9 a.m. to noon on February 3, 2000 at the Conference Room of the Environmental Health Project located in Suite 300, 1611 North Kent Street in Arlington, VA 22209–2111.

The agenda will concentrate on the activities of the MVDP over the past six months and on future plans. The meeting will be open to the public on 2 February unless it is necessary to discuss procurement sensitive information; should this be the case, it will be announced and the meeting closed at the appropriate time. Such issues will be discussed on 3 February on which date the meeting will be closed. Any interested person may attend the meeting, may file written statements with the committee before or after the meeting, or present any oral statements in accordance with procedures established by the committee, to the extent that time available for the meeting permits.

Those wishing to attend the meeting or to obtain additional information about the USAID MVDP should contact Carter Diggs, the designated Federal Officer for the USAID MVDP Federal Advisory Committee at the Office of Health and Nutrition, USAID/G/PHN/HN/EH, Room 3.07–013, 3rd floor, RRB, Washington, DC 20523–3700, telephone (202) 712–5728, Fax (202) 216–3702, cdiggs@usaid.gov.

Carter Diggs,

USAID Designated Federal Officer, Technical Advisor, Malaria Vaccine, Development Program.

[FR Doc. 00–1672 Filed 1–24–00; 8:45 am]

BILLING CODE 6116–01–M

DEPARTMENT OF AGRICULTURE

Foreign Agricultural Service

Fiscal Year 2000 Emerging Markets Program and Solicitation of Private Sector Proposals

AGENCY: Foreign Agricultural Service, USDA.

ACTION: Notice.

SUMMARY: The Foreign Agricultural Service (FAS) invites proposals for using technical assistance to promote the export of, and improve the market access for, U.S. agricultural products to emerging markets in fiscal year (FY) 2000 under the Emerging Markets Program (the Program).

DEADLINE: All proposals must be received by 5:00 p.m. Eastern Standard Time, March 13, 2000.

FOR FURTHER INFORMATION CONTACT: Requests for program guidelines and additional information may be obtained from, and proposals submitted to: Emerging Markets Office, Foreign Agricultural Service, Room 6506 South Building, U.S. Department of Agriculture, Washington, D.C. 20250–1032, Fax: (202) 690–4369, E-mail: *emo@fas.usda.gov.* It is strongly recommended that any U.S. organization considering applying to the Program for FY 2000 funding assistance first obtain a copy of the 2000 Emerging Markets Program Guidelines. The guidelines are also available on the FAS Home Page on the Internet: http:/www.fas.usda.gov/excredits/em-markets/em-markets.html.

The FAS issued a **Federal Register** notice on January 3, 2000, announcing the availability of funding for the Market Access Program (MAP) and the Foreign Market Development (FMD) (Cooperator) Program, and encouraging applicants to these programs to use the Unified Export Strategy (UES) format. Some applicants may also wish to use the UES format in order to apply to the Emerging Markets Program.

SUPPLEMENTARY INFORMATION:

Introduction

The Program is authorized by section 1542(d)(1)(D) of the Food, Agriculture, Conservation, and Trade Act of 1990. Up to $10 million is available to fund the Program each fiscal year. The purpose of the Program is to assist U.S. organizations, public and private, to improve market access and to develop and promote U.S. agricultural products or processes in low- to-middle-income countries that offer promise of emerging market opportunities in the near- to medium-term. This is to be accomplished by providing U.S. technical assistance through projects and activities in those emerging markets.

The Act defines an emerging market as any country that the Secretary of Agriculture determines:

(1) Is taking steps toward a market-oriented economy through the food, agriculture, or rural business sectors of the economy of the country; and

(2) Has the potential to provide a viable and significant market for United States agricultural commodities or products of United States agricultural commodities.

Program Priorities

Because funds are limited and the range of potential emerging market countries is worldwide, proposals will be considered which focus on those countries which meet the above definition and have (1) a per capita income less than $9,360 (the ceiling on upper middle income economies as determined by the World Bank [World Development Indicators 1999]; and (2) a population greater than 1 million. These categories may encompass suitable regional groupings, *e.g.,* the islands of the Caribbean Basin. (Consult the 2000 Emerging Markets Program Guidelines available from the contact and address identified above for further information.)

The underlying premise of the Program is that there are distinctive characteristics of emerging agricultural markets that necessitate or benefit significantly from technical assistance through the public sector before the private sector moves to develop these markets through normal corporate or

trade promotional activities. The emphasis of the program is on funding, on a project-by-project basis, marketing opportunities which involve risks that the private sector would not normally undertake alone. The Program complements the efforts of other FAS marketing programs. Once a market access issue has been addressed by this Program, further market development activities may be considered under other programs such as GSM-102 or GSM-103 credit guarantee programs, the Facilities Guarantee Program, the Suppliers' Guarantee Program, the MAP, the FMD Programs, or the section 108 foreign currency program.

Any United States agricultural or agribusiness organization, university, or state department of agriculture, is eligible to participate in the Program. Proposals from research and consulting organizations will be considered if they provide evidence of substantial participation by U.S. industry.

In general, priority consideration will be given to those proposals that identify and seek to address specific problems or constraints in rural business systems or food and agribusiness systems in emerging markets through technical assistance to expand or maintain U.S. agricultural exports.

The following marketing criteria will be used to determine the suitability of projects for funding by the Program:

1. Low U.S. market share and significant market potential.

• Is there a significant lag in U.S. market share of a specific commodity in a given country or countries?

• Is there an identifiable obstacle or competitive disadvantage facing U.S. exporters (*e.g.,* competitor financing, subsidy, competitor market development activity) or systemic obstacle to imports of U.S. products (*e.g.,* inadequate distribution, infrastructure impediments, insufficient information, lack of financing options or resources)?

• What is the potential of a project to generate a significant increase in U.S. agricultural exports in the near- to medium-term? (Estimates or projections of trade benefits to commodity exports, and the basis for evaluating such, must be included in proposals submitted to the Program.)

2. Recent change in a market.

• Is there, for example, a change in a sanitary or phytosanitary trade barrier; a change in an import regime or the lifting of a trade embargo; a shift in the political or financial situation in a country?

Content of Proposal

CCC will also review the following information, which should be included in the proposal, in considering the suitability of projects. (1) Cost-sharing: Information indicating the willingness of private agribusiness to commit its own funds along with those of the Program to seek export business in an emerging market. The Program is intended to complement, not supplant, the efforts of the U.S. private sector. The percentage of private funding proposed for a project will therefore be a critical factor in determining which proposals are funded under the Program. While no minimum or maximum is specified, the absolute amount of private sector funding proposed may also affect the decision to fund a proposal. Cost-sharing provided by private industry may be professional time of staff assigned to the project or actual cash invested in the proposed project. However, proposals in which private industry is willing to commit actual funds, rather than contributing such in-kind items as staff resources, will be given priority consideration. (2) Market Analysis and Statement of Specific Benefit(s) to U.S. Exports: A brief underlying analysis of the target market which supports the objectives of the proposed project and the benefits that can be expected to accrue to U.S. commodity exports as a result of successful completion of the project. (3) Justification for Federal Funding: A clearly stated argument supporting the need for Program funding.

For additional details that should be included in each application, see ''Submissions'' below.

Priority Considerations

The following subject areas for technical assistance activities to promote markets for U.S. agricultural product exports will be given priority consideration for funding under the Program:

—Projects and activities which use technical assistance designed specifically to improve market access in emerging foreign markets. Examples: activities intended to mitigate the impact of sudden political events or economic and currency crises in order to maintain U.S. market share; responses to time-sensitive market opportunities;

—Marketing and distribution of more value-added products, including new products or uses. Examples: food service development; market research on potential for consumer-ready foods or new uses of a product;

—Studies of food distribution channels in emerging markets, including infrastructural impediments to U.S. exports; such studies may include cross-commodity activities which focus on problems, *e.g.,* distribution, which affect more than one industry. Examples: grain storage handling and inventory systems development; distribution infrastructure development;

—Projects that specifically address various constraints to U.S. exports, including sanitary and phytosanitary issues and other non-tariff barriers. Examples: seminars on U.S. food safety standards and regulations; assessing and addressing pest and disease problems that inhibit U.S. product exports;

—Assessments and follow up activities designed to improve country-wide food and business systems, to reduce trade barriers, to increase prospects for U.S. trade and investment in emerging markets, and to determine the potential use for general export credit guarantees, including especially the Facilities Guarantee Program, for commodities, facilities and services. Examples: product needs assessments and market analysis; assessments for using facilities credits to address infrastructural impediments;

—Projects that help foreign governments to collect and use market information and to develop free trade policies that benefit American exporters as well as the target country or countries. Examples: agricultural statistical analysis; development of market information systems; policy analysis;

—Short-term training in broad aspects of agriculture and agribusiness trade that will benefit U.S. exporters, including seminars and training at trade shows designed to expand the potential for U.S. agricultural exports by focusing on the trading system. Examples: retail training; marketing seminars; transportation seminars; training keyed to opening new or expanding existing markets.

Retail Training: U.S. organizations which may be interested in applying for funding assistance to support retail training are urged to review a data base of FAS-supported activities on this topic so to avoid possible duplication and/or overlap of training in similar markets or on similar commodities. The data base will be available on the FAS Internet web site by mid-January 2000.

Projects which promote markets for any agricultural products, except tobacco, are eligible for consideration. Projects which include multiple commodities are also eligible.

Ineligible activities include in-store promotions; restaurant promotions; branded product promotions (including labeling and supplementing normal company sales activities intended to increase awareness and stimulate sales of branded products); advertising; administrative and operational expenses for trade shows; and for the preparation and printing of brochures, flyers, posters, etc. except in connection with specific technical assistance activities such as training seminars.

Funding of Proposals

Funding for technical assistance projects is made on the basis of proposals to the Emerging Markets Office (EMO). In general, each proposal submitted in response to this announcement will compete against all such proposals received under the same announcement. Proposals will be judged not only on their ability to provide benefits to the organization receiving Program funds, but which also represent the broader interests of the industry which that organization represents.

The limited funds of the Program and the range of emerging markets worldwide in which the funds may be used preclude EMO from approving large budgets for single projects. The Program is intended to provide appropriate USDA assistance to projects which also have a significant amount of financial contributions from other sources, especially U.S. private industry. There is no minimum or maximum amount set for EMO-funded projects; however, most are funded at the level of less than $500,000 and for a duration of 1 year or less. Funding is normally made available on a cost-reimbursable basis.

Multi-Year Proposals

These may be considered in the context of a strategic plan and detailed plan of implementation. Funding in such cases is normally provided 1 year at a time, with commitments beyond the first year subject to interim evaluations.

Projects Already in Progress

Funding may be considered for technical assistance projects that have already begun with the support and financial assistance of a private entity, and for which government funding for continuation of the project is requested. Such proposals must meet the criteria of the Program, including cost-sharing for the portion of the project for which government funding is requested. Note: While this announcement solicits proposals from private U.S. agricultural organizations for consideration and funding on a competitive basis, the EMO may also consider proposals on an accelerated basis depending upon the technical and time requirements of the proposal. If approved, such proposals would be covered through the Technical Issues Resolution Fund or the Quick Response Market Fund. For details concerning these specialty funds, see the program guidelines.

Project Reports

Results of all projects supported financially by the Program must be reported in a performance report to EMO. Because public funds are used to support the project, these reports will be made available to the public by the EMO.

Submissions

To assist FAS in making determinations under the Program, FAS recommends that all proposals contain complete information about the proposed project and that the proposals not be longer than 10 pages. The recommended information includes: name of person/organization submitting proposal; date of proposal; organization affiliation and address; telephone and fax numbers; full title of proposal; precis of the proposal, including objectives, proposed activities, benefits to U.S. agricultural exports, target country/countries for proposed activities, projected starting date for project, and funding amount requested; summary and detailed description of proposed project; statement of problem (specific trade constraint) to be addressed through the proposed project; benefits to U.S. agricultural exports as a result of the proposed project, including specific performance measures; supporting market analysis of the target market(s)—brief economic analysis for each commodity and country, including current market conditions and relevant trade data—and existing percentage of U.S. export market share, and the basis or source(s) for this data; information on whether similar activities are or have previously been funded in target country/countries (*e.g.,* under MAP and/or FMD programs); a clearly stated explanation as to why participating organization(s) are unlikely to carry out activities without Federal financial assistance; time line(s) for project implementation; detailed project budget, including other sources of funding for the project and contributions from participating organizations (additional requirements are contained in the program guidelines); Federal tax ID number of the responsible organization. Qualifications of applicant(s) should be included, as an attachment.

Proposals must be submitted in both printed form and on computer diskette, using WordPerfect or Word or compatible format.

Signed at Washington, D.C. on January 14, 2000.

Timothy J. Galvin,

Administrator, Foreign Agricultural Service, and Vice President, Commodity Credit Corporation.

[FR Doc. 00–1704 Filed 1–24–00; 8:45 am]

BILLING CODE 3410–10–M

DEPARTMENT OF AGRICULTURE

Forest Service

Availability of Appealable Decisions

AGENCY: Forest Service, USDA.

ACTION: Notice—Availability of appealable decisions; legal notice of availability for comment of decisions that may be appealable under 36 CFR part 215.

SUMMARY: Responsible Officials in the Southwestern Region will publish notices of availability for comment and notices of decisions that may be subject to administrative appeal under 36 CFR part 215. These notices will be published in the legal notice section of the newspapers listed in the Supplementary Information section of this notice. As provided in 36 CFR 215.5 and 215.9, such notice shall constitute legal evidence that the agency has given timely and constructive notice for comment and notice of decisions that may be subject to administrative appeal. Newspaper publication of notices of decisions is in addition to direct notice to those who have requested notice in writing and to those known to be interested in or affected by a specific decision.

DATES: Use of these newspapers for the purpose of publishing legal notices for comment and decisions that may be subject to appeal under 36 CFR part 215 shall begin January 25, 2000, and continue until further notice.

ADDRESSES: Southwestern Region, ATTN: Regional Appeals Coordinator, 517 Gold Avenue SW, Room 5432, Albuquerque, NM 87102.

FOR FURTHER INFORMATION CONTACT: Christina Gonzalez, 505–842–3219.

SUPPLEMENTARY INFORMATION: Responsible Officials in the Southwestern Region will give legal notice of decisions that may be subject to appeal under 36 CFR part 215 in the following newspapers which are listed by Forest Service administrative unit. Where more than one newspaper is

listed for any unit, the first newspaper listed is the primary newspaper which shall be used to constitute legal evidence that the agency has given timely and constructive notice for comment and for decisions that may be subject to administrative appeal. As provided in 36 CFR 215.5, the time frame for appeal shall be based on the date of publication of a notice for decision in the primary newspaper.

Notice by Regional Forester of Availability for Comment and Decisions affecting New Mexico Forests: ''Albuquerque Journal'', published daily in Albuquerque, Bernalillo County, New Mexico, for comment and decisions affecting National Forest System Lands in the State of New Mexico and for any decisions of Region-wide impact.

Notice by Regional Forester of Availability for Comment and Decisions affecting Arizona Forests: ''The Arizona Republic'' published daily in Phoenix, Maricopa County, Arizona, for comment and decisions affecting National Forest System lands in the State of Arizona and for any decisions of Region-wide impact.

Notice by Regional Forester of Availability for Comment and Decisions affecting National Grasslands in New Mexico, Oklahoma, and Texas; Kiowa National Grassland in Colfax, Harding, Mora and Union Counties, New Mexico: ''Union County Leader'', published weekly on Wednesday in Clayton, Union County, New Mexico. Rita Blanca National Grassland in Cimarron County, Oklahoma: ''Boise City News'', published weekly on Wednesday in Boise City, Cimarron County, Oklahoma. Rita Blanca National Grassland in Dallam County, Texas: ''The Dalhart Texan'', published on Tuesday and Saturday in Dalhart, Dallam County, Texas. Black Kettle National Grassland in Roger Mills County, Oklahoma: ''Cheyenne Star'', published weekly on Thursday in Cheyenne, Roger Mills County, Oklahoma. Black Kettle National Grassland in Hemphill County, Texas: ''The Canadian Record'', published weekly on Thursday in Canadian, Hemphill County, Texas. McClellan Creek National Grassland in Gray County, Texas: ''The Pampa News'', published on Friday and Sunday in Pampa, Gray County, Texas.

Arizona National Forests

Apache-Sitgreaves National Forests

Notice by Forest Supervisor of Availability for Comment and Decisions: ''The White Mountain Independent'', published Tuesday and Friday in Show Low and Navajo County, Arizona.

Notice by District Ranger of Availability for Comment and Decisions: Alpine District: ''The White Mountain Independent'', published Tuesday and Friday in Show Low and Navajo County, Arizona. Chevelon District: ''The White Mountain Independent'', published Tuesday and Friday in Show Low and Navajo County, Arizona. Clifton District: ''Copper Era'', published weekly on Wednesday in Clifton, Greenlee County, Arizona. Heber District: ''The White Mountain Independent', published Tuesday and Friday in Show Low and Navajo County, Arizona. Lakeside District: ''The White Mountain Independent'', published Tuesday and Friday in Show Low and Navjo County, Arizona. Springerville District: ''The White Mountain Independent'', published Tuesday and Friday in Show Low and Navajo County, Arizona.

Coconino National Forest

Notice by Forest Supervisor of Availability for Comment and Decisions: ''Arizona Daily Sun'', published daily, in Flagstaff, Coconino County, Arizona.

Notice by District Ranger of Availability for Comment and Decisions: Beaver Creek District: ''Arizona Daily Sun'', published daily, in Flagstaff, Coconino County, Arizona. Blue Ridge District: ''Arizona Daily Sun'', published daily, in Flagstaff, Coconino County, Arizona. Peaks District: ''Arizona Daily Sun'', published daily, in Flagstaff, Coconino County, Arizona. Long Valley District: ''Arizona Daily Sun'', published daily, in Flagstaff, Coconino County, Arizona. Mormon Lake District: ''Arizona Daily Sun'', published daily, in Flagstaff, Coconino County, Arizona. Sedona District: ''Red Rock News'', published Wednesday and Friday in Sedona, Coconino County, Arizona.

Coronado National Forest

Notice by Forest Supervisor of Availability for Comment and Decisions: ''The Arizona Daily Star'', published daily, in Tucson, Pima County, Arizona.

Notice by District Ranger of Availability for Comment and Decisions: Douglas District: ''Daily Dispatch'', published Tuesday-Friday, and Sunday in Douglas, Cochise County, Arizona. Nogales District: ''Nogales International'', published on Tuesday and Friday in Nogales, Santa Cruz County, Arizona. Sierra Vista District: ''Sierra Vista Herald'', published Sunday-Friday, in Sierra Vista, Cochise County, Arizona. Safford District: ''Eastern Arizona Courier'', published weekly on Wednesday, in Safford, Graham County, Arizona. Santa Catalina District: ''The Arizona Daily Star'', published daily, in Tucson, Pima County, Arizona.

Kaibab National Forest

Notice by Forest Supervisor of Availability for Comment and Decisions: ''Arizona Daily Sun'', published daily, in Flagstaff, Coconino County, Arizona.

Notice by District Ranger of Availability for Comment and Decisions: North Kaibab District: ''Arizona Daily Sun'', published daily, in Flagstaff, Coconino County, Arizona. Tusayan District: ''Arizona Daily Sun'', published daily, in Flagstaff, Coconino County, Arizona. Williams District: ''Arizona Daily Sun'', published daily, in Flagstaff, Coconino County, Arizona.

Prescott National Forest

Notice by Forest Supervisor of Availability for Comment and Decisions: ''Prescott Courier'', published daily in Prescott, Yavapai County, Arizona.

Notice by District Ranger of Availability for Comment and Decisions: Bradshaw District: ''Prescott Courier'', published daily in Prescott, Yavapai County, Arizona. Chino Valley District: ''Prescott Courier'', published daily in Prescott, Yavapai County, Arizona. Verde District: ''Prescott Courier'', published daily in Prescott, Yavapai County, Arizona.

Tonto National Forest

Notice by Forest Supervisor of Availability for Comment and Decisions: ''Mesa Tribune'', published daily in Mesa, Maricopa County, Arizona.

Notice by District Ranger of Availability for Comment and Decisions: Cave Creek District: ''Foothills Sentinel'', published weekly on Wednesday in Cave Creek, Maricopa County, Arizona. Globe District: ''Arizona Silver Belt'', published weekly on Thursday in Globe, Gila County, Arizona. Mesa District: ''Mesa Tribune'', published daily in Mesa, Maricopa County, Arizona. Payson District: ''Payson Roundup'', published weekly on Friday in Payson, Gila County, Arizona. Pleasant Valley District: ''Payson Roundup'', published weekly on Friday in Payson, Gila County, Arizona. Tonto Basin District: ''Payson Roundup'', published weekly on Friday in Payson, Gila County, Arizona.

New Mexico National Forests

Carson National Forest

Notice by Forest Supervisor of Availability for Comment and Decisions: ''The Taos News'', published weekly on Thursday in Taos, Taos County, New Mexico.

Notice by District Ranger of Availability for Comment and Decisions: Canjilon District: ''Rio Grande Sun'', published Wednesday in Espanola, Rio Arriba County, New Mexico. El Rito District: ''Rio Grande Sun'', published Wednesday in Espanola, Rio Arriba County, New Mexico. Jicarilla District: ''Farmington Daily Times'', published daily in Farmington, San Juan County, New Mexico. Camino Real District: ''The Taos News'', published weekly on Thursday in Taos, Taos County, New Mexico. Tres Piedras District: ''The Taos News'', published weekly on Thursday in Taos, Taos County, New Mexico. Questa District: ''The Taos News'', published weekly on Thursday in Taos, Taos County, New Mexico.

Cibola National Forest

Notice by Forest Supervisor of Availability for Comment and Decisions affecting lands in New Mexico, except the National Grasslands: ''Albuquerque Journal'', published daily in Albuquerque, Bernalillo County, New Mexico.

Notice by Forest Supervisor of Availability for Comment and Decisions affecting National Grasslands in New Mexico, Texas and Oklahoma: Kiowa National Grassland in Colfax, Harding, Mora and Union Counties, New Mexico: ''Union County Leader'', published weekly on Wednesday in Clayton, Union County, New Mexico. Rita Blanca National Grassland in Cimarron County, Oklahoma: ''Boise City News'', published weekly on Wednesday in Boise City, Cimarron County, Oklahoma. Rita Blanca National Grassland in Dallam County, Texas: ''Dalhart Texan'', published on Tuesday and Saturday in Dalhart, Dallam County, Texas. Black Kettle National Grassland, Roger Mills County, Oklahoma: ''Cheyenne Star'', published weekly on Thursday in Cheyenne, Roger Mills County, Oklahoma. Black Kettle National Grassland, Hemphill County, Texas: ''The Canadian Record'', published weekly on Thursday in Canadian, Hemphill County, Texas. McClellan Creek National Grassland, Gray County, Texas: ''The Pampa News'', published on Friday and Sunday in Pampa, Gray County, Texas.

Notice by District Ranger of Availability for Comment and Decisions: Mt. Taylor District: ''Cibola County Beacon'', published on Wednesday and Friday in Grants, Cibola County, New Mexico. Magdalena District: ''Defensor-Chieftain'', published Wednesday and Saturday in Socorro, Socorro County, New Mexico. Mountainair District: ''Estancia Valley Citizen'', published weekly on Friday in Estancia, Torrance County, New Mexico. Sandia District: ''Albuquerque Journal'', published daily in Albuquerque, Bernalillo County, New Mexico. Kiowa National Grassland: ''Union County Leader'', published weekly on Wednesday in Clayton, Union County, New Mexico. Rita Blanca National Grassland: ''Boise City News'', published weekly on Wednesday in Boise City, Cimarron County, Oklahoma. Black Kettle National Grassland: ''Cheyenne Star'', published weekly on Thursday in Cheyenne, Roger Mills County, Oklahoma. Black Kettle National Grassland: ''The Canadian Record'', published weekly on Thursday in Canadian, Hemphill County, Texas. McClellan Creek National Grassland: ''The Pampa News'', published on Friday and Sunday in Pampa, Gray County, Texas.

Gila National Forest

Notice by Forest Supervisor of Availability for Comment and Decisions: ''Silver City Daily Press'', published Monday–Saturday in Silver City, Grant County, New Mexico.

Notice by District Ranger of Availability for Comment and Decision: Black Range District: ''The Herald'', published on Tuesday, in Truth or Consequences, Sierra County, New Mexico. Quemado District: ''Silver City Daily Press'', published Monday–Saturday in Silver City, Grant County, New Mexico. Reserve District: ''Silver City Daily Press'', published Monday–Saturday in Silver City, Grant County, New Mexico. Glenwood District: ''Silver City Daily Press'', published Monday–Saturday in Silver City, Grant County, New Mexico. Silver City District: ''Silver City Daily Press'', published Monday–Saturday in Silver City, Grant County, New Mexico. Wilderness District: ''Silver City Daily Press', published Monday–Saturday in Silver City, Grant County, New Mexico.

Lincoln National Forest

Notice by Forest Supervisor of Availability for Comment and Decisions: ''Alamagordo Daily News'', published daily in Alamogordo, Otero County, New Mexico.

Notice by District Ranger of Availability for Comment and Decisions: Sacramento District: ''Alamogordo Daily News'', published daily in Alamogordo, Otero County, New Mexico. Guadalupe District: ''Carlsbad Current Argus'', published daily except Saturday, in Carlsbad, Eddy County, New Mexico. Smokey Bear District: ''Ruidoso News'', published Monday and Thursday in Ruidoso, Lincoln County, New Mexico.

Sante Fe National Forest

Notice by Forest Supervisor of Availability for Comment and Decisions: ''Albuquerque Journal'', published daily in Alburquerque, Bernalillo County, New Mexico.

Notice by District Ranger of Availability for Comment and Decisions: Coyote District: ''Albuquerque Journal'', published daily in Albuquerque, Bernalillo County, New Mexico, Cuba District: ''Albuquerque Journal'', published daily in Albuquerque, Bernalillo County, New Mexico. Espanola District: ''Albuquerque Journal'', published daily in Albuquerque, Bernalillo County, New Mexico. Jemez District: ''Albuquerque Journal'', published daily in Albuquerque, Bernalillo County, New Mexico. Pecos-Las Vegas District: ''Albuquerque Journal'', published daily in Albuquerque, Bernalillo County, New Mexico.

Dated: January 11, 2000.

James T. Gladen,

Deputy Regional Forester, Resources.

[FR Doc. 00–1671 Filed 1–24–00; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

International Trade Administration

Overseas Trade Missions; Invitation to Participate

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce invites U.S. companies to participate in the following overseas trade missions to be held between February and August 2000. For a more complete description of the trade mission, obtain a copy of the mission statement from the Project Officer indicated below. The recruitment and selection of private sector participants for these missions will be conducted according to the Statement of Policy Governing Department of Commerce Overseas Trade Missions announced by Secretary Daley on March 3, 1997.

Hotel and Recreation Equipment Trade Mission, Santo Domingo and Puerto Plata, Dominican Republic, February 8–11, 2000. Recruitment closes January 31, 2000.

For further information contact: Sheila de Andujar, Trade Event Manager, C.S. Santo Domingo, American Embassy, Unit 5515, APO AA 34041, Tel: 809–221–2171 ext. 408, Fax: 809–688–4838 E-mail: sheila.andujar@mail.doc.gov.

Information Technology Dealmaker, Toronto, Canada, February 9–10, 2000. Recruitment closes January 31, 2000.

For further information contact: Viktoria Palfi, Project Manager, U.S. Commercial Service, Toronto, 480 University Avenue, Suite 602, Toronto, ON M5G 1V2, Tel: 416–595–5412, ext. 229, Fax: 416–595–5419, E-mail: viktoria.palfi@mail.doc.gov.

Corporate Executive Office Program at Meditech Asia Show, Bangkok, Thailand, March 1–4, 2000. Recruitment closes February 15, 2000.

For further information contact: Kellie Holloway, Phoenix EAC, 901 N. Central Avenue, Suite 970, Phoenix, AR 85012, Tel: 602–640–2513, ext. 16, Fax: 602–640–2518. E-mail: Kelly.Holloway@mail.doc.gov.

Manufacturing Matchmaker India, New Delhi, Chennai, Mumbai, and Pune, India, April 3–11, 2000. Recruitment closes April 11, 2000.

For further information contact: Sam Dhir, U.S. Department of Commerce, Tel: 202–482–4756, Fax: 202–482–0178, E-mail: Sam.Dhir@mail.doc.gov.

Telecommunications Matchmaker Trade Delegation, Madrid, Spain and Rome, Italy, April 10–15, 2000. Recruitment closes February 28, 2000.

For further information contact: Molly Costa, U.S. Department of Commerce, Tel: 202–482–0693, Fax: 202–482–0178, E-mail: Molly.Costa@mail.doc.gov.

Women In Trade Business Development Mission, France and the Netherlands, May 7–12, 2000. Recruitment closes March 22, 2000.

For further information contact: Loretta Allison, U.S. Department of Commerce, Tel: 202–482–5479, Fax; 202–482–1999, E-mail: Loretta__Allison@ita.doc.gov.

U.S. Information Technology Trade Mission to Far East Asia, Taipei, Taiwan, Seoul and Pusan, South Korea, June 11–17, 2000. Recruitment closes April 15, 2000.

For further information contact: Tu-Trang Phan, U.S. Department of Commerce, Tel: 202–482–0480, Fax: 202–482–3002, E-mail Tu-Trang__Phan@ita.doc.gov.

Telecommunication Trade Mission to Chile and Argentina, June 18–23, 2000. Recruitment closes May 31, 2000.

For further information contact: Richard Paddock, U.S. Department of Commerce, Tel: 202–482–5235, Fax: 202–482–5834, E-mail Richard__Paddock@ita.doc.gov.

Medical Devices and Biotechnology Trade Mission to Australia, Melbourne, Sydney, and Brisbane, June 25–30, 2000. Recruitment closes May 5, 2000.

For further information contact: Bart Meroney, U.S. Department of Commerce, Tel: 202–482–5014, Fax: 202–482–0975, E-mail: Bart__Meroney@ita.doc.gov.

Medical Device Trade Mission, Taiwan, Malaysia, and Singapore, August 19–31, 2000. Recruitment closes June 30, 2000.

For further information contact: Steven R. Harper. U.S. Department of Commerce, Tel: 202–482–2991, Fax: 202–482–0975, E-mail: Steven__Harper@ita.doc.gov.

For further information contact: Reginald Beckham, U.S. Department of Commerce. Tel: 202–482–5478, Fax: 202–482–1999.

Dated: January 19, 2000.

Tom Nisbet,

Director, Promotion Planning and Support Division, Office of Export Promotion Coordination.

[FR Doc. 00–1705 Filed 1–24–00; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 011900A]

Mid-Atlantic Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council (Council) and the Atlantic States Marine Fisheries Commission's Summer Flounder, Scup and Black Sea Bass Board (Board) will hold a public meeting.

DATES: The meeting will be held Thursday, February 10, 2000, from 1:00–5:00 p.m.

ADDRESSES: This meeting will be held at the Radisson Hotel, 901 N. Fairfax Street, Alexandria, VA; telephone 703–683–6000.

Council Address: Mid-Atlantic Fishery Management Council, 300 S. New Street, Dover, DE 19904, telephone 302–674–2331.

FOR FURTHER INFORMATION CONTACT: Daniel T. Furlong, Executive Director, Mid-Atlantic Fishery Management Council; telephone: 302–674–2331, ext. 19.

SUPPLEMENTARY INFORMATION: The Council and Board will consider the following items: Discuss the development of a conservation equivalency amendment for summer flounder; discuss the development of an amendment to review allocation of annual total allowable catch and discards and revise summer period state by state quotas for scup; possible review and comment on 2000 specifications for summer flounder, scup, and black sea bass; discussion of disapproved portions of Sustainable Fisheries Act amendment for summer flounder, scup, and black sea bass; and discussion of other measures that would be included in amendments to summer flounder, scup, and black sea bass.

Although non-emergency issues not contained in this agenda may come before the Council and Commission for discussion, these issues may not be the subject of formal Council action during this meeting. Council action will be restricted to those issues specifically listed in this document and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

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, 302–674–2331, at least 5 days prior to the meeting date.

Dated: January 19, 2000.

Richard W. Surdi,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 00–1701 Filed 1–24–00; 8:45 am]

BILLING CODE 3510–22–F

DEPARTMENT OF DEFENSE

Test Program for Negotiation of Comprehensive Small Business Subcontracting Plans

AGENCY: Department of Defense (DoD).

ACTION: Notice of test program.

SUMMARY: The Department of Defense is amending its Test Program for Negotiation of Comprehensive Small Business Subcontracting Plans to implement Section 817 of the National Defense Authorization Act for Fiscal Year 2000. Section 817 provides for a five year extension of the DoD Test Program for negotiation of comprehensive small business subcontracting plans from September 30, 2000 to September 30, 2005.

EFFECTIVE DATE: January 24, 2000.

FOR FURTHER INFORMATION CONTACT: Mr. Ivory Fisher, Office of Small and Disadvantaged Business Utilization, OUSD (A&T) SADBU, 1777 North Kent Street, Suite 9100, Arlington, VA 22209, telephone (703) 588–8616, telefax (703) 588–7561.

SUPPLEMENTARY INFORMATION:

A. Background

In accordance with Section 834 of Public Law 101–189, as amended, the Department of Defense (DoD) established a Test Program for Negotiation of Comprehensive Small Business Subcontracting Plans (the Program) to determine whether the use of comprehensive subcontracting plans on a corporate, division, or plant-wide basis would increase subcontracting opportunities for small business concerns. DoD amended the Program to implement the requirements of Section 822 of the National Defense Authorization Act for Fiscal Year 1998 (Public Law 105–85). The amendments: (1) Provide for subcontracts that are awarded by participating contractors performing as subcontractors, under DoD contracts, to be included in comprehensive small business subcontracting plans, and (2) to cover the HUBZone Act of 1997 implementation in the Federal Acquisition Regulation (FAR), which results in the addition of HUBZone small businesses to the categories of small business concerns that must be addressed by comprehensive small business subcontracting plans.

Ivory Fisher,

Office of Small and Disadvantaged Business Utilization.

The revised test plan is as follows:

Test Program for Negotiation of Comprehensive Small Business Subcontracting Plans

I. Purpose

This document implements Section 834 of Public Law 101–189, the National Defense Authorization Act for Fiscal Years 1990 and 1991, as amended. The primary purpose of the Comprehensive Small Business Subcontracting Plan Test Program (the Program) is to determine whether the negotiation and administration of comprehensive small business subcontracting plans will reduce administrative burdens on contractors while enhancing subcontracting opportunities for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals under Department of Defense (DoD) contracts.

II. Authority

The Program is established pursuant to Section 834 of the National Defense Authorization Act for Fiscal Years 1990 and 1991, as amended.

III. Program Requirements

A. The Program shall be conducted from October 1, 1990, through September 30, 2005.

B. The selection of contractors for participation in the Program shall be in accordance with Section 811(b)(3) of the National Defense Authorization Act For Fiscal Year 1996, Public Law 104–106. Eligible contractors are large business concerns at the major (total) corporate level that, during the preceding fiscal year:

1. Were performing under at least three DoD prime contracts; furnished supplies or services (including professional services) to DoD, engaged in research and development for DoD, or performed construction for DoD; and were paid $5,000,000 or more for such contract activities; and

2. Achieved a small disadvantaged business (SDB) subcontracting participation rate of 5 percent or more during the preceding fiscal year. However, this requirement does not apply to the eight original contractors accepted into the Program. Additionally, a large business with an SDB subcontracting participation rate of less than 5 percent during the preceding fiscal year may request, through the designated contracting activity, to participate in the Program if the firm submits a detailed plan with milestones leading to attainment of at least a 5 percent SDB subcontracting participation rate by September 30, 2000, *2005.*

C. Contractors selected for participation shall:

1. Be eligible in accordance with paragraph III(B);

2. Establish their comprehensive subcontracting plans on the same corporate, division or plant-wide basis under which they submitted the Standard Form (SF) 295 during the preceding fiscal year, except that a division or plant that historically reported through a higher-level division, but would meet the criteria of paragraph III(B)(2), shall be permitted to participate in the Program if the lower-level division, plant or profit center can demonstrate a 5 percent or greater subcontract performance level with SDB concerns;

3. Have reported to DoD on the SF 295 for the previous fiscal year, except as provided in paragraph III(C)(2);

4. Accept an SDB goal for each fiscal year of not less than 5 percent, or an SDB goal that is in accordance with the milestone established under paragraph III(B)(2);

5. Comply with the requirements of Defense Federal Acquisition Regulation Supplement (DFARS) Section 215.605 for source selection purposes;

6. Offer a broad range of subcontracting opportunities;

7. Voluntarily agree to participate; and

8. Have at least one active contract that requires a subcontracting plan at the designated DoD buying activity responsible for negotiating the Comprehensive Subcontracting Plan.

IV. Elements of the Comprehensive Small Business Subcontracting Plan

A. The comprehensive small business subcontracting plan shall address each of the 11 elements set forth in paragraph (d) of the clause at FAR 52.219–9, ''Small Business Subcontracting Plan.''

1. The subcontracting plan, percentage and corresponding dollar goals for awards to small business, HUBZone small business, small disadvantaged business and women-owned small business concerns shall be developed by the contractor for its entire business operation in support of all DoD contracts and subcontracts under DoD contracts regardless of dollar value.

2. Participating contractors shall include separate specific goals and timetables for the awarding of subcontracts in two industry categories which have not historically been made available to small business and small disadvantaged business concerns. These industry categories will be recommended by the contractor and approved by the contracting officer. Subcontract awards made in support of the specific industry categories shall also count towards attainment of the overall small business and small disadvantaged business goals.

3. The subcontracting plan shall set forth the prime contractor's actions to publicize prospective subcontract opportunities for small business, HUBZone small business, small disadvantaged business and women-owned small business concerns.

B. Subcontracting plans to be established under the Program shall be submitted each year by participating contractors to the designated contracting officer 45 days prior to the end of the Government's fiscal year (September 30). However, new contractors requesting participation under the Program shall submit subcontracting plans to the contracting officer as far in advance as possible to the beginning of the fiscal year in which the contractor proposes to participate.

Procedures

A. The Service Acquisition Executive within each military department and defense agency having contractors that meet the requirements of paragraphs III(B) and (C) shall designate at least three but nor more than five contracting activities to participate in the Program. In selecting the contracting activities to participate in the Program, the Services Acquisition Executive shall ensure that the designated activities cover a broad range of supplies and services.

B. The designated contracting activity will accomplish the following:

1. With the coordination of the Director, Office of Small and Disadvantaged Business

Utilization, for their military department or defense agency, select as many eligible prime contractors (at least five) for participation under the Program as deemed appropriate.

2. Establish a ''Comprehensive Small Business Subcontracting Plan'' negotiating team(s) composed as follows:

a. A contracting officer(s) who will be responsible for negotiation and approval of the comprehensive subcontracting plan(s) as well as the responsibilities at FAR 19.705.

b. The contracting activity's Small and Disadvantaged Business Utilization Specialist.

c. The Small and Disadvantaged Business Utilization Specialist of the cognizant contract administration activity that administers the preponderance of the selected prime contractor's contracts and/or the appropriate individual who will administer contractor performance under the test in accordance with FAR 19.706 and the provisions herein.

d. Production specialist, price analyst and other functional specialists as appropriate.

C. The designated contracting officer shall:

1. Encourage prime contractors interested in participating in the program to enter the program on a plant or facility basis.

2. Solicit proposed comprehensive subcontracting plans from selected contractor(s) as soon as possible and by July 1, annually thereafter.

3. By October 1, and annually thereafter, review, negotiate and approve on behalf of DoD a comprehensive subcontracting plan for each selected contractor.

4. Distribute copies of the approved subcontracting plan in accordance with paragraph VI(A).

5. Upon negotiation and acceptance of the comprehensive subcontracting plan, obtain from the contractor:

a. A listing of all active DoD contracts that contain individual subcontracting plans required by Section 211 of Public Law 95–507.

b. The listing shall include the following:

i. Contract number.

ii. Name and address of the contracting activity.

iii. Contracting officer's name and phone number.

6. Upon receipt of the information provided by the participating contractor under paragraph V(C)(4), direct the designated administrative contracting officer to issue a comprehensive change order, which modifies all of the contractor's active DoD contracts that include subcontracting plans. The modification will substitute the contractor's approved comprehensive subcontracting plan for the individual plans, will substitute the clause at DFARS 252.219–7004 for the clause at FAR 52.219–9, and will delete the clauses at FAR 52.219–10 and 52.219–16 and DFARS 252.219–7003 and 252.219–7005, as appropriate.

7. Review annually, with the contract administration activity, the contractor's performance under the plan. Document the review findings and distribute, in accordance with paragraph VI(A), within 45 days of the end of the fiscal year.

8. By November 15 of the year after acceptance, and annually thereafter, determine whether the contractor has met its comprehensive subcontracting goals. If the goals have not been met, determine whether there is any indication that the contractor failed to make a good faith effort and take appropriate action.

9. By December 15, 2005, prepare and submit a report on each participating contractor's performance which details the results of the Program. The report must compare the contractor's performance under the Program with its performance for the three fiscal years prior to acceptance into the Program. The report distribution will be in accordance with paragraph VI(A).

D. Participating contractors:

1. Shall establish their comprehensive subcontracting plans on the same corporate, division or plant-wide basis under which they submitted the SF 295 during the preceding fiscal year, except that those contractors that historically reported through a higher headquarters can elect to participate as a separate (lower-level) reporting profit center, plant or division if the contractor achieved an SDB subcontracting performance rate of 5 percent or greater in the preceding fiscal year.

2. Upon negotiation of an acceptable comprehensive subcontracting plan, shall be exempt from individual contract-by-contract reporting requirements for DoD contracts and subcontracts under DoD contracts unless otherwise required in accordance with paragraph III(C)(5).

3. Shall continue individual contract reporting on non-DoD contracts.

4. Shall comply with the flow-down provisions of Section 211 of Public Law 95–507 for large business subcontractors which are not participating in the Program. Consequently, large business concerns which are not participating in the Program receiving a DoD subcontract in excess of $500,000 ($1,000,000 for construction) are required to adopt a plan similar to that mandated by the clause at FAR 52.219–9. Participating contractors are prohibited from flowing down the ''Comprehensive'' subcontracting deviation provisions of DFARS 252.219–7004. Accordingly, large business subcontractors to the participating contractors who themselves are not participating in the Program shall be required to establish individual subcontracting plans with specific goals for awards to small business, small disadvantaged business and women-owned small business concerns.

5. Upon expulsion from the Program or Program termination on September 10, 2005, shall negotiate and establish individual subcontracting plan son all future DoD contracts that otherwise meet the requirements of Section 211 of Public Law 95–507.

VI. Monitoring and Reporting of Comprehensive Subcontracting Plans and Goals

A. Upon negotiation and acceptance of comprehansive subcontracting plans and goals, the designated activity shall immediately forward one copy of the plan to each of the following:

1. Director, Office of Small and Disadvantaged Business Utilization, Office of the Deputy Under Secretary of Defense (Acquisition and Technology), 1777 North Kent Street, Suite 9100, Arlington, VA 22209

2. Director, Small and Disadvantaged Business Utilization, for the military department or defense agency of the activity that negotiated and accepted the comprehensive subcontracting plan.

3. The cognizant contract administration office.

B. Each participating contractor shall complete the SF 295 ''Summary Subcontract Report'' in accordance with the instructions on the back of the form on a semi-annual basis, except as noted below:

1. One copy of the SF 295 and attachments shall be submitted to Director, Office of Small and Disadvantaged Business Utilization, Office of the Deputy Under Secretary of Defense (Acquisition and Technology), 1777 North Kent Street, Suite 9100, Arlington, VA 22209.

2. Participating contractors shall enter in Item 14 Remarks block the annual corporate, division or plant-wide small business, small disadvantaged business and women-owned small business percentage and corresponding dollar goals.

3. Participating contractors shall also enter separately in Item 14 the percentage and corresponding dollar goals for each of the two selected industry categories (see paragraph IV(A) (2)).

4. Participating contractors shall also enter separately in Item 14 on a semi-annual cumulative basis the percentage and corresponding dollar amount of subcontract awards made in each of the two selected industry categories.

5. Participating contractors shall be exempt from the completion of SF 294 ''Subcontract Report For Individual Contracts'' for DoD contracts during their participation in the Program.

January 18, 2000.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 00–1544 Filed 1–21–00; 8:45 am]

BILLING CODE 5001–10–M

DEPARTMENT OF EDUCATION

Notice of proposed information collection requests

AGENCY: Department of Education.

ACTION: Notice of Proposed Information Collection Requests.

SUMMARY: The Leader, Information Management Group, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: An emergency review has been requested in accordance with the Act (44 U.S.C. Chapter 3507(j)), since public harm is reasonably likely to result if normal clearance procedures are followed. Approval by the Office of

Management and Budget (OMB) has been requested by January 31, 2000. A regular clearance process is also beginning. Interested persons are invited to submit comments on or before March 27, 2000.

ADDRESSES: Written comments regarding the emergency review should be addressed to the Office of Information and Regulatory Affairs, Attention: Danny Werfel, Desk Officer: Department of Education, Office of Management and Budget; 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503 or should be electronically mailed to the internet address DWERFEL@OMB.EOP.GOV.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Director of OMB provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The Office of Management and Budget (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 Information Officer, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. 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. ED invites public comment. 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 respondents, including through the use of information technology.

Dated: January 19, 2000.

William E. Burrow,

Leader, Information Management Group, Office of the Chief Information Officer.

Office of the Chief Financial Officer

Type of Review: Reinstatement.

Title: Grant Performance Report.

Abstract: ED uses the information collection specific to ED FORM 524–B for the award and administration of multi-year discretionary grants. The Department has substantially increased the flexibility of the grant process by enabling all years of multi-budgets to be negotiated at the time of the initial award. (ED GAPS001) and to submit only performance report (ED FORM 524–B) to receive continuation funding. This clearance also includes government-wide common rules for institutions of HIgher Education, Non-Profit agencies, and State and local governments.

Additional Information: There is an urgent need for the six principal offices to disseminate the approved Grant Performance Report (524–B) at scheduled technical assistance meetings in February and March in order for recipients to prepare the reports accurately and to submit them in a timely manner. Failure to receive the information and technical assistance would result in additional hardship to an estimated 6,000 recipients.

Failure to receive the reports in a timely manner would delay ED from issuing the continuation awards in accordance with Departmental directives. Also, the reported information is needed for ED to document program and administrative performance on essential indicators described in ED's strategic plan as required by the Government Performance and Results Act.

We are requesting an Emergency Clearance by OMB for the Grant Performance Report (524–B). When the emergency clearance has been granted the Department will submit the same document to OMB for a three year clearance.

Frequency: One time. High-risk grant organizations may be required to report more frequently.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs; Not-for-profit institutions; Individuals or household.

Reporting and Recordkeeping Hour Burden: Responses: 6,000. *Burden Hours:* 120,000.

Requests for copies of the proposed information collection request should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, S.W., Room 5624, Regional Office Building 3, Washington, D.C. 20202–4651, or should be electronically mailed to the internet address OCIO__IMG__Issues@ed.gov, or should be faxed to 202–708–9346.

Written comments or questions regarding burden and/or the collection activity requirements, contact Terry O'Malley at (202) 395–6466. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 00–1707 Filed 1–24–00; 8:45 am]

BILLING CODE 4000–01–U

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Information Management Group, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before February 24, 2000.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Danny Werfel, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW, Room 10235, New Executive Office Building, Washington, DC 20503 or should be electronically mailed to the internet address DWERFEL@OMB.EOP.GOV.

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 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.

Dated: January 19, 2000.

William E. Burrow,

Leader, Information Management Group, Office of the Chief Information Officer.

Office of Elementary and Secondary Education

Type of Review: Reinstatment.

Title: Applications for Grants under the Class Size Reduction Program.

Frequency: Annually.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 57.

Burden Hours: 14.

Abstract: This application will be used to award grants to State educational agencies for the purpose of reducing class size.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* or should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW, Room 5624, Regional Office Building 3, Washington, DC 20202–4651. Requests may also be electronically mailed to the internet address OCIO__IMG__Issues@ed.gov or faxed to 202–708–9346.

Questions regarding burden and/or the collection activity requirements should be directed to Kathy Axt at (703) 426–9692 or via her internet address Kathy__Axt@ed.gov. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 00–1706 Filed 1–24–00; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Information Management Group, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before February 24, 2000.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Danny Werfel, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW, Room 10235, New Executive Office Building, Washington, DC 20503 or should be electronically mailed to the internet address DWERFEL@OMB.EOP.GOV.

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 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.

Dated: January 20, 2000.

William E. Burrow,

Leader, Information Management Group, Office of the Chief Information Officer.

Office of Elementary and Secondary Education

Type of Review: New.

Title: Safe and Drug-Free Schools and Communities National Programs—Federal Activities Grants Program—The Challenge Newsletter.

Frequency: Annually.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs; Not-for-profit institutions.

Reporting and Recordkeeping Hour Burden:

Responses: 20;

Burden Hours: 400.

Abstract: This program provides a communication link on current and future program directions, research-based activities, and other information related to effective drug and violence prevention strategies between the Department of Education and State and local education agencies and other public and private organizations involved with safe and drug-free schools programs.

This information collection is being submitted under the Streamlined Clearance Process for Discretionary Grant Information Collections (1890–0001). Therefore, the 30-day public comment period notice will be the only public comment notice published for this information collection.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* or should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW, Room 5624, Regional Office Building 3, Washington, DC 20202–4651. Requests may also be electronically mailed to the internet address OCIO__IMG__Issues@ed.gov or faxed to 202–708–9346.

Questions regarding burden and/or the collection activity requirements should be directed to AXT at (703) 426–9692. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 00–1754 Filed 1–24–00; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[CFDA No 84.031S]

Developing Hispanic Serving Institutions Program

AGENCY: Department of Education.

Notice inviting applications for new awards for fiscal year (FY) 2000.

Purpose of Program: Grants to Hispanic Serving Institutions (HSI) under the Developing Hispanic Serving Institutions Program assist eligible Hispanic Serving institutions of higher education to expand their capacity to serve Hispanic and low-income students by enabling them to improve their academic quality, institutional management, and fiscal stability and to increase their self-sufficiency. Five-year development grants and one-year planning grants are awarded.

Eligible Applicants: Institutions that, at the time of application, have an enrollment of undergraduate full-time equivalent students that is at least 25 percent Hispanic students, and provide assurances that not less than 50 percent of their Hispanic students are low-income individuals.

Special Notes

1. If an institution is the recipient of a grant under the programs authorized under Part A or B of Title III of the Higher Education Act of 1965, as amended(HEA), the institution may not receive a grant under the HSI Program if any part of the grant period for the HSI Program grant would overlap with the grant awarded under Part A or B of Title III. Thus, such an institution may not apply for a grant under the HSI Program in this competition. Further, an institution that is a recipient of a grant under Part A or B may not relinquish that grant in order to apply for a grant under the HSI Program. The programs authorized under Part A of Title III of the HEA include the Strengthening Institutions Program, American Indian Tribally Controlled Colleges and Universities Program, Alaska Native-Serving Institutions Program, and Native Hawaiian-Serving Institutions Program. The programs authorized under Part B of Title III of the HEA include the Strengthening Historically Black Colleges and Universities Program and the Strengthening Historically Black Graduate Institutions Program.

2. An institution that does not fall within the limitation described in paragraph 1 may apply for a grant under both the programs authorized under Title III Part A of the HEA and the HSI Program. However, the institution may receive only one grant under any of those programs. Accordingly, if an institution applies for a grant under more than one program, it should indicate that fact in each application, and should further indicate which grant it wishes to receive if it is selected to receive a grant under more than one program.

3. We have changed the way we collect information for determining the value of endowment funds and total expenditures for library materials. As a result of that change, we do not now have base year data beyond 1996–1997 data. Consequently, in order to award FY 2000 grants in a timely manner, we will use 1996–1997 base year data.

Applications Available: January 25, 2000.

Deadline for Transmittal of Applications: March 10, 2000.

Deadline for Intergovernmental Review: May 10, 2000.

Methods for Submission of Grant Applications: We will accept applications in two formats, a paper application and a diskette application. You must submit one original (hard copy with signatures) and two diskettes. Each diskette must contain a copy of the entire application for the FY 2000 grant competition, excluding the following forms (which should be included with the hard copy only): the Application for Federal Education Assistance Form (ED 424), HSI Certification Form (ED 851S–7), the Assurances and Certification Forms and the Endowment Fund Assurance Form (ED 851S–8). The hard copy and the two diskettes must be postmarked on or before the closing date of the competition.

Under both formats we have established mandatory page limits. Reviewers will be instructed not to read applications beyond the stated page limits. If, to meet the page limit, you use a larger page or you use a print size, spacing, or margins smaller than the standards in this notice, we will reject your application. For this purpose, an application narrative includes the institutional narrative, the comprehensive development plan, activity narratives, and the project management narrative.

- The narrative of a development grant application may not exceed 60 pages. Additionally, essential appendices may be attached but may not exceed 5 pages each.
- The narrative of a cooperative arrangement grant application may not exceed 120 pages. Additionally, essential appendices may be attached but may not exceed 10 pages each.
- The narrative of a planning grant application may not exceed 20 pages. Additionally, essential appendices may be attached but may not exceed 5 pages each.

The cover page (ED Form 424 and the tiebreaker information page on the back of ED Form 424) and all certificates and assurances must accompany the original application and are not included within the page limits.

1. A 'page' is 8.5'' x 11'', on one side only, with 1'' margins top, bottom, right and left.

2. You must double-space all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions. However, you may single space charts, forms, tables, figures or graphs.

Electronic Field Readings: During FY 2000, all grant applications under the HSI Program will be reviewed by readers from a secure website. The reviewers will provide comments and award points online. Reviewers will have the opportunity to discuss any significant point differences in a virtual chat room environment.

Note: Some of the procedures in these instructions for transmitting applications differ from those in 34 CFR 75.102. Under 5 U.S.C. 553, the Department generally offers interested parties the opportunity to comment on proposed regulations. However, these amendments make procedural changes only and do not establish new substantive policy. Therefore, under 5 U.S.C. 553(b)(A), the Secretary has determined that proposed rulemaking is not required.

Available Funds: Total estimated funding available is $42,500,000 for FY 2000. Approximately $16,500,000 will support 39 continuing grants. Approximately $26,000,000 will be available for the new grant competition.

Estimated Range of Awards:

Development Grants: $350,000-$400,000 per year.

Planning Grants: $30,000—$35,000 for one year.

Estimated Average Size of Awards:

Development Grant: $375,000 per year.

Planning Grant: $32,500 for one year.

Estimated Number of Awards:

Development Awards: 65.

Planning Grant Awards: 10.

Project Period:

60 months for development grants.

12 months for planning grants.

Note: The Department is not bound by any estimates in this notice.

Statutory Priorities

Under Section 511(d) of the HEA, we give priority to applications that contain satisfactory evidence that the Hispanic Serving institution has entered into or will enter into a collaborative arrangement with at least one local educational agency or community-based organization to provide that agency or organization with assistance (from funds other than funds provided under Title V of the HEA) in reducing dropout rates for Hispanic students, improving rates of academic achievement for Hispanic students, and increasing the rates at which Hispanic secondary school graduates enroll in higher education. We anticipate that we will fund under this competition only applications that meet this priority.

As described under Section 514(b) of the HEA, we give priority to grants for cooperative arrangements that are geographically and economically sound or will benefit the applicant Hispanic Serving Institution. We anticipate that we will fund only those applications that meet this priority under this competition.

Special Funding Consideration

In tie-breaking situations described in 34 CFR 606.23 of the HSI Program regulations, we award one additional point to an application from an

institution that has an endowment fund for which the market value in 1996–97, per full-time equivalent (FTE) student, was less than the average per FTE student at similar type institutions; and one additional point to an application from an institution that had expenditures for library materials in 1996–97, per FTE student, that were less than the average per FTE student at similar type institutions.

For the purpose of these funding considerations, an applicant must be able to demonstrate that the market value of its endowment fund per FTE student, or expenditures for library per FTE student, were less than the following approximated national averages for year 1996–97.

	Average market value of endowment fund per FTE student	Average Library expenditures for materials per FTE student
Two-year public institutions	$1,332	$45
Two-year nonprofit private institutions	11,567	121
Four-year public institutions	2,829	165
Four-year nonprofit private institution	42,579	254

If a tie still remains after applying the additional points, we determine that an institution will receive an award according to a combined ranking of two-year and four-year institutions. This ranking is established by combining library expenditures and endowment values per FTE student. The institutions with the lowest combined library expenditures per FTE student and endowment values per FTE student are ranked higher in strict numerical order.

Applicable Regulations

(a) The Department of Education General Administrative Regulations (EDGAR) in 34 CFR Parts 74, 75, 77, 79, 82, 85, 86, 97, 98, and 99; and (b) the regulations for the HSI Program in 34 CFR Part 606. The HSI final regulations, 34 CFR part 606, were published in the **Federal Register** on December 15, 1999,64 FR 70146–70155.

For Applications or Information Contact: Jessie DeAro, Title V-Developing Hispanic Serving Institutions Program, U.S. Department of Education, Office of Postsecondary Education, Higher Education Programs, 1990 K Street N.W., 6th floor, Washington DC 20006–8501. Telephone (202) 502–7562. The email address for Jessie DeAro is jessie__dearo@ed.gov.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

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 specified in the preceding paragraph. Individuals with disabilities may obtain a copy of the application package in an alternate format, also, by contacting that person. However, the Department is not able to reproduce in an alternate format the standard forms included in the application package.

Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following sites:

http://www.ed.gov/news.html

http://ocfo.ed.gov/fedreg.htm

To use the PDF you must have the Adobe Acrobat Reader Program with Search, which is available free at the previously mentioned web sites. If you have any questions about using the PDF, call the U.S. Government Printing Office (GPO) toll free, at 1–888–293–6498; or in the Washington, DC area at (202) 512–1530.

Note: The official version of a document is the document Published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: http://www.access.gpo.gov/nara/index.html.

Program Authority: 20 USC 1059c.

Dated: January 19, 2000.

A. Lee Fritschler,

Assistant Secretary Office of Postsecondary Education.

[FR Doc. 00–1725 Filed 1–24–00; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Elementary and Secondary Education—Safe and Drug-Free Schools and Communities National Programs—Federal Activities Grants Program

AGENCY: Department of Education

ACTION: Notice of proposed priority and selection criteria for fiscal year 2000 and subsequent years.

SUMMARY: The Secretary announces a proposed priority, eligible applicants, and selection criteria for fiscal year (FY) 2000 and, at the discretion of the Secretary, for subsequent years under the Safe and Drug-Free Schools and Communities (SDFSC) National Programs—Federal Activities Grants Program. The Secretary takes this action to focus Federal financial assistance on an identified national need—the development and dissemination of a newsletter with information about effective practices to prevent drug use and violent behavior among youth. *The Challenge* newsletter will provide a communication link on current and future program directions, research-based activities, and other information related to effective drug and violence prevention strategies between the U.S. Department of Education and State and local education agencies and other public and private organizations involved with safe and drug-free schools programs.

Eligible Applicants: Eligible applicants under this competition are public and private nonprofit organizations and individuals.

Invitation to Comment: Interested persons are invited to submit comments and recommendations regarding this proposed priority. All comments submitted in response to this notice will be available for public inspection, during and after the comment period, in Room 3E310, 400 Maryland Avenue, SW, Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Eastern time, Monday through Friday of each week except Federal holidays. On request, the Department supplies an appropriate aid, such as a reader or print magnifier, to an individual with a disability who

needs assistance to review the comments. An individual with a disability who wants to schedule an appointment for this type of aid may call (202) 205–8113 or (202) 260–9895. An individual who uses a TDD may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

DATES: Comments must be received by the Department on or before February 24, 2000.

ADDRESSES: All comments concerning these proposed priorities should be addressed to Gail Beaumont, Safe and Drug-Free Schools Program, U.S. Department of Education, 400 Maryland Avenue, SW, Room 3E310, Washington, DC 20202–6123. Comments may be sent through the Internet: *comments@ed.gov*. You must include the term ''Federal Activities Grants Program'' in the subject line of your electronic message.

FOR FURTHER INFORMATION CONTACT: Gail Beaumont, Safe and Drug-Free Schools Programs, U.S. Department of Education, 400 Maryland Avenue, SW, Room 3E310, Washington, DC 20202–6123, (202) 260–3954. Fax: (202) 260–7767. Internet: http//www.ed.gov/offices/OESE/SDFS.

Individuals who use a telecommunication device for the deaf (TDD) may call the Federal Information Relay Service at 1–800–877–8339. Individuals with disabilities may obtain this document in an alternate format (e.g., Braille, large print, audio tape, or computer diskette) on request to the contact person listed above.

Note: This notice of proposed priorities does not solicit applications. A notice inviting applications under this competition will be published in the **Federal Register** concurrent with or following the publication of the notice of final priorities.

SUPPLEMENTARY INFORMATION: This notice contains one proposed priority for fiscal year 2000, and related selection criteria. Under the absolute priority, the Secretary intends to award one cooperative agreement for up to 36 months; this cooperative agreement will support a means of communicating with the field on current and future program directions, research-based activities, and other information related to effective drug and violence prevention practices through *The Challenge* newsletter. The primary audience for *The Challenge* is classroom teachers.

Applicants must demonstrate extensive knowledge of elements of effective drug and violence prevention programs and current research in the area of drug and violence prevention programs and current research in the area of drug and violence prevention. Funds under the Safe and Drug-Free Schools Program reach 97 percent of the nation's school districts. While most school districts have implemented drug and violence prevention activities in some form, too often these activities are narrow in scope and are not based on science. Many school districts lack data on the effects of their drug and violence prevention programs on student behavior. They need information about programs that have proven to be effective or promising that they can adopt for their students. Although research exists on drug and violence prevention strategies that have positive results, too often this research is not known to school personnel, and does not get translated into practice. *The Challenge* will provide classroom teachers and other professionals with information about effective or promising drug and violence prevention programs and strategies, articles by experts in the prevention field, and other timely information covering a broad range of topics that comprise the expanding knowledge base on drug and violence prevention.

With regard to content, the following information describes examples of topics and types of articles that have been featured in past issues of *The Challenge:*

- Information about principles of effective drug and violence prevention programs.
- Key elements or characteristics of successful drug and violence prevention programs.
- Research studies and data related to drug and violence prevention.
- Articles by recognized experts in fields related to safe and drug-free schools.
- Articles describing model programs.
- Information that describes discretionary grant activities funded under the Safe and Drug-Free Schools Program, National Programs, including resources and products resulting from the activities.
- Timely information on special topics such as emerging trends in use of specific drugs, or early warning signs of violent behavior.
- Resources and helplines for obtaining information and materials on drug and violence prevention.

While applicants are expected to address in their applications the topics and types of articles described in the above list, the list is by no means comprehensive. Applicants are encouraged to offer suggestions on ways to communicate with the field on key issues.

Frequency of past publication of *The Challenge* has ranged from 6–10 times per year, and the number of pages has ranged from 4–26 pages per issue. The number of copies has been 50,000 per issue. These numbers are offered as guides based on past practice, and are not requirements of the current competition. Applicants are encouraged to offer suggestions regarding the length and frequency of publication, as well as number of copies per issue and dissemination plan.

The applicant funded under the absolute priority in this notice will have the responsibility to design, develop, publish, disseminate, and manage all aspects of *The Challenge* consistent with the specific requirements in the absolute priority below. In submitting their proposals for funding, applicants are encouraged to offer suggestions and ideas for *The Challenge* in addition to those specified in the absolute priority.

Absolute Priority: Under 34 CFR 75.105(c)(3) and the Safe and Drug-Free Schools and Communities Act of 1994, the Secretary gives an absolute preference to applications that meet the following priority. The Secretary funds under this competition *only* applications that meet this absolute priority. Under the absolute funding priority for this competition, applicants must propose projects that:

(1) Design, develop, publish, and disseminate *The Challenge*, a newsletter for educators, prevention specialists, and other professionals in fields related to education and drug and violence prevention to provide information above effective practices to prevent drug use and violent behavior among youth.

(2) Manage all aspects of *The Challenge*, including developing contents of each issue, writing or soliciting articles for each issue, preparing artwork, handling all design and pre-production tasks, and printing and mailing.

(3) Create, maintain, and expand a subscriber data base for ED.

(4) Evaluate on an ongoing basis the impact of *The Challenge* on the intended audience, and use evaluation results for continuous improvement of the newsletter.

(5) Develop, create, and maintain a Web site to post each issue and receive reader comments and suggestions.

(6) Agree to have content of the newsletter reviewed and approved by the Department of Education prior to publication.

Selection Criteria

The following selection criteria will be used to evaluate applications for one cooperative agreement under this competition. The maximum score for all these criteria is 100 points. The

maximum score for each criterion or factor under that criterion is indicated in parentheses.

(1) Significance. (10 points)

In determining the significance of the proposed project, the following factor is considered: The potential contribution of the proposed project to increased knowledge or understanding of educational problems, issues, or effective strategies.

(2) Quality of the project design. (30 points)

In determining the quality of the design of the proposed project, the following factors are considered:

(a) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable. (10)

(b) The extent to which the design of the proposed project is appropriate to, and will successfully address, the needs of the target population or other identified needs. (5)

(c) The extent to which the proposed project represents an exceptional approach to the priority or priorities established for the competition. (15)

(3) Adequacy of resources. (10 points)

In determining the adequacy of resources for the proposed project, the following factor is considered: The extent to which the costs are reasonable in relation to the objectives, design, and potential significance of the proposed project.

(4) Quality of management plan. (25 points)

In determining the quality of the management plan for the proposed project, the following factors are considered.

(a) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks. (5)

(b) The adequacy of mechanisms for ensuring high-quality products and services from the proposed project, including qualifications and experience of key personnel in writing and editing newsletters for education, prevention and related fields. (10)

(c) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project. (5)

(d) How the applicant will ensure that a diversity of perspectives are brought to bear in the operation of the proposed project, including those of students, faculty, parents, the business community, a variety of disciplinary and professional fields, recipients or beneficiaries of services, or others, as appropriate. (5)

(5) Quality of project evaluation. (25 points)

In determining the quality of the evaluation, the following factors are considered:

(a) The extent to which the evaluation plan provides for an ongoing evaluation of the effectiveness of *The Challenge* newsletter, and its impact on the intended audience. (10)

(b) The extent to which the evaluation results will be used for continuous improvement of *The Challenge*. (5)

(c) The extent to which the methods of evaluation are appropriate to the context within which the project operates. (5)

(d) The extent to which the methods of evaluation will provide performance feedback and permit periodic assignment of progress toward achieving intended outcomes. (5)

Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR part 79. The objective of the executive order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local government for coordination and review of proposed Federal financial assistance.

In accordance with this order, this document is intended to provide early notification of the Department's specific plans and actions for this program.

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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 (GPO), toll free, at 1–888–293–6498; or in the Washington, D.C. area at (202) 512–1530.

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Program Authority: 20 U.S.C. 7131. (Catalog of Federal Domestic Assistance Number 84.184P Office of Elementary and Secondary Education—Safe and Drug-Free Schools and Communities National Programs—Federal Activities—*The Challenge* Newsletter)

Dated: January 19, 2000.

Michael Cohen,

Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 00–1726 Filed 1–24–00; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF EDUCATION

[CFDA No.: 84.037]

Office of Student Financial Assistance; Federal Perkins and National Direct Student Loan Programs

AGENCY: Department of Education.

ACTION: Notice of availability of the Federal Perkins Loan and National Direct Student Loan Programs Directory of Designated Low-Income Schools for Teacher Cancellation Benefits for the 1999–2000 School Year.

SUMMARY: We are announcing that the 1999–2000 Federal Perkins Loan and National Direct Student Loan Programs Directory of Designated Low-Income Schools (The Directory) is now available on the Department of Education's (the Department's) Web site. Under the Federal Perkins Loan and National Direct Student Loan programs, a borrower may have repayment of his or her loan deferred and a portion of his or her loan canceled if the borrower teaches full-time for a complete academic year in a designated elementary or secondary school having a high concentration of students from low-income families. In the 1999–2000 Directory, we list, on a State-by-State and Territory-by-Territory basis, the schools in which a borrower may teach during the 1999–2000 school year to qualify for deferment and cancellation benefits.

DATES: The Directory is currently available at the Department's Web site.

ADDRESSES: You may obtain information concerning specific schools listed in the Directory from Chrissa Allen, Systems Administration Branch, Campus-Based Programs Systems Division, Office of Student Financial Assistance, U.S. Department of Education, 400 Maryland Avenue, S.W., (Portals Building, Room 6200), Washington, D.C. 20202–5447, Telephone (202) 708–7738. You may

obtain information concerning deferment and cancellation of a National Direct or Federal Perkins loan from Gail McLarnon, Program Specialist, Product Development Division, Office of Student Financial Assistance, U.S. Department of Education, 400 Maryland Avenue, S.W., (Regional Office Building 3, Room 3045), Washington, D.C. 20202–5447, 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.

FOR FURTHER INFORMATION CONTACT: Directories are also available in an electronic format at (1) each institution of higher education participating in the Federal Perkins Loan Program, (2) each of the fifty-seven (57) State and Territory Departments of Education, (3) each of the major Federal Perkins Loan billing services, and (4) the U.S. Department of Education, including its regional offices. Individuals with disabilities may obtain this notice in an alternate format (*e.g.,* Braille, large print, audiotape, or computer diskette) by contacting the Alternate Format Center at (202) 260–9895 between 8:30 a.m. and 4:30 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: We select schools that qualify a borrower for deferment and cancellation benefits under the procedures contained in the Federal Perkins Loan Program regulations in 34 CFR 674.53, 674.54 and 674.55.

We have determined that, for the 1999–2000 academic year, full-time teaching in the schools set forth in the 1999–2000 Directory qualifies a borrower for deferment and cancellation benefits.

We are providing the Directory to each institution participating in the Federal Perkins Loan Program in an electronic format only. Borrowers and other interested parties may check the Web site or their lending institution, the appropriate State or Territory Department of Education, a regional office of the Department of Education, or contact us directly at the Office of Student Financial Assistance concerning the identity of qualifying schools for the 1999–2000 academic year. We retain, on a permanent basis, copies of past Directories.

Electronic Access to This Document

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http://ocfo.ed.gov/fedreg.htm
http://www.ed.gov/news.html

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Note: The official version of this document is published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: http://www.access.gpo.gov/nara/index.html.

Program Authority: 20 U.S.C. 1087aa–1087ii and 20 U.S.C. 421–429, unless otherwise noted.

Dated: January 19, 2000.

Greg Woods,

Chief Operating Officer, Office of Student Financial Assistance.

[FR Doc. 00–1727 Filed 1–24–00; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Solicitation for Expressions of Interest; Low-Cost Prototype Inverters

AGENCY: U.S. Department of Energy.

ACTION: Notice of Solicitation for Participation in Competition to Create Low-Cost Inverters.

SUMMARY: The U.S. Department of Energy (DOE), in partnership with the National Association of State Energy Officials (NASEO), the Institute of Electrical and Electronics Engineers (IEEE), and other sponsors announces an opportunity for qualified colleges and university engineering programs to submit proposals to compete for a cash prize for funds to build prototype, low-cost inverters, in a contest titled the 2001 Future Energy Challenge. This competition is open to schools with ABET-accredited engineering programs or the equivalent.

DATES: Additional information on this competition and application requirements will be mailed beginning February 1, 2000, with a due date for receipt of application requirements of April 3, 2000. Schools selected to compete in the 2001 Future Energy Challenge will be notified by May 1, 2000. The competition will be scheduled for late May or early June 2001.

ADDRESSES: If your school is interested in receiving an application requirements package for the 2001 Future Energy Challenge, complete the attached form and fax or mail it to the address on the form. You can also e-mail your response to: *samuel.biondo@hq.doe.gov.* Be sure to include all the information requested on the form or in your e-mail message. The application requirements package will also provide information on how you might qualify for seed money from other sponsors. (Note: The agency or organization providing the seed money will solicit and evaluate the application requirements for seed funding, not DOE.)

SUPPLEMENTARY INFORMATION: The 2001 Future Energy Challenge seeks to dramatically improve the design and reduce the cost of DC–AC inverters and interface systems for use in distributed generation systems. DOE is joining with NASEO, and possibly others, to sponsor this competition with the goal of making these interface systems practical and cost effective. The objectives are to design elegant, manufacturable systems that would reduce the costs of commercial interface systems by at least 50% and, thereby, accelerate the deployment of distributed generation systems in homes and buildings. Schools with the capability to undertake the challenging task of designing complete systems or modifying commercial inverters to achieve design and manufacturability improvements that lead to cost reductions of 50% or better are invited to submit proposals to DOE to compete. Schools may elect to compete in one of three classes: an engineering design study class that involves a thorough design, analysis, cost, and simulation study; a scale prototype class in which hardware is built and demonstrated at a fraction of the target power level; and a full prototype class that leads to a comprehensive hardware system. Schools should plan to form multi-disciplinary teams to address the energy source characteristics (selected from fuel cells, solar panels, or other direct energy conversion devices), design the power electronics, design packaging and thermal management systems, develop filtering and other interface sub-systems, analyze process costs and manufacturability, and perform economic and life-cycle cost analyses.

The hardware prototypes judged as best will be tested by fuel cell manufacturers, at DOE energy technology centers, or at national laboratory facilities as interfaces for a fuel cell source. The school with the most cost-effective, fully functional design that can meet the aggressive cost target will win a prize of at least

$50,000. Proposals will be judged by a distinguished panel of experts from the IEEE.

Issued in Washington, D.C., on January 14, 2000.

Robert W. Gee,

Assistant Secretary for Fossil Energy.

BILLING CODE 6450–01–P

2001 Future Energy Challenge

Response to the U.S. Department of Energy's Solicitation for Expressions of Interest – Low-Cost Prototype Inverters

Name of Proposed Team Leader:

_____

Affiliation:

_____

Address of Proposed Team Leader:

_____

_____

_____

Phone Number: _____

E-Mail: _____

Date of This Response: _____

[FR Doc. 00–1720 Filed 1–24–00; 8:45 am]

BILLING CODE 6450–01–C

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00–163–000]

Kern River Gas Transmission Company; Notice of Proposed Changes in FERC Gas Tariff

January 19, 2000.

Take notice that on January 13, 2000, Kern River Gas Transmission Company (Kern River) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets to be effective January 13, 2000.

Seventh Revised Sheet No. 70
Third Revised Sheet No. 88
First Revised Sheet No. 88–A
First Revised Sheet No. 89
Third Revised Sheet No. 90
Ninth Revised Sheet No. 500–A
Ninth Revised Sheet No. 600–A
Ninth Revised Sheet No. 700–A
Eighth Revised Sheet No. 891

Kern River states that the purpose of this filing is to establish procedures in its tariff to allow shippers to net and/or trade shipper imbalances.

Kern River states that is has served a copy of this filing upon its customers and interested 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. This filing may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 00–1693 Filed 1–24–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Southwest Power Pool, Inc.; Notice of Settlement Conference

DATE: January 19, 2000.

Take notice that a Settlement Conference will be convened to discuss compensation for deferred maintenance costs in Docket No. ER99–4392–000. The Settlement Conference is scheduled for Monday, January 24, 2000, at 10:00 a.m. The Settlement Conference will be held at the Offices of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426, for the purpose of exploring settlement of the captioned proceeding.

Any party as defined by 18 CFR 385.102(c), or any participant as defined in 18 CFR 385.102(b), is invited to attend. Persons wishing to become a party must move to intervene and receive intervenor status pursuant to the Commission's regulations (18 CFR 385.214).

For additional information contact Moira Notargiacomo at (202) 208–1079.

David P. Boergers,

Secretary.

[FR Doc. 00–1691 Filed 1–24–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC00–48–000, et al.]

Cajun Electric Power Cooperative, Inc., et al.; Electric Rate and Corporate Regulation Filings

January 18, 2000.

Take notice that the following filings have been made with the Commission:

1. Cajun Electric Power Cooperative, Inc., and Louisiana Generating LLC

[Docket No. EC00–48–000]

Take notice that on January 13, 2000, Louisiana Generating LLC (Generating) tendered for filing an application under section 203 of the Federal Power Act for approval of the transfer of certain transmission facilities associated with generating facilities being sold to Louisiana Generating LLC by Cajun Electric Power Cooperative, Inc. (Cajun). Generating also requested approval of the assignment of four power sales agreements from Cajun to Generating.

Comment date: February 14, 2000, in accordance with Standard Paragraph E at the end of this notice.

2. Ameren Services Company

[Docket No. ER00–1084–000]

Take notice that on January 13, 2000, Ameren Services Company (Ameren) tendered for filing a Service Agreement for Market Based Rate Power Sales between Ameren and the City of Sikeston, Board of Municipal Utilities. Ameren asserts that the purpose of the Agreement is to replace the unexecuted Agreement in Docket No. ER98-4440–000 with an executed Agreement.

Ameren requests that the Service Agreement become effective August 3, 1998.

Comment date: February 2, 2000, in accordance with Standard Paragraph E at the end of this notice.

3. Ameren Services Company

[Docket No. ER00–1085–000]

Take notice that on January 13, 2000, Ameren Services Company (Ameren) tendered for filing a Service Agreement for Market Based Rate Power Sales between Ameren and Duke Energy Trading & Marketing, L.L.C. Ameren asserts that the purpose of the Agreement is to replace the unexecuted Agreement in Docket No. 98–3886–000 with an executed Agreement.

Ameren requests that the Service Agreement become effective August 3, 1998.

Comment date: February 2, 2000, in accordance with Standard Paragraph E at the end of this notice.

4. California Independent System Operator Corporation

[Docket No. ER00–1086–000]

Take notice that on January 13, 2000, the California Independent System Operator Corporation (ISO) tendered for filing Amendment No. 2 to the Meter Service Agreement between the ISO and PG&E Energy Services Corporation, for acceptance by the Commission. The ISO states that Amendment No. 2 modifies Schedule 1 of the Meter Service Agreement to reflect changes in meter information concerning meter resources and their locations.

The ISO states that this filing has been served on all parties listed on the official service list in the above-referenced docket.

Comment date: February 2, 2000, in accordance with Standard Paragraph E at the end of this notice.

5. California Independent System Operator Corporation

[Docket No. ER00–1087–000]

Take notice that on January 13, 2000, the California Independent System Operator Corporation (ISO) tendered for filing Amendment No. 1 to the Meter

Service Agreement between the ISO and Cabrillo Power II LLC, for acceptance by the Commission. The ISO states that Amendment No. 1 modifies Schedule 1, Section 3.3.2 of the Meter Service Agreement to reflect changes in meter information concerning meter locations and addresses.

The ISO states that this filing has been served on all parties listed on the official service list in the above-referenced docket.

Comment date: February 2, 2000, in accordance with Standard Paragraph E at the end of this notice.

6. Northeast Utilities Service Company

[Docket No. ER00–1088–000]

Take notice that on January 13, 2000, Northeast Utilities Service Company (NUSCO) tendered for filing, a First Amendment to its Service Agreement No. 55 under FERC Electric Tariff Original Volume No. 9, under which New Hampshire Electric Cooperative (NHEC) takes Network Integration Transmission Service under the NU System Companies' Open Access Transmission Service Tariff.

NUSCO states that the amendment changes the delivery points identified in Service Agreement No.55 and is being filed to correspond to a settlement reached between the NU System Companies and NHEC and filed with the Commission in Docket Nos. EL96–53–000 and EL95–37–000.

NUSCO requests waiver of the Commission's regulations to allow the amendment to become effective as of January 1, 2000, the effective date requested for the Settlement.

Comment date: February 2, 2000, in accordance with Standard Paragraph E at the end of this notice.

7. PECO Energy Company

[Docket No. ER00–1089–000]

Take notice that on January 13, 2000, PECO Energy Company (PECO) filed an amendment to its Electric Tariff Original Volume No. 1 accepted by the Commission in Docket No. ER95–770, as subsequently amended and accepted by the Commission in Docket No. ER97–316. The amendment requests Commission authorization to make market based sales of specified ancillary services.

PECO requests a waiver of the Commission's regulations to permit the revised tariff sheets to become effective January 14, 2000.

Comment date: February 2, 2000, in accordance with Standard Paragraph E at the end of this notice.

8. Wisconsin Public Service Corporation

[Docket No. ER00–1090–000]

Take notice that on January 13, 2000, Wisconsin Public Service Corporation (WPSC) tendered for filing a quarterly report for the quarter ending December 31, 1999.

Comment date: February 7, 2000, in accordance with Standard Paragraph E at the end of this notice.

9. Entergy Services, Inc.

[Docket No. ER00–1091–000]

Take notice that on January 13, 2000, Entergy Services, Inc. (Entergy), on behalf of Entergy Gulf States, Inc. (Entergy Gulf States), tendered for filing an Interconnection and Operating Agreement between Entergy Gulf States and SRW Cogeneration Limited Partnership (SRW).

Comment date: February 2, 2000, in accordance with Standard Paragraph E at the end of this notice.

10. Illinova Power Marketing, Inc.

[Docket No. ER00–1092–000]

Take notice that on January 13, 2000, Illinova Power Marketing, Inc. (IPMI) tendered for filing Electric Power Transaction Service Agreements under which Cargill Alliant, LLC and Springfield City Water Light & Power will take service pursuant to IPMI's power sales tariff, Rate Schedule FERC No. 1.

IPMI has requested an effective date of December 14, 1999, for each service agreement.

Comment date: February 2, 2000, in accordance with Standard Paragraph E at the end of this notice.

11. Cadillac Renewable Energy LLC

[Docket No. ER00–1097–000]

Take notice that on January 12, 2000, Cadillac Renewable Energy LLC filed their quarterly report for the quarter ending December 31, 1999.

Comment date: February 1, 2000, in accordance with Standard Paragraph E at the end of this notice.

12. Cleco Utility Group, Inc.

[Docket No. ER00–1098–000]

Take notice that on January 10, 2000, Cleco Utility Group, Inc., Transmission Services (CLECO) filed their service agreements for non-firm and short term firm point-to-point transmission services by CLECO to Cargill and Alliant, LLC.

CLECO requests an effective date of December 22, 1999.

Copies of this filing have been served to: Ms. Arlene Jorgensen Hillestad, Contract Administrator, Cargill-Alliant, LLC, P. O. Box 5653, Minneapolis, MN 55440–5653.

Comment date: January 28, 2000, in accordance with Standard Paragraph E at the end of this notice.

13. ACN Power, Inc.

[Docket No. ER00–1102–000]

Take notice that on January 11, 2000, ACN Power, Inc. tendered for filing a letter from the Executive Committee of the Western Systems Power Pool (WSPP) indicating that ACN Power, Inc. had completed all the steps for pool membership. ACN Power, Inc. requests that the Commission amend the WSPP Agreement to include it as a member.

ACN Power, Inc. requests an effective date of January 6, 2000 for the proposed amendment.

Copies of the filing were served upon the WSPP Executive Committee.

Comment date: January 31, 2000, in accordance with Standard Paragraph E at the end of this notice.

14. Indianapolis Power & Light Company

[Docket No. OA00–4–000]

Take notice that on January 6, 2000, Indianapolis Power & Light Company (Indianapolis) submitted standards of conduct under Order No. 889 *et seq.*[1]

Indianapolis states that it served copies of the filing on the service list, to the Indiana Utility Regulatory Commission, Cinergy Corp., and Hoosier Energy Rural Electric Cooperative, Inc.

Comment date: February 2, 2000, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraph E

Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding.

[1] Open Access Same-Time Information System (Formerly Real-Time Information Network) and Standards of Conduct, 61 FR 21737 (May 10, 1996), FERC Stats. & Regs., Regulations Preambles January 1991–1996 ¶ 31,035 (April 24, 1996), Order No. 889–A, *order on rehearing*, 62 FR 12484 (March 14, 1997), III FERC Stats. & Regs. ¶ 31,049 (March 4, 1997); Order No. 889–B, *rehearing denied*, 62 FR 64715 (December 9, 1997), III FERC Stats. & Regs. ¶ 31,253 (November 25, 1997).

Any person wishing to become a party must file a motion to intervene. Copies of these filings are on file with the Commission and are available for public inspection. This filing may also be viewed on the Internet at http://www.ferc.fed.us/ online/rims.htm (call 202–208–2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 00–1690 Filed 1–24–00; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application Accepted for Filing and Soliciting Motions To Intervene and Protests

January 19, 2000.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* New Major License.

b. *Project No.:* 2589–024.

c. *Date filed:* July 29, 1999.

d. *Applicant:* Marquette Board of Light and Power.

e. *Name of Project:* Marquette Hydroelectric Project.

f. *Location:* On the Dead River near the City of Marquette, Marquette County, Michigan. The project would not use federal lands.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. §§ 791(a)–825(r).

h. *Applicant Contact:* Mr. David E. Hickey, Marquette Board of Light and Power, 2200 Wright Street, Marquette, MI 49855, (906) 228–0322.

i. *FERC Contact:* Lee Emery, *lee.emery@ferc.fed.us,* or (202) 219–2778.

j. *Deadline for filing motions to intervene and protests:* 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: David P. Boergers, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Status of environmental analysis:* This application is not ready for environmental analysis at this time.

l. *Description of the Project:* The project consists of the following two existing facilities: The Marquette Development No. 2 includes (1) Forestville Reservoir with a surface area of 110 acres and a storage volume of 2,900 acre-feet, impounded by (2) a 202-foot-long, 62-foot high, concrete-capped Cyclopean masonry dam with crest elevation 771.0 feet NGVD, which acts as a spillway under extremely high flows, with (a) a 197-foot-long concrete retaining wall, (b) a 75-foot-long training wall, and (c) a 33-foot-wide intake structure, with inclined trashracks, which discharges into (3) a 90-inch-diameter, wood-stave penstock, about 4,200 feet long, which conveys the water to (4) a concrete surge tank. From the surge tank, the water is carried by (5) two 440-foot-long, 78-inch-diameter steel penstocks to (6) Powerhouse No. 2, which is a 40-foot by 96-foot reinforced concrete and brick structure containing (7) two, two-phase, 60-cycle horizontal turbine-generator sets with a combined generating capacity of 3,200 kilowatts, which transmits power to the 12,500 kV power distribution system.

The Marquette Development No. 3 includes (8) Tourist Park Reservoir with a surface area of 100 acres and a storage volume of 875 acre-feet, impounded by (9) a dam composed of (a) a 37-foot-long left spillway dike with a crest elevation of 642.84 feet NGVD, (b) an 80-foot long, 21-foot high, uncontrolled concrete ogee-shaped overflow spillway, with a crest elevation of 638.84 feet NGVD, (c) a gated spillway with two electric-hoist-operated, 10-foot-high by 10-foot-wide Taintor gates with a crest elevation of 629.84 feet NGVD, (d) a 758-foot-long right dike, with a reinforced concrete core wall with a crest elevation of 642.84 feet NGVD, and (e) a reinforced concrete intake structure with inclined trash racks, located 123 feet from the right end of the right dike, and having a single 20-foot-wide by 17-foot high bay. This bay controls water flowing into (10) an 8-foot-diameter, 150-foot long steel penstock, supported on nine reinforced-concrete pedestals spaced 16 feet apart, which carries water to (11) Powerhouse No. 3, which is a 28-foot by 40-foot reinforced concrete and brick structure containing (12) one two-phase, 60-cycle vertical turbine-generator set with a generating capacity of 700 kW, which transmits power to the 12,500kV power distribution system.

m. *Locations of the application:* A copy of the application for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE, Room 2A, Washington, DC 20246, or by calling (202) 208–1371. The application may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call (202) 208–2222 for assistance). A copy is also available for inspection and reproduction at the address in item h. above.

n. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

Protests or Motions to Intervene—Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified deadline date for the particular application.

Filing and Service of Responsive Documents—The application is not ready for environmental analysis at this time; therefore, the Commission is not now requesting comments, recommendations, terms and conditions, or prescriptions.

When the application is ready for environmental analysis, the Commission will issue a public notice requesting comments, recommendations, terms and conditions, or prescriptions.

All filings must (1) bear in all capital letters the title ''PROTEST'' or ''MOTION TO INTERVENE;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. Agencies may obtain copies of the application directly from the applicant. Any of these documents must be filed by providing the original and the number of copies required by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington DC 20426. An additional copy must be sent to Director, Division of Project Review, Office of Hydropower Licensing, Federal Energy Regulatory Commission, at the above address. A copy of any protest or motion to intervene must be served upon each

representative of the applicant specified in the particular application.

David P. Boergers,

Secretary.

[FR Doc. 00–1692 Filed 1–24–00; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Sunshine Act Meeting

January 19, 2000.

The following notice of meeting is published pursuant to section 3(a) of the Government in the Sunshine Act (Pub. L. No. 94–409), 5 U.S.C 552B:

AGENCY HOLDING MEETING: Federal Energy Regulatory Commission.

DATE AND TIME: January 26, 2000, 10:00 a.m.

PLACE: Room 2C, 888 First Street, N.E., Washington, D.C. 20426.

STATUS: Open.

MATTERS TO BE CONSIDERED: Agenda (Note—Items listed on the agenda may be deleted without further notice).

CONTACT PERSON FOR MORE INFORMATION: David P. Boergers, Secretary, Telephone (202) 208–0400. For a recording listing items stricken from or added to the meeting, call (202) 208–1627.

This is a list of matters to be considered by the commission. It does not include a listing of all papers relevant to the items on the agenda; however, all public documents may be examined in the reference and information center.

Consent Agenda—Hydro 733rd—Meeting January 26, 2000; Regular Meeting (10:00 a.m.)

CAH–1.
Omitted
CAH–2.
Docket# P–11282, 003, Summit Hydropower, Inc.
CAH–3.
Docket# P–4270, 005, Mountain Rhythm Resources
CAH–4.
Omitted

Consent Agenda—Electric

CAE–1.
Docket# ER00–713, 000, Southwest Power Pool, Inc.
CAE–2.
Docket# ER00–661, 000, American Electric Power Service Corporation
CAE–3.
Docket# ER00–710, 000, Southhaven Power, LLC
Other#s ER00–741, 000, Canal Emirates Power International, Inc.
ER00–744, 000, PPL Martins Creek, LLC, PPL Montour, LLC, PPL Brunner Island, LLC, PPL Holtwood, LLC and PPL Susquehanna, LLC
CAE–4.
Docket# ER00–663, 000, Puget Sound Energy, Inc.
Other#s ER00–664, 000, Puget Sound Energy, Inc.
ER00–665, 000, Puget Sound Energy, Inc.
ER00–666, 000, Puget Sound Energy, Inc.
ER00–667, 000, Puget Sound Energy, Inc.
ER00–668, 000, Puget Sound Energy, Inc.
ER00–669, 000, Puget Sound Energy, Inc.
ER00–670, 000, Puget Sound Energy, Inc.
ER00–671, 000, Puget Sound Energy, Inc.
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ER00–674, 000, Puget Sound Energy, Inc.
ER00–675, 000, Puget Sound Energy, Inc.
ER00–676, 000, Puget Sound Energy, Inc.
ER00–677, 000, Puget Sound Energy, Inc.
ER00–678, 000, Puget Sound Energy, Inc.
CAE–5.
Docket# ER00–718, 000, Tampa Electric Company
CAE–6.
Docket# ER00–569, 000, CSW Operating Companies
CAE–7.
Omitted
CAE–8.
Docket# ER00–746, 000, Amergen Energy Company, L.L.C.
CAE–9.
Docket# EL99–75, 002, California Power Exchange Corporation
Other#S EC96–19, 051, California Power Exchange Corporation
ER96–1663, 053, California Power Exchange Corporation
ER00–723, 000, California Power Exchange Corporation
CAE–10.
Docket# ER99–2012, 002, North American Electric Reliability Council
CAE–11.
Docket# ER99–3719, 000, Mountain West Independent System Administrator
Other#s EC99–100, 000, Sierra Pacific Power Company and Nevada Power Company
CAE–12.
Docket# ER99–3886, 001, Commonwealth Edison Company and Commonwealth Edison Company of Indiana
CAE–13.
Omitted
CAE–14.
Docket# ER00–657, 000, Pacific Gas and Electric Company
CAE–15.
Docket# ER00–335, 000, Central Vermont Public Service Corporation
CAE–16.
Docket# ER98–2668, 008, Duke Energy Moss Landing LLC
Other#S ER98–2669, 007, Duke Energy Oakland LLC
ER98–4296, 005, Duke Energy Oakland LLC
ER98–4300, 005, Duke Energy Moss Landing LLC
ER99–1127, 006, Duke Energy Moss Landing LLC
ER99–1128, 006, Duke Energy Oakland LLC
CAE–17.
Docket# ER99–978, 000, Boston Edison Company
Other#S EL99–31, 000, Boston Edison Company
CAE–18.
Docket# ER99–2339, 002, Sierra Pacific Power Company
CAE–19.
Docket# ER99–1618, 000, Atlantic City Electric Company
Other#S ER99–1618, 001, Atlantic City Electric Company
CAE–20.
Docket# ER99–3887, 000, Midamerican Energy Company
Other#S EL99–92, 000, Midamerican Energy Company
ER99–4226, 000, Ameren Operating Companies
ER99–4415, 000, Illinois Power Company
ER99–4470, 000, Commonwealth Edison Company and Commonwealth Edison Company of Indiana
ER99–4530, 000, Illinois Power Company
EL00–7, 000, Illinois Power Company
EL00–16, 000, Ameren Operating Companies
EL00–21, 000, Commonwealth Edison Company and Commonwealth Edison Company of Indiana
CAE–21.
Docket# ER98–441, 005, Southern California Edison Company
Other# ER98–2550, 002, Southern California Edison Company
ER98–495, 005, Pacific Gas and Electric Company
ER98–1614, 003, Pacific Gas and Electric Company
ER98–2145, 003, Pacific Gas and Electric Company
ER98–496, 004, San Diego Gas & Electric Company
ER98–2160, 002, San Diego Gas & Electric Company
ER98–2668, 006, Duke Energy Moss Landing LLC
ER98–2669, 005, Duke Energy Oakland LLC
ER98–4296, 003, Duke Energy Oakland LLC
ER98–4300, 003, Duke Energy Moss Landing LLC
ER99–1127, 004, Duke Energy Moss Landing LLC
ER99–1128, 004, Duke Energy Oakland LLC
ER98–441, 008, Southern California Edison Company
ER98–441, 009, Southern California Edison Company
CAE–22.
Docket# ER99–2326, 002, Pacific Gas and Electric Company
Other#S EL99–68, 002, Pacific Gas and Electric Company
CAE–23.
Docket# EC98–40, 002, American Electric Power Company, Inc. and Central and South West Corporation
Other#S ER98–2770, 002, American Electric Power Company, Inc. and Central and South West Corporation
ER98–2786, 003, American Electric Power Company, Inc. and Central and South West Corporation
CAE–24.

Docket# ER99–3339, 001, California Independent System Operator Corporation
CAE–25.
Docket# ER97–1523, 017, Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc. and Rochester Gas and Electric Corporation
Other#s OA97–470, 014, Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc. and Rochester Gas and Electric Corporation
ER97–4234, 016, Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc. and Rochester Gas and Electric Corporation
CAE–26.
Omitted
CAE–27.
Docket# RM00–7, 000, Revision of Annual Charges Assessed to Public Utilities
CAE–28.
Docket# EL00–15, 000, Pittsfield Generating Company, L.P.
CAE–29.
Docket# EL00–10, 000, Open-Access Same-Time Information System and Standards of Conduct
CAE–30.
Docket# EL00–8, 000, White River Electric Association Incorporated
Other#s EL00–14, 000, McDonough Power Cooperative
CAE–31.
Docket# EL00–23, 000, Choptank Electric Cooperative
CAE–32.
Docket# EL00–1, 000, AES NY, L.L.C. V. Niagara Mohawk Power Corporation
CAE–33.
Docket# EL99–90, 000, City of Wichita, Kansas V. Western Resources, Inc.
CAE–34.
Docket# EL00–9, 000, Cherokee County Cogeneration Partners, L.P. V. Duke Energy Corporation
Other#s ER99–2331, 002, Duke Energy Corporation
CAE–35.
Omitted
CAE–36.
Docket# OA97–433, 005, Public Service Company of New Mexico
Other#s OA97–720, 005, Public Service Company of New Mexico

Consent Agenda—Gas and Oil

CAG–1.
Docket# RP00–145, 000, Sumas International Pipeline Inc.
CAG–2.
Docket# RP00–157, 000, Kern River Gas Transmission Company
CAG–3.
Omitted
CAG–4.
Omitted
CAG–5.
Docket# RP96–272, 014, Northern Natural Gas Company
CAG–6.
Docket# RP00–152, 000, Northern Natural Gas Company
CAG–7.
Docket# RP00–141, 000, Pine Needle LNG Company, LLC
CAG–8.
Omitted
CAG–9.
Docket# RP99–481, 000, Transwestern Pipeline Company
Other#s RP99–481, 001, Transwestern Pipeline Company
CAG–10.
Docket# RP99–20, 000, Vidor Pipeline Company
CAG–11.
Omitted
CAG–12.
Docket# RP00–39, 001, Natural Gas Pipeline Company of America
CAG–13.
Omitted
CAG–14.
Docket# RP99–518, 002, PGE Gas Transmission, Northwest Corporation
CAG–15.
Omitted
CAG–16.
Omitted
CAG–17.
Docket# RP93–5, 031, Northwest Pipeline Corporation
Other#s RP93–5, 036, Northwest Pipeline Corporation
RP93–96, 006, Northwest Pipeline Corporation
CAG–18.
Docket# RP96–129, 006, Trunkline Gas Company
Other#s RP96–129, 005, Trunkline Gas Company
RP96–129, 007, Trunkline Gas Company
CAG–19.
Omitted
CAG–20.
Docket# RP99–514, 001, Destin Pipeline Company, L.L.C.
CAG–21.
Omitted
CAG–22.
Docket# CP87–203, 007, CNG Transmission Corporation
Other#S CP99–106, 000, NE Hub Partners, L.P. V. CNG Transmission Corporation
CAG–23.
Omitted
CAG–24.
Docket# CP98–596, 001, Columbia Gulf Transmission Company
CAG–25.
Docket# PL99–3, 001, Certification of New Interstate Natural Gas Pipeline Facilities
CAG–26.
Docket# RM00–5, 000, Optional Certificate and Abandonment Procedures for Applications for New Service Under Section 7 of the Natural Gas Act
CAG–27.
Omitted
CAG–28.
Docket# RP00–63, 000, Great Lakes Gas Transmission Limited Partnership
CAG–29.
Docket# CP99–322, 000, El Paso Natural Gas Company
Other#s CP99–323, 000, El Paso Natural Gas Company

Hydro Agenda

H–1.
Reserved

Electric Agenda

E–1.
Reserved

Oil and Gas Agenda

I. Pipeline Rate Matters

PR–1.
Omitted
PR–2.
Docket# RM00–6, 000, Well Category Determinations Proposed Rulemaking

II. Pipeline Certificate Matters

PC–1.
Reserved

David P. Boergers,
Secretary.

[FR Doc. 00–1791 Filed 1–21–00; 12:20 pm]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6527–5]

Agency Information Collection Activities: Submission for OMB Review; Comment Request, MACT Subpart KK, National Emission Standards for the Printing and Publishing Industry

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that the following Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval: MACT Subpart KK, National Emission Standards for the Printing and Publishing Industry, OMB Control Number 2060–0335 which expires on March 31, 2000. The ICR describes the nature of the information collection and its expected burden and cost; where appropriate, it includes the actual data collection instrument.

DATES: Comments must be submitted on or before February 24, 2000.

FOR FURTHER INFORMATION CONTACT: For a copy of the ICR contact Sandy Farmer at EPA by phone at (202) 260–2740, by E-Mail at Farmer.Sandy@epamail.epa.gov or download off the Internet at *http://*

www.epa.gov/icr and refer to EPA ICR No.1739.03. For technical questions about the ICR contact Ginger Gotliffe at 202–564–7072.

SUPPLEMENTARY INFORMATION:

Title: MACT Subpart KK, National Emission Standards for the Printing and Publishing Industry (OMB Control No. 2060–0335; EPA ICR No.1739.03) expiring 03/31/00. This is a request for extension of a currently approved collection.

Abstract: The Maximum Achievable Control Technology (MACT) for the Printing and Publishing Industry were promulgated on May 30, 1996 (61 FR 27131). These standards apply to the following facilities in 40 CFR part 63, subpart KK: publication rotogravure, product and packaging rotogravure, and wide-web flexographic printing presses at major sources. The effective date is May 30, 1999 for sources existing on May 30, 1996. For new sources or reconstructed sources after May 30, 1996, the effective date is start-up or May 30, 1996, whichever is later.

These standards of performance for this category of major sources and area sources of hazardous air pollutants are required by section 112 of the Clean Air Act. Facilities may meet the standards by materials substitution, by installing control devices, or by a combination of both. The information that is required to be submitted to the Agency or kept at the facility is needed to insure compliance with the regulation. These include initial one time notifications, performance tests plans and reports and records of maintenance and shutdown, startup, and malfunctions. The required notifications are used to inform the Agency or delegated authority when a source becomes subject to the standard. The reviewing authority may then inspect the source to check if the pollution control devices are properly installed and operated, leaks are being detected and repaired and the standard is being met. Performance test reports are needed as these are the Agency's record of a source's initial capability to comply with the emission standard, and serve as a record of the operating conditions under which compliance was achieved. For facilities that install CMS there are performance test, and maintenance reports. Excess emissions reports are submitted semiannually. Responses to the collection of information are mandatory.

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. The **Federal Register** document required under 5 CFR 1320.8(d), soliciting comments on this collection of information was published on 7/29/99 (64 FR 41110); no comments/comments were received.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 192 hours per response. 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.

Respondents/Affected Entities: Owners or operators of publication rotogravure, product and packaging rotogravure, or wide-web flexographic printing presses.

Estimated Number of Respondents: 135.

Frequency of Response: one time notifications, semiannual reports.

Estimated Total Annual Hour Burden: 52,495

Estimated Total Annualized Capital, O&M Cost Burden: $403,000

Send comments 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 to the following addresses. Please refer to EPA ICR No. 1739.03 and OMB Control No. 2060–0335 in any correspondence.

Ms. Sandy Farmer, U.S. Environmental Protection Agency, Office of Environmental Information, Collection Strategies Division (2822), 1200 Pennsylvania Ave., NW, Washington, DC 20460; and

Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for EPA, 725 17th Street, NW, Washington, DC 20503.

Dated: January 11, 2000.

Oscar Morales,

Director, Collection Strategies Division.

[FR Doc. 00–1664 Filed 1–24–00; 8:45 am]

BILLING CODE 6560–50–U

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6528–6]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; National Volatile Organic Compound Emission Standards for Automobile Refinish Coatings

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that the following Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval: Reporting and Recordkeeping Requirements for National Volatile Organic Compound Emission Standards for Automobile Refinish Coatings, EPA No. 1765.02, OMB No. 2060–0353, expires March 31, 2000. The ICR describes the nature of the information collection and its expected burden and cost; where appropriate, it includes the actual data collection instrument.

DATES: Comments must be submitted on or before February 24, 2000.

FOR FURTHER INFORMATION CONTACT: For a copy of the ICR contact Sandy Farmer at EPA by phone at (202) 260–2740, by E-Mail at Farmer.Sandy@epamail.epa.gov or download off the Internet at *http://www.epa.gov/icr* and refer to EPA ICR No. 1765.02. For technical questions about the ICR contact Mark Morris at (919) 541–5416.

SUPPLEMENTARY INFORMATION:

Title: Reporting and Recordkeeping Requirements for National Volatile Organic Compound Emission Standards for Automobile Refinish Coatings (OMB Control No. 2060–0353; EPA ICR No. 1765.02), expiring March 31, 2000. This is a request for extension of a currently approved collection.

Abstract: The information collection includes initial and periodic reporting necessary for the EPA to ensure compliance with Federal standards for volatile organic compounds in automobile refinish coatings. Respondents are manufacturers and importers of automobile refinish

coatings and coating components. Responses to the collection are mandatory under 40 CFR part 59, subpart B–National Volatile Organic Compound Emission Standards for Automobile Refinish Coatings.

The information collection includes initial and periodic reporting necessary for the EPA to ensure compliance with the promulgated federal rule for automobile refinish coatings. The rule will be enforced through random sampling of coatings to determine VOC content. All manufacturers and importers of coatings and coating components subject to this rule must submit an initial report. The initial report must include the name and mailing address of the manufacturer or importer. The rule requires that containers of all subject automobile refinish coatings and coating components display the date of manufacture or a code indicating the date of manufacture. All manufacturers and importers of subject coatings and coating components must submit an explanation of all date codes used on automobile refinish coating and coating component containers. Date code explanations can be submitted with the initial report. Thereafter, respondents must submit explanations of any new date codes within 30 days of their first use. The EPA is required under section 183(e) of the Clean Air Act (Act) to regulate VOC emissions from the use of consumer and commercial products. Pursuant to section 183(e)(3), the EPA published a list of consumer and commercial products and a schedule for their regulation (60 FR 15264). Automobile refinish coatings were included in Group 1 of the list, and the standards for such coatings were promulgated on September 11, 1998 (63 FR 48806).The reports required under the rule enable the EPA to identify all coating and coating component manufacturers and importers in the United States, and to determine which coatings and coating components are subject to the rule based on dates of manufacture. Agency enforcement personnel will use the information collected to identify manufacturers and importers subject to the rule and to determine which coatings and coating components are subject to the rule by dates of manufacture.

All information submitted to the EPA for which a claim of confidentiality is made will be safeguarded according to the Agency policies set forth in 40 CFR part 2, subpart B—Confidentiality of Business 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. The **Federal Register** document required under 5 CFR 1320.8(d), soliciting comments on this collection of information was published on August 27, 1999 (64 FR 46906); no comments were received.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 2.2 hours per response. 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.

Respondents/Affected Entities: Manufacturers and importers of coatings/components for Automobile Refinishing.

Estimated Number of Respondents: 10.

Frequency of Response: Annual.

Estimated Total Annual Hour Burden: 22 hours.

Estimated Total Annualized Capital, Operating/Maintenance Cost Burden: $0.

Send comments 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 to the following addresses. Please refer to EPA ICR No. 1765.02 and OMB Control No. 2060–0353 in any correspondence. Ms. Sandy Farmer, U.S. Environmental Protection Agency, Office of Environmental Information, Collection Strategies Division (2822), 1200 Pennsylvania, NW, Washington, DC 20460; and Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for EPA, 725 17th Street, NW, Washington, DC 20503.

Dated: January 19, 2000.

Oscar Morales,

Director, Collection Strategies Division.

[FR Doc. 00–1738 Filed 1–24–00; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6528–4]

Board of Scientific Counselors, Executive Committee Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, as amended (5 U.S.C., App. 2) notification is hereby given that the Environmental Protection Agency, Office of Research and Development (ORD), Board of Scientific Counselors (BOSC), will hold an Executive Committee Meeting.

DATES: The meeting will be held on February 9–10, 2000. On Wednesday, February 9, the meeting will begin at 9 a.m., and will recess at 4:30 p.m. On Thursday, February 10, the meeting will reconvene at 8:45 a.m. and adjourn at approximately 1 p.m. All times noted are Eastern Time.

ADDRESSES: The meeting will be held at the Washington Monarch Hotel, 2401 M Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Shirley R. Hamilton, Designated Federal Officer, U.S. Environmental Protection Agency, Office of Research and Development, NCERQA (MC 8701R), 401 M Street, SW., Washington, DC 20460, (202) 564–6853.

SUPPLEMENTARY INFORMATION: Agenda items will include, but not limited to: Discussion on ORD's Particulate Matter$^{2.5}$ Research Program and BOSC subcommittee Draft Reports on Particulate Matter, and SAB and BOSC subcommittee Review of ORD's Science to Achieve Results (STAR) Program. Anyone desiring a draft BOSC agenda may fax their request to Shirley R. Hamilton, (202) 565–2444. The meeting is open to the public. Any member of the public wishing to make a presentation at the meeting should contact Shirley Hamilton, Designated Federal Officer, Office of Research and Development (8701R), 1200 Pennsylvania Avenue, NW., Washington , DC 20460; or by telephone at (202) 564–6853. In general, each individual making an oral presentation will be limited to a total of three minutes.

Dated: January 18, 2000.

John C. Puzak,

Acting Director, National Center for Environmental Research and Quality Assurance.

[FR Doc. 00–1665 Filed 1–24–00; 8:45 am]

BILLING CODE 6560–50–M

ENVIRONMENTAL PROTECTION AGENCY

[PB–402404–CN; FRL–6490–1]

Lead-Based Paint Activities in Target Housing and Child-Occupied Facilities; Cherokee Nation Authorization Application

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: On November 19, 1999, the Cherokee Nation submitted an application for EPA approval to administer and enforce training and certification requirements, training program accreditation requirements, and work practice standards for lead-based paint activities in target housing and child-occupied facilities under section 402 of the Toxic Substances Control Act (TSCA). This notice announces the receipt of the Cherokee Nation's application, and provides a 45–day public comment period and an opportunity to request a public hearing on the application.

DATES: Comments, identified by docket control number PB–402404–CN, must be received on or before March 10, 2000. In addition, a public hearing request may be submitted on or before March 10, 2000.

ADDRESSES: Comments and the public hearing request may be submitted by mail, electronically, or in person. Please follow the detailed instructions for each method as provided in Unit I. of the **SUPPLEMENTARY INFORMATION.** To ensure proper receipt by EPA, it is imperative that you identify docket control number PB–402404–CN in the subject line on the first page of your response.

FOR FURTHER INFORMATION CONTACT: Jeffrey Robinson, Regional Lead Coordinator, Environmental Protection Agency, Region VI, 6PD–T, 1445 Ross Avenue, Suite 1200, Dallas, TX 75202–2733. Telephone: 214–665–7577, e-mail address: robinson.jeffrey@epamail.epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. This action may, however, be of interest to firms and individuals engaged in lead-based paint activities in the Cherokee Nation. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

B. How Can I Get Additional Information, Including Copies of this Document or Other Related Documents?

1. *Electronically.* You may obtain electronic copies of this document, and certain other related documents that might be available electronically, from the EPA Internet Home Page at http://www.epa.gov/. To access this document, on the Home Page select ''Laws and Regulations'' and then look up the entry for this document under the ''**Federal Register**--Environmental Documents.'' You can also go directly to the **Federal Register** listings at http://www.epa.gov/fedrgstr/.

2. *In person.* The Agency has established an official record for this action under docket control number PB–402404–CN. The official record consists of the documents specifically referenced in this action, this notice, the Cherokee Nation's authorization application, any public comments received during an applicable comment period, and other information related to this action, including any information claimed as Confidential Business Information (CBI). This official record includes the documents that are physically located in the docket, as well as the documents that are referenced in those documents. The public version of the official record does not include any information claimed as CBI. The public version of the official record, which includes printed, paper versions of any electronic comments submitted during an applicable comment period, is available for inspection from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The docket is located at the EPA Region VI Office, Environmental Protection Agency, Multi-Media Planning and Permitting Division, Toxics Section, 1445 Ross Avenue, Dallas, TX.

C. How and to Whom Do I Submit Comments and Hearing Requests?

You may submit comments and hearing requests through the mail, in person, or electronically. To ensure proper receipt by EPA, it is imperative that you identify docket control number PB–402404–CN in the subject line on the first page of your response.

1. *By mail.* Submit your comments and hearing requests to: Environmental Protection Agency, Region VI, Multi-Media Planning & Permitting Division, Toxics Section, 1445 Ross Avenue, Suite 1200, 6PD-T, Dallas, TX 75202–2733.

2. *In person or by courier.* Deliver your comments and hearing requests to: Environmental Protection Agency, Multi-Media Planning & Permitting Division, Toxics Section, 7th Floor, 1445 Ross Avenue, Dallas, TX. The regional office is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays.

3. *Electronically.* You may submit your comments and hearing requests electronically by e-mail to: ''steele.eva@epamail.epa.gov'' or mail your computer disk to the address identified above. Do not submit any information electronically that you consider to be CBI. Electronic comments and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data and hearing requests will also be accepted on standard disks in WordPerfect 6.1/8.0 or ASCII file format. All comments and hearing requests in electronic form must be identified by docket control number PB–402404–CN. Electronic comments and hearing requests may also be filed online at many Federal Depository Libraries.

D. How Should I Handle CBI Information That I Want to Submit to the Agency?

Do not submit any information electronically that you consider to be CBI. You may claim information that you submit to EPA in response to this document as CBI by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public version of the official record. Information not marked confidential will be included in the public version of the official record without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified under **FOR FURTHER INFORMATION CONTACT.**

II. Background

A. What Action is the Agency Taking?

The Cherokee Nation has submitted an application to EPA Region VI, under section 404 of TSCA and has requested approval of their lead-based paint training and certification program. This application will be reviewed by EPA within 180 days of receipt of a complete application. If EPA subsequently finds that the program does not meet all the requirements for approval of a Tribal program, EPA will work with the Tribe to correct any deficiencies in order to approve the program. If the deficiencies are not corrected, a notice of disapproval will be issued in the **Federal Register** and a Federal program will be implemented in the Cherokee Nation.

Pursuant to section 404(b) of TSCA (15 U.S.C. 2684(b)), EPA provides notice and an opportunity for a public hearing on a State or Tribal program application before approving the application. Therefore, by this notice EPA is soliciting public comment on whether the Cherokee Nation's application meets the requirements for EPA approval. This notice also provides an opportunity to request a public hearing on the application. If a hearing is requested and granted, EPA will issue a **Federal Register** notice announcing the date, time, and place of the hearing. EPA's final decision on the application will be published in the **Federal Register**.

B. What is the Agency's Authority for Taking this Action?

On October 28, 1992, the Housing and Community Development Act of 1992, Public Law 102–550, became law. Title X of that statute was the Residential Lead-Based Paint Hazard Reduction Act of 1992. That Act amended TSCA (15 U.S.C. 2601 *et seq.*) by adding Title IV (15 U.S.C. 2681-2692), entitled ''Lead Exposure Reduction.''

Section 402 of TSCA authorizes and directs EPA to promulgate final regulations governing lead-based paint activities in target housing, public and commercial buildings, bridges, and other structures. Those regulations are to ensure that individuals engaged in such activities are properly trained, that training programs are accredited, and that individuals engaged in these activities are certified and follow documented work practice standards. Under section 404 of TSCA, a State may seek authorization from EPA to administer and enforce its own lead-based paint activities program.

On August 29, 1996 (61 FR 45777) (FRL–5389–9), EPA promulgated final TSCA section 402/404 regulations governing lead-based paint activities in target housing and child-occupied facilities (a subset of public buildings). Those regulations are codified at 40 CFR part 745, and allow both States and Indian Tribes to apply for program authorization. Pursuant to section 404(h) of TSCA, EPA is to establish the Federal program in any State or Tribal Nation without its own authorized program in place by August 31, 1998.

States and Tribes that choose to apply for program authorization must submit a complete application to the appropriate Regional EPA Office for review. Those applications will be reviewed by EPA within 180 days of receipt of the complete application. To receive EPA approval, a State or Tribe must demonstrate that its program is at least as protective of human health and the environment as the Federal program, and provides for adequate enforcement (section 404(b) of TSCA, 15 U.S.C. 2684(b)). EPA's regulations (40 CFR part 745, subpart Q) provide the detailed requirements a State or Tribal program must meet in order to obtain EPA approval.

A State may choose to certify that its lead-based paint activities program meets the requirements for EPA approval, by submitting a letter signed by the Governor or Attorney General stating that the program meets the requirements of section 404(b) of TSCA. Upon submission of such certification letter, the program is deemed authorized. This authorization becomes ineffective, however, if EPA disapproves the application or withdraws the program authorization.

III. State Program Description Summary

The following summary of the Cherokee Nation's proposed program has been provided by the applicant:

On November 19, 1999, the Cherokee Nation applied to EPA for authorization to administer and enforce a Tribal Lead-Based Paint Program. The Cherokee Nation originally enacted on January 26, 1998, the Cherokee Nation Lead-Based Paint Management Act. L-98, 63 CNCA. Article 12, 1201, Section 601 *et seq.* (hereinafter known as the Act) This tribal statute designates the Department of Environmental Protection as the official Cherokee Nation agency for implementing the lead-based paint reduction and regulation program. This statute instructs the Department of Environmental Protection through the Cherokee Nation Environmental Protection Act to promulgate rules governing lead-based paint services, including lead-based paint contractor certification and accreditation of approved training providers and programs.

In addition to authority under the Cherokee Nation Environmental Code, the Act provides Cherokee Nation Environmental Protection with the power and duty to enforce the Act, rules, certification and accreditations. The Act authorizes the Cherokee Nation Department of Environmental Protection to issue, refuse to issue, renew, reactivate, reinstate, modify, suspend, or revoke certifications and accreditations.

The Cherokee Nation Lead-Based Paint Management Rules were promulgated on August 30, 1998. In general, 40 CFR part 745, subpart L and Oklahoma Administrative Code 252:110 were incorporated by reference when possible. The items not incorporated by reference are those that are otherwise mandated by the Act. Items pertaining to dates and deadlines were not incorporated by reference since the legislation provides those.

The scope of the Cherokee Nation Rules applies to all individuals and firms engaged in lead-based paint services in target housing and child-occupied facilities. It contains procedures and requirements for the accreditation of lead-based paint services training programs, procedures and requirements for the certification of individual and firms engaged in Lead-Based Paint services, and work practice standards for performing such services.

Accreditation is only available to educational institutions and government agencies offering ongoing and continuous lead-based paint training programs. Accreditation is available for both initial and refresher courses for inspector, risk assessor, supervisor, project designer and abatement worker. It is not available to training programs offering courses on a one time-only basis or for a period of less than 12 months. As an effort to maintain quality training, accreditation is not available for refresher courses only. If a training program wishes to receive accreditation for a refresher course, it must receive accreditation for the initial training course as well. The Cherokee Nation Lead Rules outline the accreditation timelines and the fees for initial and renewal accreditation. Renewal must be done on an annual basis.

Certification is required for all individuals and firms who perform or offer to perform Lead-Based Paint services in target housing and child-occupied facilities in the Cherokee Nation. Certification is available for inspector, risk assessor, supervisor, project designer, abatement worker, and firm. Only the Oklahoma Department of Environmental Quality (ODEQ)

accredited LBP training will be accepted for certification in the Cherokee Nation. Chapter 110 of ODEQ rules outlines the certification timelines and the fees for initial and renewal certification in the Cherokee Nation. Renewal must be done on an annual basis. All initial applicants for inspector, risk assessor, and supervisor in the Cherokee Nation must successfully complete the DEQ certification. All renewal applicants for inspector, risk assessor, and supervisor in the Cherokee Nation must complete the DEQ certification exam every third year.

The Cherokee Nation Lead Rules incorporate by reference the work practice standards from 40 CFR 745.227. These work practice standards must be followed when performing all lead-based paint activities. Work practice standards are outlined for inspection, lead hazard screen, risk assessment, abatement, collection and laboratory analysis of samples, composite dust sampling, and recordkeeping.

As required by 40 CFR 745.327, the Cherokee Nation will establish a Memorandum of Agreement with the Region VI, Regional Administrator. The Memorandum of Agreement will include provisions for the timely and appropriate referral to the Region VI, Regional Administrator for those criminal enforcement matters where the Cherokee Nation does not have the authority. The Agreement will also identify any enforcement agreements that may exist between the Cherokee Nation and any State.

IV. Federal Overfiling

Section 404(b) of TSCA makes it unlawful for any person to violate, or fail or refuse to comply with, any requirement of an approved State or Tribal program. Therefore, EPA reserves the right to exercise its enforcement authority under TSCA against a violation of, or a failure or refusal to comply with, any requirement of an authorized State or Tribal program.

V. Submission to Congress and the General Accounting Office

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 certain actions may take effect, the agency promulgating the action must submit a report, which includes a copy of the action, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this document in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects

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

Dated: January 6, 2000.

Carl E. Edlund,

Director, Multi-Media Planning & Permitting Division, Region VI.

[FR Doc. 00–1739 Filed 1–24–00; 8:45 am]

BILLING CODE 6560–50–F

FARM CREDIT ADMINISTRATION

Farm Credit Administration Board; Amendment to Sunshine Act Meeting

AGENCY: Farm Credit Administration.

SUMMARY: Pursuant to the Government in the Sunshine Act (5 U.S.C. 552b(e)(3)), the Farm Credit Administration gave notice on January 10, 2000 (65 FR 1389) of the regular meeting of the Farm Credit Administration Board (Board) scheduled for January 13, 2000. We then gave notice on January 12, 2000 (65 FR 1892) of the regular meeting cancellation and scheduling of a special meeting on January 27, 2000. This notice is to amend the original agenda for the upcoming special meeting.

DATE AND TIME: The special meeting of the Board will be held at the offices of the Farm Credit Administration in McLean, Virginia, on January 27, 2000, from 9:00 a.m. until such time as the Board concludes its business.

FOR FURTHER INFORMATION CONTACT: Vivian L. Portis, Secretary to the Farm Credit Administration Board, (703) 883–4025, TDD (703) 883–4444.

ADDRESSES: Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090.

SUPPLEMENTARY INFORMATION: This meeting of the Board is open to the public (limited space available). In order to increase the accessibility to Board meetings, persons requiring assistance should make arrangements in advance. The agenda for January 27, 2000, is amended to read as follows:

OPEN SESSION

A. Approval of Minutes
  —December 9, 1999 (Open and Closed)
B. Reports
  1. Farm Credit Administration's Y2K Status Report
  2. Y2K Status Report (Systemwide Level)
C. New Business
  Regulations
  —Termination of Farm Credit Status-Proposed Rule; Supplemental and Extension of comment period (12 CFR Part 611)

Dated: January 21, 2000.

Vivian L. Portis,

Secretary, Farm Credit Administration.

[FR Doc. 00–1833 Filed 1–21–00; 2:36 pm]

BILLING CODE 6705–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting

DATE . TIME: Thursday, January 27, 2000 at 10:00 a.m.

PLACE: 999 E Street, NW., Washington, DC (Ninth Floor)

STATUS: This meeting will be open to the public. The following item has been added to the agenda. Express Advocacy Rule (11 CFR 100.22).

PERSON TO CONTACT FOR INFORMATION: Ron Harris, Press Officer, Telephone (202) 694–1220.

Mary W. Dove,

Acting Secretary.

[FR Doc. 00–1759 Filed 1–21–00; 11:00 am]

BILLING CODE 6715–01–M

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 February 7, 2000.

A. Federal Reserve Bank of Chicago (Phillip Jackson, Applications Officer) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. Edwin Henry Eichler, Pigeon, Michigan; to acquire additional voting shares of Bay Port Financial Corporation, Bay Port, Michigan, and thereby indirectly acquire voting shares

of Bay Port State Bank, Bay Port, Michigan.

B. Federal Reserve Bank of Kansas City (D. Michael Manies, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198–0001:

1. Dan Howard Galbraith, Lawrence, Kansas, and Jan Louise Galbraith, Tulsa, Oklahoma; to acquire voting shares of Second Century Financial Corporation, Perry, Kansas, and thereby indirectly acquire voting shares of The Bank of Perry, Perry, Kansas.

Board of Governors of the Federal Reserve System, January 19, 2000.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 00–1694 Filed 1–24–00; 8:45 am]

BILLING CODE 6210–01–P

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 (12 U.S.C. 1843). 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 February 17, 2000.

A. Federal Reserve Bank of Richmond (A. Linwood Gill, III, Assistant Vice President) 701 East Byrd Street, Richmond, Virginia 23261–4528:

1. BB&T Corporation, Winston-Salem, North Carolina; to merge with Hardwick Holding Company, Dalton, Georgia, and thereby indirectly acquire voting shares of Hardwick Bank & Trust Company, Dalton, Georgia, and First National Bank of Northwest Georgia, Calhoun, Georgia.

In connection with this proposal, BB&T Corporation requests permission to exercise an option to acquire up to 19.9 percent of the voting securities of Hardwick Holding Company under certain circumstances.

Board of Governors of the Federal Reserve System, January 19, 2000.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 00–1695 Filed 1–24–00; 8:45 am]

BILLING CODE 6210–01–P

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 February 7, 2000.

A. Federal Reserve Bank of Atlanta (Lois Berthaume, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303–2713:

1. Birthright, Incorporated, Montgomery, Alabama; to engage de novo through its subsidiary, Jackson, Shanklin, & Sonia Securities, LLC, New Orleans, Louisiana, in securities brokerage activities, pursuant to § 225.28(b)(7)(i) of Regulation Y.

B. Federal Reserve Bank of San Francisco (Maria Villanueva, Consumer Regulation Group) 101 Market Street, San Francisco, California 94105–1579:

1. Wells Fargo & Company, San Francisco, California; to acquire Ragen MacKenzie Group Incorporated, Seattle, Washington, and thereby engage in providing financial and investment advisory services, pursuant to § 225.28(b)(6) of Regulation Y; providing securities brokerage, riskless principal, private placement, and other agency transactional services, pursuant to § 225.28(b)(7) of Regulation Y; underwriting and dealing in government obligations and money market instruments in which state member banks may underwrite and deal under 12 U.S.C. 335 and 24; and investing and trading activities other than in bank ineligible securities, pursuant to § 225.28(b)(8) of Regulation Y; and in underwriting and dealing in all types of debt and equity securities, other than interests in open-end investment companies, see J.P. Morgan & Co., Inc., et al., 75 Fed. Res. Bull. 192 (1989).

Board of Governors of the Federal Reserve System, January 19, 2000.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 00–1696 Filed 1–24–00; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Project:

Title: National Child Abuse and Neglect Data System.

OMB No.: 0980–0256.

Description: The Administration on Children, Youth and Families established the National Child Abuse and Neglect Data System (NCANDS) to respond to the 1996 amendments (Pub. L. 93–247) to the Child Abuse Prevention and Treatment Act [42 U.S.C. 5101 *et seq.*], as amended, which called for the creation of a coordinated national data collection and analysis program, both universal and case specific in scope, to examine standardized data on false, unfounded, or unsubstantiated reports. In 1988, ACYF embarked on a collaborative effort with the States to develop a voluntary national data collection and analysis program, to collect, compile,

and make available State child abuse and neglect reporting information from child protective services agencies in the 50 States, the District of Columbia, and the territories.

NCANDS has two components. The Summary Data Component (SDC) survey collects aggregate data on key child protective services statistics. The Detailed Case Data Component (DCDC) collects case-level data on each child reported as an alleged victim of child maltreatment. The Children's Bureau is currently preparing the 9th annual report based on the NCANDS data.

In 1996, the Child Abuse Prevention and Treatment Act was amended by Public Law 104–235 to require that any State receiving the Basic State Grant work with the Secretary of the Department of Health and Human Services (DHHS) to provide specific data on child maltreatment to the extent practicable. The legislation specified the following data elements.

(1) The number of children who were reported to the State during the year as abused or neglected.

(2) Of the number of children described in paragraph (1), the number with respect to whom such reports were—

(A) substantiated;

(B) unsubstantiated; or

(C) determined to be false.

(3) Of the number of children described in paragraph (2)—

(A) the number that did not receive services during the year under the State program funded under this section or an equivalent State program;

(B) the number that received services during the year under the State program funded under this section or an equivalent State program; and

(C) the number that were removed from their families during the year by disposition of the case.

(4) The number of families that received preventive services from the State during the year.

(5) The number of deaths in the State during the year resulting from child abuse or neglect.

(6) Of the number of children described in paragraph (5), the number of such children who were in foster care.

(7) The number of child protective services workers responsible for the intake and screening of reports filed in the previous year.

(8) The agency response time with respect to each such report with respect to initial investigation of reports of child abuse or neglect.

(9) The response time with respect to the provision of services to families and children where an allegation of abuse or neglect has been made.

(10) The number of child protective services workers responsible for intake, assessment, and investigation of child abuse and neglect reports relative to the number of reports investigated in the previous year.

(11) The number of children reunited with their families or receiving family preservation services that, within five years, result in subsequent substantiated reports of child abuse and neglect, including the death of the child.

(12) The number of children for whom individuals were appointed by the court to represent the best interests of such children and the average number of out-of-court contacts between such individuals and children.

The reporting requirements specified in CAPTA, as amended, have been met through recent revisions to the SDC. After discussions with the States and pilot testing with a small number of States, the reporting requirements are being integrated into the current DCDC. With this modification to the NCANDS, States will be able to annually report on child maltreatment using either the SDC or the DCDC. States that participate in the DCDC will no longer need to additionally respond to the SDC Survey in order to meet the annual reporting requirements.

The information collected by NCANDS will be used to understand better the experiences of children and families served by CPS and to guide policy and program development at the national and local levels. An annual report, entitled Child Maltreatment, will continue to be published. Data collected through the NCANDS will also be used to support the Department in responding to the requirements of the Government Performance and Results Act; publishing State data in the annual report to Congress on child welfare outcomes; and monitoring States through the Child and Family Services Review process.

Respondents: State, Local or Tribal Govt.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
DCDC	30	1	130	3900
SDC	22	1	40	880

Estimated Total Annual Burden Hours: 4780.

In compliance with the requirements of Section 3506(c)(2)(A) the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above.

Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Information Services, 370 L'Enfant Promenade, S.W., Washington, D.C. 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection.

The Department specifically requests comments 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) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: January 18, 2000.

Bob Sargis,

Acting Reports Clearance Officer.

[FR Doc. 00–1670 Filed 1–24–00; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; 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 Nursing Research Initial Review Group.

Date: February 17–18, 2000.

Time: February 17, 2000, 8:30 AM to 5:00 PM.

Agenda: To review and evaluate grant applications.

Place: Building 45, Room 3AN–18B, MD 20892.

Time: February 18, 2000, 8:30 AM to 5:00 PM.

Agenda: To review and evaluate grant applications.

Place: Building 45, Room 3AN–18B, MD 20892.

Contact Person: Mary J. Stephens-Frazier Scientific Review Administrator, National Institute of Nursing Research, National Institutes of Health, Natcher Building, Room 3AN32, 45 Center Drive, Bethesda, MD 20892, (301) 594–5971.

(Catalogue of Federal Domestic Assistance Program Nos. 93.361, Nursing Research, National Institutes of Health HHS)

Dated: January 18, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–1685 Filed 1–24–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Neurological Sciences and Disorders A, February 17, 2000, 7:30 p.m. to February 19, 2000, 5:00 p.m., Ramada Inn Rockville, 1775 Rockville Pike, Rockville, MD 20852 which was published in the **Federal Register** on January 11, 2000, 65 FR 1642.

The meeting will be held February 17, 2000, 8:00 a.m. to February 18, 2000, 5:00 p.m. The meeting will is closed to the public.

Dated: January 18, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Cmte. Policy.

[FR Doc. 00–1686 Filed 1–24–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; 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 of Neurological Disorders and Stroke Special Emphasis Panel.

Date: January 27, 2000.

Time: 2:30 PM to 4:30 PM.

Agenda: To review and evaluate contract proposals.

Place: Neuroscience Center, National Institutes of Health, 6001 Executive Blvd., Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Philip F. Wiethorn, Scientific Review Administrator, Scientific Review Branch, NINDS/NIH/DHHS, Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–496–9223.

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. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: January 18, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–1687 Filed 1–24–00; 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; Meeting of the National Reading Panel

Notice is hereby given of the Washington D.C. area meeting of the National Reading Panel. The meeting will be held on Monday, January 31, 2000, from 8:00 AM to 6:00 PM. The meeting location is the National Institutes of Health, Building 31, C Wing-Conference Room 6, 9000 Rockville Pike, Bethesda, Maryland, 20816. The entire meeting will be open to the public.

The National Reading Panel was requested by Congress and created by the Director of the National Institute of Child Health and Human Development in consultation with the Secretary of Education. The Panel is studying the effectiveness of various approaches to teaching children how to read and report on the best ways to apply these findings in classrooms and at home. Its members include prominent reading researchers, teachers, child development experts, leaders in elementary and higher education, and parents. The Chair of the Panel is Dr. Donald N. Langenberg, Chancellor of the University System of Maryland.

The Panel is building on the findings presented by the National Research Council's Committee on the Prevention of Reading Difficulties in Young Children. Based on these findings and the National Reading Panel's own review of the literature, the Panel will: determine the readiness for application in the classroom of the results of these research studies; identify appropriate means to rapidly disseminate this information to facilitate effective reading instruction in the schools; and identify gaps in the knowledge base for reading instruction and the best ways to close these gaps.

The agenda for this meeting will include discussion and final acceptance of the reports by The National Reading Panel. A period of time will be set aside at approximately 3:00 PM on Monday, January 31 for members of the public to address the Panel and express their views regarding the Panel's mission.

Individuals desiring an opportunity to speak before the Panel should address their requests to F. William Dommel, Jr., Executive Director, National Reading Panel, c/o Mr. Patrick Riccards and either mail them to the Widmeyer-Baker Group, 1825 Connecticut Avenue, NW, Fifth Floor, Washington, D.C. 20009, or e-mail them to patrickr@twog.com, or fax them to 202–667–0902. Requests for addressing the Panel should be received by January 27, 2000. Panel business permitting, each public speaker will be allowed five minutes to present his or her views. In the event of a large number of public speakers, the Panel Chair retains the option to further limit the presentation time allowed to each. Although the time permitted for oral presentations will be brief, the full text of all written comments submitted to the Panel will be made available to the Panel members for consideration.

For further information contact Mr. Patrick Riccards at 202–667–0901. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact Mr. Patrick Riccards by January 27, 2000.

Dated: January 13, 2000.

Duane Alexander,

Director, National Institute of Child Health and Human Development.

[FR Doc. 00–1688 Filed 1–24–00; 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 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: Center for Scientific Review Special Emphasis Panel.
Date: January 31, 2000.
Time: 3:00 PM to 3:30 PM.
Agenda: To review and evaluate grant applications.
Place: NIH, Rockledge 2, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: David M. Monsees, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3199, MSC 7770, Bethesda, MD 20892, (301) 435–0684, monseesd@drg,nih.gov.

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 Empahsis Panel.
Date: February 1, 2000.
Time: 2:00 PM to 3:30 PM.
Agenda: To review and evaluate grant applications.
Place: NIH, Rockledge 2, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Timothy J. Henry, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4180, MSC 7808, Bethesda, MD 20892, (301) 435–1147.

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: February 7–8, 2000.
Time: 8:00 AM to 4:00 PM.
Agenda: To review and evaluate grant applications.
Place: Holiday, Inn, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.
Contact Person: Lee S. Mann, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3186, MSC 7848, Bethesda, MD 20892, (301) 435–0677.

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: February 7–8, 2000.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: One Washington Circle Hotel, Conference Center, One Washington Circle, Washington, DC 20037.
Contact Person: Jay Cinque, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5186, MSC 7846, Bethesda, MD 20892, (301) 435–1252.

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: Musculoskeletal and Dental Sciences Initial Review Group, General Medicine B Study Section.
Date: February 7–8, 2000.
Time: 8 a.m. to 4:30 p.m.
Agenda: To review and evaluate grant applications.
Place: Georgetown Holiday Inn, Kaleidoscope Room, 2101 Wisconsin Ave., NW, Washington, DC 20007.
Contact Person: Shirley Hilden, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4218, MSC 7814, Bethesda, MD 20892, (301) 435–1198.

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: Health Promotion and Disease Prevention Initial Review Group, Alcohol and Toxicology Subcommittee 4.
Date: February 7–8, 2000.
Time: 8 a.m. to 6 p.m.
Agenda: To review and evaluate grant applications.
Place: Chevy Chase Holiday Inn, 5520 Wisconsin Ave., Chevy Chase, MD 20815.
Contact Person: Mushtaq A. Khan, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2176, MSC 7818, Bethesda, MD 20892, (301) 435–1778, khanm@csr.nih.gov.

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: Surgery, Radiology and Bioengineering Initial Review Group, Surgery and Bioengineering Study Section.
Date: February 7–8, 2000.
Time: 8 a.m. to 4 p.m.
Agenda: To review and evaluate grant applications.
Place: Double Tree Hotel, 1750 Rockville Pike, Rockville, MD 20852.
Contact Person: Teresa Nesbitt, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5118, MSC 7854, Bethesda, MD 20892, (301) 435–1172, nesbittt@csr.nih.gov.

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: Health Promotion and Disease Prevention Initial Review Group, Epidemiology and Disease Control Subcommittee 2.
Date: February 7–8, 2000.
Time: 8:30 AM to 6:00 PM.
Agenda: To review and evaluate grant applications.
Place: Holiday Inn, Select, 480 King Street, Old Town Alexandria, VA 22314.
Contact Person: David M. Monsees, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3150, MSC 7848, Bethesda, MD 20892, (301) 435–0684, monseesd@drg.nih.gov.

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: February 7–8, 2000.
Time: 8:30 AM to 5:00 PM.
Agenda: To review and evaluate grant applications.

Place: The Governor's House Hotel, 1615 Rhode Island Avenue, N.W., Washington, DC 20036.

Contact Person: Joseph Kimm, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5178 MSC 7844, Bethesda, MD 20892, (301) 435–1249.

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: February 7, 2000.

Time: 1:00 PM to 3:00 PM.

Agenda: To review and evaluate grant applications.

Place: Double Tree Hotel, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Teresa Nesbitt, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5110 MSC 7854, Bethesda, MD 20892, (301) 435–1172.

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: January 18, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00–1684 Filed 1–24–00; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Privacy Act of 1974; Altered System of Records

AGENCY: National Institutes of Health (NIH), HHS.

ACTION: Notification of altered system of records.

SUMMARY: In accordance with the requirements of the Privacy Act, the National Institutes of Health is publishing a notice of a proposal to alter the system of records 09–25–0165, ''National Institutes of Health Loan Repayment Program HHS/NIH/OD.'' The main purposes of the major alteration include: (1) Addition of new programs, (2) change of the system name to 09–25–0165, ''National Institutes of Health Office of Loan Repayment and Scholarship (OLRS) Records System, HHS/NIH/OD,'' (3) the addition of applicants, participants and individuals interested in scholarship or loan repayment programs of the NIH to ''Categories of Individuals Covered by the System;'' and (4) two new and two modified routine uses to reflect the added programs.

DATES: The NIH invites interested parties to submit comments on the proposed uses on or before February 24, 2000. The NIH has sent a Report of the Altered System to the Congress and to the Office of Management and Budget (OMB) on January 19, 2000. The alteration of this system of records will be effective 40 days from the date submitted to the OMB, unless NIH receives comments which would result in a contrary determination.

ADDRESSES: Please address comments to: NIH Privacy Act Officer, 6011 Executive Boulevard, Room 601, MSC 7669, Rockville, MD 20852, (301) 496–2832. (This is not a toll-free number). Comments received will be available for inspection at this same address from 9 a.m. to 3 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Marc S. Horowitz, J.D., Director, Office of Loan Repayment and Scholarship, National Institutes of Health, 7550 Wisconsin Avenue, Room 604, Bethesda, MD 20814–9121, (800) 528–7689 (toll-free number).

SUPPLEMENTARY INFORMATION: Sections 487A–C, and E of the Public Health Service (PHS) Act (42 U.S.C. 288–1, 2, 3, and 5), as amended, authorizes the Secretary to implement and establish programs of entering into agreements with appropriately qualified health professionals under which such health professionals agree to conduct research, as employees of the NIH or to conduct research with respect to contraception or infertility as employees or affiliates of the National Institute of Child Health and Human Development (NICHD) Intramural Laboratories and NICHD Extramural sites, in consideration of the Federal Government agreeing to repay, for each year of service, not more than $35,000 of the principal and interest of the educational loans of such health professionals. These programs include the following: (1) The NIH AIDS Research Loan Repayment Program, (2) the NIH General Research Loan Repayment Program, (3) the NIH Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds, and (4) the Contraceptive and Infertility Research Loan Repayment Program.

Section 487D of the PHS Act (42 U.S.C 288–4) authorizes a scholarship program for individuals who agree to pursue, as undergraduates, academic programs appropriate for careers in professions needed by the NIH and who agree to serve as NIH employees in exchange for receipt of the scholarship. This program is known as the NIH Undergraduate Scholarship Program (UGSP) for Individuals from Disadvantaged Backgrounds.

The NIH is recommending this proposed major alteration to expand system coverage for three new programs: (1) The General Research Loan Repayment Program, (2) the Contraceptive and Infertility Research Loan Repayment Program, and (3) the Undergraduate Scholarship Program. The proposed name change for this system of records to ''National Institutes of Health (NIH) Office of Loan Repayment and Scholarship (OLRS) Records System, HHS/NIH/OD,'' is recommended to reflect the addition of records authorized by Sections 487B–D of the Public Health Service Act (42 U.S.C. 288–2, 288–3, and 288–4), as added June 10, 1993, by Pub. L. 103–43. NIH is proposing to change the ''Categories of Individuals Covered by the System'' to include applicants, participants and individuals interested in scholarship or loan repayment programs of the NIH. The proposed ''Categories of Records in the System'' adds (a) program application and associated forms; (b) academic and research progress reports (which include related data, correspondence, and professional performance information consisting of continuing education, performance awards, and adverse or disciplinary actions); (c) financial data, including loan balances, deferment, forbearance, and repayment/delinquent/default status information; (d) commercial credit reports; and (e) educational data including tuition and other expenses, and academic programs and class standing.

In addition, two new routine uses and two modified routine uses are proposed: (a) New Routine Use No. 16—the disclosure of identifying information to: Designated coordinators at schools participating in the scholarship program for the purpose of determining educational expenses and resulting levels of scholarship support, and guiding and informing these recipients about the nature of their professional service obligation to the NIH; and to medical and graduate schools, attended by UGSP scholars who have elected to defer their service obligation, for the purpose of determining their academic status and verifying the validity of the NIH UGSP service deferment; (b) New Routine Use No. 17—the disclosure of records to Department contractors and subcontractors for the purpose of recruiting, screening, and matching health professionals for NIH

employment in qualified research positions under the NIH Loan Repayment and Scholarship Programs (LRSPs); (c) Modified Routine Use No. 8—the disclosure of identifying information to a consumer reporting agency (credit bureau) to obtain an applicant's or participant's commercial credit report to: (1) Establish his/her creditworthiness, (2) assess and verify his/her ability to repay debts owed to the Federal Government, and (3) determine and verify the eligibility of loans submitted for repayment; and (d) Modified Routine Use No. 15—the disclosure of information provided by a lender or educational institution to other Federal agencies, debt collection agents, and other third parties who are authorized to collect a Federal debt. The purpose of this disclosure is to identify an individual who is delinquent in loan or benefit payments owed to the Federal Government.

Only authorized users will have access to the records contained in the system. Authorized users include the following: system managers and their staffs, OLRS staff, financial, fiscal and records management personnel, legal personnel, computer personnel, and NIH contractors and subcontractors, all of whom are responsible for administering or monitoring the LRSPs. Access is limited to those individuals trained in accordance with Privacy Act procedures. Contractors will be required to maintain, and will also be required to ensure that subcontractors maintain confidentiality safeguards with respect to the records covered by this system.

The 09–25–0165 system notice was last published in the **Federal Register** on January 20, 1995. We are republishing the system notice in its entirety below to incorporate the proposed changes.

The following notice is written in the present tense, rather than the future tense, in order to avoid the unnecessary expenditure of public funds to republish the notice after the system has become effective.

Dated: January 14, 2000.

Anthony L. Itteilag,

Deputy Director for Management, National Institutes of Health.

09–25–0165

SYSTEM NAME:

''National Institutes of Health (NIH) Office of Loan Repayment and Scholarship (OLRS) Records System, HHS/NIH/OD.''

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

Office of Loan Repayment and Scholarship (OLRS), National Institutes of Health, 7550 Wisconsin Avenue, Rooms 604 & B1–16, Bethesda, Maryland 20814–9121.

See Appendix I for a listing of NIH offices responsible for administration of the NIH LRSPs. Write to the System Manager at the address below for the address of any Federal Records Center where records from this system may be stored.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who have applied for, who have been approved to receive, who are receiving, or who have received funds under the NIH LRSPs; and individuals who are interested in participation in the NIH LRSPs.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name, address, Social Security number (SSN), program application and associated forms, service pay-back obligations, employment data, professional performance and credentialing history of licensed health professionals; personal, professional, and demographic background information; academic and research progress reports (which include related data, correspondence, and professional performance information consisting of continuing education, performance awards, and adverse or disciplinary actions); standard school budgets; financial data including loan balances, deferment, forbearance, and repayment/delinquent/default status information; commercial credit reports; educational data including tuition and other related educational expenses; educational data including academic program and status; employment status verification (which includes certifications and verifications of continuing participation in qualified research); Federal, State and local tax related information, including copies of tax returns.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Sections 487A–E (42 U.S.C. 288–1, 288–2, 288–3, 288–4, 288–5) of the PHS Act, as amended, authorize the NIH to establish and implement (a) multiple programs of educational loan repayment for qualified health professionals who agree to conduct research, subject to each program's specific statutory requirements; and (b) a scholarship program for undergraduates who agree to pursue academic programs appropriate for careers in professions needed by the NIH and who agree to serve as NIH employees. The provisions of subpart III of part D of title III of the PHS Act (42 U.S.C. 254l *et seq.*), as amended, governing the National Health Service Corps (NHSC) loan repayment and scholarship programs, are incorporated in these authorities, except as inconsistent with Sections 487A–E. The Internal Revenue Code at 26 U.S.C. 6109 requires the provision of the SSN for the receipt of loan repayment and scholarship funds under the NIH LRSPs. The Federal Debt Collection Procedures Act of 1990, Public Law 101–647 (28 U.S.C. 3201) requires that an individual who has a judgement lien against his/her property for a debt to the United States shall not be eligible to receive funds directly from the Federal Government in any program, except funds to which the debtor is entitled as a beneficiary, until the judgement is paid in full or otherwise satisfied. Thus, individuals applying to the LRSPs are required to disclose in their applications whether they have a judgement lien against them arising from a debt to the United States.

PURPOSE(S):

These records are used to: (1) Identify and select applicants for the NIH LRSPs; (2) monitor loan repayment and scholarship activities, such as payment tracking, academic status and performance, research and related services, deferment of service obligation, and default; and (3) assist NIH officials in the collection of overdue debts owed under the NIH LRSPs. Records may be transferred to System No. 09–15–0045, ''Health Resources and Services Administration Loan Repayment/Debt Management Records System, HHS/HRSA/OA,'' for debt collection purposes when NIH officials are unable to collect overdue debts owed under the NIH LRSPs.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USE:

1. Disclosure may be made to a Member of Congress or to a Congressional staff member in response to an inquiry of the Congressional office made at the written request of the constituent about whom the record is maintained.

2. The Department of Health and Human Services (HHS) may disclose information from this system of records to the Department of Justice, or to a court or other tribunal when: (a) HHS or any component thereof; or (b) any HHS employee in his or her official capacity; or (c) any HHS employee in his or her individual capacity where the Department of Justice (or HHS, where it is authorized to do so) has agreed to represent the employee; or (d) the

United States Government, is a party to litigation or has an interest in such litigation, and by careful review, HHS determines that the records are both relevant and necessary to the litigation and the use of such records by the Department of Justice is therefore deemed by HHS to be for a purpose that is compatible with the purpose for which the records were collected.

3. When a record on its face, or in conjunction with other records, indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule, or order issued pursuant thereto, disclosure may be made to the appropriate agency, whether Federal, foreign, State, local, or tribal, or other public authority responsible for enforcing, investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation, or order issued pursuant thereto, if the information disclosed is relevant to any enforcement, regulatory, investigative or prosecutive responsibility of the receiving entity.

4. The NIH may disclose records to HHS contractors and subcontractors for the purpose of collecting, compiling, aggregating, analyzing, or refining records in the system. Contractors maintain, and are also required to ensure that subcontractors maintain, Privacy Act safeguards with respect to such records.

5. The NIH may disclose information from this system of records to private parties such as present and former employers, references listed on applications and associated forms, other references and educational institutions. The purpose of such disclosures is to evaluate an individual's professional and or academic accomplishments and plans, performance, credentials, and educational background, and to determine if an applicant is suitable for participation in the NIH LRSPs.

6. The NIH will disclose information from this system of records to a consumer reporting agency (credit bureau) to obtain an applicant or participant's commercial credit report for the following purposes: (1) To establish his/her creditworthiness; (2) To assess and verify his/her ability to repay debts owed to the Federal Government; and (3) To determine and verify the eligibility of loans submitted for repayment. Disclosures are limited to the individual's name, address, Social Security number and other information necessary to identify him/her; the funding being sought or amount and status of the debt; and the program under which the applicant or claim is being processed.

7. The NIH may disclose from this system of records a delinquent debtor's or a defaulting participant's name, address, Social Security number, and other information necessary to identify him/her; the amount, status, and history of the claim, and the agency or program under which the claim arose, as follows:

a. To another Federal agency so that agency can effect a salary offset for debts owed by Federal employees; if the claim arose under the Social Security Act, the employee must have agreed in writing to the salary offset.

b. To another Federal agency so that agency can effect an authorized administrative offset; i.e., withhold money, other than Federal salaries, payable to or held on behalf of the individual.

c. To the Treasury Department, Internal Revenue Service (IRS), to request an individual's current mailing address to locate him/her for purposes of either collecting or compromising a debt, or to have a commercial credit report prepared.

8. The NIH may disclose information from this system of records to another agency that has asked the HHS to effect a salary or administrative offset to help collect a debt owed to the United States. Disclosure is limited to the individual's name, address, Social Security number, and other information necessary to identify the individual, information about the money payable to or held for the individual, and other information concerning the offset.

9. The NIH may disclose to the IRS information about an individual applying for any NIH loan repayment or scholarship program authorized by the Public Health Service Act to find out whether the applicant has a delinquent tax account. This disclosure is for the sole purpose of determining the applicant's creditworthiness and is limited to the individual's name, address, Social Security number, other information necessary to identify him/her, and the program for which the information is being obtained.

10. The NIH may report to the IRS, as taxable income, the written-off amount of a debt owed by an individual to the Federal Government when a debt becomes partly or wholly uncollectible, either because the time period for collection under statute or regulations has expired, or because the Government agrees with the individual to forgive or compromise the debt.

11. The NIH may disclose to debt collection agents, other Federal agencies, and other third parties who are authorized to collect a Federal debt, information necessary to identify a delinquent debtor or a defaulting participant. Disclosure will be limited to the individual's name, address, Social Security number, and other information necessary to identify him/her; the amount, status, and history of the claim, and the agency or program under which the claim arose.

12. The NIH may disclose information from this system of records to any third party that may have information about a delinquent debtor's or a defaulting participant's current address, such as a U.S. post office, a State motor vehicle administration, a professional organization, an alumni association, etc., for the purpose of obtaining the individual's current address. This disclosure will be strictly limited to information necessary to identify the individual, without any reference to the reason for the agency's need for obtaining the current address.

13. The NIH may disclose information from this system of records to other Federal agencies that also provide loan repayment or scholarship at the request of these Federal agencies in conjunction with a matching program conducted by these Federal agencies to detect or curtail fraud and abuse in Federal loan repayment or scholarship programs, and to collect delinquent loans or benefit payments owed to the Federal Government.

14. The NIH will disclose from this system of records to the Department of Treasury, IRS: (1) A delinquent debtor's or a defaulting participant's name, address, Social Security number, and other information necessary to identify the individual; (2) the amount of the debt; and (3) the program under which the debt arose, so that the IRS can offset against the debt any income tax refunds which may be due to the individual.

15. The NIH may disclose information provided by a lender or educational institution to other Federal agencies, debt collection agents, and other third parties who are authorized to collect a Federal debt. The purpose of this disclosure is to identify an individual who is delinquent in loan or benefit payments owed to the Federal Government and the nature of the debt.

16. The NIH will disclose records consisting of names, disciplines, current mailing addresses, and dates of scholarship support and dates of graduation of scholarship recipients to: (a) Designated coordinators at each school participating in the scholarship program for the purpose of determining educational expenses and resulting levels of scholarship support, and for the purpose of guiding and informing these recipients about the nature of their

service obligations to the NIH; and (b) medical and graduate schools, attended by UGSP scholars who have elected to defer their service obligation, for the purpose of determining their academic status and verifying the validity of the NIH UGSP service deferment.

17. The NIH may disclose records to HHS contractors and subcontractors for the purpose of recruiting, screening, and matching health professionals for NIH employment in qualified research positions under the NIH LRSPs. In addition, HHS contractors and subcontractors: (1) may disclose biographic data and information supplied by potential applicants (a) to references listed on application and associated forms for the purpose of evaluating the applicant's professional qualifications, experience, and suitability, and (b) to a State or local government medical licensing board and/or to the Federation of State Medical Boards or a similar nongovernment entity for the purpose of verifying that all claimed background and employment data are valid and all claimed credentials are current and in good standing; (2) may disclose biographic data and information supplied by references listed on application and associated forms to other references for the purpose of inquiring into the applicant's professional qualifications and suitability; and (3) may disclose professional suitability evaluation information to NIH officials for the purpose of appraising the applicant's professional qualifications and suitability for participation in the NIH LRSPs. Contractors maintain, and are also required to ensure that subcontractors maintain, Privacy Act safeguards with respect to such records.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

Disclosures pursuant to 5 U.S.C. 552a(b)(12): Disclosures may be made from this system to ''consumer reporting agencies'' as defined in the Federal Claims Collection Act of 1966, as amended (31 U.S.C. 3701(a)(3)). The purposes of these disclosures are: (1) To provide an incentive for debtors to repay delinquent debts to the Federal Government by making these debts part of their credit records, and (2) to enable NIH to improve the quality of loan repayment and scholarship decisions by taking into account the financial reliability of applicants, including obtaining a commercial credit report to assess and verify the ability of an individual to repay debts owed to the Federal Government. Disclosure of records will be limited to the individual's name, Social Security number, and other information necessary to establish the identity of the individual, the amount, status, and history of the claim, and the agency or program under which the claim arose.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained in file folders, file cards, microfiche and electronic media, including computer tape, discs, servers connected to local area networks, and Internet servers.

RETRIEVABILITY:

Records are retrieved by name, NIH Institutes and Centers, Social Security number, or other identifying numbers or characteristics.

SAFEGUARDS:

1. Authorized Users: Access to information is limited to authorized personnel in the performance of their duties. Authorized personnel include system managers and their staffs, NIH OLRS officials and staff, financial, fiscal and records management personnel, legal personnel, computer personnel, and NIH contractors and subcontractors—all of whom are responsible for administering the NIH LRSPs.

2. Physical Safeguards: Rooms where records are stored are locked when not in use. During regular business hours rooms are unlocked but are controlled by on-site personnel. Security guards perform random checks on the physical security of the storage locations after duty hours, including weekends and holidays.

3. Procedural and Technical Safeguards: A password is required to access the terminal and a data set name controls the release of data to only authorized users. All users of personal information in connection with the performance of their jobs (see Authorized Users, above) protect information from public view and from unauthorized personnel entering an unsupervised office. Data on local area network computer files is accessed by keyword known only to authorized personnel. Codes by which automated files may be accessed are changed periodically. This procedure also includes deletion of access codes when employees or contractors leave. New employees and contractors are briefed and the security department is notified of all staff members and contractors authorized to be in secured areas during working and nonworking hours. This list is revised as necessary. Individuals remotely accessing the secured areas of the OLRS Internet sites have separate accounts and passwords. Passwords are assigned by project staff and may include both alphabetic and non-alphabetic characters. These practices are in compliance with the standards of Chapter 45–13 of the HHS General Administration Manual, ''Safeguarding Records Contained in Systems of Records,'' supplementary Chapter PHS hf: 45–13, and the Department's Automated Information System Security Handbook.

RETENTION AND DISPOSAL:

Records are retained and disposed of under the authority of the NIH Records Control Schedule contained in NIH Manual Chapter 1743, Appendix 1—''Keeping and Destroying Records'' (HHS Records Management Manual, Appendix B–361), item 2300–537–1. Participant case files are transferred to a Federal Records Center one year after closeout and destroyed five years later. Closeout is the process by which it is determined that all applicable administrative actions and disbursements of benefits have been completed by the OLRS and service obligations have been completed by the participant. Applicant case files are destroyed three years after disapproval or withdrawal of their application. Appeal and litigation case files are destroyed six years after the calendar year in which the case is closed. Other copies of these files are destroyed two years after the calendar year in which the case is closed.

SYSTEM MANAGER AND ADDRESS:

Director, Office of Loan Repayment and Scholarship, National Institutes of Health, 7550 Wisconsin Avenue, Room 604, Bethesda, Maryland 20814–9121.

NOTIFICATION PROCEDURES:

To determine if a record exists, write to the System Manager listed above. A written request must contain the name and address of the requester, Social Security number, and his/her signature which is either notarized to verify his/her identity or includes a written certification that the requester is the person he/she claims to be and that he/she understands that the knowing and willful request or acquisition of records pertaining to an individual under false pretenses is a criminal offense subject to a $5,000 fine. In addition, the following information is needed: dates of enrollment in the NIH LRSPs and current enrollment status, such as pending application approval or approved for participation.

An individual who appears in person at a specific location seeking access to or disclosure of records relating to him/her shall provide his/her name, current address, Social Security number, dates of enrollment in an NIH loan repayment or scholarship program, and at least one piece of tangible identification, such as driver's license, passport, or voter registration card. Identification papers with current photographs are preferred but not required. If an individual has no identification papers but is personally known to an agency employee, such employees shall make a written record verifying the individual's identity. Where the individual has no identification papers, the responsible agency official shall require that the individual certify in writing that he/she is the individual who he/she claims to be and that he/she understands that the knowing and willful request or acquisition of a record concerning an individual under false pretenses is a criminal offense subject to a $5,000 fine. Since positive identification of the caller or sender cannot be established, telephone and electronic mail requests are not honored.

RECORD ACCESS PROCEDURES:

Write to the System Manager specified above to attain access to records and provide the same information as is required under the Notification Procedures. Requesters should also reasonably specify the record contents being sought. Individuals may also request an accounting of disclosures of their records, if any.

CONTESTING RECORD PROCEDURES:

Contact the System Manager specified above and reasonably identify the record, specify the information to be contested, the corrective action sought, and your reasons for requesting the correction, along with supporting information to show how the record is inaccurate, incomplete, untimely or irrelevant. The right to contest records is limited to information which is incomplete, irrelevant, incorrect, or untimely (obsolete).

RECORD SOURCE CATEGORIES:

Subject individual; participating lending and loan servicing institutions; educational institutions; other Federal agencies; consumer reporting agencies/credit bureaus; and third parties that provide references concerning the subject individual.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

Appendix I: System Locations

Office of Loan Repayment and Scholarship, National Institutes of Health, 7550 Wisconsin Avenue, Room 604, Bethesda, Maryland 20814–9121

Center for Information Technology, National Institutes of Health, Building 12A, Room 1011, 9000 Rockville Pike, Bethesda, Maryland 20892

Clinical Center, National Institutes of Health, 6100 Executive Boulevard, Room 3E01, Bethesda, MD 20892–7509

National Cancer Institute, National Institutes of Health, Building 31, Room 11A19, 9000 Rockville Pike, Bethesda, MD 20892–2590

National Heart, Lung, and Blood Institute, National Institutes of Health, Building 10, Room 7N220, 9000 Rockville Pike, Bethesda, MD 20892–1670

National Institute of Dental and Craniofacial Research, National Institutes of Health, Building 31, Room 2C23, 9000 Rockville Pike, Bethesda, MD 20892–2290

National Institute of Diabetes and Digestive and Kidney Diseases, National Institutes of Health, Building 10, Room 9N222, 9000 Rockville Pike, Bethesda, MD 20892–1818

National Institute of Neurological Disorders and Stroke, National Institutes of Health, Building 10, Room 5N220, 9000 Rockville Pike, Bethesda, MD 20892–4152

National Institute of Allergy and Infectious Diseases, National Institutes of Health, Building 31, Room 7A05, 9000 Rockville Pike, Bethesda, MD 20892–2520

National Institute of Mental Health, National Institutes of Health, Building 10, Room 4N222, 9000 Rockville Pike, Bethesda, MD 20892

National Institute of General Medical Sciences, Pharmacological Sciences Program, National Institutes of Health, Building 45, Room 2AS–43, 9000 Rockville Pike, Bethesda, MD 20892–6200

National Institute of Child Health and Human Development, National Institutes of Health, Building 31, Room 2A25, 9000 Rockville Pike, Bethesda, MD 20892

National Institute of Child Health and Human Development, National Institutes of Health, Building 61E, Room 8B01A, Bethesda, MD 20892

National Eye Institute, National Institutes of Health, Building 10, Room 10N202, 9000 Rockville Pike, Bethesda, MD 20892–1858

National Institute of Environmental Health Sciences, National Institutes of Health, South Campus, Building 101, Room A–210, 111 Alexander Drive, Research Triangle Park, NC 27709

National Institute on Aging, Gerontology Research Center, National Institutes of Health, 4940 Eastern Avenue, Baltimore, MD 21224

National Institute of Arthritis and Musculoskeletal and Skin Diseases, National Institutes of Health, Building 45, Room 5AN40, 9000 Rockville Pike, Bethesda, MD 20892

National Institute of Deafness and Communication Disorders, National Institutes of Health, Building 31, Room 3C02, 9000 Rockville Pike, Bethesda, MD 20892–2320

National Institute on Drug Abuse, National Institutes of Health, Parklawn Building, Room 9A30, 5600 Fishers Lane, Rockville, MD 20857

National Center for Research Resources, National Institutes of Health, One Rockledge Center, Room 6070, 6705 Rockledge Drive, Bethesda, MD 20892–7965

National Institute for Nursing Research, National Institutes of Health, Building 31, Room 5B25, 9000 Rockville Pike, Bethesda, MD 20892–2178

National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, Building 31, Room 1B58, 9000 Rockville Pike, Bethesda, MD 20892–2088

National Human Genome Research Institute, National Institutes of Health, 49 Covent Drive, Building 49, Room 4A06, 9000 Rockville Pike, Bethesda, MD 20892–4470

Office of Financial Management, National Institutes of Health, Building 31, Room B1B47, 9000 Rockville Pike, Bethesda, Maryland 20892

[FR Doc. 00–1689 Filed 1–24–00; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF THE INTERIOR

Office of the Assistant Secretary—Water and Science; Central Utah Project Completion Act; Notice of Intent to Prepare an Environmental Assessment for the Diamond Fork Proposed Action Modifications

AGENCY: Office of the Assistant Secretary—Water and Science, Department of the Interior.

ACTION: Notice of intent to prepare an Environmental Assessment for the Diamond Fork Proposed Action Modifications.

SUMMARY: Pursuant to the National Environmental Policy Act of 1969, the Central Utah Water Conservancy District (CUWCD), Utah Reclamation Mitigation and Conservation Commission (Mitigation Commission), and the Department of the Interior (Interior) announces their intent to prepare an Environmental Assessment (EA) on the Diamond Fork Proposed Action Modifications.

This EA will address modifications to the Proposed Action as a result of value engineering studies on the Proposed Action of the Diamond Fork System 1999 Final Supplement to the Final Environmental Impact Statement (FSFEIS) that was filed with the Environmental Protection Agency July 1, 1999. A Record of Decision (1999 ROD) documenting the selection of the Proposed Action Alternative as presented in the FSFEIS was signed by the Assistant Secretary—Water and Science on September 29, 1999. The 1999 ROD allowed for value engineering studies, pursuant to public law 104–

106, to be conducted on the Proposed Action to further reduce environmental impacts or project construction costs. Based on value engineering studies the following modifications to the Proposed Action will be addressed in the EA: (1) Replacing a series of tunnels and pipelines with one tunnel and one pipeline; (2) relocating flow control facilities; and (3) adjusting the alignment of the Diamond Fork System. The proposed modifications will reduce environmental impacts and reduce project construction costs while not changing the Proposed Action's purposes or needs as described in the FSFEIS and 1999 ROD.

DATES: Information relating to the EA will be announced in local newspapers and/or mailed to interested parties. Upon completion of a draft EA a notice of availability will be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Harold Sersland, Environmental Program Manger, Central Utah Water Conservancy District, 355 West University Parkway, Orem, Utah 84058–7303, (801) 226–7110.

SUPPLEMENTARY INFORMATION: The purpose of this Notice of Intent is to inform the public, local, State, and Federal government agencies that an EA will be prepared. Information, data, opinions, and comments obtained on the draft EA may be used in the preparation of the final EA.

Dated: January 19, 2000.

Ronald Johnston,

CUP Program Director, Department of the Interior.

[FR Doc. 00–1714 Filed 1–24–00; 8:45 am]

BILLING CODE 4310–RK–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Endangered and Threatened Wildlife and Plants; Reopening of Comment Period for the Notice of Intent To Clarify the Role of Habitat in Endangered Species Conservation; Announcement of Workshops

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; reopening of comment period.

SUMMARY: We (the U.S. Fish and Wildlife Service) reopen the comment period on our notice of intent to develop policy or guidance and/or to revise regulations, if necessary, to clarify the role of habitat in endangered species conservation. We are reopening the comment period to allow us to receive comments in conjunction with two critical habitat workshops to be held with major stakeholders. We will analyze additional comments received during this comment period from workshop participants, others who wish to comment on issues raised at the workshop, and any additional comments, as well as those we received during the two previous comment periods, and will consider these comments when preparing new proposed guidance, policy, or regulations, as appropriate.

DATES: We will accept comments on this guidance until February 24, 2000. The first workshop will be held in Reston, Virginia, on February 8, 2000, and the second in Tempe, Arizona, on February 11, 2000. Members of the public who wish to attend as an observer are requested to contact the U.S. Institute for Environmental Conflict Resolution (see **ADDRESSES** section) by February 3, 2000.

ADDRESSES: Submit your comments to the Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, 1849 C Street, NW, Mailstop ARLSQ–420, Washington, D.C. 20240. If you are interested in attending a workshop as an observer, contact Tina Urbina, Executive Assistant, U.S. Institute for Environmental Conflict Resolution, 110 South Church Avenue, Suite 3350, Tempe, Arizona 85701, telephone 520/670–5299, facsimile 520/670–5530.

FOR FURTHER INFORMATION CONTACT: Nancy Gloman, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, 703–358–2171 (see **ADDRESSES** section).

SUPPLEMENTARY INFORMATION:

Background

On June 14, 1999 (64 FR 31871), we published a notice of our intent to develop policy or guidance and/or to revise regulations, if necessary, to clarify the role of habitat in endangered species conservation. In that notice, we sought comments on the benefits of the designation of critical habitat, beyond the benefits that result from the act of listing species as endangered or threatened, and what considerations should be included in determining whether a designation of critical habitat is prudent. We also requested comments and suggestions on how we can effectively streamline the process of designating critical habitat and specifically whether and how our existing regulations might or should be changed to accomplish this goal. Additionally, we requested comments and suggestions on possible legislative actions that might improve the effectiveness and efficiency of the critical habitat process. We reopened the comment period on August 30, 1999 (64 FR 47195), in order to provide additional time for interested parties to comment on this important issue.

Based on our preliminary review of the comments, a wide range of opinions exists on the role of habitat in endangered species conservation. We felt it would be beneficial to have a focus group provide their individual views on these issues. We have contracted with the U.S. Institute for Environmental Conflict Resolution to hold two workshops with major stakeholders to discuss critical habitat issues, such as the regulatory effect of designating critical habitat, linking critical habitat designation to recovery planning, and the relationship between critical habitat and habitat conservation planning under section 10 of the Act. These participants will not act as a committee and there will be no attempt to seek a group recommendation on any issue. The workshops are scheduled to be held in Reston, Virginia, on February 8, 2000, and Tempe, Arizona, on February 11, 2000. In order to facilitate a meaningful discussion, we have invited a small number of participants representing Federal, State, and local governments, Congress, resource user groups, environmental organizations, and academia. Additional seats will be available for members of the public to attend as observers, who will be given a limited time on the agenda to provide comments. If you would like to attend as an observer, please contact the U.S. Institute for Environmental Conflict Resolution (see **ADDRESSES** section) by February 3, 2000, so that we can judge the amount of interest.

Public Comments Solicited

We will take into consideration any comments and additional information received. We will make available for your review and comment any proposed guidance, policy, or regulatory changes that are developed.

Authority

The authority for this notice is the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*

Dated: January 19, 2000.

Jamie Rappaport Clark,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 00–1745 Filed 1–24–00; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Availability of the Morro Bay Kangaroo Rat (Dipodomys heermanni morroensis) Draft Revised Recovery Plan

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of document availability.

SUMMARY: The Fish and Wildlife Service announces the availability of the Morro Bay kangaroo rat (*Dipodomys heermanni morroensis*) draft revised recovery plan for public review. This kangaroo rat is believed to exist at one site in San Luis Obispo County, California.

DATES: Comments on the draft revised recovery plan received by March 27, 2000 will be considered by the Fish and Wildlife Service.

ADDRESSES: Copies of the draft revised recovery plan are available for inspection, by appointment, during normal business hours at the following location: U.S. Fish and Wildlife Service, 2493 Portola Road, Suite B, Ventura, California 93003 (phone: 805/644–1766). The draft revised recovery plan will also be available at the San Luis Obispo County Public Library. Requests for copies of the draft revised recovery plan and written comments and materials regarding this plan should be addressed to the Field Supervisor, at the above Ventura address.

FOR FURTHER INFORMATION CONTACT: Catherine Mc Calvin, at the above Ventura address.

SUPPLEMENTARY INFORMATION:

Background

Restoring endangered or threatened animals and plants to the point where they are again secure, self-sustaining members of their ecosystems is a primary goal of the Service's endangered species program. To help guide the recovery effort, the Service is working to prepare recovery plans for most of the listed species native to the United States. Recovery plans describe actions considered necessary for the conservation of the species, establish criteria for downlisting or delisting them, and estimate time and cost for implementing recovery measures.

The Endangered Species Act, as amended (16 U.S.C. 1531 *et seq.*) (Act), requires the development of recovery plans for listed species unless such a plan would not promote the conservation of a particular species. Section 4(f) of the Act as amended in 1988 requires that public notice and an opportunity for public review and comment be provided during recovery plan development. The Service considers all information presented during the public comment period prior to approval of each new or revised recovery plan. Substantive technical comments will result in changes to the plans. Substantive comments regarding recovery plan implementation may not necessarily result in changes to the recovery plans, but will be forwarded to appropriate Federal or other entities so that they can take these comments into account during the course of implementing recovery actions. Individualized responses to comments will not be provided.

The Morro Bay kangaroo rat is listed as endangered (35 FR 16047). This species is restricted to less than 200 acres. It is currently known from one site. The Morro Bay kangaroo rat is threatened by habitat loss from development. In addition, the very low numbers of individuals and populations of this species puts it at great risk of extinction due to random naturally-occurring (stochastic) events.

The objective of this revised plan is to provide a framework for the recovery of the Morro Bay kangaroo rat so that protection by the Endangered Species Act is no longer necessary. Actions necessary to accomplish this objective include protecting species habitat through acquisition, conservation easements, and Habitat Conservation Plans; managing species habitat; conducting management-oriented research on the ecology and biology of the species; reviewing and revising management and recovery guidelines; locating additional populations; and establishing new populations within the historic range of the species.

Public Comments Solicited

The Service solicits written comments on this draft revised recovery plan. All comments received by the date specified above will be considered prior to approval of this plan.

Authority: The authority for this action is section 4(f) of the Endangered Species Act, 16 U.S.C. 1533(f).

Dated: January 19, 2000.

Elizabeth H. Stevens,

Acting, California/Nevada Operations Manager, Fish and Wildlife Service, Region 1, Sacramento, California.

[FR Doc. 00–1715 Filed 1–24–00; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Marine Mammal Species Permit Applications; Notice of Extension of Comment Period

The Fish and Wildlife Service gives notice that the comment period is extended on the notice of receipt of applications for two applications submitted by International Animal Consulting Group, Inc. The applications were submitted to satisfy requirements of the Marine Mammal Protection Act of 1972, *as amended* (16 U.S.C. 1361 *et seq.*) and the regulations governing marine mammals (50 CFR 18). The applications, 018196 and 018197, are for conducting certain activities with marine mammals, specifically taking northern sea otters (*Enhydra lutris lutris*) from the wild in Alaska for export and public display at two Japanese aquariums. The extension will allow all interested parties to submit written comments. The Fish and Wildlife Service published a notice of receipt of the applications on Friday, December 17, 1999. The current comment period closes on January 26, 2000. Written comments may now be submitted until January 31, 2000, and should be submitted to the Director, U.S. Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203.

Dated: January 21, 2000.

Kristen Nelson,

Chief, Branch of Permits (Domestic), Office of Management Authority.

[FR Doc. 00–1769 Filed 1–24–00; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WO–320–1330–PB–24 1A]

Extension of Currently Approved Information Collection; OMB Approval Number 1004–0121

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Bureau of Land Management (BLM) announces its intention to request an extension of approval for the collection of information from applicants to lease and develop solid minerals other than coal and oil shale. The BLM uses the information supplied to determine

whether an applicant, permittee, or lease is qualified to hold an interest under the terms of the Mineral Leasing Act of 1920 (MLA). BLM also uses this information to determine if development plans will adequately protect Federal land and that the property amounts of rental and royalty are collected.

DATE: Comments on the proposed information collection must be received by March 27, 2000 to be considered.

ADDRESSES: Comments may be mailed to: Regulatory Affairs Group, 1849 C St., N.W., Room 401LS, Washington, D.C. 20240. Comments may be sent by Internet to: WOComment@wo.blm.gov. Please include: ''Attn.: 1004–0121'' and your name and address in your Internet message. Comments will be available for public review at the L Street address during regular business hours (7:45 am to 4:15 pm, Monday through Friday).

FOR FURTHER INFORMATION CONTACT: Philip Allard, Solid Minerals Group, (202) 452–5195. For assistance in reaching the above contact, individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern time, Monday through Friday, except holidays.

SUPPLEMENTARY INFORMATION: The regulations at 5 CFR 1320.12(a) require BLM to provide 60-day notice in the **Federal Register** concerning a collection of information contained in a published current rule to solicit comments on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of BLM'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 collecting the information on those who must respond, including through the use of automated, electronic, mechanical, or technological collection techniques or other forms of information technology.

BLM plans to seek from the Office of Management and Budget extension of approval for the information collection requirements in 43 CFR Parts 3500 through 3590, which cover the leasing of solid minerals other than coal and oil shale and operations on those leases. These regulations implement the statutory authority governing leasing activities on Federal lands found in the Mineral Leasing Act of 1920 (30 U.S.C. 181 et seq.), the Mineral Leasing Act for Acquired Lands of 1947 (30 U.S.C. 351–359), Section 402 of Reorganization Plan No. 3 of 1946 (5 U.S.C. Appendix), the Multiple Mineral Development Act of 1954 (30 U.S.C. 521–531), the National Environmental Policy Act of 1969 (42 U.S.C. 4321), and the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.).

The implementing regulations outline procedures for members of the public to submit applications, offers, statements, petitions, and various forms. The information required in the applications, statements and petitions is needed by BLM to determine applicant qualifications to hold a lease to obtain a benefit under the terms of the MLA, its subsequent amendments, related statutes, and the regulations. Information collection requirements are based on the statutory requirements concerning the qualifications and eligibility to hold title to or interest in Federal mineral leases and on the regulatory requirements relating to the identification, location and quality of minerals under application and identification of proposed operational activities. The affected public consists of all present and prospective holders of Federal solid mineral leases other than coal or oil shale, prospecting permits, use permits, and exploration licenses.

BREAKDOWN OF INFORMATION COLLECTIONS AND TOTAL HOURS

Type of information collection	Number of responses	Hours per response	Total hours
Prospecting Permit	25	1	25
Exploration Plan for Prospecting Permit	20	80	1,600
Prospecting Permit Extension	5	1	5
Preference Right Lease	2	100	200
Competitive Lease Bid	5	40	200
Fringe Acreage Lease or Lease Modification	5	40	200
Assignment or Sublease	40	2	80
Lease Renewals or Adjustments	15	1	15
Use Permit	1	1	1
Exploration License	1	3	3
Exploration Plan for Exploration License	1	80	80
Development Contract	1	1	1
Bond	150	4	600
Mine Plan	5	150	750
Total	276	.....	3,760

Based on its experience administering the leasing program, BLM estimates that it will take an average of about 14 hours per response to complete the applications, petitions, offers and statements required. The applicants will have access to records, plats and maps necessary for providing legal land descriptions. The type of information necessary is outlined in the regulations and is already maintained by the respondents for their own record keeping purposes and needs only to be compiled in a reasonable format. The estimate also includes the time required for assembling the information, as well as the time of clerical personnel, if needed.

BLM estimates that approximately 276 filings will be made annually for a total of 3,760 reporting hours. Respondents vary from individuals to small businesses and major corporations. Any interested member of the public may request and obtain, without charge, copies of any of forms listed in this notice by contacting the person identified under **FOR FURTHER INFORMATION CONTACT**.

All responses to this notice will be summarized and included in the request for Office of Management and Budget

approval. All comments will become part of the public record.

Dated: January 4, 2000.

Carole Smith,

Bureau of Land Management Information Collection Clearance Officer.

[FR Doc. 00–1740 Filed 1–24–00; 8:45 am]

BILLING CODE 4310–84–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–070–00–1020–PA]

Montana; Scratchgravel Hills Area Recreation Management Restrictions

AGENCY: Bureau of Land Management, Interior.

ACTION: Updating Scratchgravel Hills Area Recreation Management Restrictions.

SUMMARY: Under authority of 43 CFR 8364.1 and as a result of the approval of the Scratchgravel Hills Cooperative Agreement on July 11, 1985, the following restrictions for the use of the Scratchgravel Hills, adjacent to Helena, Montana, became effective August 15, 1985:

1. The use, possession afield, or discharge of all firearms is prohibited year-round in the Scratchgravel Hills, except during such big game seasons as may be established by the Montana Department of Fish, Wildlife, and Parks.

2. The possession and use of fireworks is prohibited year-round.

To comply with requests from the Helena Interagency Fire Dispatch Center, Lewis and Clark County Sheriff Department, local fire districts and Scratchgravel Hills residents, this notice adds the following restriction:

3. The building, maintaining, attending or using a campfire, charcoal fire, cooking fire or warming fire is prohibited year-round.

Principal Meridian, Montana

These regulations apply to public lands in:
T. 11 N., R. 4 W.,
Secs. 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 33, 34, 35, and 36.
T. 10 N., R. 4 W.,
Secs. 1, 2, 3, 4, and 5.

The purpose of these restrictions is to minimize hazards to visitors and surrounding residences, and to minimize the possibility of wildfire. The public lands within the designated area will remain open to other resource and recreation uses unless otherwise restricted.

Penalties: As prescribed under the Federal Land Policy and Management, 43 USC Section 1733 (a). Violation is punishable by fines and/or imprisonment under 43 CFR 8360.0–7.

EFFECTIVE DATE: These management restrictions will go into effect upon publication in the **Federal Register** and will remain in effect until rescinded or modified by the authorized officer.

FOR FURTHER INFORMATION CONTACT: Steve Hartmann, Acting Field Manager, P.O. Box 3388, Butte, Montana 59702, 406–494–5059.

Dated: January 12, 2000.

Steve Hartmann.

Acting Field Manager.

[FR Doc. 00–1674 Filed 1–24–00; 8:45 am]

BILLING CODE 4310–DN–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree; Under the Comprehensive, Environmental Response, Compensation and Liability Act (''CERCLA'')

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that a proposed consent decree in Civil Action No. 99–2673–Civ–T–24B was lodged with the United States District Court for the Middle District of Florida on November 23, 1999.

In this action the United States sought injunctive relief and recovery of response costs under Sections 106(a) and 107 of CERCLA, 42 U.S.C. 9606(a) and 9607, with respect to the Stauffer Chemical Superfund Site in Tarpon Springs, Florida (''the Site'').

Under a proposed Consent Decree, Atkemix Thirty-Seven, Inc., the present owner and operator of the Site, and Rhone-Poulenc Ag Company, Inc., the former owner and operator of the Site, have agreed to perform the remedy chosen by EPA to clean up the Site, pay the government's remaining past response costs, and pay future response costs, in settlement of the government's claims under Sections 106 and 107 of CERCLA, 42 U.S.C. 9606 and 9607.

The Department of Justice will extend the public comment period for an additional thirty (30) days and will receive comments until February 22, 2000 relating to the proposed consent decree. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States* v. *Atkemix Thirty-Seven, Inc., and Rhone-Poulenc Ag. Company, Inc.,* (M.D.F1.), DOJ #90–11–2–1227/1.

The proposed consent decree may be examined at the Office of the United States Attorney, 400 North Tampa Street, Suite 3200, Tampa Florida 33602; the Region 4 Office of the Environmental Protection Agency, 61 Forsyth Street, Atlanta, Georgia 30303, and at the Consent Decree Library, Post Office Box 7611, Washington, DC 20044–7611, (202) 514–1547. A copy of the proposed consent decree may be obtained by mail from the Consent Decree Library, Post Office Box 7611, Washington, DC 20044–7611. In requesting a copy please refer to the referenced case and enclose a check in the amount of 25 cents per page for reproduction costs, payable to the Consent Decree Library.

Joel M. Gross,

Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 1676 Filed 1–24–00; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on November 17, 1999 a proposed Consent Decree (the ''Consent Decree'') in *United States* v. *Intalco Aluminum Corporation* (''Intalco''), Civil Action No. CS–99–0324 was lodged with the United States District Court for the Eastern District of Washington.

In this action the United States sought to recover the United States Department of Agriculture Forest Service's (''Forest Service'') past costs incurred in connection with past response actions at the Holden Mine Site (the ''Site''), located in the Wenatchee National Forest in Chelan County, Washington. Throughout the history of mining operations at Holden Mine, large quantities of mine tailings were deposited in and around the Site and caused releases of hazardous substances. In 1989 and 1990 the Forest Service performed a variety of actions costing approximately $6 million to stabilize the tailings and prevent further environmental degradation. Under the Consent Decree, Intalco will reimburse the Forest Service $3.1 million for those past costs. Under an Administrative Order on Consent entered into between the Forest Service, Intalco, the Environmental Protection Agency and the State of Washington, Department of Ecology, Intalco is performing a Remedial Action and Feasibility Study for the Site, which is expected to result in selection of a remedy to address hazardous substances at the Site. Under

the Consent Decree, Intalco agrees to perform or fund the remedy, subject to future orders or decrees. Additionally, Intalco agrees not to sue the United States for any response costs associated with the Site.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, Washington, D.C., 20530, and should refer to *United States* v. *Intalco Aluminum,* D.J. Ref. 90–11–2–1135.

The Consent Decree may be examined at the Office of the United States Attorney, Suite 300, United States Courthouse, 920 West Riverside, Spokane, Washington, 99210; at the Office of the Wenatchee National Forest, 215 Melody Lane, Wenatchee, Washington, 98801; at the Office of the Holden Village, Holden, Washington; and a copy may be obtained from the Department of Justice Consent Decree Library, P.O. Box 7611, Washington, D.C. 20044–7611. In requesting a copy, please enclose a check in the amount of $26.75 payable to the Consent Decree Library.

Joel M. Gross,

Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 00–1677 Filed 1–24–00; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Pursuant to the Safe Drinking Water Act

In accordance with departmental policy, 28 CFR 50.7, notice is hereby given that on January 6, 2000, a proposed consent decree in *United States* v. *Jupiter Oil Corp., et al.,* C.A. No. 98–CV–72684–DT (E.D. Mich.), was lodged with the United States District Court for the Eastern District of Michigan. The proposed consent decree would resolve pending claims of the United States against defendants, Jupiter Oil Corporation and Blake Energy Company, Inc., in the above-referenced action.

The Amended Complaint in the above-referenced civil action seeks injunctive relief and civil penalties for violations of the Safe Drinking Water Act, 42 U.S.C. 300f *et seq.*, at an underground injection well known as the Smith E 01, located in St. Clair County, Michigan. The complaint alleges that defendants failed to comply with various reporting requirements and mechanical integrity demonstration requirements set forth in applicable regulations, an undergound injection control (''UIC'') permit, and in Final Administrative Orders issued by the United States Environmental Protection Agency.

The proposed consent decree would require defendants to achieve and maintain compliance with the Safe Drinking Water Act, applicable regulations thereunder, and terms of the UIC permit for the Smith E 01 Well. In addition, the proposed consent decree would require defendants to pay a civil penalty of $50,000.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, United States Department of Justice, P.O. Box 7611, Ben Franklin Station, Washington, D.C. 20044–7611, and should refer to *United States* v. *Jupiter Oil Corp., et al.,* C.A. No. 98–CV–72684–DT (E.D. Mich.), and the Department of Justice Reference No. 90–5–1–1–4482.

The proposed Consent Decree may be examined at the Office of the United States Attorney for the Eastern District of Michigan, 231 West Fort Street, Suite 2001, Detroit, MI 48226; and at the Region 5 Office of the United States Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604–3590. A copy of the proposed Consent Decree may be obtained in person or by mail from the Consent Decree Library, P.O. Box 7611, Ben Franklin Station, Washington, D.C. 20044–7611. In requesting a copy, please refer to DJ #90–5–1–1–4482, and enclose a check in the amount of $3.50 (14 pages at 25 cents per page for reproduction costs). Makes checks payable to the Consent Decree Library.

Joel M. Gross,

Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 00–1678 Filed 1–24–00; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Lodging of Stipulation and Settlement Agreement Pursuant to the Resource Conservation and Recovery Act

In accordance with 28 CFR 50.7, the Department of Justice gives notice that a proposed stipulation and settlement agreement in *United States, et al.* v. *Production Plated Plastics, Inc. et al.,* Civil No. K87–CV–138 (W.D. Mich.), was lodged with the United States District Court for the Western District of Michigan on January 3, 2000.

The United States brought its action pursuant to Section 3008(a) and (g) of the Resource Conservation and Recovery Act of 1976, as amended (''RCRA''), 42 U.S.C. 6928(a) and (g). The Complaint alleged that at relevant times the Defendants were the owners and/or operators of a manufacturing facility in Richland, Michigan (Richland Facility), where Defendants stored and disposed of hazardous waste in violation of RCRA. The Complaint sought: (1) The imposition of injunctive orders requiring Defendants to cease the improper storage and disposal of hazardous waste, and to prepare and implement closure plans for the Richland Facility's hazardous waste regulated units; and (2) the assessment of civil penalties for the alleged violations of RCRA.

The United States and its co-plaintiff, the State of Michigan, prevailed against Ladney and two other defendants in a 1992 train in this case. The proposed stipulation and settlement agreement would resolve Ladney's liability to the United States' claims against Ladney under RCRA. Ladney will be required to pay the United States $100,000.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed stipulation and settlement agreement. In accordance with RCRA Section 7003(d), 42 U.S.C. 6973(d), commentors also may request an opportunity for a public meeting in the affected areas to discuss the proposed covenants not to sue under RCRA Section 7003, 42 U.S.C. 6973.

All comments, and/or requests for a public meeting under RCRA Section 7003(d) should refer to *United States et al.* v. *Production Plated Plastics, et al.*, Civil No. K87–CV–138 (W.D. Mich.) and DOJ Reference No. 90–7–1–377A.

The proposed stipulation and settlement agreement may be examined at: (1) The Office of the United States Attorney for the Western District of Michigan, 330 Ionia, NW., Grand Rapids, Michigan 49503, (616) 456–2404; and (2) the United States Environmental Protection Agency (Region 5), 77 West Jackson Boulevard, Chicago, Illinois 60604–3590 (contact Stuart Hersh (312)–886–6235).

A copy of the proposed stipulation and settlement agreement may also be obtained by mail from the Department of Justice Consent Decree Library, P.O. Box 7611, Washington, DC 20044. In

requesting a copy, please refer to the reference case and DOJ Reference Number and enclose a check in the amount of $3.50 for the document (14 pages at 25 cents per page reproduction costs), made payable to the Consent Decree Library.

Joel M. Gross,

Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 00–1679 Filed 1–24–00; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Antitrust Division

Motion to Modify Final Judgment and Memorandum in Support of Motion to Modify; United States v. Baroid Corp., et al.

Notice is hereby given that Smith International, Inc. (''Smith'') has filed with the United States District Court for the District of Columbia a motion to modify the judgment in *United States* v. *Baroid Corporation, et al.,* Civil Action No. 93–2621. The Department has consented to modification of the Judgment but has reserved the right to withdraw its consent if it determines that, based upon comments filed or other information, consent to the modification is not in the public interest.

This case was filed on December 23, 1993, and alleged that the merger of Dresser Industries, Inc. (''Dresser'') and Baroid Corporation (''Baroid'') might substantially lessen competition in the United States in the manufacture and sale of two oil field service products, including drilling fluids, in violation of Section 7 of the Clayton Act. The Final Judgment was entered on April 12, 1994 and modified on September 19, 1996.

Under the Final Judgment, Dresser was required to divest either its 64 percent partnership interest in M–I Drilling Fluids Company or Baroid's wholly owned subsidiary, Baroid Drilling Fluids, Inc. Pursuant to the judgment, Dresser divested its partnership interest in M–I to Smith.

Paragraph IV.F. of the Final Judgment states that the purchaser of the divested drilling fluids business may not combine that business with any one of three named companies. One of those companies is Schlumberger Ltd. (''Schlumberger''). In July 1999, Smith formed a drilling fluids joint venture with Schlumberger, and the United States petitioned the United States District Court for the District of Columbia to find Smith and Schlumberger in civil and criminal contempt for violating the Final Judgment by forming the joint venture. In December 1999, the District Court found Smith and Schlumberger guilty of criminal contempt and imposed a $750,000 fine against each company. Smith and Schlumberger settled the civil contempt case, agreeing to disgorge a total of $13.1 million in joint venture profits.

Smith's motion proposes modifying the Final Judgment to remove Schlumberger from Paragraph IV.F. The United States has consented, subject to the comment period, to the modification as being in the public interest because of Schlumberger's failure to achieve more than 2 percent of the U.S. drilling fluid market in the six years since the Final Judgment was filed.

Copies of the Complaint and Judgment, the pleadings related to the 1996 modification, Smith's motion and supporting memorandum, and the United States' consent are available for inspection in Room 215, Antitrust Division, U.S. Department of Justice, 325 7th St., NW., Washington, DC 20530 and at the Office of the Clerk of the United States District Court for the District of Columbia, Third Street and Constitution Avenue, NW., Washington, DC 20001. Copies of any of these materials may be obtained upon request and payment of a copying fee.

Comments to the Department of Justice and to the Court regarding the proposed modification of the Final Judgment are invited from members of the public. They should be addressed to Roger W. Fones, Chief, Transportation, Energy and Agriculture Section, Antitrust Division, U.S. Department of Justice, Suite 500, 325 7th Street, NW., Washington, DC 20530 (202–307–6351.) Such comments must be received within 30 days.

Constance K. Robinson,

Director of Operations & Merger Enforcement, Antitrust Division.

[FR Doc. 00–1680 Filed 1–24–00; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. ICR–1218–0104(2000)]

Inorganic Arsenic; Extension of the Office of Management and Budget (OMB) Approval of Information Collection (Paperwork) Requirements

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

ACTION: Notice of an opportunity for public comment.

SUMMARY: OSHA solicits comments concerning the proposed reduction in, and extension of, the information collection requirements contained in the Inorganic arsenic standard (29 CFR 1910.1018).

REQUEST FOR COMMENT: The Agency is particularly interested in comments on the following issues:

- Whether the information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of the Agency's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated, electronic, mechanical, and other technological information collection and transmission techniques.

DATES: Submit written comments on or before March 27, 2000.

ADDRESSES: Submit written comments to the Docket Office, Docket No. ICR–1218–0104(2000), Occupational Safety and Health Administration, U.S. Department of Labor, Room N–2625, 200 Constitution Avenue, N.W., Washington, DC 20210; telephone: (202) 693–2350. Commenters may transmit written comments of 10 pages or less in length by facsimile to (202) 693–1648.

FOR FURTHER INFORMATION CONTACT: Nancy Dorris, Directorate of Policy, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3641, 200 Constitution Avenue, N.W., Washington, DC 20210; telephone: (202) 693–2444. A copy of the Agency's Information Collection Request (ICR) supporting the need for the information collection requirements in the Inorganic arsenic standard is available for inspection and copying in the Docket Office, or you may request a mailed copy by telephoning Nancy Dorris or Todd R. Owen at (202) 693–2444. For electronic copies of the ICR on the Inorganic arsenic standard, contact OSHA on the Internet at *http://www.osha-slc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to

provide the general public and Federal agencies with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA–95) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments clearly understood, and OSHA's estimate of the information burden is correct. The Occupational Safety and Health Act of 1970 (the Act) authorizes information collection by employers as necessary or appropriate for enforcement of the Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). In this regard, the information collection requirements in the Inorganic arsenic standard provide protection for employees from the adverse health effects associated with exposure to inorganic arsenic. The Inorganic arsenic standard requires employers to: Monitor employees' exposure to inorganic arsenic; monitor employee health; develop and maintain employee exposure-monitoring and medical records; notify local OSHA area office in writing of regulated areas, and changes to these areas; and provide employees with information about their exposures and health effects of exposure to inorganic arsenic.

II. Proposed Actions

OSHA proposes to extend the OMB approval for the collection of information (paperwork) contained in the Inorganic arsenic standard (29 CFR 1910.1018). OSHA will summarize the comments submitted in response to this notice, and will include this summary in the request to OMB to extend the approval of the information collection requirements contained in the Inorganic arsenic standard (29 CFR 1910.1018).

Type of Review: Extension of currently approved information collection requirements.

Title: Inorganic arsenic standard.

OMB Number: 1218–0104.

Affected Public: Business or other for-profit; Federal government; state, local or tribal government.

Number of Respondents: 42.

Frequency: On occasion.

Total Responses: 58,763.

Average Time per Response: Time per response ranges from 5 minutes to maintain records to 1.67 hours to complete a medical examination.

Estimated Total Burden Hours: 7,381 hours.

Estimated Cost (Operation and Maintenance): $1,142,802.

Authority and Signature

Charles N. Jeffress, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506) and Secretary of Labor's Order No. 6–96 (62 FR 111).

Signed at Washington, D.C. on January 19, 2000.

Charles N. Jeffress,

Assistant Secretary of Labor.

[FR Doc. 00–1722 Filed 1–24–00 8:45 am]

BILLING CODE 4510–26–M

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. ICR–1218–0128(2000)]

Coke Oven Emissions Standard; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

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

ACTION: Notice of an opportunity for public comment.

SUMMARY: OSHA solicits comments concerning the proposed reduction in, and extension of, the information collection requirements contained in the Coke Oven Standard (29 CFR 1910.1029).

REQUEST FOR COMMENT: The Agency is particularly interested in comments on the following issues:

- Whether the information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of the Agency's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated, electronic, mechanical, and other technological information collection and transmission techniques.

DATES: Submit written comments on or before March 27, 2000.

ADDRESSES: Submit written comments to the Docket Office, Docket No. ICR–1218–0128(2000), Occupational Safety and Health Administration, U.S. Department of Labor, Room N–2625, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693–2350. Commenters may transmit written comments of 10 pages or less in length by facsimile to (202) 693–1648.

FOR FURTHER INFORMATION CONTACT: Todd Owen, Directorate of Policy, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3641, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693–2444. A copy of the Agency's Information Collection request (ICR) supporting the need for the information collection requirements in the Coke oven emissions standard is available for inspection and copying in the Docket Office, or you may request a mailed copy by telephoning Todd R. Owen at (202) 693–2444. For electronic copies of the ICR on the Coke Oven Emissions Standard, contact OSHA on the Internet at http://www.osha-slc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA–95) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments clearly understood, and OSHA's estimate of the information burden is correct. The Occupational Safety and Health Act of 1970 (the Act) authorizes information collection by employers as necessary or appropriate for enforcement of the Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657).

The information collection requirements in the Coke Oven Emissions Standard provide protection for employees from the adverse health effects associated with exposure to coke oven emissions. In this regard, the Coke Oven Emissions Standard requires employers to monitor employees' exposure to coke oven emissions, monitor employee health, and provide employees with information about their exposures and the health effects of exposure to coke oven emissions.

II. Proposed Action

OSHA proposes to extend the OMB approval for the collection of information (paperwork) contained in

the Coke Oven Emissions Standard (29 CFR 1910.1029). OSHA will summarize the comments submitted in response to this notice, and will include this summary in the request to OMB to extend the approval of the information collection requirements contained in the Coke Oven Emissions Standard.

Type of Review: Extension of currently-approved information collection requirements.

Title: Coke Oven Emissions Standard.

OMB Number: 1218–0128.

Affected Public: Business or other for-profit; Federal government; state, local or tribal government.

Number of Respondents: 14.

Frequency: On occasion.

Total Responses: 83,111.

Average Time per Response: Time per response ranges from 5 minutes to maintain records to 4 hours to complete a medical examination.

Estimated Time Burden Hours: 60,664.

Estimated Cost (Operation and Maintenance): $1,365,825.

III. Authority and Signature

Charles N. Jeffress, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506) and Secretary of Labor's Order No 6–96 (62 FR 111).

Signed at Washington, D.C., on January 19, 2000.

Charles N. Jeffress,

Assistant Secretary of Labor.

[FR Doc. 00–1723 Filed 1–24–00 8:45 am]

BILLING CODE 4510–26–M

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. ICR–1218–0170(2000)]

1,3-Butadiene; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

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

ACTION: Notice of an opportunity for public comment.

SUMMARY: OSHA solicits comments concerning the proposed reduction in, and extension of, the information collection requirements contained in the 1,3-Butadiene Standard (29 CFR 1910.1051).

REQUEST FOR COMMENT: The Agency is particularly interested in comments on the following issues:

- Whether the information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of the Agency's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated, electronic, mechanical, and other technological information collection and transmission techniques.

DATES: Submit written comments on or before March 27, 2000.

ADDRESSES: Submit written comments to the Docket Office, Docket No. ICR–1218–0170(2000), Occupational Safety and Health Administration, U.S. Department of Labor, Room N–2625, 200 Constitution Avenue, NW, Washington, DC 20210; telephone: (202) 693–2350. Commenters may transmit written comments of 10 pages or less in length by facsimile to (202) 693–1648.

FOR FURTHER INFORMATION CONTACT: Todd R. Owen, Directorate of Policy, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3641, 2000 Constitution Avenue, NW, Washington, DC 20210; telephone: (202) 693–2444. A copy of the Agency's Information Collection Request (ICR) supporting the need for the information collection requirements in the 1,3-Butadiene Standard is available for inspection and copying in the Docket Office, or you may request a mailed copy by telephoning Todd R. Owen at (202) 693–2444. For electronic copies of the ICR on the 1,3-Butadiene Standard, contact OSHA on the Internet at *http://www.osha-slc.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA–95) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments clearly understood, and OSHA's estimate of the information burden is correct. The Occupational Safety and Health Act of 1970 (the Act) authorizes information collection by employers as necessary or appropriate for enforcement of the Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657).

The information collection requirements in the 1,3-Butadiene Standard provide protection for employees from the adverse health effects associated with exposure to 1,3-Butadiene. In this regard, the 1,3-Butadiene Standard requires employers to: Monitor employees' exposure to 1,3-Butadiene; develop and maintain compliance and exposure-goal programs if employee exposures to 1,3-Butadiene are above the Standard's permissible exposure limits or action level; monitor employee health; maintain employee exposure-monitoring and medical records, and provide employees with information about their exposures and the health effects of exposure to 1,3-Butadiene.

II. Proposed Actions

OSHA proposes to extend the OMB approval for the collection of information (paperwork) contained in the 1,3-Butadiene Standard (29 CFR 1910.1051). OSHA will summarize the comments submitted in response to this notice, and will include this summary in the request to OMB to extend the approval of the information collection requirements contained in the 1,3-Butadiene Standard (29 CFR 1910.1051).

Type of Review: Extension of currently approved information collection requirements.

Title: 1,3-Butadiene Standard (29 CFR 1910.1051).

OMB Number: 1218–0170.

Affected Public: Business or other for-profit; Federal government; state, local or tribal government.

Number of Respondents: 255.

Frequency: On occasion.

Total Responses: 492,849.

Average Time per Response: Time per response ranges from 5 minutes to maintain records to 1.5 hours for an employee to complete a medical examination.

Estimated Total Burden Hours: 2,894.

Estimated Cost (Operation and Maintenance): $83,080.

III. Authority and Signature

Charles N. Jeffress, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506) and Secretary of Labor's Order No. 6–96 (62 FR 111).

Signed at Washington, D.C. on January 19, 2000.

Charles N. Jeffress,

Assistant Secretary of Labor.

[FR Doc. 00–1724 Filed 1–25–00; 8:45 am]

BILLING CODE 4510–26–M

NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE

Sunshine Act Meeting

AGENCY: The U.S. National Commission of Libraries and Information Science.

DATE, TIME, AND PLACE: Closed Meeting (Closing this meeting is taken in accordance with the exemption provided under Title 45, CFR, Part 1703.202(a)(9): February 17, 2000 from 8:30 a.m. to 10:30 a.m., Los Angeles Times Building, 145 South Spring Street, Los Angeles, CA. Discussion Topic: The National Award for Library Service. Open Meetings: February 17, 2000 from 10:45 a.m. to 5:00 p.m., Los Angeles Times Building, 145 South Spring Street, Los Angeles, CA.

MATTERS TO BE DISCUSSED:

Administrative matters
Acting Chairperson's report
Executive Director's report
Discussion, Plans for NCLIS Hearing on Scholarly Publishing in April 2000
NCLIS Program/Committee Updates
Sister Libraries, A White House Millennium Council Project
Update, The future of the National Technical Information Service
UNESCO relations
Presentation, *Los Angeles Times* Literacy Initiative (Reading by 9) February 18, 2000 from 10:00 a.m. to 1:00 p.m., Los Angeles Public Library, 630 W. Fifth Street, Meeting Room A.

DISCUSSION TOPIC: The role of the Commission in the areas of literacy and information literacy; focus will be on activities of school, academic and public libraries as well as Federal government initiatives.

For security reasons, the *Los Angeles Times* Building requires pre-registration for attendance. To attend meeting on February 17, please notify Barbara Whiteleather (telephone: 202–606–9200; fax: 202–606–9203; e-mail: bwhiteleather@nclis.gov) no later than one week in advance of the meeting.

To request further information or to make special arrangements for persons with disabilities, contact Barbara Whiteleather (telephone: 202–606–9200; fax: 202–606–9203; e-mail: bwhiteleather@nclis.gov) no later than one week in advance of the meeting.

Dated: January 7, 2000.

Robert S. Willard,

NCLIS Executive Director.

[FR Doc. 00–1793 Filed 1–21–00; 2:22 pm]

BILLING CODE 7527–$$–M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[00–007]

Notice of agency report forms under OMB review

AGENCY: National Aeronautics and Space Administration (NASA)

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3506(c)(2)(A)). Information collection is required to ensure proper use of and disposition of rights to inventions made in the course of, and data developed under NASA contracts.

DATES: All comments should be submitted on or before March 27, 2000.

ADDRESSES: All comments should be addressed to Mr. Phillip Smith Code BFZ, National Aeronautics and Space Administration, Washington, DC 20546–0001.

FOR FURTHER INFORMATION CONTACT: Ms. Carmela Simonson, NASA Reports Officer, (202) 358–1223.

Title: NASA Contractor Financial Management Reports

OMB Number: 2700–0003

Type of review: Extension

Need and Uses: The NASA Contractor Financial Management Reporting System is the basic financial medium for contractor reporting of estimated and incurred costs, providing essential data for projecting costs and hours to ensure that contractor performance is realistically planned and supported by dollar and labor resources. The data provided by these reports is an integral part of the Agency's accrual accounting and cost-based budgeting systems required under 31 U.S.C. 3512.

Affected Public: Business or other for-profit, not-for-profit institutions.

Number of Respondents: 850.

Responses Per Respondent: 12.

Annual Responses: 10,200.

Hours Per Request: 9 hrs.

Annual Burden Hours: 91,500.

Frequency of Report: quarterly/monthly.

David B. Nelson,

Deputy Chief Information Officer, Office of the Administrator.

[FR Doc. 00–1669 Filed 1–24–00; 8:45 am]

BILLING CODE 7510–01–U

NORTHEAST DAIRY COMPACT COMMISSION

Notice of Meeting

AGENCY: Northeast Dairy Compact Commission.

ACTION: Notice of meeting.

SUMMARY: The Compact Commission will hold its monthly meeting to consider matters relating to administration and enforcement of the price regulation, including the reports and recommendations of the Commission's standing Committees. The Commission will also continue its deliberative meeting, which was convened at the December 1, 1999 and January 5, 2000 Commission meetings, to consider whether to implement an assessment/refund supply management program.

DATES: The meeting will begin immediately following the public hearing on technical amendments to the Over-order Price Regulation scheduled to commence at 10 a.m. on Wednesday, February 2, 2000.

ADDRESSES: The meeting will be held at The Centennial Inn, Armenia White Room, 96 Pleasant Street, Concord, New Hampshire (I–93 Exit 14).

FOR FURTHER INFORMATION CONTACT: Kenneth M. Becker, Executive Director, Northeast Dairy Compact Commission, 34 Barre Street, Suite 2, Montpelier, VT 05602. Telephone (802) 229–1941.

Authority: 7 U.S.C. 7256.

Dated: January 19, 2000.

Kenneth M. Becker,

Executive Director.

[FR Doc. 00–1711 Filed 1–24–00; 8:45 am]

BILLING CODE 1650–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 40–8027]

Notice of Consideration of Amendment Request for Sequoyah Fuels Corp., Gore, Oklahoma and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (NRC) is considering

issuance of a license amendment (LA) to materials license SUB–1010 issued to Sequoyah Fuels Corp. (SFC), to remove license conditions controlling flammable substances near the uranium hexafluoride (UF_6) cylinders at its site near Gore, Oklahoma, per SFC request dated November 19, 1999.

On November 21, 1994, SFC requested a license amendment to remove the requirements for an emergency plan (EP) because the facility was no longer operating. License conditions to preclude a uranium uptake by members of the public from postulated fire involving UF_6 cylinders were added to the license. LA number 20 was approved on February 1, 1995.

In 1998, SFC commenced activities to wash all remaining cylinders. SFC has completed cylinder washing, thereby removing the residual UF_6, so the postulated fire-related event could not result in a uranium uptake by a member of the public. Therefore, SFC wishes to remove the license conditions. An NRC administrative review, documented in a letter to SFC dated December 22, 1999, found the request for a LA acceptable to begin a technical review.

If the NRC approves the LA, the approval will be documented in a LA to NRC's license SUB–1010. However, before approving the proposed LA, NRC will need to make the findings required by the Atomic Energy Act of 1954, as amended, and NRC's regulations. These findings will be documented in a Safety Evaluation Report and an Environmental Assessment.

NRC hereby provides notice that this is a proceeding on an application for an amendment of a license falling within the scope of Subpart L, ''Informal Hearing Procedures for Adjudication in Materials Licensing Proceedings,'' of NRC's rules of practice for domestic licensing proceedings in 10 CFR Part 2. Pursuant to § 2.1205(a), any person whose interest may be affected by this proceeding may file a request for a hearing in accordance with § 2.1205(d). A request for a hearing must be filed within thirty (30) days of the date of publication of this **Federal Register** notice.

The request for a hearing must be filed with the Office of the Secretary either:

1. By delivery to: Secretary, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852–2738; between 7:45 am and 4:15 pm Federal workdays; or

2. By mail, telegram, or facsimile addressed to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Attention: Rulemakings and Adjudications Staff.

In accordance with 10 CFR § 2.1205(f), each request for a hearing must also be served, by delivering it personally or by mail, to:

1. The applicant, Sequoyah Fuels Corporation, PO Box 610, Gore, Oklahoma, Attention: Mr. John Ellis, and;

2. The NRC staff, by delivery to the Executive Director for Operations, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852–2738, between 7:45 am and 4:15 pm Federal workdays, or by mail, addressed to the Executive Director for Operations, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

In addition to meeting other applicable requirements of 10 CFR Part 2 of NRC's regulations, a request for a hearing filed by a person other than an applicant must describe in detail:

1. The interest of the requester in the proceeding;

2. How that interest may be affected by the results of the proceeding, including the reasons why the requester should be permitted a hearing, with particular reference to the factors set out in § 2.1205(h):

3. The requester's areas of concern about the licensing activity that is the subject matter of the proceeding; and

4. The circumstance establishing that the request for a hearing is timely in accordance with § 2.1205(d).

FOR FURTHER INFORMATION: The application for the LA and supporting documentation are available for inspection on NRC's Public Electronic Reading Room at *http://www.nrc.gov/NRC/ADAMS/index.html.* Questions with respect to this action should be referred to Mr. James Shepherd, Decommissioning Branch, Division of Waste Management, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Telephone: (301) 415–6712. Fax: (301) 415–5398.

Dated at Rockville, Maryland, this 18th day of January 2000.

For the Nuclear Regulatory Commission.

Larry W. Camper,

Chief, Decommissioning Branch, Division of Waste Management, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 00–1731 Filed 1–24–00; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Act Meeting; Notice

AGENCY HOLDING THE MEETING: Nuclear Regulatory Commission.

DATE: Weeks of January 24, 31, February 7 and 14, 2000.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of January 24

Tuesday, January 25

9:00 a.m. Briefing on NRC Staff's Response to DOE's Draft Environmental Impact Statement (EIS) for a Proposed HLW Geologic Repository (Public Meeting).

Wednesday, January 26

9:25 a.m. Affirmation Session (Public Meeting) (if needed).

9:30 a.m. Briefing on Status of NMSS Programs, Performance, and Plans (Public Meeting) (Contact: Claudia Seelig, 301–415–7243).

Week of January 31—Tentative

There are no meetings scheduled for the Week of January 31.

Week of February 7—Tentative

Wednesday, February 9

10:00 a.m. Briefing on Status of Research Programs, Performance, and Plans (Including Status of Thermo-Hydraulics) (Public Meeting) (Contact: Jocelyn Mitchell, 301–415–5289).

Thursday, February 10

9:25 a.m. Affirmation Session (Public Meeting) (if needed).

9:30 a.m. Briefing on Status of CFO Programs, Performance, and Plans (Public Meeting).

Friday, February 11

9:30 a.m. Briefing on Status of Spent Fuel Projects (Public Meeting).

Week of February 14—Tentative

There are no meetings scheduled for the Week of February 14.

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.

ADDITIONAL INFORMATION: By a vote of 5–0 on January 10, the Commission determined pursuant to U.S.C. 552b(e) and § 9.107(a) of the Commission's rules

that ''Discussion of Management Issues (Closed—Ex. 2)'' be held on January 10, 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, DC 20555 (301–415–1661). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to wmh@nrc.gov or dkw@nrc.gov.

Dated: January 20, 2000.

William M. Hill, Jr.,

Secy Tracking Officer, Office of the Secretary.

[FR Doc. 00–1792 Filed 1–21–00; 12:53 pm]

BILLING CODE 7590–01–M

NUCLEAR REGULATORY COMMISSION

Staff Meetings Open to the Public: Proposed Policy Statement

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed policy statement.

SUMMARY: The Nuclear Regulatory Commission (NRC) proposes to revise Section D of its current policy statement that NRC staff follows in opening to public observation meetings between the NRC staff and one or more outside persons. The NRC proposes to announce via the Internet from the NRC Web site at *http://www.nrc.gov,* its staff meetings that will be open to the public. The NRC proposes to discontinue announcing public staff meetings, meeting changes, and cancellations through its public meeting notice system provided by NRC's electronic bulletin board and a telephone recording, and through the Weekly Compilation of Press Releases and posting in the NRC's Public Document Room (PDR). The policy would also be amended to state that staff meetings will be announced as soon as the staff is certain that a meeting will be held and firm arrangements have been made, but generally no fewer than 10 calendar days before the meeting. Also, the policy would be amended to eliminate the current practice of only posting meetings scheduled within 60 days.

The Commission will not finalize revisions to the Policy Statement or discontinue its current methods of informing the public of open staff meetings until public comments have been received and evaluated as to whether changes in the proposed course are warranted.

DATES: Submit comments by March 27, 2000. Comments received after this date will be considered if it is practical to do so, but the Commission is only able to guarantee its consideration of comments received on or before this date.

ADDRESSES: Send comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. ATTN: Rulemakings and Adjudications Staff.

Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland, between 7:30 a.m. and 4:15 p.m., on Federal workdays.

Examine comments received at the NRC Public Document Room, 2120 L Street NW. (Lower level), Washington, D.C.

A copy of NRC's current Policy Statement on Staff Meetings Open to the Public and this proposed revision to the policy statement are available at the NRC's rulemaking Web site at *http://ruleforum.llnl.gov.* This site also enables you to submit comments on the proposed policy statement. Comments may be uploaded as files (any format), if your Web browser supports that function. For information about the interactive rulemaking Web site, contact Ms. Carol Gallagher, 301–415–5905; email: cag@nrc.gov.

FOR FURTHER INFORMATION CONTACT: John Craig, Office of the Executive Director for Operations, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Telephone: 301–415–8703: email: *jwc1@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The NRC first published its policy on open staff meetings in the **Federal Register** on June 28, 1978 (43 FR 28058). Subsequently, the NRC published a new Policy Statement on Staff Meetings Open to the Public in the **Federal Register** on September 20, 1994 (59 FR 48340). Section D of that policy statement implemented an electronic bulletin board and a telephone recording as the primary mechanisms for announcing staff meetings open to the public.

II. Proposed Change to the Policy Statement

The proposed change would revise Section D to state that staff meetings open to the public will be announced via the Internet from the NRC Web site, (*http://www.nrc.gov*). In 1997, the NRC began to announce staff meetings open to the public on the NRC Web site, in addition to the two mechanisms indicated in Section D. The public is provided access to the NRC Web site in the NRC Public Document Room, and may access it from personal computers as well. The NRC staff studied the use of the Electronic Bulletin Board and telephone recordings of the Public Meeting Notice System and compared this use with the same information provided via the Internet. The Bulletin Board averaged 33 calls per month and the telephone recording averaged 49 calls per month, as compared to 1,465 views per month of this information on the Internet. It has become apparent that with the increasing use of the Internet to obtain information, the NRC Web site is the primary mechanism by which the public accesses announcements of NRC staff meetings open to the public. Additionally, the study revealed that the public does not rely on the telephone recording to determine if meetings have been changed or canceled. The public usually contacts the NRC staff person listed in each meeting announcement, or accesses the NRC Web site to determine if there is a change in the schedule or location of a meeting. Consequently, the Commission has determined that the Electronic Bulletin Board and the telephone recording are not used sufficiently to merit continuation. Furthermore, the NRC does not believe that eliminating the telephone recording will adversely affect the ability of the public to find out whether meetings have been changed or canceled. The NRC plans to retain the telephone number, with a new recording that refers the public to the NRC Web site and the toll-free telephone number of the PDR. For people who cannot access the NRC Web site, assistance on scheduled NRC meetings will be available through NRC staff at the PDR, by calling toll-free 1–800–397–4209.

The NRC does not distribute a summary compilation of meeting notices in the Weekly Compilation of Press Releases; therefore, that provision in Section D has been eliminated. Also, because the public can gain access to the NRC Web site using a computer at the PDR, the proposed revision no longer requires that paper copies of meeting notices be posted at the PDR. Specific comments regarding the discontinuation of announcing staff public meetings through the electronic bulletin board and telephone recording and through the weekly compilation of

press releases and posting in the NRC's PDR are requested.

This policy statement would also be revised to state that staff meetings will be noticed as soon as the NRC staff is certain that a meeting will be held and that firm arrangements have been made, but generally no fewer than 10 calendar days before the meeting. Under the current policy, the NRC staff is instructed to provide a notice to the public meeting notice coordinator at least 10 days in advance of the date of the meeting, with certain exceptions. The goal of that practice was to ensure that the subsequent administrative processing of the notice for public notification would result in the public having at least a one-week notice of the open staff meeting. However, the current NRC guidance for this policy, Management Directive 3.5, ''Public Attendance at Certain Meetings Involving the NRC Staff'', states that ''[m]eetings open to the public should normally be *announced to the public* [emphasis added] and to the Commission at least 10 calendar days in advance of the date of the meeting. * * * The change to the policy would specify that the public can expect to receive notification of a staff meeting open to the public via the NRC Web site 10 calendar days in advance. The change will bring the policy statement into line with the Management Directive.

Experience has also shown that sometimes a staff meeting that is going to be open to the public needs to be scheduled quickly, and thus time is not available for the public to receive notice at least 10 calendar days in advance of the meeting. In these cases where an exception to the 10 calendar day policy must be made, the proposed change states that the staff will try to give notice as promptly as possible.

The current policy also provides for such exceptions, but the proposed policy would tie the exceptions to the NRC's strategic plan performance goals. The current draft of the strategic plan includes performance goals to: (1) Maintain safety; (2) increase public confidence; (3) reduce unnecessary regulatory burden; and (4) make NRC activities and decisions more effective, efficient and realistic. When the final version of the strategic plan is available, the Commission will consider whether the performance goals in the plan necessitate additional changes to NRC's policy of opening staff meetings to the public.

With respect to the third and fourth draft performance goals noted above, the Commission anticipates that they would be used sparingly and only when circumstances would not reasonably permit the 10 calendar-day notice. Comment is explicitly requested to identify circumstances in which these performance goals may justify an exception to the 10 calendar-day notice period.

To explain how these performance goals would be used to evaluate whether exceptions should be made to the 10 calendar-day notice period, the following examples are given. To maintain safety, it may be necessary to hold a meeting called on short notice to resolve a licensee safety issue. To increase public confidence, the NRC would hold a meeting as soon as is practical for a critical licensee safety issue requiring immediate attention even if the meeting notice period was less than 10 calendar days. To reduce unnecessary regulatory burden, it may be necessary for the staff to interact with an applicant for a license amendment frequently and on short notice in order to meet aggressive licensing schedules for high-priority reviews. The meeting notice would indicate that meetings will be held on the application for the stated period of time and that specifics on individual meetings will be provided with as much notice as possible. As shown in the three examples, the staff may have to provide less than the 10 calendar-day notice to make activities and decisions more effective, efficient and realistic for aggressive licensing schedules and unforeseen circumstances that require timely response.

Also, the policy is revised to eliminate the current practice of only posting meetings scheduled within 60 days. This restriction was placed in the current policy because of limited computer storage capacity available when the Public Meeting Notice System was designed in the early 1990s.

The Commission is requesting comments on the proposed discontinuation of providing notice of staff meetings open to the public through the electronic bulletin board and telephone recording as well as through the Weekly Compilation of Press Releases and posting in the NRC's Public Document Room.

The Commission will not finalize revisions to the Policy Statement or discontinue its current methods of informing the public of open staff meetings until any public comments have been evaluated as to whether changes in the proposed course are warranted.

Accordingly, the Commission is proposing to revise Section D of the Commission's Policy Statement on Staff Meetings Open to the Public, to read as follows:

Notice to the Public

1. Meeting announcement information is to be provided to the public as soon as the staff is certain that a meeting will be held and firm date, time, and facility arrangements have been made, but generally no fewer than 10 calendar days before the meeting. Where a meeting must be scheduled but cannot be announced 10 calendar days in advance, the staff will provide as much advance notice as possible. Public notice of meetings will be made via the Internet from the NRC Web site at *http://www.nrc.gov.* Meeting notices, changes to scheduled meetings, and cancellations will be updated on the NRC Web site each Federal work day, as appropriate. Information regarding public meetings can be obtained from the Public Document Room by calling toll-free at 1–800–397–4209.

2. Meeting announcements will include the date, time, and location of the meeting, as well as its purpose, the NRC office(s) and outside participant(s) in attendance, and the name and telephone number of the NRC contact for the meeting.

Dated at Rockville, MD, this 19th day of January, 2000.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. 00–1730 Filed 1–24–00; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 24255, 812–11774]

Liberty All-Star Equity Fund, et al.; Notice of Application

January 19, 2000.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under sections 6(c) and 17(b) of the Investment Company Act of 1940 (''Act'') for an exemption from section 17(a) of the Act, under section 6(c) for an exemption from section 17(e) of the Act and rule 17e–1 under the Act, and under section 10(f) of the Act for an exemption from section 10(f).

APPLICANTS: Liberty All-Star Equity Fund (''Equity Fund''), Liberty All-Star Growth Fund, Inc. (''Growth Fund''), Liberty Funds Trust IX (''Liberty Trust'') on behalf of its sole series, Liberty All-Star Growth & Income Fund (''Growth &

Income Fund''), Liberty Variable Investment Trust (''LVIT'') on behalf of one of its services, Liberty All-Star Equity Fund, Variable Series (''Equity Fund, VS,'' collectively with Equity Fund, Growth Fund and Growth & Income Fund, the ''Funds''), Liberty Asset Management Company (''LAMCO''), J.P. Morgan Investment Management Inc. (''J.P. Morgan''), J.P. Morgan Securities Inc. (''Morgan Securities''), and William Blair & Company, L.L.C. (''William Blair'').

SUMMARY OF APPLICATION: Applicants request an order to permit certain registered management investment companies advised by several investment advisers to engage in principal and brokerage transactions with a broker-dealer affiliated with one of the investment advisers and to purchase securities in offerings underwritten by a principal underwriter affiliated with one of the investment advisers. The transactions would be between a broker-dealer or principal underwriter and a portion of the investment company's portfolio not advised by the adviser affiliated with the broker-dealer or principal underwriter. Applicants also request relief to permit a portion of the portfolio to purchase securities in offerings underwritten by a principal underwriter affiliated with the investment adviser to that portion if the purchase is in accordance with all of the conditions of rule 10f–3 under the Act, except for the provision that would require aggregation of certain purchases.

FILING DATES: The application was filed on September 16, 1999. Applicants have agreed to file an amendment during the notice period, the substance of which is reflected in this notice.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on February 14, 2000 and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Commission's Secretary.

ADDRESSES: Secretary, Commission, 450 5th Street, NW, Washington, D.C. 20549–0609. Applicants: Equity Fund, Growth Fund, Liberty Trust and LAMCO, 600 Atlantic Avenue, Boston, MA 02210–2214; LVIT, One Financial Center, Boston, MA 02111; J.P. Morgan, 522 Fifth Avenue, New York, NY 10036; Morgan Securities, 60 Wall Street, New York, NY 10260; and William Blair, 222 W. Adams Street, Chicago, IL 60606.

FOR FURTHER INFORMATION CONTACT: Anu Dubey, Senior Counsel, at (202) 942–0687, or Michael W. Mundt, 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 20549–0102 (tel. 202–942–8090).

Applicants' Representations

1. Equity Fund, a Massachusetts business trust, and Growth Fund, a Maryland corporation, are registered under the Act as closed-end management investment companies. Liberty Trust and LVIT are Massachusetts business trusts registered under the Act as open-end management investment companies.

2. LAMCO is registered as an investment adviser under the Investment Advisers Act of 1940 (''Advisers Act'') and is responsible for the general management and investment of each Fund's assets. LAMCO also provides administrative services to each Fund, some of which are delegated to LAMCO's affiliate, Colonial Management Associates, Inc. The assets of each Fund are allocated by LAMCO among three to five subadvisers (''Subadvisers''). Each Subadviser has discretion to purchase and sell securities for a discrete portion of a Fund portfolio's assets in accordance with the Fund's objectives, policies, and restrictions. Each Subadviser is paid a fee by LAMCO out of the management fee received by LAMCO from the Funds. None of the Subadvisers (except by virtue of serving as Subadviser to a discrete portion of a Fund) has any affiliation with the Funds or LAMCO or with any person that serves as promoter or principal underwriter to the Funds.

3. J.P. Morgan, a subsidiary of J.P. Morgan & Co. Incorporated (''JPM Incorporated''), a bank holding company, is an investment adviser registered under the Advisers Act that serves as Subadviser to Growth Fund, Equity Fund, and Equity Fund, VS. Morgan Securities is a broker-dealer registered under the Securities Exchange Act of 1934 (''Exchange Act'') and, as a wholly-owned subsidiary of JPM Incorporated, is under common control with J.P. Morgan. William Blair is an investment adviser registered under the Advisers Act and a broker-dealer registered under the Exchange Act that serves as Subadviser to Growth Fund through its investment management services department. William Blair conducts brokerage activities through its institutional sales and trading department, an operating division separate from its investment management services department.

4. The requested relief would permit: (a) William Blair, Morgan Securities, or any broker-dealer registered under the Exchange Act that itself serves as Subadviser (either directly or through a separate operating division) or is an affiliated person (an ''Affiliated Broker-Dealer'') of J.P. Morgan, William Blair, or another investment adviser serving as Subadviser (an ''Affiliated Subadviser'') to one or more Multi-Managed Funds (as defined below) to engage in principal transactions with a portion of the Fund that is advised by another Subadviser that is not an affiliated person of the Affiliated Broker-Dealer or the Affiliated Subadviser (an ''Unaffiliated Subadviser'') (each such portion, an ''Unaffiliated Portion''); (b) an Affiliated Broker Dealer to provide brokerage services to an Unaffiliated Portion, and the Unaffiliated Portion to utilize such brokerage services, without complying with rule 17e–1(b) and (c) under the Act; (c) an Unaffiliated Portion to purchase securities during the existence of an underwriting syndicate, a principal underwriter of which is an Affiliated Subadviser or an affiliated person of an Affiliated Subadviser (an ''Affiliated Underwriter''); and (d) a portion of the Fund advised by an Affiliated Subadviser (''Affiliated Portion'') to purchase securities during the existence of an underwriting syndicate, a principal underwriter of which is an Affiliated Underwriter, in accordance with the conditions of rule 10f–3, except that paragraph (b)(7) of the rule would not require the aggregation of purchases by the Affiliated Portion with purchases by an Unaffiliated Portion.

5. Applicants request that the exemptive relief apply to the Funds or any existing or future registered management and investment company (a) advised by LAMCO or any entity controlling, controlled by, or under common control (within the meaning of section 2(a)(9) of the Act) with LAMCO and (b) at least one other investment adviser registered under the Advisers Act or exempt from such registration (the Funds and such investment companies, each a ''Multi-Managed

Fund''). The relief also would apply as described in the application to any existing or future entity that serves as an Affiliated Subadviser, Affiliated Broker-Dealer, or Affiliated Underwriter. Any entity that currently intends to rely on the order is named as an applicant. Any other existing or future entity that relies on the order will comply with the terms and conditions of the application.

Applicants' Legal Analysis

A. Principal Transactions between Unaffiliated Portions and Affiliated Broker-Dealers

1. Section 17(a) of the Act generally prohibits sales and purchases of securities between a registered investment company and an affiliated person of, promoter of, or principal underwriter for such company, or any affiliated person of an affiliated person, promoter, or principal underwriter. Section 2(a)(3)(e) of the Act defines an affiliated person to be any investment adviser of an investment company, and section 2(a)(3)(C) of the Act defines an affiliated person of another person to include any person directly or indirectly controlling, controlled by, or under common control with such person. Applicants state that an Affiliated Subadviser would be an affiliated person of a Fund, and an Affiliated Broker-Dealer would be either an Affiliated Subadviser or an affiliated person of the Affiliated Subadviser, and thus an affiliated person of an affiliated person (''second-tier affiliate'') of a Fund, including the Unaffiliated Portion. Accordingly, applicants state that any transactions to be effected by an Unaffiliated Subadviser on behalf of an Unaffiliated Portion of a Fund with an Affiliated Broker-Dealer are subject to the prohibitions of section 17(a).

2. Applicants seek relief under sections 6(c) and 17(b) to exempt principal transactions prohibited by section 17(a) because an Affiliated Broker-Dealer is deemed to be an affiliated person or a second-tier affiliate of an Unaffiliated Portion solely because an Affiliated Subadviser is the Subadviser to another portion of the same Fund. The requested relief would not be available if the Affiliated Broker-Dealer (except by virtue of serving as a Subadviser to a discrete portion of a Fund) is an affiliated person or a second-tier affiliate of LAMCO, the unaffiliated Subadviser making the investment decision, or any officer, director or employee of the Multi-Managed Fund.

3. Section 17(b) of the Act authorizes the Commission to grant an order permitting a transaction otherwise prohibited by section 17(a) if it finds that the terms of the proposed transaction are fair and reasonable and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policy of each registered investment company and the general purposes of the Act. Section 6(c) of the Act permits the Commission to exempt any person or transaction from any provision of the Act if the exemption is necessary or 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.

4. Applicants contend that section 17(a) is intended to prevent persons who have the power to control an investment company from using that power to the person's own pecuniary advantage. Applicants assert that when the person acting on behalf of an investment company has no direct or indirect pecuniary interest in a party to a principal transaction, the abuses that section 17(a) is designed to prevent are not present. Applicants state that if an Unaffiliated Subadviser purchases securities on behalf of an Unaffiliated Portion in a principal transaction with an Affiliated Broker-Dealer, any benefit that might inure to the Affiliated Broker-Dealer would not be shared by the Unaffiliated Subadviser. In addition, applicants state that Subadvisers are paid on the basis of a percentage of the value of the assets allocated to their management. The execution of a transaction to the disadvantage of the Unaffiliated Portion would disadvantage the Unaffiliated Subadviser to the extent that it diminishes the value of the Unaffiliated Portion. Applicants further submit that LAMCO's power to dismiss Subadvisers or to change the portion of a Fund allocated to each Subadviser reinforces a Subadviser's incentive to maximize the investment performance of its own portion of the Fund.

5. Applicants state that each Subadviser's contract assigns it responsibility to manage a discrete portion of the Fund. Each Subadviser is responsible for making independent investment and brokerage allocation decisions based on its own research and credit evaluations. Applicants represent that LAMCO does not dictate brokerage allocation or investment decisions to any Fund advised by a Subadviser, or have the contractual right to do so. Applicants contend that, in managing a discrete portion of a Fund, each Subadviser acts for all practical purposes as though it is managing a separate investment company.

6. Applicants state that the proposed transactions will be consistent with the policies of the Fund involved, since each Unaffiliated Subadviser is required to manage the Unaffiliated Portion in accordance with the investment objectives and related investment policies of the Fund as described in its registration statement. Applicants also assert that permitting the transactions will be consistent with the general purposes of the Act and in the public interest because the ability to engage in the transactions increases the likelihood of a Fund achieving best price and execution on its principal transactions, while giving rise to none of the abuses that section 17(a) was designed to prevent.

B. Payment of Brokerage Compensation by Unaffiliated Portions to Affiliated Broker-Dealers

1. Section 17(e)(2) of the Act prohibits an affiliate or a second-tier affiliate of a registered investment company from receiving compensation for acting as broker in connection with the sale of securities to or by the investment company if the compensation exceeds the limits prescribed by the section unless otherwise permitted by rule 17e–1 under the Act. Rule 17e–1 sets forth the conditions under which an affiliated person or a second-tier affiliate of an investment company may receive a commission which would not exceed the ''usual and customary broker's commission'' for purposes of section 17(e)(2). Rule 17e–1(b) requires the investment company's board of directors, including a majority of the directors who are not interested persons under section 2(a)(19) of the Act, to adopt certain procedures and to determine at least quarterly that all transactions effected in reliance on the rule complied with the procedures. Rule 17e–1(c) specifies the records that must be maintained by each investment company with respect to any transaction effected pursuant to rule 17e–1.

2. As discussed above, applicants state that an Affiliated Broker-Dealer is either an affiliated person (as Subadviser to another portion of the Fund) or a second-tier affiliate of an Unaffiliated Portion and thus subject to section 17(e). Applicants request an exemption under section 6(c) from section 17(e) and rule 17e–1 to the extent necessary to permit an Unaffiliated Portion to pay brokerage compensation to an Affiliated Broker-Dealer acting as broker in the ordinary course of business in connection with the sale of securities to or by such Unaffiliated Portion, without complying with the requirements of rule 17e–1 (b)

and (c). The requested exemption would apply only where an Affiliated Broker-Dealer is deemed to be an affiliated person or a second-tier affiliate of an Unaffiliated Portion solely because an Affiliated Subadviser is the Subadviser to another portion of the same Fund. The relief would not apply if the Affiliated Broker-Dealer (except by virtue of serving as Subadviser to a discrete portion of a Fund) is an affiliated person or a second-tier affiliate of LAMCO, the Unaffiliated Subadviser to the Unaffiliated Portion of the Fund, or any officer, director or employee of the Multi-Managed Fund.

3. Applicants believe that the proposed brokerage transactions involve no conflicts of interest or possibility of self-dealing and will meet the standards of section 6(c). Applicants assert that the interests of an Unaffiliated Subadviser are directly aligned with the interests of the Unaffiliated Portion it advises, and an Unaffiliated Subadviser will enter into brokerage transactions with Affiliated Broker-Dealers only if the fees charged are reasonable and fair as required by rule 17e–1(a). Applicants also note that an Unaffiliated Subadviser has a fiduciary duty to obtain best price and execution for the Unaffiliated Portion.

C. Purchases of Securities From Offerings With Affiliated Underwriters

1. Section 10(f) of the Act, in relevant part, prohibits a registered investment company from knowingly purchasing or otherwise acquiring, during the existence of any underwriting or selling syndicate, any security (except a security of which the company is the issuer) a principal underwriter of such is an officer, director, member of an advisory board, investment adviser, or employee of the company, or an affiliated person of any of those persons. Section 10(f) also provides that the Commission may exempt by order any transaction or classes of transactions from any of the provisions of section 10(f), if and to the extent that such exemption is consistent with the protection of investors. Rule 10f–3 under the Act exempts certain transactions from the prohibitions of section 10(f) if specified conditions are met. Paragraph (b)(7) of rule 10f–3 limits the securities purchased by the investment company, or by two or more investment companies having the same investment adviser, to 25% of the principal amount of the offering of the class of securities.

2. Applicants state that each Subadviser, although under contract to manage only a distinct portion of a Fund, is considered an investment adviser to the entire Fund. As a result, applicants believe that all purchases of securities by an Unaffiliated Portion from an underwriting syndicate a principal underwriter of which is an Affiliated Underwriter would be subject to section 10(f).

3. Applicants request relief under section 10(f) from that section to permit an Unaffiliated Portion to purchase securities during the existence of an underwriting or selling syndicate, a principal underwriter of which is an Affiliated Underwriter. Applicants request relief from section 10(f) only to the extent those provisions apply solely because an Affiliated Subadviser is an investment adviser to the Fund. The requested relief would not be available if the Affiliated Underwriter (except by virtue of serving as Subadviser to a discrete portion of a Fund) is an affiliated person or a second-tier affiliate of LAMCO, the Unaffiliated Subadviser making the investment decision with respect to the Unaffiliated Portion of the Fund, or any officer, director, or employee of the Multi-Managed Fund. Applicants also seek relief from section 10(f) to permit an Affiliated Portion to purchase securities during the existence of an underwriting syndicate, a principal underwriter of which is an Affiliated Underwriter, provided that the purchase will be in accordance with the conditions of rule 10f–3, except that paragraph (b)(7) of the rule will not require the aggregation of purchases by the Affiliated Portion with purchases by an Unaffiliated Portion.

4. Applicants state that section 10(f) was adopted in response to concerns about the ''dumping '' of otherwise unmarketable securities on investment companies, either by forcing the investment company to purchase unmarketable securities from its underwriting affiliate, or by forcing or encouraging the investment company to purchase the securities from another member of the syndicate. Applicants submit that these abuses are not present in the context of the Funds because a decision by an Unaffiliated Subadviser to purchase securities from an underwriting syndicate, a principal underwriter of which is an Affiliated Underwriter, involves no potential for ''dumping.'' In addition, applicants assert that aggregating purchases would serve no purpose because there is no collaboration among Subadvisers, and any common purchases by an Affiliated Subadviser and an Unaffiliated Subadviser would be coincidence.

Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. Each Fund relying on the requested order will be advised by an Affiliated Subadviser and at least one Unaffiliated Subadviser and will be operated in the manner described in this application.

2. No Affiliated Subadviser, Affiliated Broker-Dealer or Affiliated Underwriter (except by virtue of serving as Subadviser to a discrete portion of a Fund) will be an affiliated person or a second-tier affiliate of LAMCO, any Unaffiliated Subadviser or any officer, director or employee of a Multi-Managed Fund.

3. No Affiliated Subadviser will directly or indirectly consult with any Unaffiliated Subadvisers concerning allocation of principal or brokerage transactions.

4. No Affiliated Subadviser will participate in any arrangement whereby the amount of its subadvisory fees will be affected by the investment performance of an Unaffiliated Subadviser.

5. With respect to purchases of securities by an Affiliated Portion of a Fund during the existence of any underwriting or selling syndicate, a principal underwriter of which is an Affiliated Underwriter, the conditions of rule 10f–3 will be satisfied except that paragraph (b)(7) will not require the aggregation of purchases by the Affiliated Portion of the Fund with purchases by an Unaffiliated Portion.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 00–1734 Filed 1–24–00; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting; Agency Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold the following meeting during the week of January 24, 2000.

A closed meeting will be held on Tuesday, January 25, 2000 at 11:00 a.m.

Commissioner Hunt, as duty officer, determined that no earlier notice thereof was possible.

Commissioners, Counsel to the Commission, the Secretary to the

Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(4), (8), (9)(A) and (10) and 17 CFR 200.402(a)(4), (8), (9)(A) and (10), permit consideration for the scheduled matters at the closed meeting.

Commissioner Hunt, as duty officer, voted to consider the items listed for the closed meeting in a closed session.

The subject matters of the closed meeting scheduled for Tuesday, January 25, 2000, will be:

A litigation matter;

Institution and settlement of injunctive actions; and

Institution and settlement of administrative proceedings of an enforcement nature.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 942–7070.

Dated: January 20, 2000.

Jonathan G. Katz,

Secretary.

[FR Doc. 00–1806 Filed 1–21–00; 2:40 pm]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–42344; File No. SR–NASD–99–11]

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 1, 2, and 3 to the Proposed Rule Change by the National Association of Securities Dealers, Inc., To Modify the NASD's Small Order Execution System and SelectNet Service

January 14, 2000.

I. Introduction

On February 5, 1999, the National Association of Securities Dealers, Inc. (''NASD''), through its wholly-owned subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder [2] to amend the rules governing Nasdaq's Small Order Execution System (''SOES'') and SelectNet Service (''SelectNet''). Notice of the proposed rule change was published for comment in the **Federal Register** on April 22, 1999.[3] The Commission received 79 comment letters regarding the proposal.[4] On August 24, 1999, December 8, 1999, and January 4, 2000, Nasdaq filed Amendment Nos. 1, 2, and 3 to the proposal.[5] This order approves the proposed rule change, as amended.

II. Description of the Proposal

A. Background

The NASD implemented SOES in 1984 to provide for the automatic execution of small retail agency orders at the best bid or offer (the ''inside market'').[6] Orders entered into SOES generally are routed automatically on a rotating basis to the SOES market makers displaying the best bid or ask price. SOES also allows market participants to ''preference'' (*i.e.*, direct) an order to a designated market maker.[7] SOES currently provides for ''tiered'' maximum order sizes in Nasdaq National Market (''NNM'') securities of 1000, 500, or 200 shares, depending on the trading characteristics of a security.[8] The maximum SOES order size for Nasdaq SmallCap securities is 500 shares.[9] SOES participation is mandatory for all market makers in NNM securities [10] and voluntary for market makers in Nasdaq SmallCap securities. SOES reports trades for public dissemination and sends both sides of a transaction to the applicable clearing corporations designated for clearance and settlement.

SelectNet is an electronic, screen-based order routing system that allows market makers and order entry firms (referred to collectively as ''participants'') to negotiate securities transactions in Nasdaq securities through computer communications rather than by telephone.[11] Unlike SOES, SelectNet does not provide automatic executions. SelectNet allows participants to negotiate for a larger size or a price superior to the current inside quote. In addition, SelectNet participants may indicate that an order or counter-offer will be in effect from between three and 99 minutes, specify a day order, and indicate whether price or size are negotiable or whether a specific minimum quantity is acceptable. Participants may accept, price improve, counter, or decline a

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 41296 (April 15, 1999), 64 FR 19844. In addition to providing notice of the current proposal, Securities Exchange Act Release No. 41296 also re-opened the comment period for File No. SR–NASD–98–17, regarding Nasdaq's proposal to establish an integrated order delivery and execution system (''IODES Proposal''). The IODES Proposal was published for comment in the **Federal Register** on March 12, 1998. *See* Securities Exchange Act Release No. 39718 (March 4, 1998), 63 FR 12124. Subsequently, the Commission extended the comment period for the IODES Proposal through May 8, 1998. *See* Securities Exchange Act Release No. 39794 (March 25, 1998), 63 FR 15471 (March 31, 1998).

[4] A list of the commenters appears in Appendix A.

[5] *See* letter from Robert E. Aber, General Counsel, Nasdaq, to Belinda Blaine, Associate Director, Division of Market Regulation (''Division''), Commission, dated August 24, 1999 (''Amendment No. 1''); letter from Thomas P. Moran, Assistant General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated December 8, 1999 (''Amendment No. 2''); and letter from Thomas P. Moran, Assistant General Counsel, Nasdaq, to Richard Strasser, Assistant Director, Division, Commission, dated January 4, 2000 (''Amendment No. 3''). Amendment Nos. 1 and 2 responded to concerns raised by the commenters. Specifically, Amendment No. 1 discussed electronic communication network (''ECN'') participation in the proposed Nasdaq National Market System (''NNMS''); ECN reserve size interaction with NNMS; unlisted trading privilege (''UTP'') exchange participation in NNMS; the elimination of SelectNet preferencing; NNMS fees; order entry firm participation in NNMS; the timeframe for implementing NNMS; and the continuation of SelectNet. Amendment No. 2 discussed the five-second interval delay between automatic executions; the elimination of SelectNet liability orders; SelectNet preferencing away from the inside market; technology concerns; the potential for manipulative order entry strategies; the reserve size feature; the maximum order size for NNMS; and the elimination of the No Decrementation functionality. Amendment No. 3 revised NASD Rule 4730 (to be renumbered as NASD Rule 4753) to provide that the delay between SOES executions during locked and crossed markets for market makers in SmallCap securities will remain at five seconds.

[6] *See* Securities Exchange Act Release Nos. 21433 (October 29, 1984), 49 FR 44042 (November 1, 1984) (File No. SR–NASD–84–26) (notice of proposal to implement SOES); and 21743 (February 12, 1985), 50 FR 7432 (February 22, 1985) (order approving File No. SR–NASD–84–26).

[7] *See* Securities Exchange Act Release No. 25791 (June 9, 1988), 53 FR 22594 (June 16, 1988) (order approving File No. SR–NASD–88–1) (''1988 Order'').

[8] *See* 1988 Order and NASD Rule 4710(g).

[9] *See* NASD Rule 4710(g).

[10] *See* 1988 Order and NASD Rule 4611(f).

[11] The Commission approved SelectNet, which originally was referred to as the Order Confirmation Transaction Service, on a permanent basis in 1988. *See* Securities Exchange Act Release No. 25690 (May 11, 1988), 53 FR 17523 (May 17, 1988) (order approving File No. SR–NASD–88–11). *See also* Securities Exchange Act Release Nos. 28636 (November 21, 1990), 55 FR 49732 (November 30, 1990) (order approving File No. SR–NASD–90–51) (implementing enhancements to SelectNet); and 30581 (April 14, 1992), 57 FR 14596 (April 21, 1992) (order approving File No. SR–NASD–91–51) (expanding SelectNet's hours of operation to include a pre-opening session from 9:00 a.m. to 9:30 a.m. Eastern Time and an after-hours session from 4:00 p.m. until 5:15 p.m. Eastern Time).

SelectNet order. If a participant elects to counter an offer, SelectNet allows the participants to negotiate by exchanging counter-offers until they reach an agreement. After the participants reach an agreement, the execution is ''locked in,'' reported to the tape for public dissemination, and sent to the clearing organization for comparison and settlement.

SelectNet currently allows participants to broadcast orders to all market participants or to preference an order to a designated market maker. Although SelectNet is an order delivery service rather than an order execution service, Nasdaq believes that a preferenced SelectNet order presented to a market maker at its displayed quote generally gives rise to liability under Exchange Act Rule 11Ac1–1 (''Firm Quote Rule'') for the market maker to execute the transaction at that price.[12] As discussed more fully below, Nasdaq proposes to eliminate most SelectNet liability orders.

Nasdaq has designated SelectNet as the link to the electronic communications networks (''ECNs'') pursuant to the Commission's Order Handling Rules.[13] SelectNet also allows exchanges that trade Nasdaq securities on an unlisted trading privilege (''UTP'') basis to access Nasdaq market makers.[14] As discussed more fully below, SelectNet will continue to perform both of these functions under the current proposal.

Nasdaq maintains that although SOES and SelectNet provide valuable services to market participants, the operation of two separate and independent execution systems has resulted in the long-standing problem of potential dual liability for market makers. According to Nasdaq, multiple access points to a market maker's quote, through SOES and SelectNet as well as a firm's internal order delivery and telephone facilities, can routinely subject market makers to unintended double liability for orders that reach a market maker's quote at or near the same time through different systems. Nasdaq asserts that the potential for unexpected and increased order liability reduces market maker incentives to commit capital and display larger quote sizes, thereby depriving the Nasdaq market of valuable liquidity.

Nasdaq proposes to implement a new trading environment to address these problems. Specifically, Nasdaq proposes to modify SOES and SelectNet to (1) Re-establish SelectNet as a non-liability order delivery and execution system for NNM securities; and (2) Recast SOES as it is used to trade NNM securities.[15] The recast SOES will be called the Nasdaq National Market Execution System (''NNMS''). Nasdaq believes that the proposed changes will reduce instances of dual liability in the most active Nasdaq securities while improving the speed of executions and increasing the access of all market participants to the full depth of a security's trading interest.

B. NNMS

As proposed, NNMS would: (1) Increase the maximum order size for NNM securities that are eligible for automatic execution to 9,900 shares;[16] (2) Allow market makers and order entry firms to enter proprietary orders into NNMS and obtain automatic executions for proprietary and agency orders in NNM securities; (3) Reduce the current 17-second delay between executions against the same market maker to five seconds;[17] (4) Enable NNM orders to interact automatically with a market maker's displayed size and reserve size, including, if approved by the Commission in a separate pending proposal, a market maker's agency quotes,[18] after yielding priority to displayed quotations at the same price; (5) Eliminate the No Decrementation (''No Dec'') feature for NNM securities, which currently allows continuous executions against a market maker's quote at the same price without decrementing the quoted size; and (6) Eliminate the SOES preferencing feature for NNM securities. Several of these changes are discussed in more detail below.

1. Automatic Executions for Orders of up to 9,900 Shares in NNM Securities

SOES currently permits the automatic execution of retail agency orders of 200, 500, or 1,000 shares at the inside market. NNMS will provide automatic executions at the inside market for orders of up to 9,900 shares in NNM securities. Automatic executions through NNMS will be available not only for retail agency orders, but also for market makers' proprietary orders and for the orders of order entry firms.

2. Reserve Size

The NNMS reserve size functionality would allow a market maker or its customer to display publicly part of the full size of its order or interest with the remainder of its order or interest held in undisplayed reserve. The undisplayed portion of the order or interest would be displayed in whole or in part as the displayed portion of the order or interest is executed. To use the reserve size function, a market maker must initially display a minimum of 1,000 shares in its quotation, or in its agency quotation, if the Commission approves the display of separate agency quotes, and it must refresh its proprietary or agency quote to a minimum of 1,000 shares. After a market maker's or its customer's displayed quotation was decremented to zero due to NNMS executions, Nasdaq would refresh the market maker's or its customer's displayed size from reserve size to a level designated by the market maker or its customer or, in the absence of such a designation, to the automatic refresh size (*i.e.,* 1,000 shares).[19] A market maker that wished to refresh a displayed proprietary or agency quote at the inside market at the same price level would be required to refresh his proprietary or agency quotation at the level of 1,000 shares or more to continue using reserve size. A market maker that wished to refresh and display his proprietary or agency quote at the same inside price at

[12] Nasdaq notes that the Firm Quote Rule does not apply if: (1) prior to the receipt of an order in a security, a broker or dealer has communicated to its exchange or association a revised quotation size or a revised bid or offer; or (2) at the time an order in a security is presented, a broker or dealer is in the process of effecting a transaction in that security, and immediately after the completion of that transaction, the broker or dealer communicates to its exchange or association a revised quotation size or a revised bid or offer for the security.

[13] *See* Securities Exchange Act Release No. 38156 (January 10, 1997), 62 FR 2415 (January 16, 1997) (order approving File No. SR–NASD–96–43).

[14] *See* Securities Exchange Act Release No. 38191 (January 22, 1997), 62 FR 4562 (January 30, 1997) (notice of filing and immediate effectiveness of File No. SR–NASD–97–02).

[15] For Nasdaq SmallCap securities, SOES generally will remain unchanged.

[16] The current order size maximums for NNM securities through SOES are 1,000, 500, or 200 shares.

[17] After SOES executes an unpreferenced market order or marketable limit order against a SOES market maker, the market maker currently is not required to execute another unpreferenced SOES order in that security at the same bid or offer until 17 seconds have elapsed, absent a quotation update by the market maker within the 17-second period. *See* Securities Exchange Act Release No. 39490 (December 24, 1997), 63 FR 897 (January 7, 1998) (order approving File No. SR–NASD–97–50).

[18] Nasdaq filed a proposal with the Commission that would permit the separate display of customer orders by market makers in Nasdaq through a market maker agency identification symbol (''agency quote''). *See* Securities Exchange Act Release No. 41128 (March 2, 1999), 64 FR 12198 (March 11, 1999) (notice of filing of SR–NASD–99–09) (''Agency Quote Proposal''). The Commission subsequently extended the comment period for the Agency Quote Proposal. *See* Securities Exchange Act Release No. 41243 (April 1, 1999), 64 FR 17428 (April 9, 1999). The Agency Quote Proposal currently is pending with the Commission.

[19] In addition, NNMS's autoquote refresh function would allow a market maker whose displayed proprietary quotation and reserve size have been decremented to zero due to NNMS executions to elect to have Nasdaq refresh the market maker's quotation (1) at a price interval designated by the market maker; and (2) to the size level designated by the market maker or, in the absence of such a size level designation, to the automatic refresh size.

a size less than 1,000 shares would be permitted to do so, but would not be permitted to use NNMS's reserve size feature.[20]

Orders entered in NNMS would be executed automatically against displayed quotations and reserve size (including agency quotes, if the Commission approves the display of separate agency quotes), in price/time priority. For quotations at the same price level, NNMS would yield priority to all displayed quotations over reserve size, so that NNMS would execute against displayed quotations in time priority and then against reserve size in time priority.

3. Elimination of the No Dec Feature for NNM Securities

The No Dec feature allows continuous executions against a market maker's quotation at the same price without decrementing the quoted size. Nasdaq proposes to eliminate the No Dec feature for NNM securities. Nasdaq believes that the No Dec feature has become less important because market makers now are able to manage their quotations by displaying their actual size. In addition, Nasdaq believes that the No Dec feature will become less important in a market where market makers will have the ability to refresh their quotations at a size they determine. Nasdaq also believes that the No Dec feature inhibits quote competition among market participants and discourages the full display of trading interest.

4. Elimination of SOES Preferencing

Nasdaq proposes to eliminate the existing SOES preferencing feature for NNM securities because it is inconsistent with the processing of orders in time priority as contemplated in Nasdaq's new trading environment. Nasdaq also believes that preferencing in an automatic execution system reduces incentives for market makers to compete aggressively for orders by showing the full size and true price of their trading interest. Moreover, Nasdaq believes that the preferencing feature might place the agency quotes of public customers at a disadvantage.

5. Execution Fees

NNMS would impose a $0.50 per side fee for each execution. To reduce user cost and facilitate the use of NNMS's reserve size functionality, a simultaneous and instantaneous execution against an NNMS participant's displayed size and reserve size would be treated for billing purposes as a single execution.

6. Penalties for Withdrawals

Like today, under the proposal, a market maker's failure to update a fully exhausted quote would result in the system placing the market maker's quote in a ''closed'' state that, if not updated within five minutes, would be cause for suspension of the market maker's quote for 20 business days.[21]

C. Modifications to SelectNet

Through rule changes requiring the use of ''oversized'' preferenced SelectNet orders, Nasdaq proposes to eliminate the use of most SelectNet liability orders and thereby re-establish SelectNet as an order delivery and negotiation system. Specifically, subject to the exceptions discussed below, Nasdaq proposes to revise its rules to implement an ''oversized order requirement,'' which will prohibit members from directing a SelectNet preferenced order to an NNMS market maker, including the market maker's agency quote, if the Commission approves the display of separate agency quotes, unless the preferenced order is designated as either (1) ''All-or-None'' (''AON'') of a size that is at least 100 shares greater than the displayed amount of the NNMS market maker's quote to which the order is directed; or (2) ''Minimum Acceptable Quantity'' (''MAQ'') with a MAQ value of at least 100 shares greater than the displayed amount of the NNMS market maker's quote to which the order is directed. SelectNet will be programmed to reject preferenced messages that fail to satisfy these requirements.[22] In Nasdaq's view, the oversized order requirement will ensure that market makers are not subject to liability under the Firm Quote Rule for SelectNet preferenced orders directed to them. Accordingly, Nasdaq believes that the proposal will reduce instances of dual liability resulting from the receipt of orders through asynchronous systems. Nasdaq notes that the recipient of an oversized NNM SelectNet order may choose to execute the incoming order or initiate an electronic negotiation in response to the message.[23]

As discussed below, the oversized order requirement will not apply to UTP exchanges, which will be able to send and receive SelectNet liability orders. In addition, market participants will continue to use SelectNet liability orders to access ECNs that choose to participate in Nasdaq's new trading environment as order entry ECNs.

D. UTP Exchange Participation

Under the proposal, SelectNet will continue to serve as the primary linkage between UTP exchanges and Nasdaq. UTP exchanges will continue to receive and be obligated to execute preferenced SelectNet liability orders, and they will retain their ability to send SelectNet preferenced liability orders to Nasdaq market makers. Although a market maker may be subject to dual liability if a UTP exchange accesses the market maker with a SelectNet liability order and, at the same time, an NNMS market maker or order entry firm accesses the market maker via NNMS, Nasdaq believes that the potential dual liability will be manageable.

E. ECN Participation

An ECN will be able to participate in NNMS as either an order entry ECN or as a full participant ECN. The manner in which an ECN chooses to participate in NNMS will be governed by an

[20] This restriction would not apply for interim executions against a market maker's non-updated proprietary or agency quote. For example, if a market maker displaying an initial proprietary or agency quotation of 1,000 shares with 5,000 shares in reserve were accessed automatically by NNMS for 300 shares in displayed size, the market maker or its customer would be allowed to continue to display its remaining 700 shares and keep 5,000 shares available in reserve size. If the market maker or its customer subsequently updated either its displayed or reserve size, or its quoted price, the market maker would be obligated to increase the displayed size of its proprietary or agency quote to 1,000 shares to continue to use NNMS's reserve size feature.

[21] Market makers will continue to have the ability, through Nasdaq's automatic quote update facility, to pre-select a tick value and have Nasdaq refresh the market maker's proprietary quote away from the inside market. This capability will not apply to a market maker's agency quote because that quotation would represent agency interest. If a market maker's quote is refreshed to a different price or size level, another order will not be delivered to that market maker for five seconds after that quote is refreshed at the new price or size level. Nasdaq recently proposed an order display facility (''Order Display Facility Proposal'') that would eliminate the 20-day suspension. *See* Securities Exchange Act Release No. 42166 (November 22, 1999), 64 FR 69125 (December 6, 1999) (notice of filing of File No. SR–NASD–99–53). Under the Order Display Facility Proposal, if a market maker's quote/order decremented to zero, and the market maker did not update its principal quote/order, transmit an attributable revised quote/order to Nasdaq, or have another principal (*i.e.,* non-agency quote) attributable quote/order in the system, Nasdaq would place the market maker's quote (both sides) in a closed state for three minutes. At the end of that time, if the market maker did not voluntarily update or withdraw its quote from the market, Nasdaq would refresh the market maker's quote/order to 100 shares at the lowest market maker bid and highest market maker offer being displayed in that security at that time and reopen the market maker's quote.

[22] SelectNet will continue to accept orders of any size (subject to the current 999,999-share system limit) for Nasdaq SmallCap securities.

[23] Nasdaq notes that this is not to be understood to prohibit liability for each of potentially two quotes displayed by market makers under the Agency Quote Proposal.

addendum to the Nasdaq Workstation II Subscriber Agreement for ECNs.[24]

An order entry ECN will participate in Nasdaq in substantially the same manner as ECNs participate in Nasdaq today. Market participants will continue to access order entry ECNs via the SelectNet linkage and will be able to send preferenced SelectNet messages (*i.e.,* liability orders) of up to 999,999 shares to order entry ECNs. Unlike a full participant ECN, an order entry ECN will not provide automatic executions for orders received from NNMS participants. An order entry ECN will be able to send oversized SelectNet orders to NNMS market makers and other ECNs. In addition, an order entry ECN may request order entry capability in NNMS, which will allow the ECN to obtain automatic executions against the quotations of NNMS market makers, including agency quotations, if the Commission approves the display of separate agency quotes.

A full participant ECN will agree to provide automatic executions for orders the ECN receives from other NNMS participants through NNMS. A full participant ECN will not receive SelectNet preferenced liability orders.[25] Like an order entry ECN, a full participant ECN may request order entry capability in NNMS, which will allow the ECN to obtain automatic executions against the quotations of NNMS market makers, including agency quotations, if the Commission approves the display of separate agency quotes.

Due to the time and the technology constraints affecting some ECNs, Nasdaq believes that, on an interim basis, ECNs should have an option regarding their manner of participation in Nasdaq's new system. Accordingly, Nasdaq does not propose at this time to require all ECNs to register as full participant ECNs, although Nasdaq will reconsider this issue in the future.

F. Nasdaq SmallCap Securities

For Nasdaq SmallCap securities, the trading rules for automatic execution through SOES will remain unchanged. Accordingly, participation in the automatic execution system for SmallCap securities will continue to be voluntary, and automatic executions will be available only for the small orders of public customers. The current maximum order size limits also will remain in effect. After Nasdaq has had experience with NNMS, it will consider whether the functionality of the NNMS system should be made available for the trading of SmallCap securities.

Nasdaq originally proposed to revise NASD Rule 4730(b)(3) (to be renumbered as NASD Rule 4753(b)(3)) to provide that during locked and crossed markets, SOES will execute orders against the quotations of market makers in SmallCap securities that are locked or crossed at 17-second intervals, rather than five-second intervals, as currently required. Nasdaq amended its proposal to maintain the current five-second delay between SOES executions during locked and crossed markets.[26]

G. Technical Amendments

Nasdaq proposes technical, non-substantive changes to several rules in the NASD Rule 4600 Series and throughout the NASD Manual. In particular, Nasdaq proposes to revise NASD Rule 4613, ''Character of Quotations,'' to eliminate the references to SOES tier sizes for the NNM quotations of market makers. In addition, Nasdaq will rescind or conform other rules that refer to SOES, including NASD Rule 4611(f), ''Registration as a Nasdaq Market Maker,'' NASD Rule 4619, ''Withdrawal of Quotations and Passive Market Making,'' NASD Rule 4620, ''Voluntary Termination of Registration,'' NASD Rule 4632, ''Trade Reporting,'' NASD Rule 4618(c), ''Clearance and Settlement,'' and the NASD Rule 4700 Series (SOES).

III. Summary of Comments

The Commission received 79 comment letters regarding the proposed rule change. The commenters included broker-dealers, registered representatives, ECNs, academics, professional associations, and a registered national securities exchange.[27] Nineteen commenters, including the Trading Committee of the Securities Industry Association (''SIA''),[28] the Investment Company Institute (''ICI''),[29] and Charles Schwab,[30] supported the proposal.[31] The Trading Committee of the SIA, for example, believed that the proposal would reduce the problem of dual liability for market makers and improve the speed of executions.[32] Similarly, the ICI maintained that the proposal would increase the speed of executions and enhance access to the full depth of a security's trading interest by all market participants.[33] One trader and investor believed that the proposal would result in a more liquid and more transparent Nasdaq market.[34]

Fourteen commenters supported the proposal but voiced concerns with some aspects of the proposed changes. Morgan Stanley Dean Witter (''Morgan Stanley''), for example, generally supported the proposed rule change because it will reduce instances of double liability for market makers, but recommended several modifications to the proposal.[35] Similarly, the Electronic Traders Association (''ETA'') supported the proposal but expressed reservations regarding, among other things, the operation of the fee system for NNMS.[36] Donaldson, Lufkin & Jenrette (''DLJ'') believed that the proposal ''can bring substantial benefits'' to Nasdaq but noted that the proposal fails to eliminate all instances of dual liability.[37] The

[24] *See* NASD Rule 4623(b)(3).

[25] Telephone conversation between Thomas P. Moran, Assistant General Counsel, Nasdaq, and Yvonne Fraticelli, Special Counsel, Division, Commission, on October 5, 1999.

[26] *See* Amendment No. 3, *supra* note 5. The proposal, as amended, retains proposed changes to the rule text of renumbered NASD Rule 4753(b)(3) to clarify that the interval for execution of orders against the quotations of market makers that have locked or crossed the market applies to SmallCap securities as well as NNM securities. Telephone conversation between Thomas P. Moran, Assistant General Counsel, Nasdaq, and Ira L. Brandriss, Division, Commission, on January 14, 2000.

[27] A list of the commenters appears in Appendix A.

[28] The SIA is comprised of over 740 North American securities firms.

[29] 29 The ICI is an association of 7,576 mutual fund companies, 479 closed-end investment companies, and 8 sponsors of unit investment trusts.

[30] *See* Schwab Letter, Appendix A.

[31] Thirteen commenters who supported the proposal are persons associated with a Nasdaq market maker, the Security Investment Company of Kansas City. These commenters submitted identical letters which maintained that the proposal will provide prompt access to the best prices in the Nasdaq market, reduce the potential dual liability of market makers, and improve the speed of executions. *See* Halford Letter, Cave Letter, Gaines Letter, Hook Letter, Kitzmiller Letter, Frankel Letter, Schmidt Letter, Mytinger Letter, McCann Letter, Turpin Letter, Malmstrom Letter, Boyle Letter, Means Letter, and Weisenborn Letter, Appendix A. The Kansas City Securities Association (''KCSA'') submitted a similar letter. *See* KCSA Letter, Appendix A.

[32] *See* SIA Letter, Appendix A.

[33] *See* ICI Letter, Appendix A.

[34] *See* Mktmaven Letter, Appendix A.

[35] *See* Morgan Stanley Letter, Appendix A. Morgan Stanley believed that the proposal should be modified to (1) retain the existing 17-second delay in executions against a market maker; (2) retain the No Dec feature for market makers' proprietary quotations; (3) provide a firm quote compliance facility that would allow a market maker to indicate that it has received a telephone order to trade at its displayed quotation; and (4) modify the availability of the 9,900-share NNMS maximum order size.

[36] *See* ETA Letter, Appendix A. The ETA is an association of order entry and other related firms.

[37] *See* DLJ Letter, Appendix A. DLJ believed that Nasdaq should not implement the proposed changes to SOES and SelectNet prior to the year 2000. In addition, DLJ stated that it would require at least six months from the time Nasdaq publishes its changes to the Application Programming Interface (''API'') for DLJ to program, test, and install new systems. As discussed more fully below, other commenters also expressed concern regarding the time for implementing the proposed changes.

Electronic Trading Group (''ETG''), a proprietary trading firm that makes markets in listed and Nasdaq securities, ''strongly support[ed]'' the proposal but maintained that the proposed changes fail to create a level playing field for all market participants.[38]

Forty-one commenters opposed or noted concerns with the proposal without expressing general support for the proposed changes.[39] One commenter stated that it did not support any of the features in the proposed system and recommended that Nasdaq instead adopt its previously proposed IODES system, excluding the proposed limit order book.[40] Another commenter urged the Commission to reject the current proposal.[41]

Nasdaq responded to the commenters in Amendment Nos. 1 and 2 to the proposal.[42] The views of the commenters are discussed below.

A. Elimination of SelectNet Liability Orders

Thirty-two commenters objected to the elimination of most preferenced SelectNet liability orders for NNM securities. Many of the commenters asserted that the elimination of SelectNet liability orders will limit their ability to obtain executions at quotes outside the current inside market (*i.e.,* the best bid or offer), a capability that the commenters believed is crucial for investors.[43] In this regard, several commenters maintained that investors are willing to forego the inside price for the ability to access the liquidity outside the inside market, or to obtain an execution when a stock's price is moving rapidly.[44] One commenter maintained that an order might not be executable at the current inside price if a market maker at the inside is slow to update its 100-share quotation.[45] Accordingly, the commenter found it ''imperative that investors be able to enter orders at prices outside the current inside market.''[46]

Other commenters maintained that the oversized order requirement might fail to provide an effective means for accessing a quotation because, in some instances, it would require an investor to assume an unwanted short position. For example, an investor seeking to sell 500 shares would be required to assume an 800-share short position to SelectNet preference a market maker quoting 1200 shares.[47]

Other commenters believed that the proposed changes could undermine the integrity of the Nasdaq market. For example, one commenter feared that the elimination of SelectNet liability orders would produce a market that could permit market makers to refuse to fill an order and not move their quote.[48] The commenter also asserted that a market maker would be able to ''hold'' the market by repeatedly entering 100-share quotations at five-second intervals.[49] Another commenter stated that market makers would be able to ''ignore'' oversized orders preferenced to them through SelectNet.[50] Similarly, another commenter, asserting that the oversized order requirement ''opens up numerous possibilities for [market maker] manipulation,'' maintained that market makers might post artificially inflated quotes because they will not be required to trade at their quotations.[51]

One commenter recommended that the proposed system be designed to require a market maker to honor all orders in a manner consistent with the Firm Quote Rule at the price and up to the size the market maker elects to display until the market maker exhausts or changes his quotation.[52] In addition, the commenter asserted that the elimination of SelectNet liability orders is unnecessary because the existing exceptions to the Firm Quote Rule adequately address the issue of potential double liability when a market maker is in the process of effecting an execution, after which he will update his quote.[53]

Other commenters suggested that Nasdaq address the issue of dual liability by retaining SelectNet liability orders only for quotations outside the current inside market.[54] Because automatic executions through NNMS will be available only for quotations at the inside market, these commenters believed that retaining SelectNet liability orders solely for quotations outside the current inside market would eliminate the potential for dual liability while allowing market participants to continue using the existing SelectNet preferencing feature for quotations outside the current inside market.

Other commenters expressed concern that market makers will continue to be exposed to potential double liability through SelectNet liability orders from UTP exchanges.[55]

B. ECN Participation

As noted above, the proposal will allow ECNs to participate in NNMS either as full participants or as order entry participants. Several ECNs criticized both alternatives. One commenter, for example, asserted that full participation would disadvantage an ECN because (1) The ECN's reserve quotations would not participate in the NNMS sweep of the ECN's top-of-the-file orders; [56] (2) The ECN would be subject to potential double executions; [57] and (3) The ECN would be required to provide access through NNMS to brokers that pay no ECN

[38] *See* ETG Letter, Appendix A. Among other things, ETG supported the implementation of a consolidated order book to provide price protection and time priority of orders. *See also* Sierra Nevada Letter (supporting the proposed changes as an interim measure).

[39] In addition, six comment letters related solely to Nasdaq's IODES Proposal. *See* Lek Letter, USCC Trading I and II, Hill Letter, and Knight I and II, Appendix A. As noted above, the notice of filing for the current proposal also re-opened the comment period for Nasdaq's IODES Proposal. *See* note 3, supra.

[40] *See* A.G. Edwards Letter, Appendix A.

[41] *See* Weil Letter I and Weil Letter II, Appendix A.

[42] *See* note 5, *supra.*

[43] *See, e.g.,* Chung Letter, Deeney Letter, Erman Letter, Fennell Letter, King Letter, Lin Letter, Mt. Pleasant Letter, Mack Letter, Nemcic Letter, Norman Letter, O'Reilly Letter, Rudd Letter, Schiller Letter, Swenson Letter, Teitelman Letter, Vercellone Letter, Wolverton Letter, and Zucker Letter, Appendix A.

[44] *See e.g.,* Weintraub Letter, Swenson Letter, Haber Letter, Deeney Letter, King Letter, Nemcic Letter, Schiller Letter, Vercellone Letter, Snell Letter, and Teitelman Letter, Appendix A.

[45] *See* Atreya Letter, Appendix A.

[46] *See* Atreya Letter, Appendix A.

[47] *See* Catrina Letter, Appendix A. Similarly, the commenters expressed concern that the proposed rule may require an investor to purchase or sell more shares than the investor intended to purchase or sell. *See* Mack Letter, Lin Letter, and Catrina Letter, Appendix A. Moreover, the commenters noted that a short sale on a downtick would violate the short sale rule. *See, e.g.,* Atreya Letter, Vercellone Letter, Deeney Letter, Lin Letter, and Schiller Letter, Appendix A.

[48] *See* Whitcomb Letter, Appendix A. Similarly, the ETA asserted that the failure of market makers to honor their quotations in a manner consistent with the Firm Quote Rule would result in misleading and inaccurate quotations that would reduce the efficiency of the Nasdaq market and undermine investor confidence. *See* ETA Letter, Appendix A.

[49] *See* Whitcomb Letter, Appendix A.

[50] One commenter asserted, for example, that market makers ''can and will ignore'' non-liability SelectNet orders. *See* Mount Pleasant Letter, Appendix A. Another commenter maintained that it would have no recourse when non-liability SelectNet orders go unfilled. *See* ACIM Letter, Appendix A.

[51] *See* Haber Letter, Appendix A. The commenter noted that a market maker could withdraw its quotation when the inside market approached the market maker's quotation.

[52] *See* ETA Letter, Appendix A.

[53] *See* ETA Letter, Appendix A.

[54] *See* Norman Letter and O'Reilly Letter, Appendix A.

[55] *See, e.g.,* DLJ Letter, A.G. Edwards Letter, and STA Letter, Appendix A. The STA asserted that any possibility of dual liability must be eliminated.

[56] *See* Bloomberg Letter, Appendix A.

[57] Double liability could arise due to the time lag between the execution of an order on the ECN's own system and the subsequent receipt of an execution for the same order from Nasdaq. *See* Bloomberg Letter, Appendix A. Other ECNs also criticized the potential for double liability. *See* Instinet Letter and BRUT Letter, Appendix A (asserting that dual liability is inappropriate for ECNs because ECNs act solely as agents).

fees.[58] On the other hand, the commenter maintained that order entry participation would ''marginalize'' an ECN by omitting the ECN's orders from the NNMS sweep.[59]

Similarly, another commenter asserted that an order entry ECN would be able to execute transactions against preferenced SelectNet orders but, unlike market makers and full participant ECNs, would not be able to interact automatically with other NNMS orders on the basis of strict price/time priority.[60] A third commenter believed that order entry participation is not a viable alternative because an ECN must be accessible by widely used order delivery and execution systems to remain competitive.[61] Several ECNs recommended that Nasdaq implement an order delivery system, rather than a system that provides for automatic executions.[62]

On the other hand, other commenters criticized the proposal for providing two levels of participation for ECNs. One commenter asserted that because the proposal allows ECNs, but not other market participants, to choose between two levels of participation in NNMS, the proposal fails to promote fair competition between market participants and therefore is inconsistent with the Congressional finding in Section 11A(a)(1)(C) under the Act.[63] In addition, the commenter expressed concern that lack of uniform access to ECN quotes would provide opportunities for manipulative and fraudulent quotation and order entry strategies similar to those noted in Nasdaq's IODES proposal.[64] The commenter believed that Nasdaq should revise its proposal to require the full participation of ECNs and UTP exchanges in NNMS.[65]

Other commenters also believed that Nasdaq should require ECNs to become full participants in NNMS, and, accordingly, subject to automatic executions.[66] One commenter expressed concern that a market maker might post its quotes in an order entry ECN to avoid automatic executions,[67] and other commenters asserted that automatic executions against an ECN's quotes are ''essential to provide equal access to all market participants.'' [68]

C. UTP Exchange Participation

The Chicago Stock Exchange (''CHX'') asserted that the proposal improperly excludes the UTP exchanges, including the CHX, from full participation in NNMS. [69] The CHX noted that the proposal will allow UTP specialists to send preferenced orders through SelectNet but will not permit them to use NNMS, which, unlike SelectNet, provides for automatic executions. The CHX maintained that the inability of its specialists to participate in NNMS will ''cripple the CHX's UTP program.'' [70]

D. Technology Concerns

Several commenters raised technology issues in connection with the proposal, including concerns regarding the capability of Nasdaq's systems to promptly deliver messages relating to the trading process. In this regard, one commenter recommended that Nasdaq ''demonstrate that it has the capability to deliver immediately to market makers and executing broker-dealers executions, quote updates, size decrements, and other message traffic that is critical to the trading process.'' [71] The commenter maintained that prompt message delivery is crucial in light of the proposed reduction in time delays between executions against a market maker from 17 seconds to five seconds.[72] Noting that there can be a time delay of five seconds or more between the entry of a SOES order and the market maker's receipt of notice of the execution, another commenter expressed concern that an increase in messaging traffic resulting from the proposed changes will increase the delay in providing notice of an execution and, accordingly, will increase the potential for double liability.[73]

Two commenters expressed concern that SOES, which uses technology inferior to that used by SelectNet, will replace SelectNet as the primary means of inter-participant trading.[74] One commenter feared that the impact of existing problems associated with SOES technology would be exacerbated by the increased use of SOES.[75]

In addition, several commenters noted that firms must have sufficient time to modify their computer systems to implement the proposed changes. In

[58] *See* Bloomberg Letter, Appendix A.

[59] *See* Bloomberg Letter, Appendix A.

[60] *See* Instinet Letter, Appendix A.

[61] *See* BRUT Letter, Appendix A.

[62] *See* Instinet Letter and Archipelago Letter, Appendix A. *See also* Bloomberg Letter, Appendix A.

[63] *See* Knight Letter II, Appendix A.

[64] *See* Knight Letter II, Appendix A. In the IODES Proposal, Nasdaq stated that the dichotomy between market makers, which provide automatic executions, and ECNs, which do not provide automatic executions, had resulted in anomalies in the processing of orders through SOES. Nasdaq noted that because ECNs and UTP exchanges do not provide automatic executions, Nasdaq had implemented systems changes designed to suspend executions in SOES whenever an ECN or UTP exchange was alone at the inside market. Nasdaq noted that because an ECN quote at the inside effectively halted SOES executions for a security, it might also cause SOES orders to be rejected back to the sending firm. Accordingly, Nasdaq stated that an ECN customer potentially could enter an order to control the inside price and create an advantage in SOES for the ECN customer or another order entry firm to jump ahead of orders that would have been executed if they had not been returned. The ECN customer could then change its quote before the quote could be accessed through SelectNet or the ECN's internal system. After a new dealer inside price had been established, a new SOES order that entered the system would be executed as the first order against the first market maker at the new inside price. Under these circumstances, customer orders could be disadvantaged because orders entered earlier in time would be forced to go to the back of the queue. Nasdaq noted in the IODES Proposal that it had addressed this problem through a software modification that holds customer orders sent through SOES in queue for up to 90 seconds when an ECN or UTP participant is alone at the inside, instead of immediately rejecting the order. In addition, Nasdaq noted in the IODES Proposal Nasdaq that SOES users had alleged that some traders might be using ECNs to affect the way that SOES handles automatic executions. To avoid this potential problem, Nasdaq proposed to require all participants receiving orders through the proposed IODES system, including ECNs, to be subject to automatic executions. *See* IODES Proposal, *supra* note 3. *See also* Mack Letter, Appendix A (asserting that market makers should not be permitted to use an ECN to block or stop a stock).

[65] *See* Knight Letter II, Appendix A.

[66] *See, e.g.,* ACIM Letter, King Letter, Mack Letter, and Vercellone Letter, Appendix A.

[67] *See* King Letter, Appendix A.

[68] *See* ACIM Letter, Appendix A. *See also* Vercellone Letter, Appendix A.

[69] *See* CHX Letter, Appendix A.

[70] *See* CHX Letter, Appendix A.

[71] *See* STA Letter, Appendix A.

[72] *See* STA Letter, Appendix A. Another commenter stated that it is unclear whether Nasdaq's systems capacity will accommodate the greater speed of automatic execution. *See* Morgan Stanley Letter, Appendix A.

[73] *See* ASC Letter, Appendix A. *See also* BRUT Letter (noting that the issue of dual liability centers on Nasdaq's delay in communicating notices of SOES executions to market makers, and that the delay in notification may increase with an increase in SOES messages), and Archipelago Letter (maintaining that any Nasdaq routing system must route messages as quickly as possible), Appendix A.

[74] *See* Archipelago Letter, Appendix A. *See also* ASC Letter, Appendix A.

[75] *See* ASC Letter, Appendix A. The commenter noted several problems associated with SOES technology, including the following: (1) The Permanent Virtual Circuits connecting Nasdaq and market participants fail to indicate whether the opposite party is able to receive data, thereby permitting one party to send messages without realizing that the other party has not received the messages due to a malfunctioning application; (2) due to the lack of automatic re-route facilities, messages must be re-routed manually when a circuit is down, which may result in extended outages; (3) retransmitted messages may be unrecoverable due to the system's procedures for numbering missing messages; (4) the system's sequence number field is unable to fully represent numbers above 9999, so that an application cannot determine the correct sequence number of a retransmission once the total messages received exceeds 10,000; (5) execution messages do not include a unique identifier to prevent duplicate trade reports; and (6) due to delays in message processing, it may take up to 30 minutes to retransmit a message. *See also* Archipelago Letter, Appendix A.

this regard, one commenter estimated that it would require at least six months from the time Nasdaq publishes it changes to the Application Programming Interface (''API'') to program, test, and install new systems.[76]

E. NNMS System Features

1. Automatic Execution for Orders up to 9,900 Shares

Although many commenters supported Nasdaq's proposal to establish a maximum automatic execution order entry size of 9,900 shares for NNMS securities, one commenter maintained that the 9,900-share order entry size was arbitrary,[77] and another asserted that Nasdaq provided no basis for the 9,900-share maximum order size.[78]

Other commenters believed that allowing automatic executions for orders of up to 9,900 shares would drastically reduce small investors' access to executions [79] and prevent small investors from competing with market makers, a purpose inconsistent with the original purpose for establishing SOES.[80]

On the other hand, Charles Schwab maintained that increasing the availability of the automatic execution system would provide market makers with a crucial tool to access the best available prices in the market, and, consequently, to manage risk and obtain liquidity for customer orders.[81]

2. Availability of Automatic Execution

Several commenters believed that the proposed rule change would allow market makers, but not order entry firms, to engage in proprietary trading against market makers' quotes on NNMS.[82]

3. Reducing the Delay Between Automatic Executions From 17 Seconds to Five Seconds

Although many commenters supported the proposed reduction in the delay between automatic executions against a market maker from 17 seconds to five seconds, Morgan Stanley expressed concern that the reduction would provide market makers with insufficient time to react to virtually continuous executions against their quotations and would create significant difficulty for market makers in maintaining control over their positions and effectuating a coherent market making strategy.[83]

4. Reserve Size Feature

Several commenters supported the reserve size feature, asserting that it would increase liquidity and facilitate more rapid executions of larger-sized orders.[84] Other commenters, however, expressed concern regarding Nasdaq's ability to monitor and ensure the proper use of the reserve size feature.[85] In addition, some commenters asserted that reserve size is inconsistent with market transparency. Morgan Stanley, for example, stated that ''[r]eserve size hides the true depth of trading interest from the marketplace and acts as a disincentive to display liquidity.'' [86] Similarly, one market maker maintained that the reserve size feature would hinder proprietary trading by market makers, which make their proprietary trading decisions based upon the size of an order being offered.[87] Accordingly, the commenter believed that the proposal would diminish liquidity on Nasdaq.[88]

5. Elimination of the No Dec Feature

Archipelago asserted that Nasdaq should retain the No Dec feature because it reduces quote update traffic, thereby mitigating the capacity strain on Nasdaq's network. Morgan Stanley believed that the No Dec feature serves as a useful quote maintenance tool that Nasdaq should retain in a modified form.[89] Another commenter asserted that the elimination of the No Dec feature would make it more difficult for market makers to provide orderly markets.[90]

However, two commenters favored the elimination of the No Dec feature.[91] One commenter asserted that the elimination of the No Dec feature would prevent a market maker at the inside from repeatedly renewing a 100-share quote.[92] The commenter believed that the elimination of the No Dec feature, combined with the reserve size feature, would improve the functioning of the market.[93]

F. NNMS Fees

One commenter expressed concern that the fee system for NNMS might operate in a discriminatory and anticompetitive manner.[94]

IV. Discussion

After carefully considering all of the comments, the Commission finds, for the reasons discussed below, that the proposed rule change is consistent with the Act and the rules and regulations applicable to the NASD. In particular, the Commission finds that the proposal is consistent with the requirements of Sections 15A(b)(6) and (11), and 11A(a)(1)(C) of the Act.[95] Section 15A(b)(6) requires that the rules of a registered national securities association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. In Section 11A(a)(1)(C), Congress found that it is in the public interest and appropriate for the protection of investors and the

[76] *See* DLJ Letter, Appendix A. *See also* STA Letter, ASC Letter (noting that implementation of the proposed changes will require considerable effort by market participants), and BancBoston Letter (noting that Order Audit Trail System, extended trading hours, Year 2000, and decimalization have placed significant resource strains on BancBoston and other market participants), Appendix A.

[77] *See* ACIM Letter, Appendix A.

[78] *See* Archipelago Letter, Appendix A. The commenter maintained that wholesale market makers and ECNs, the market participants that most frequently post large quoted sizes, wish to make quotes fully accessible for the entire size, and, accordingly, the 9,900-share maximum size is an impediment to prompt access to liquidity.

[79] *See* O'Leary Letter, Appendix A. The commenter asserted that in fast market conditions, several 9,900-share orders would absorb the highest quality executions ahead of an individual investor's order.

[80] *See* Galchen Letter, Appendix A.

[81] *See* Schwab Letter, Appendix A.

[82] *See, e.g.,* Miller Letter, Whitcomb Letter, ETA Letter, Sierra Nevada Letter, Mount Pleasant Letter, and Sudit Letter, Appendix A.

[83] *See* Morgan Stanley Letter, Appendix A.

[84] *See, e.g.,* Samarasinghe Letter, Haber Letter, and Lin Letter. One commenter supported executions against a market maker's reserve size, but argued that reserve size feature may present misleading information. *See* Wilson Letter, Appendix A.

[85] *See, e.g.,* King Letter (asserting that the reserve size feature will foster manipulative and fraudulent practices), Snell Letter (questioning the enforcement of the reserve size feature), and Wolverton Letter (maintaining that the reserve size feature will permit market makers to ''hide'' shares behind their displayed quotes), Appendix A. *See* also Sievers Letter.

[86] *See* Morgan Stanley Letter, Appendix A. *See also* Mack Letter and Wilson Letter, Appendix A.

[87] *See* Sievers Letter, Appendix A.

[88] *See* Sievers Letter, Appendix A.

[89] *See* Morgan Stanley Letter, Appendix A. Morgan Stanley believed that Nasdaq should retain the No Dec feature, but that it should be available only to market makers displaying a size of at least 1,000 shares.

[90] *See* Caris Letter, Appendix A.

[91] *See* Wilson Letter and Lin Letter, Appendix A.

[92] *See* Lin Letter, Appendix A. The commenter asserted that a market maker at the inside might repeatedly renew a 100-share quote in an effort to sustain the price of a stock. The commenter noted that the repeated renewal of the quotation might hinder the efforts of other market participants to fill larger-sized orders in the stock.

[93] *See* Lin Letter, Appendix A.

[94] *See* ETA Letter, Appendix A.

[95] 15 U.S.C. 78o–3(b)(6) and (11), and 15 U.S.C. 78k–1(a)(1)(C).

maintenance of fair and orderly markets to assure: (1) The economically efficient execution of securities transactions; (2) Fair competition among brokers and dealers; (3) The availability to brokers, dealers, and investors of information with respect to quotations and transactions in securities; (4) The practicability of brokers executing investors' orders in the best market; and (5) An opportunity for investors' orders to be executed without the participation of a dealer.[96]

Specifically, as discussed more fully below, the Commission finds that the proposed changes are designed to protect investors and the public interest and to assure the economically efficient execution of securities transactions by allowing market makers, public customers, and order entry firms to obtain automatic executions for orders of up to 9,900 shares in NNM securities. By reducing instances of double liability for market makers in NNM securities, the proposal potentially may encourage market makers in NNM securities to display larger sized quotations, thereby adding liquidity to the market for NNM securities and helping to assure the economically efficient execution of transactions in NNM securities. In addition, by reducing the delay between executions against a market maker from 17 seconds to five seconds, the proposal may facilitate the price discovery process and promote quote competition among market makers, thus helping to ensure the best execution of customer orders. The Commission believes that the proposed changes potentially may enhance the efficiency and increase the depth and liquidity of the market for NNM securities, to the benefit of all market participants.

A. Automatic Executions for Orders of up to 9,900 Shares in NNM Securities

SOES currently permits the automatic execution of retail agency orders of 200, 500, or 1,000 shares at the inside market. NNMS will provide automatic executions at the inside market for orders of up to 9,900 shares in NNM securities. Automatic executions through NNMS will be available not only for retail agency orders, but also for market makers' proprietary orders and for the orders of order entry firms.

Several commenters expressed concerns regarding the automatic execution feature of NNMS. Specifically, the commenters maintained that the 9,900-share order entry size was arbitrary,[97] that it would reduce small investors' access to executions,[98] and that it would prevent small investors from competing with market makers, a purpose inconsistent with the original purpose for establishing SOES.[99] In addition, some commenters believed that NNMS would be available for the proprietary trading of market makers, but not for order entry firms.[100]

In response to the concern about the availability of NNMS, Nasdaq clarified that NNMS will be available to all NASD member firms, including order entry firms.[101] In addition, in response to the concerns regarding the 9,900-share maximum order size entry in NNMS, Nasdaq stated that the 9,900-share maximum is a technological system constraint of the NNMS automatic execution platform.[102] Nasdaq also maintained that because the current average size of a SelectNet execution is 800 shares, the 9,900-share maximum NNMS order size should be sufficient to handle the majority of SelectNet orders that will migrate to NNMS.[103] Nasdaq noted that orders of over 10,000 shares would be processed through a combination of NNMS, SelectNet, and other means.[104]

The Commission believes that the proposed automatic execution feature of NNMS is consistent with Section 15A(b)(6) of the Act because it is designed to protect investors and the public interest. In addition, the Commission believes that the proposed automatic execution feature of NNMS is consistent with Congress's finding in Section 11A(a)(1)(C)(i) of the Act that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the economically efficient execution of securities transactions. In this regard, the Commission believes that the immediacy and certainty of order execution for NNM orders of up to 9,900 shares should strengthen the Nasdaq market and benefit market participants by permitting the prompt, efficient execution of orders of up to 9,900 shares at the best available price. Because NNMS will provide automatic executions against displayed quotations and against reserve size, NNMS's automatic execution feature will provide prompt access to all of the available liquidity in a security at the current inside market.

In addition, the Commission notes that the proposal will extend the benefits associated with automatic executions to order entry firms and to the proprietary orders of market makers. The Commission agrees with the NASD that allowing automatic executions for broker-dealers' proprietary trades potentially may encourage broker-dealers to commit capital to the market, thereby adding to the depth and liquidity of the market for NNM securities.

Further, the Commission believes that the 9,900-share maximum order size is reasonable in light of the system constraint of the NNMS automatic execution platform. According to the NASD, the 9,900-share maximum order size should accommodate the size of the orders that are likely to be processed through NNMS.

With regard to small investors' access to executions, the Commission notes that NNMS's automatic execution feature will be available equally for the orders of market makers, order entry firms, and public customers. Accordingly, the Commission believes that the automatic execution feature of NNMS is reasonably designed to provide market makers, order entry firms, and public customers with equal access to the current inside market in NNM securities.

B. Reserve Size Feature of NNMS

The reserve size feature of NNMS will allow an NNMS market maker or its customer to display publicly part of the full size of its order or interest with the remainder held in reserve on an undisplayed basis to be displayed in whole or in part as the displayed part is executed. To use the reserve size feature, a market maker's quotation, including its agency quotation, if the Commission approves the display of separate agency quotes, initially must display a minimum of 1,000 shares, and the quotation must be refreshed to 1,000 shares to continue using the reserve size feature.

Several commenters expressed concerns with the reserve size feature. In particular, some commenters questioned Nasdaq's ability to monitor and ensure the proper use of the reserve size feature. [105] One commenter contended that reserve size is inconsistent with market transparency and that reserve size would hide the

[96] In approving the proposal, the Commission has considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[97] *See* ACIM Letter, Appendix A. *See also* Archipelago Letter, Appendix A.

[98] *See* O'Leary Letter, Appendix A.

[99] *See* Galchen Letter, Appendix A.

[100] *See, e.g.*, Miller Letter, Whitcomb Letter, ETA Letter, Sierra Nevada Letter, Mount Pleasant Letter, and Sudit Letter, Appendix A.

[101] *See* Amendment No. 1, *supra* note 5.

[102] *See* Amendment No. 2, *supra* note 5.

[103] *See* Amendment No. 2, *supra* note 5.

[104] *See* Amendment No. 2, *supra* note 5.

[105] *See, e.g.,* King Letter, Snell Letter, and Wolverton Letter, Appendix A.

depth of trading interest and act as a disincentive to display liquidity.[106] One market maker maintained that reserve size would hinder proprietary trading by market makers and, accordingly, would diminish liquidity on Nasdaq.[107]

In response to the commenters, Nasdaq asserted that reserve size would be likely to increase the amount of shares market participants commit to the market because the non-display of the reserve shares would lessen the potential negative price impacts associated with the display of larger trading interest.[108] In addition, Nasdaq maintained that the requirement that a market participant seeking to use reserve size in NNMS display a minimum of 1,000 shares also would serve to increase liquidity by providing an incentive to display a larger quotation size.[109]

The Commission believes that the reserve size feature will encourage participation in NNMS by providing market makers and their customers with greater flexibility in the handling of large orders. Increased participation in NNMS should, in turn, enhance the depth and the liquidity of the market for NNM securities, to the benefit of all market participants. The requirement that a market participant display a minimum of 1,000 shares to use the reserve size feature should encourage market participants to display orders of at least 1,000 shares, which may reduce volatility and enhance market depth at a given price. In addition, because all displayed quotations in NNMS at the same price level will have priority over reserve size quotations at that price level, NNMS will provide an incentive for market participants to display their orders.

The Commission also believes that reserve size could prove useful to institutions wishing to minimize the market impact of their orders. In addition, the reserve size feature of NNMS will allow market makers quoting in Nasdaq to compete more effectively with alternative trading systems that provide a reserve size feature. The Commission expects NASD Regulation to monitor trading to ensure the proper use of the reserve size feature (particularly priority rules) and compliance with the requirements applicable to the use of reserve size.

C. Reduction of the 17-Second Delay Between Executions Against a Market Maker

Nasdaq proposes to reduce the current 17-second delay between executions against the same market maker to five seconds. As noted above, one commenter believed that the proposed five-second delay between executions against a market maker would provide market makers with insufficient time to react to executions against their quotations and would create significant difficulty for market makers in maintaining control over their positions and effectuating a coherent market making strategy.[110] In addition, several commenters expressed concerns regarding the ability of Nasdaq's systems to promptly notify market participants of executions against their quotations.[111]

In response, Nasdaq maintained that a five-second interval delay (with an additional two-second internal Nasdaq system processing time) is an appropriate compromise between the need for fast executions and the need to provide market makers with adequate time to manage their capital risk through monitoring and updating their quotes in response to rapidly changing market conditions.[112] Nasdaq stated that it would monitor market performance in NNMS as it related to the five-second interval delay and would consider modifying that time period, in consultation with Commission staff.[113] As discussed more fully in Section IV.I, *infra,* Nasdaq stated that proposed enhancements to its systems, including a new central message switch that will provide faster delivery of automatic execution confirmation messages, will help to ensure that Nasdaq has the technological capability to promptly deliver notices of automatic executions.[114]

The Commission believes that the proposal to reduce the delay between executions against the same market maker from 17 seconds to five seconds will help to ensure that a market maker has no more time than is necessary after an execution before it must update its quotes. This requirement will help to ensure that a market maker cannot attempt to avoid its market making obligations by delaying after an NNMS execution before entering an updated quote.[115] As a result, the reduced time delay between executions against a market maker's quote should increase a market maker's compliance with its obligation to make continuous, two-sided markets and promote quote competition among market makers. Such competition among market makers should, in turn, enhance the integrity of the Nasdaq market by helping to ensure the best execution of customer orders and improving the price discovery process for NNM securities.

As discussed more fully in Section IV.I, *infra*, the Commission believes, based on Nasdaq's representations, that planned enhancements to Nasdaq's systems, including the planned implementation of a new central message switch in January 2000, should enable Nasdaq to promptly deliver execution messages to market participants.[116] Accordingly, based on Nasdaq's representations, the Commission believes that Nasdaq will have the technological capability to implement the proposed five-second delay between executions against a market maker's quotation.

D. Elimination of the No Dec Feature for NNM Securities

Nasdaq proposes to eliminate the No Dec feature for NNM securities. The No Dec feature allows continuous executions against a market maker's quotation at the same price without decrementing the quoted size. Nasdaq believes that the No Dec feature has become less important because market makers are able to manage their quotations by displaying their actual size. In addition, Nasdaq believes that the No Dec feature will become less important in a market where market makers will have the ability to refresh their quotations at a size they determine.

Several commenters questioned the elimination of the No Dec feature. One commenter maintained that Nasdaq should retain the No Dec feature because it reduces quote update traffic, thereby mitigating the capacity strain on Nasdaq's network.[117] Other commenters maintained that the No Dec feature serves as a useful quote maintenance tool and that the elimination of the No Dec feature would make it more difficult

[106] *See* Morgan Stanley Letter, Appendix A.

[107] *See* Sievers Letter, Appendix A.

[108] *See* Amendment No. 2, *supra* note 5.

[109] *See* Amendment No. 2, *supra* note 5.

[110] *See* Morgan Stanley Letter, Appendix A.

[111] *See* STA Letter, Morgan Stanley Letter, ASC Letter, and BRUT Letter, Appendix A.

[112] *See* Amendment No. 2, *supra* note 5.

[113] *See* Amendment No. 2, *supra* note 5.

[114] *See* Amendment No. 2, *supra* note 5.

[115] A market maker that can avoid updating its quote for a period of time can take advantage of its temporary ability to avoid NNMS executions and wait to see how other market makers update their quotes. This delay could serve to lessen competition among market makers. *See* Securities Exchange Act Release No. 39490 (December 24, 1997), 63 FR 897 (January 7, 1998) (order approving File No. SR–NASD–97–50).

[116] *See* Amendment No. 2, *supra* note 5.

[117] *See* Archipelago Letter, Appendix A.

for market makers to provide orderly markets.[118]

In response, Nasdaq asserted that the elimination of the No Dec feature will allow market participants to more easily execute multiple customer orders at the inside and move the market to new quote levels, thereby aiding the price discovery process.[119] In addition, Nasdaq maintained that the No Dec feature is incompatible with the NNMS processing functions that immediately access displayed and reserve size and move through different price levels. Nasdaq noted that in NNMS the full size of reserve share amounts will be immediately and automatically accessible (after executions against displayed quotations), while the No Dec feature makes additional shares available on a piecemeal basis each time a quote is accessed and only after an interval delay between executions. Thus, Nasdaq concluded that NNMS's reserve size feature would speed executions, while the No Dec feature would result in slower executions.[120]

The Commission believes that it is reasonable for Nasdaq to eliminate the No Dec feature for NNM securities. Specifically, the Commission believes that the elimination of the No Dec feature should result in quicker executions and prompt access to the available liquidity at the current inside market. The Commission also believes that the elimination of the No Dec feature may allow the market to adjust more quickly to information, thereby facilitating price discovery and improving the efficiency of the Nasdaq market.

The Commission notes that market makers now have the ability to quote in actual size, and therefore have an enhanced ability to manage their quotations. In addition, NNMS's reserve size refresh and autoquote refresh features should help market makers that elect to use reserve size to manage their quotations.[121] Because the reserve size refresh function and the autoquote refresh function, as well as the ability to quote actual size, will assist market makers, the Commission believes that market makers will be able to manage their quotations after Nasdaq eliminates the No Dec feature.

With regard to the commenter's concern that the elimination of the No Dec feature might strain the capacity of Nasdaq's network, the Commission does not believe, based on Nasdaq's representations regarding planned enhancements to its systems[122] (as discussed more fully in Section IV.I, *infra*), that the elimination of the No Dec feature will result in a capacity strain on Nasdaq's network.

E. Elimination of SOES Preferencing for NNMS Securities

Nasdaq proposes to eliminate the SOES preferencing feature for NNM securities because it is inconsistent with the processing of orders in time priority and because the preferencing feature might place the agency quotations of public customers, if the Commission approves the display of separate agency quotes, at a disadvantage. In addition, Nasdaq believes that preferencing in an automatic execution system reduces incentives for market makers to compete aggressively for orders by showing the full size and true price of their trading interest.

The Commission believes that it is reasonable for Nasdaq to eliminate the SOES preferencing feature to provide for the processing of orders in price/time priority. The processing of orders in price/time priority should help to ensure that all orders are processed in a fair, equal, and orderly manner. Accordingly, the Commission finds that the elimination of SOES preferencing is designed to protect investors and the public interest by helping Nasdaq to maintain a fair and orderly market.

F. SelectNet Liability Orders

Nasdaq proposes to revise SelectNet to require the use of ''oversized'' preferenced SelectNet Orders. As discussed above, the proposed oversized order provisions will allow members to direct a SelectNet preferenced order to an NNMS market maker, including the market maker's agency quote, if the Commission approves the display of separate agency quotes, only if the order is designated as AON or MAQ for a size that is at least 100 shares greater than the displayed amount of the quote to which the order is directed. The oversized order requirement is designed to reduce instances of double liability for market makers. UTP exchanges, however, will continue to send and receive SelectNet liability orders. In addition, order entry ECNs will be able to receive SelectNet liability orders.

As discussed above, thirty-two commenters objected to the elimination of SelectNet liability orders. Among other things, the commenters argued that (1) the ability to preference outside the current inside market is crucial to investors who, in some cases, would be willing to forego the inside price to access the liquidity outside the current inside market;[123] (2) the oversized order requirement might require an investor to assume an unwanted position;[124] (3) the elimination of SelectNet liability orders might undermine the integrity of the Nasdaq market because market participants will not be required to trade at their quotations;[125] (4) the elimination of SelectNet liability orders is unnecessary because the Firm Quote Rule addresses the issue of potential double liability when a market maker is effecting an execution;[126] (5) Nasdaq should retain SelectNet liability orders for quotations outside the current inside market;[127] (6) market makers will not be obligated to respond to non-liability SelectNet orders;[128] and (7) a market maker at the inside would be able to ''hold'' the market by repeatedly entering 100-share quotations at five-second intervals.[129]

In response to the commenters, Nasdaq maintained that the elimination of SelectNet preferencing was essential to achieving two of the proposal's goals, the reduction of dual liability[130] and the establishment of a single order execution system.[131] Nasdaq concluded that neither the Firm Quote Rule nor the retention of SelectNet liability orders for quotations outside the inside market offered viable means for preserving SelectNet liability orders. Specifically, Nasdaq asserted that retaining SelectNet liability orders for quotations outside the current inside market would create confusion in a fast-moving market and could result in significant unanticipated dual liability for market makers during

[118] *See* Morgan Stanley Letter and Caris Letter, Appendix A.

[119] *See* Amendment No. 2, *supra* note 5.

[120] *See* Amendment No. 2, *supra* note 5.

[121] The reserve size refresh function will refresh a market maker's displayed proprietary or agency quote, if the Commission approves the display of separate agency quotes, from its reserve size at the automatic refresh size or at a size level designated by the market maker. The autoquote refresh function will allow a market maker whose displayed proprietary quotation and reserve size have been decremented to zero to elect to have Nasdaq refresh the market maker's quotation price by an interval designated by the market maker and to refresh the market maker's displayed size to a level designated by the market maker or to the automatic refresh size (*i.e.*, 1,000 shares).

[122] *See* Amendment No. 2, *supra* note 5.

[123] *See, e.g.*, Weintraub Letter, Swenson Letter, Haber Letter, Deeney Letter, King Letter, Nemcic Letter, Schiller Letter, Vercellone Letter, Snell Letter, and Teitelman Letter, Appendix A. *See also* Chung Letter, Deeney Letter, Erman Letter, Fennell Letter, Lin Letter, Mt. Pleasant Letter, Mack Letter, Norman Letter, O'Reilly Letter, Rudd Letter, and Zucker Letter, Appendix A.

[124] *See* Catrina Letter, Mack Letter, and Lin Letter, Appendix A.

[125] *See* Whitcomb Letter and Haber Letter, Appendix A. *See also* ETA Letter, Appendix A.

[126] *See* ETA Letter, Appendix A.

[127] *See* Norman Letter and O'Reilly Letter, Appendix A.

[128] *See* Mount Pleasant Letter, Appendix A.

[129] *See* Whitcomb Letter, Appendix A.

[130] *See* Amendment No. 1, *supra* note 5.

[131] *See* Amendment No. 2, *supra* note 5.

periods of rapid price change.[132] Nasdaq also believed that the Firm Quote Rule would not eliminate the potential for double liability because Nasdaq currently maintains two systems, SOES and SelectNet, that deliver liability orders. Thus, according to Nasdaq, a market maker who receives a SelectNet message at its price and size, followed immediately by a SOES execution against its quote, would be obligated to fill both orders.[133]

In response to the commenters' concerns regarding their ability to access quotations outside the inside market in the absence of SelectNet liability orders, Nasdaq stated that market participants may attempt to access such quotations through oversized SelectNet orders or through traditional means of communication.[134] In addition, Nasdaq noted that market participants will be able to enter limit orders in NNMS outside the current inside market that will be entitled to execution at the limit price or better if the inside market rises or falls to the price level of the limit order.[135] Nasdaq also maintained that SelectNet preferencing outside the inside market would be inconsistent with the orderly and fair processing of orders in the Nasdaq market and that, in light of NNMS' reserve size feature, efforts to access a quotation outside the current inside market without attempting to exhaust interest at the inside could be inconsistent with a broker's duty of best execution.[136] Nasdaq acknowledged that market makers will not be obligated to respond to non-liability SelectNet messages, but maintained that the implementation of a single liability/execution system is essential to reduce dual liability.[137]

In response to the commenters who raised concerns about the potential for manipulative activity in NNMS, Nasdaq asserted that NASD Regulation would closely monitor quotation and order entry activity to ensure the protection of all market participants.[138] In addition, in response to the commenter who believed a market maker would be able to ''hold'' the market by repeatedly renewing a 100-share quotation at five-second intervals because market participants would not be able to use SelectNet liability orders to exhaust the market maker's quotation, Nasdaq maintained that the commenter's description of trading activity was inaccurate and provided examples supporting its position.[139]

The Commission believes that the oversized order requirement and the resulting elimination of most SelectNet liability orders is a reasonable means to address the problem of double liability.[140] As noted above, Nasdaq has stated that double liability is a ''significant and ongoing problem'' and that reducing double liability is one of the proposal's primary goals. The Commission believes that reducing double liability may encourage market makers to display larger sized quotations, thereby providing greater liquidity to the market for NNM securities. The reduction in double liability also may enhance market makers' ability to reflect size in their quotations based on market and business factors with less concern for the potential for double liability. In addition, by preventing market participants from preferencing a quotation outside the current inside market, the elimination of most SelectNet liability orders may facilitate the fair and orderly processing of orders in the Nasdaq market.

With regard to obtaining access to liquidity outside the current inside market, the Commission notes that market participants may attempt to access quotations outside the current inside market through the use of oversized SelectNet orders or through traditional means of communication (*e.g.*, telephone orders). Accordingly, the Commission believes that the availability of oversized SelectNet orders, as well as traditional means of communication, should provide market participants with adequate means to access quotations outside the current inside market.

As discussed above, several commenters believed that the proposed reduction in SelectNet liability orders would result in misleading or inaccurate quotations because market makers would not be required to trade at their quotations.[141] In response, Nasdaq stated that NASD Regulation would closely monitor quotation and order entry activity to ensure the protection of all market participants.[142] The Commission expects NASD Regulation to carefully monitor the conduct of market participants and to bring appropriate disciplinary action against any market participant who enters false or misleading quotations in NNMS or engages in other conduct that is inconsistent with just and equitable principles of trade.

G. ECN Participation in NNMS

Under the proposal, an ECN may participate in NNMS as either an order entry ECN or as a full participant ECN. Market participants will access an order entry ECN through SelectNet liability orders, and an order entry ECN will not provide automatic executions for orders received from those participants. An order entry ECN may request order entry capability in NNMS, which will allow it to obtain automatic executions against the quotations of NNMS market makers, including agency quotes, if the Commission approves the separate display of agency quotes.

A full participant ECN will provide automatic executions for orders the ECN receives through NNMS. Like an order entry ECN, a full participant ECN may request order entry capability in NNMS to obtain automatic executions for orders it sends through NNMS.

As discussed more fully above, ECNs and other market participants criticized the provisions of the proposal relating to ECN participation in NNMS. Two ECNs asserted that order entry participation would marginalize an ECN and was not a viable means for participating in NNMS.[143] One ECN maintained that full participation would disadvantage an ECN because (1) the ECN's reserve quotations would not participate in the NNMS sweep of the ECN's top-of-the-file orders; (2) the ECN would be subject to potential double executions; and (3)

[132] *See* Amendment No. 1, *supra* note 5.

[133] *See* Amendment No. 2, *supra* note 5.

[134] *See* Amendment No. 1, *supra* note 5.

[135] *See* Amendment No. 2, *supra* note 5.

[136] *See* Amendment No. 2, *supra* note 5.

[137] *See* Amendment No. 2, *supra* note 5. Nasdaq also noted that the elimination of SelectNet liability orders would apply equally to all market participants. *Id.*

[138] *See* Amendment No. 2, *supra* note 5.

[139] Specifically, Nasdaq provided scenarios indicating that a market maker could not ''hold'' the market at a price level. In Nasdaq's first scenario, NNMS receives a market order to sell 1,200 shares. Market maker A (''MMA'') is alone at the inside bid of $20 for 100 shares, with 1,100 shares in reserve (the example assumes a previous partial execution against MMA's non-updated quote because reserve size would not be available unless MMA initially displayed a minimum of 1,000 shares). In this case, the order would execute automatically in full at $20 against displayed and reserve size and MMA's quote would be decremented to zero and refreshed or placed in a closed quote status. In the second scenario, NNMS receives a market order to sell 1,200 shares and MMA is alone at the inside bid of $20 for 100 shares, with no shares in reserve. In this case, NNMS would execute against MMA's quote and then move immediately to execute against the quotes at the next lower price level. Thus, the market would not be held at $20. If the inside offer moved to $20, MMA would violate NASD Rule 4613(e) (regarding locked and crossed markets) if MMA entered a locking bid of $20. *See* Amendment No. 2, *supra* note 5.

[140] As discussed above, UTP exchanges will continue to send and receive SelectNet liability orders. In addition, market participants will access order entry ECNs through SelectNet liability orders.

[141] *See* Whitcomb Letter, ETA Letter, and Haber Letter, Appendix A.

[142] *See* Amendment No. 2, *supra* note 5.

[143] *See* Bloomberg Letter and BRUT Letter, Appendix A.

the ECN would be required to provide access through NNMS to brokers that pay no ECN fees.[144]

One market maker criticized the proposal for providing two levels of participation for ECNs but not for other market participants.[145] Several commenters believed that Nasdaq should require ECNs to be full participants in NNMS and, accordingly, subject to automatic executions.[146] In addition, one commenter expressed concern that lack of uniform access to ECN quotes would provide opportunities for manipulative and fraudulent quotation and order entry strategies. [147] Another commenter asserted that a market maker might post its quotes in an order entry ECN to avoid automatic executions.[148]

In response to the concerns regarding ECN participation, Nasdaq stated that it proposed two levels of ECN participation after some ECNs indicated that their systems were not capable of supporting a full automatic execution interface with Nasdaq at this time.[149] In addition, Nasdaq indicated that it would monitor ECN activity in NNMS with a view towards fully integrating all ECNs in the future through enhanced automation.[150] Nasdaq maintained that the proposal balances the benefits of ECN participation in NNMS with current technological constraints and provides maximum flexibility for ECNs while reducing market makers' dual liability concerns.[151]

With regard to the interaction of an ECN's reserve size with NNMS, Nasdaq stated that ECNs currently do not allow Nasdaq access to the reserve size share amounts residing in their systems.[152] Nasdaq indicated that to the extent that an ECN agrees to share its reserve size information with Nasdaq and subject the reserved shares to the automatic execution parameters outlined in the proposal, Nasdaq would be willing to program NNMS to interact with the ECN's reserve size.[153]

In response to concerns that NNMS will provide an opportunity for manipulative and fraudulent quotation and order entry activity, Nasdaq stated, as noted above, that NASD Regulation would closely monitor quotation and order entry activity to ensure the protection of all market participants.[154]

The Commission finds that Nasdaq's proposal for ECN participation in NNMS provides an effective means for integrating ECNs into NNMS. By allowing an ECN to participate in NNMS either as a full participant ECN or as an order entry ECN, the proposal provides ECNs with the flexibility to determine the method of participation in NNMS that is most appropriate for the ECN at this time. The Commission also believes that providing two options for ECN participation in NNMS is reasonable and necessary because, according to Nasdaq, some ECNs currently are not capable of supporting a full automatic execution interface with Nasdaq. Moreover, it is not likely that ECNs that choose order entry participation will be marginalized because ECNs are frequently at the best quote in the market. Further, these ECNs have the ability to obtain automatic executions against the quotes of NNMS market makers if they so choose.

With regard to the concern that the lack of uniform access to ECN quotes will provide opportunities for manipulative and fraudulent quotation and order entry strategies in NNMS, the Commission expects NASD Regulation to carefully monitor trading in NNMS to detect manipulative quotation or order entry strategies and to bring appropriate disciplinary action against a market participant who engages in such strategies or other conduct that is inconsistent with just and equitable principles of trade.

H. UTP Exchange Participation in NNMS

Under the proposal, SelectNet will continue to serve as the primary linkage between UTP exchanges and Nasdaq. UTP exchanges will receive and be obligated to execute preferenced SelectNet liability orders and they will retain their ability to send SelectNet preferenced liability orders to Nasdaq market makers.

The CHX asserted that the proposal improperly excludes the UTP exchanges, including the CHX, from full participation in NNMS.[155] The CHX noted that the proposal would allow UTP specialists to send preferenced orders through SelectNet but will not permit them to use NNMS, which, unlike SelectNet, provides for automatic executions.

In response, Nasdaq noted that Nasdaq market makers currently are not able to obtain automatic executions against exchange specialists.[156] Nasdaq asserted that it would be inappropriate and inconsistent with the fair competition mandate of the Act for Nasdaq to provide CHX specialists with the ability to obtain automatic executions against Nasdaq members while the CHX and the other exchanges decline to provide Nasdaq members with automatic execution access to the quotes of exchange specialists through the Intermarket Trading System.[157]

The Commission believes that it is reasonable for Nasdaq to continue to use SelectNet as the primary linkage between Nasdaq and the UTP exchanges, allowing UTP exchange specialists to access the Nasdaq market through SelectNet liability orders. The Commission believes that the use of SelectNet linkage will provide UTP exchange specialists with adequate access to the Nasdaq market.

I. Technology Concerns

Several commenters expressed concerns regarding Nasdaq's technological capability to implement the proposed changes. In particular, one commenter noted that Nasdaq's systems must be able to promptly deliver critical message traffic, including messages relating to executions, size decrements, and quote updates.[158] The commenters argued that prompt message delivery is critical in light of the proposed reduction in time delays between executions against a market maker from 17 seconds to five seconds,[159] and they noted that a delay in providing notice of an execution increases the potential for double liability.[160] One commenter feared that the impact of existing problems associated with SOES technology will be exacerbated by the increased use of SOES under the proposal.[161] In addition, several commenters noted that firms must have sufficient time to modify their computer systems to implement the proposed changes.[162]

In response, Nasdaq indicated that it has and will continue to take all appropriate steps to assure the adequacy and sufficiency of the proposed systems changes.[163] Specifically, Nasdaq represented that its current automatic execution platform can be expanded

[144] *See* Bloomberg Letter, Appendix A.

[145] *See* Knight Letter II, Appendix A.

[146] *See* Knight Letter II, ACIM Letter, King Letter, Mack Letter, and Vercellone Letter, Appendix A.

[147] *See* Knight II, Appendix A. *See also* Mack Letter, Appendix A.

[148] *See* King Letter, Appendix A.

[149] *See* Amendment No. 1, *supra* note 5.

[150] *See* Amendment No. 1, *supra* note 5.

[151] *See* Amendment No. 1, *supra* note 5.

[152] *See* Amendment No. 1, *supra* note 5.

[153] *See* Amendment No. 1, *supra* note 5.

[154] *See* Amendment No. 2, *supra* note 5.

[155] *See* CHX Letter, Appendix A.

[156] *See* Amendment No. 1, *supra* note 5.

[157] *See* Amendment No. 1, *supra* note 5.

[158] *See* STA Letter, Appendix A.

[159] *See* STA Letter, Appendix A.

[160] *See* ASC Letter, Appendix A. *See also* BRUT Letter, Appendix A.

[161] *See* ASC Letter, Appendix A. *See also* BRUT Letter, Appendix A.

[162] *See* DLJ Letter, Appendix A. *See also* STA Letter and BancBoston Letter, Appendix A.

[163] *See* Amendment No. 1, *supra* note 5.

rapidly to add sufficient capacity to handle the increased volume of message traffic moving into automatic execution under NNMS.[164] In this regard, Nasdaq noted that it plans to replace its current Tandem K-Series host processors with new Tandem S-Series models, resulting in an approximate 25% increase in system capacity and processing speed.[165] Nasdaq stated that this increase would be augmented further by software application tuning (*e.g.*, the addition of more parallel processes to handle order flow) that will expand capacity well beyond the needs of NNMS.[166] In addition, because SelectNet uses more message capacity than SOES due to SelectNet's broadcast, negotiation, and response capabilities, Nasdaq believes that the movement of order traffic to the SOES-based automatic execution platform will reduce overall network traffic levels, thereby increasing the speed and reliability of the entire Nasdaq market.[167]

In response to the commenters' concerns regarding Nasdaq's ability to provide prompt notice of an execution, Nasdaq asserted that the delays in execution report delivery result from competition for system resources in the Nasdaq central message switch.[168] Nasdaq maintained that the migration of message traffic from SelectNet to NNMS would significantly reduce the message traffic causing these delays.[169] In addition, Nasdaq indicated that it expects to roll out an improved central message switch in January 2000, which should dramatically increase the speed of automatic execution confirmation messages and more closely synchronize automatic execution transactions with execution updates to market makers and ECNs.[170]

Nasdaq also noted that it is in the process of testing a Transmission Control Protocol/Internet Protocol (''TCP/IP'')-based, API communications protocol for NNMS, which Nasdaq expects to implement by the end of February 2000.[171] Nasdaq stated that the API would allow NNMS participants to more seamlessly link their internal systems with NNMS for trading, risk management, and regulatory compliance purposes.[172] Nasdaq asserted that the TCP/IP protocol should increase the speed and reliability of NNMS and remove most, if not all, of the technological objections to NNMS.[173]

The Commission believes that the proposed enhancements to Nasdaq's systems, including the new Tandem S-Series host processors and software modifications, the improved central message switch, and the TCP/IP-based, API communications protocol for NNMS, will help to ensure that Nasdaq has the technological capability to implement the proposed changes. The Commission expects that Nasdaq will implement these changes before it moves to the new NNMS trading platform. The Commission also expects Nasdaq to provide sufficient lead time for market participants before implementing NNMS, and to closely monitor operation of NNMS and to implement additional technological changes as necessary.

J. NNMS Fees

One commenter expressed concern that the fee system for NNMS may operate in a discriminatory and anticompetitive manner.[174]

In response, Nasdaq noted that the fees to be assessed under NNMS mirror the current fees for Nasdaq's automatic execution facilities (*i.e.*, $0.50 per side) and SelectNet ($1.00 per execution, order entry side only).[175] Nasdaq will treat a simultaneous execution against an NNMS participant's displayed and reserve sizes as a single execution. For example, a 5,000-share NNMS automatic execution order that interacts with the quotes of three market participants will result in a $0.50 fee for the order entry firm and a $0.50 fee for each of the three market participants whose quotes were accessed, regardless of whether the order also interacted with any of the market participants' reserve sizes.[176] Nasdaq indicated that it is reviewing modifications that may reduce NNMS fees in the future.[177]

The Commission believes that the proposed NNMS fees provide for the equitable allocation of reasonable dues, fees, and other changes, consistent with Section 15A(b)(5) of the Act.

K. Executions Against SOES Market Makers During Locked and Crossed Markets

The Commission believes that it is reasonable for Nasdaq to retain the current five-second delay between SOES executions against the quotation of market maker in SmallCap securities during locked and crossed markets.[178] The Commission believes that retaining the five-second delay between SOES executions during locked and crossed markets will help to ensure that locked or crossed markets are resolved promptly, thereby improving market quality, providing more informative quotation information, and contributing to the maintenance of a fair and orderly market. In addition, the Commission believes, as it has concluded previously, that the five-second delay between SOES executions during locked and crossed markets provides market makers with a brief period to update their quotations while encouraging market makers to quickly remedy a locked or crossed market.[179] Accordingly, the Commission believes that the proposal to retain the five-second delay between SOES executions during locked and crossed markets is reasonably designed to protect investors and the public interest and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

L. Technical Amendments

The Commission believes that the proposed technical, non-substantive amendments to the NASD Manual will clarify the NASD's rules to reflect the proposed changes. Because these changes will reduce confusion and help to ensure compliance with the NASD's rules, the Commission finds that the changes are designed to protect investors and the public interest.

The Commission finds good cause for approving Amendment Nos. 1, 2, and 3 to the proposal prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. Amendment Nos. 1 and 2 respond to the concerns raised by the commenters, provide additional representations concerning the operation of the proposal, and clarify the proposed changes. Among other things, Amendment No. 1 makes clear that order entry firms will be able to participate in NNMS and that Nasdaq would be willing to program NNMS to interact with an ECN's reserve size to the extent that the ECN agrees to share its reserve size information with Nasdaq and subject the reserved shares to the automatic execution parameters outlined in the proposal. Amendment No. 2 describes Nasdaq's technological capability to implement the proposed changes and provides additional

[164] *See* Amendment No. 2, *supra* note 5.
[165] *See* Amendment No. 2, *supra* note 5.
[166] *See* Amendment No. 2, *supra* note 5.
[167] *See* Amendment No. 2, *supra* note 5.
[168] *See* Amendment No. 2, *supra* note 5.
[169] *See* Amendment No. 2, *supra* note 5.
[170] *See* Amendment No. 2, *supra* note 5.
[171] *See* Amendment No. 2, *supra* note 5.
[172] *See* Amendment No. 2, *supra* note 5.
[173] *See* Amendment No. 2, *supra* note 5.
[174] *See* ETA Letter, Appendix A.
[175] *See* Amendment No. 1, *supra* note 5.
[176] *See* Amendment No. 1, *supra* note 5.
[177] *See* Amendment No. 1, *supra* note 5.
[178] *See* Amendment No. 3, *supra* note 5.
[179] *See* Securities Exchange Act Release No. 38115 (January 3, 1997), 62 FR 1351 (January 9, 1997) (order approving File No. SR–NASD–95–54).

explanations concerning the rationale for the proposed changes. Amendment No. 3 strengthens the proposal by retaining the current five-second delay between SOES executions during locked and crossed markets, thereby encouraging market makers to quickly correct locked or crossed quotations. Accordingly, the Commission believes that granting accelerated approval of Amendment Nos. 1, 2, and 3 is appropriate and consistent with Sections 15A(b)(6) and 19(b)(2) of the Act.[180]

V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment Nos. 1, 2, and 3, including whether Amendment Nos. 1, 2, and 3 are consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. § 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR–NASD–99–11 and should be submitted by February 15, 2000.

VI. Conclusion

For the reasons discussed above, the Commission finds that the proposal is consistent with the Act (specifically, Sections 11A and 15A of the Act) and the rules and regulations thereunder applicable to a national securities association.

It Is Therefore Ordered, pursuant to Section 19(b)(2) of the Act,[181] that the proposed rule change (SR–NASD–99–11), as amended, be and hereby is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[182]

Margaret H. McFarland,

Deputy Secretary.

Appendix A—Comment Letters Regarding SR–NASD–99–11

1. Letter from John M. Schaible, President, NexTrade, to Jonathan G. Katz, Secretary, SEC, dated May 3, 1999.
2. Letter from Steven Weil to SEC, dated May 8, 1999 (''Weil Letter I'').
3. Letter from Steven Weil to Jonathan G. Katz, Secretary, SEC, dated May 7, 1999. (''Weil Letter II'').
4. Letter from Kenneth D. Pasternak, President, and Walter F. Raquet, Chief Operating Officer, Knight Securities, Inc., to Jonathan G. Katz, Secretary, SEC, dated May 21, 1999 (''Knight Letter I'').
5. Letter from James M. Hensley, President, Sierra Nevada Securities, Inc., to Jonathan G. Katz, Secretary, SEC, dated May 24, 1999 (''Sierra Nevada Letter'').
6. Letter from Brent M. Weisenborn, Chairman, Security Investment Company of Kansas City (''KCMO''), to Jonathan G. Katz, Secretary, SEC, dated May 25, 1999 (''Weisenborn Letter'').
7. Letter from Mktmaven to SEC (sent by e-mail) dated May 24, 1999 (''Mktmaven Letter'').
8. Letter from Samuel F. Lek, Chief Executive Officer, Lek Schoenau & Company, Inc., to Jonathan G. Katz, Secretary, SEC, dated May 27, 1999 (''Lek Letter'').
9. Letter from James F. Mytinger, Treasurer, Kansas City Securities Association, to Jonathan G. Katz, Secretary, SEC, dated May 26, 1999 (''KCSA Letter'').
10. Letter from Christopher Halford, KCMO, to Jonathan G. Katz, Secretary, SEC, dated May 27, 1999 (''Halford Letter'').
11. Letter from Stuart Cave, KCMO, to Jonathan G. Katz, Secretary, SEC, dated May 27, 1999 (''Cave Letter'').
12. Letter from Ludwell G. Gaines III, KCMO, to Jonathan G. Katz, Secretary, SEC, dated May 27, 1999 (''Gaines Letter'').
13. Letter from Steven R. Hook, KCMO, to Jonathan G. Katz, Secretary, SEC, dated May 27, 1999 (''Hook Letter'').
14. Letter from Richard Kitzmiller, KCMO, to Jonathan G. Katz, Secretary, SEC, dated May 27, 1999 (''Kitzmiller Letter'').
15. Letter from Jeffrey Frankel, KCMO, to Jonathan G. Katz, Secretary, SEC, dated May 27, 1999 (''Frankel Letter'').
16. Letter from Bruce K. Schmidt, KCMO, to Jonathan G. Katz, Secretary, SEC, dated May 27, 1999 (''Schmidt Letter'').
17. Letter from James F. Mytinger, KCMO, to Jonathan G. Katz, Secretary, SEC, dated May 27, 1999 (''Mytinger Letter'').
18. Letter from Trent McCann, KCMO, to Jonathan G. Katz, Secretary, SEC, dated May 27, 1999 (''McCann Letter'').
19. Letter from Lance Turpin, KCMO, to Jonathan G. Katz, Secretary, SEC, dated May 27, 1999 (''Turpin Letter'').
20. Letter from Kyle Malmstrom, KCMO, to Jonathan G. Katz, Secretary, SEC, dated May 27, 1999 (''Malmstrom Letter'').
21. Letter from Ron F. Boyle III, KCMO, to Jonathan G. Katz, Secretary, SEC, dated May 27, 1999 (''Boyle Letter'').
22. Letter from Carl L. Means, Jr., KCMO, to Jonathan G. Katz, Secretary, SEC, dated May 27, 1999 (''Means Letter'').
23. Letter from Oren Galchen to Jonathan G. Katz, Secretary, SEC, dated May 22, 1999 (''Galchen Letter'').
24. Letter from Richard Y. Roberts, Thelen Reid & Priest LLP, on behalf of the Electronic Traders Association (''ETA''), to Jonathan G. Katz, Secretary, SEC, dated May 28, 1999 (''ETA Letter'').
25. Letter from Robin Roger, Principal and Counsel, Morgan Stanley Dean Witter, to Jonathan G. Katz, Secretary, SEC, dated May 28, 1999 (''Morgan Stanley Letter'').
26. Letter from Dan Liu, Executive Vice President, *et. al.*, Automated Securities Clearance Ltd., to Jonathan G. Katz, Secretary, SEC, dated May 28, 1999 (''ASC Letter'').
27. Letter from David K. Whitcomb, Professor of Finance and Economics, Rutgers University, Faculty of Management, Department of Finance and Economics, to Jonathan G. Katz, Secretary, SEC, dated June 1, 1999 (''Whitcomb Letter'').
28. Letter from Brian Hyndman, President, *et al.*, The Brass Utility, L.L.C., to Jonathan G. Katz, Secretary, SEC, dated May 28, 1999 (''BRUT Letter'').
29. Letter from Diane Murphy, Managing Director/Nasdaq Trading, BancBoston Robertson Stephens, to Jonathan G. Katz, Secretary, SEC, dated June 1, 1999 (''BancBoston Letter'').
30. Letter from Bruce Miller, Professor of Accounting, The Anderson School at UCLA, to Jonathan G. Katz, Secretary, SEC, dated May 28, 1999 (''Miller Letter'').

[180] 15 U.S.C. 78o–3(b)(6) and 78s(b)(2).

[181] 15 U.S.C. 78s(b)(2).

[182] 17 CFR 200.30–3(a)(12).

31. Letter from Timothy J. Wilson to Jonathan G. Katz, Secretary, SEC, dated May 23, 1999. (''Wilson Letter'').

32. Letter from Craig S. Tyle, General Counsel, Investment Company Institute, to Jonathan G. Katz, Secretary, SEC, dated June 1, 1999 (''ICI Letter'').

33. Letter from Dinuka L. Samarasinghe to Jonathan G. Katz, Secretary, SEC, dated May 23, 1999 (''Samarasinghe Letter'').

34. Letter from Gregg Giaquinto, In-House Counsel, Electronic Trading Group, L.L.C. (''ETG''), to Jonathan G. Katz, Secretary, SEC, dated June 1, 1999 (''ETG Letter'').

35. Letter from Paul R. Rudd to Jonathan G. Katz, Secretary, SEC, dated May 23, 1999 (''Rudd Letter'').

36. Letter from William B. Norman to Jonathan G. Katz, Secretary, SEC, dated May 25, 1999 (''Norman Letter'').

37. Letter from Michael O'Reilly to Jonathan G. Katz, Secretary, SEC, dated May 25, 1999 (''O'Reilly Letter'').

38. Letter from Gabriel Levin to Jonathan G. Katz, Secretary, SEC, dated May 21, 1999 (''Levin Letter'').

39. Letter from Jeremy Zucker to Jonathan G. Katz, Secretary, SEC, dated March 29, 1999 (''Zucker Letter'').

40. Letter from David O'Leary to Jonathan G. Katz, Secretary, SEC, undated, received June 3, 1999 (''O'Leary Letter'').

41. Letter from Tolga Erman to Jonathan G. Katz, Secretary, SEC, dated May 25, 1999 (''Erman Letter'').

42. Letter from Piers Fennell to Jonathan G. Katz, Secretary, SEC, dated May 28, 1999 (''Fennell Letter'').

43. Letter from Mike Wolverton to Jonathan G. Katz, Secretary, SEC, dated May 28, 1999 (''Wolverton Letter'').

44. Letter from Neal King to Jonathan G. Katz, Secretary, SEC, dated May 24, 1999 (''King Letter'').

45. Letter from Nikhil Atreya to Jonathan G. Katz, Secretary, SEC, dated May 27, 1999 (''Atreya Letter'').

46. Letter from Joel Haber to Jonathan G. Katz, Secretary, SEC, dated May 28, 1999 (''Haber Letter'').

47. Letter from Joshua Weintraub to Jonathan G. Katz, Secretary, SEC, undated, received June 2, 1999 (''Weintraub Letter'').

48. Letter from Bryan D. Chung to Jonathan G. Katz, undated, received June 2, 1999 (''Chung Letter'').

49. Letter from Jeffrey A. Deeney to Jonathan G. Katz, Secretary, SEC, dated May 28, 1999 (''Deeney Letter'').

50. Letter from Steven Weil to Jonathan G. Katz, Secretary, SEC, dated May 28, 1999 (''Weil Letter III'').

51. Letter from Bob Sievers, Access Securities, to SEC, dated June 2, 1999 (''Sievers Letter'').

52. Letter from Steve Swanson, President, Mount Pleasant Brokerage Services, LP, to Jonathan G. Katz, Secretary, SEC, dated June 1, 1999 (''Mt. Pleasant Letter'').

53. Letter from Arthur J. Kearney, Chairman, and Leopold Korins, President and CEO, Security Traders Association (''STA'') to Jonathan G. Katz, Secretary, SEC, dated June 3, 1999 (''STA Letter'').

54. Letter from Howard Teitelman to Jonathan G. Katz, Secretary, SEC, dated May 20, 1999 (''Teitelman Letter'').

55. Letter from Justin Schiller to Jonathan G. Katz, Secretary, SEC, undated, received June 4, 1999 (''Schiller Letter'').

56. Letter from James T. Snell, Registered Representative, Heartland Securities, to Jonathan G. Katz, Secretary, SEC, dated May 24, 1999 (''Snell Letter'').

57. Letter from Matthew D. Nemcic to Jonathan G. Katz, Secretary, SEC, undated, received June 3, 1999 (''Nemcic Letter'').

58. Letter from Kenneth D. Pasternak, President, and Walter F. Raquet, Chief Operating Officer, Knight Securities, Inc., to Jonathan G. Katz, Secretary, SEC, dated June 4, 1999 (''Knight Letter II'').

59. Letter from Richard D. Schenkman, Executive Vice President, Instinet Corporation, to Jonathan G. Katz, Secretary, SEC, dated June 7, 1999 (''Instinet Letter'').

60. Letter from Paul B. O'Kelly, Chicago Stock Exchange (''CHX''), to Jonathan G. Katz, Secretary, SEC, dated June 7, 1999 (''CHX Letter'').

61. Letter from Bernard L. Madoff, Chairman, Trading Committee, Securities Industry Association (''SIA''), to Jonathan G. Katz, Secretary, SEC, dated June 2, 1999 (''SIA Letter'').

62. Letter from Brian L. Mack to Jonathan G. Katz, Secretary, SEC, dated May 28, 1999 (''Mack Letter'').

63. Letter from Jon Vercellone to Jonathan G. Katz, Secretary, SEC, undated, received June 4, 1999 (''Vercellone Letter'').

64. Letter from Yu-Hui J. Lin to Jonathan G. Katz, Secretary, SEC, dated May 30, 1999 (''Lin Letter'').

65. Letter from Cornel Catrina to Jonathan G. Katz, Secretary, SEC, dated May 29, 1999 (''Catrina Letter'').

66. Letter from William H. Sulya, Senior Vice President and Director of Nasdaq/OTC Trading, A.G. Edwards & Sons, Inc. (''A.G. Edwards''), to Margaret H. McFarland, Deputy Secretary, SEC, dated June 7, 1999 (''A.G. Edwards Letter'').

67. Letter from Greg Swenson to Jonathan G. Katz, Secretary, SEC, undated, received June 8, 1999 (''Swenson Letter'').

68. Letter from Kevin M. Foley, Bloomberg L.P. (''Bloomberg''), to Jonathan G. Katz, Secretary, SEC, dated June 4, 1999 (''Bloomberg Letter'').

69. Letter from Hill, Thompson, Magid & Co., Inc. (''Hill''), to Jonathan G. Katz, Secretary, SEC, dated June 7, 1999 (''Hill Letter'').

70. Letter from Mike Cormack, Manager, Equity Trading, American Century Investment Management (''ACIM''), to Jonathan G. Katz, Secretary, SEC, dated June 3, 1999 (''ACIM Letter'').

71. Letter from Ephraim F. Sudit, Ph.D., Professor of Accounting and Information Systems, Rutgers University, to Jonathan G. Katz, Secretary, SEC, dated June 1, 1999 (''Sudit Letter'').

72. Letter from Matthew D. Lang, Senior Compliance Officer, USCC Trading, to Jonathan G. Katz, Secretary, SEC, dated June 8, 1999 (''USSC Trading Letter I'').

73. Letter from Robert L. Padala, Managing Director, Over-the-Counter Trading, Donaldson, Lufkin & Jenrette (''DLJ''), to Jonathan G. Katz, Secretary, SEC, dated June 14, 1999 (''DLJ Letter'').

74. Letter from Gerald D. Putnam, Chief Executive Officer, Archipelago, L.L.C. (''Archipelago''), to Jonathan G. Katz, Secretary, SEC, dated June 14, 1999 (''Archipelago Letter'').

75. Letter from Darren Caris, Torrey Pines Securities, to Jonathan G. Katz, Secretary, SEC, dated June 16, 1999 (''Caris Letter'').

76. Letter from Neil C. Feldman, President, USCC Trading, to Jonathan G. Katz, Secretary, SEC, dated June 17, 1999 (''USCC Trading Letter II'').

77. Letter from Lon Gorman, Executive Vice President, Charles Schwab (''Schwab''), to Jonathan G. Katz, Secretary, SEC, dated June 16, 1999 (''Schwab Letter'').

78. Letter from Michael T. Dorsey, Senior Vice President and General Counsel, Knight Securities, Inc., to Jonathan G. Katz, Secretary, SEC, dated June 23, 1999 (''Knight Letter III'').

79. Letter from Maria A. Silverstein, The Security Traders Association of New York, to Jonathan G. Katz, Secretary, SEC, and Robert Colby, Deputy Director, Division of Market Regulation, SEC, dated March 22, 1999.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–42345; File No. SR–NASD–99–33]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 to the Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Establishment of Trade and Quote Halt Authority for the NASD's OTCBB Service

January 18, 2000.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 14, 1999, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association''), through its wholly-owned subsidiary, Nasdaq Stock Market, Inc. (''Nasdaq'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. On November 16, 1999, Nasdaq filed Amendment No. 1 to the proposed rule change.[3] On December 3, 1999, Nasdaq filed Amendment No. 2 to the proposed rule change.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NASD and Nasdaq are proposing to amend the rules of the NASD to establish authority to halt trading in certain specific circumstances in securities included in the OTC Bulletin Board Service (''OTCBB''). The NASD and Nasdaq are also proposing to make changes to the Plan Of Allocation And Delegation Of Functions By NASD To Subsidiaries to clarify that the Stockwatch section of Nasdaq would have authority to effectuate OTCBB halts. Below is the text of the proposed rule change. Proposed new language is in *italics;* proposed deletions are in [brackets].

Rule 6545. Trading and Quotation Halt in OTCBB-Eligible Securities

(a) Authority for Initiating a Trading and Quotation Halt

In circumstances in which it is necessary to protect investors and the public interest, Nasdaq may direct members, pursuant to the procedures set forth in paragraph (b), to halt trading and quotations in the over-the-counter (''OTC'') market of a security or an American Depository Receipt (''ADR'') that is included in the OTC Bulletin Board (''OTCBB'') if:

(1) The OTCBB security or the security underlying the OTCBB ADR is listed on or registered with a foreign securities exchange or market, and the foreign securities exchange, market, or regulatory authority overseeing such issuer, exchange, or market, halts trading in such security for regulatory reasons because of public interest concerns (''Foreign Regulatory Halt''); provided, however, that Nasdaq will not impose a trading and quotation halt if the Foreign Regulatory Halt was imposed solely for material news, a regulatory filing deficiency, or operational reasons; or

(2) The OTCBB security or the security underlying the OTCBB ADR is a derivative or component of a security listed on or registered with a national securities exchange, The Nasdaq Stock Market, or foreign securities exchange or market (''listed security'') and the national securities exchange, The Nasdaq Stock Market or foreign securities exchange or market, imposes a trading halt in the listed security[5] *or*

(3) The issuer of the OTCBB security or the security underlying the OTCBB ADR fails to comply with the requirements of SEC Rule 10b–17 regarding untimely Announcements of Record Dates.

(b) Procedure for Initiating a Trading and Quotation Halt

(1) When a halt is initiated under subparagraph (a)(1) of this rule, upon receipt of information from a foreign securities exchange or market on which the OTCBB security or the security underlying the OTCBB ADR is listed or registered, or from a regulatory authority overseeing such issuer, exchange, or market, Nasdaq will promptly evaluate the information and determine whether a trading and quotation halt in the OTCBB security is appropriate.

(2) Should Nasdaq determine that a basis exists under this rule for initiating a trading and quotation halt, the commencement of the trading and quotation halt will be effective simultaneous with the issuance of appropriate public notice.

(3) Trading and quotations in the OTC market may resume when Nasdaq determines that the basis for the halt no longer exists, or when five business days have elapsed from the date Nasdaq initiated the trading and quotation halt in the security, whichever occurs first. Nasdaq shall disseminate appropriate public notice that the trading and quotation halt is no longer in effect.

(c) Violation of OTCBB Trading and Quotation Halt Rule

If a security is subject to a trading and quotation halt initiated pursuant to this rule, it shall be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2110 for a member:

(i) To effect, directly or indirectly, a trade in such security; or

(ii) To publish a quotation, a priced bid and/or offer, an unpriced indication of interest (including ''bid wanted'' and ''offer wanted'' indications), or a bid or offer accompanied by a modifier to reflect unsolicited customer interest, in any quotation medium. For purposes of this Rule, ''quotation medium'' shall mean any: system of general circulation to brokers or dealers that regularly disseminates quotations of identified brokers or dealers; or publication, alternative trading system or other device that is used by brokers or dealers to disseminate quotations to others.[6]

Plan Of Allocation And Delegation Of Functions By NASD To Subsidiaries

I–III. No Change

IV. Stockwatch

The Stockwatch section handles the trading halt functions for The Nasdaq Stock market *securities* [and], exchange-listed securities traded in the over-the-counter market (*i.e.*, the Third Market), *and securities quoted in the Over-the-Counter Bulletin Board.* Review of all questionable market activity, possible rule infractions or any other matters that require any type of investigative or regulatory follow-up will be referred to and conducted by NASD Regulation, which will assume sole responsibility for the matter until resolution. This responsibility will include examinations, investigations, document requests, and any enforcement actions that NASD Regulation may deem necessary. NASD Regulation staff at all times will have access to all records and files of the stockwatch function.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from John F. Malitzis, Esq., Assistant General Counsel, Nasdaq to Nancy Sanow, Senior Special Counsel, Division of Market Regulation, SEC dated November 12, 1999. (Amendment No. 1 added language to proposed NASD Rule 6545(a)(2) giving the NASD the authority to halt the trading of a derivative or component of a security listed on a foreign market or exchange if the foreign securities exchange or market imposes a trading halt in the listed securities.)

[4] *See* letter from John F. Malitzis, Esq., Assistant General Counsel, Nasdaq to Nancy Sanow, Senior Special Counsel, Division of Market Regulation, SEC dated December 3, 1999. (Amendment No. 2 revised the definition of ''quotation medium'' in Rule 6545(c)(ii) and conformed the language in footnote 12 to reflect the requirements of NASD Rule 6740 and SEC Rule 15c2–11.)

[5] *See* Amendment No. 1, *supra* note 3.

[6] *See* Amendment No. 2, *supra* note 4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Background. As part of the NASD's ongoing effort to address abuses in thinly traded, thinly capitalized securities and to increase investor protection in the trading of over-the-counter (''OTC'') market, the NASD, Nasdaq, and NASD Regulation have been reviewing whether to establish trading and quotation halt authority for securities that are not listed on an exchange or on Nasdaq, but are traded by NASD members in the OTC market. Nasdaq specifically focused on expanding its current trading halt authority, which generally extends to Nasdaq-listed securities and exchange-listed securities traded off an exchange [7] (*i.e.,* third market), to those securities quoted on the OTCBB. The OTCBB is an NASD system which, pursuant to delegated authority. the Nasdaq Stock Market, Inc. is responsible for operating.

Based on this review, the NASD and Nasdaq are proposing to expand Nasdaq's authority so that Nasdaq may impose quotation and trading halts in OTCBB securities when: (1) The OTCBB security is dually listed or registered and a foreign regulatory authority or market halts trading in the security; (2) the OTCBB security is a derivative or component of a security listed on Nasdaq, a domestic exchange, or foreign exchange/market (*e.g.,* a convertible security or warrant) and Nasdaq, the exchange, or foreign exchange/market halts trading in the underlying security; [8] or (3) the OTCBB issuer does not timely provide the NASD with information required by Exchange Act Rule 10b–17.[9]

Currently, NASD Rule 4120 authorizes Nasdaq to impose trading halts in Nasdaq-listed securities and securities listed on a national securities exchange and traded in the third market. There are, however, no rules that grant Nasdaq authority to impose trading or quotation halts in OTCBB securities. Additionally, unlike the Nasdaq market, there is no listing agreement between Nasdaq and OTCBB issuers, and thus Nasdaq does not have the ability to compel such issuers to disclose information to Nasdaq. Accordingly, it is difficult for Nasdaq to unilaterally imposes halts in the OTCBB because, in most cases, information from the issuer is necessary to assess the situation and determine if a a halt and/or resumption of trading is appropriate.[10] In light of the foregoing the NASD and Nasdaq are proposing to vest Nasdaq with proscribed trading-halt authority.

Foreign Regulatory Authority Halts. First, the NASD and Nasdaq are proposing to impose trading and quotation halts in OTCBB eligible securities when a foreign market or regulatory authority has imposed a halt in the security in their market for regulatory reasons. This authority would permit Nasdaq to halt an OTCBB security or OTCBB ADRs when a foreign market on which the OTCBB issue is also traded, or a regulatory authority which has oversight authority for the OTCBB security, halts trading in the security or the security underlying the ADR for ''regulatory'' reasons. (Nasdaq currently has similar trading-halt authority for Nasdaq-listed securities.) [11] Under the proposal, upon receipt of information from a foreign securities market on which the OTCBB security or the security underlying the OTCBB ADR is listed or registered or from a regulatory authority overseeing such issuer, exchange, or market, Nasdaq's Stockwatch section will evaluate the information (generally, a trade-halt order issued by the foreign market or regulatory authority) and determine whether a halt in the OTCBB security is appropriate. Nasdaq will impose such a halt only when the foreign market or regulatory authority has imposed its halt because of potential fraudulent conduct or other public interest concerns. Nasdaq will not impose a halt if the foreign entity's halt is based on the dissemination of material news, an issuer's failure to meet regulatory filing requirements imposed by a foreign market or regulatory authority, or for operational reasons (*e.g.* order imbalance in the foreign market).[12]

For this and the proposed halts described below, an OTCBB halt would be lifted if Nasdaq determines that the basis of the halt no longer exists or upon the passage of five trading days, which ever occurs first.[13] If a stock is halted for five days and then the halt is lifted, at the time the halt is lifted, market makers will be required to fulfill their obligations under Exchange Act Rule 15c2–11 prior to initiating a priced or unpriced quotation in the security.[14]

[7] *See* NASD Rule 4120. NASD Rule 4120 provides that Nasdaq may halt trading: (1) In the over-the-counter market of a security listed on Nasdaq to permit the dissemination of material news; (2) in the over-the-counter market of a security listed on a national securities exchange during a trading halt imposed by such exchange to permit the dissemination of material news; (3) by: (i) Consolidated Quotation System (''CQS'') market makers in a CQS security when a national securities exchange imposes a trading halt in that CQS security because of an order imbalance or influx (''operational trading halt''); or (ii) Nasdaq market makers in a security listed on Nasdaq, when the security is a derivative or component of a CQS security and a national securities exchange imposes an operational trading halt in that CQS security; (4) in an American Depository Receipt (''ADR'') or other security listed on Nasdaq, when the Nasdaq-listed security or the security underlying the ADR is listed on or registered with a national or foreign securities exchange or market, and the national or foreign securities exchange or market, or regulatory authority overseeing such exchange or market, halts trading in such security for regulatory reasons; or (5) in a security listed on Nasdaq when Nasdaq requests from the issuer information relating to (i) material news; (ii) the issuer's ability to meet Nasdaq listing qualification requirements, as set forth in NASD Rule 4300 and 4400 Series; or (iii) or any other information which is necessary to protect investors and the public interest.

[8] *See* Amendment No. 1, *supra* note 3.

[9] Separately, NASD Regulation focused on establishing authority to impose trading and quotation halts in non-Nasdaq, non-OTCBB, OTC securities. Based on its review, NASD Regulation is issuing *Notice to Members 99–69,* in which it is soliciting comments on whether NASD Regualtion should have authority to halt trading in non-Nasdaq, non-OTCBB, OTC securities: (1) When the security is dually listed and a foreign regulatory authority or market halts trading; or (2) when the security is a derivative of a Nasdaq or exchange-listed security and Nasdaq or a national securities exchange halts trading in the underlying security. NASD Regulation is seeking comments from its membership prior to filing a rule proposal with the Commission because NASD Regulation's proposal is broader than that proposed in this filing. *See* Amendment No. 1, *supra* note 3.

[10] Under section 12(k) of the Act, the Commission may impose trading suspensions in the U.S. securities markets. *See* 15 U.S.C. 781–12(k). Additionally, NASD Rule 3340 prohibits members from trading any security as to which a trading halt is in effect. When the Commission suspends trading in an OTCBB security, Nasdaq announces the halt via the NEWS frame on the Nasdaq Workstation II and prohibits trading and quotations on the OTCBB.

[11] *See* NASD Rule 4210(a)(4).

[12] The NASD and Nasdaq do not propose to halt for material news because Nasdaq does not have a formal listing agreement with OTCBB issuers, and thus cannot compel the full disclosure and dissemination of material news. The NASD and Nasdaq do not propose to halt trading if an issuer fails to meet filing/disclosure requirements imposed by a foreign regulatory authority or market, because Nasdaq would, in essence, be importing filing obligations of a foreign regulatory authority on OTCBB issuers when such requirements may not currently exist in the United States for such issuers. Lastly, the NASD and Nasdaq are not proposing to halt trading based on a foreign exchange's operational halt, such as an order imbalance, because Nasdaq generally does not halt for operational reasons.

[13] Of course, if an issuer failed to meet the eligibility requirements contained in NASD rules 6530 and 6540, which impose certain regulatory filing requirements for securities to be included in the OTCBB, the security would be removed from the OTCBB.

[14] That is, if Nasdaq directs all members to cease quoting a security for five or more business days, pursuant to NASD Rule 6740 and Exchange Act Rule 15c2–11, members will be required to file a Form 211 prior to the resumption of quotations in the OTCBB. *See* 17 CFR 240.15c2–11, The NASD and Nasdaq note that the Commission recently issued for comment a reproposal of amendments to Exchange Act Rule 15c2–11. *See* Securities Exchange Act Release No. 41110 (February 25,

Continued

Nasdaq will notify market participants and the public of halts through the NASD Regulation and Nasdaq Websites (*e.g.,* OTCBB.com, Nasdaqtrader.com, NASDR.com), as well as the Nasdaq NEWS frame on the Nasdaq Workstation II.

Halts in Derivative Securities. Nasdaq currently has the authority to halt trading in a Nasdaq-listed derivative security when a national securities exchange or Nasdaq halts trading in the underlying equity security that is listed on the exchange or Nasdaq.[15] Halt authority only extends to derivatives listed on Nasdaq, and does not extend to derivatives quoted in the OTCBB. Thus, for example, Nasdaq or an exchange may halt trading in a security, but trading may continue in the OTCBB derivative security. Since the trading price of the OTCBB derivative is dependent on the price of the underlying listed security, it is difficult to accurately price the derivative security when there is no current pricing information on the underlying security. Such difficulty in pricing may lead to disorderly markets and investor confusion. According, the NASD and Nasdaq are proposing to halt trading and quotations in OTCBB securities when the OTCBB security is a derivative or component of a security listed on Nasdaq, a domestic exchange, or Nasdaq, foreign market/exchange, and the exchange, or foreign market/exchange imposes a trading halt in the underlying listed security.[16]

OTCBB Halts for Failure to Comply With Exchange Act Rule 10b–17. Finally, the NASD and Nasdaq are proposing to halt quotations and trading in an OTCBB security if the issuer fails to comply with the requirements of Exchange Act Rule 10b–17 regarding Untimely Announcements of Record Dates.[17] Exchange Act Rule 10b–17 requires issuers to give, in a timely fashion, the NASD information relating to: (1) A dividend or other distribution in cash or in kind; (2) a stock split or reverse split; and (3) a rights or other subscription offering. Under Exchange Act Rule 10b–17, the issuer is required to provide this information to the NASD no later than 10 days prior to the record date or, in case of a rights subscription or other offering if such 10 days advance notice is not practical, on or before the record date.[18]

For both Nasdaq-listed and OTCBB securities, Nasdaq publishes the record date of the action and the ex-date in its ''Daily List'' on the Nasdaq Websites. This provides information to broker-dealers, clearing agencies, and the public regarding the record date and settlement of such trades. For Nasdaq-listed securities, if an issuer does not provide the information in a timely manner, Nasdaq may request the Rule 10b–17 information from the issuer and halt trading pending receipt of such information.[19] Nasdaq may then issue a Uniform Practice Code (''UPC'') notice informing members of the status of the record date and underlying event in order to clarify any confusion in the marketplace regarding the pricing or settlement of these trades.

While OTCBB issuers are also required to give the NASD information proscribed by Exchange Act Rule 10b–17 in a timely manner, Nasdaq does not currently have authority to institute trading halts in an OTCBB security when such information has not been timely provided. In the past, OTCBB issuers have failed to provide the NASD with the information required by Exchange Act Rule 10b–17, such as a stock split or the payment of a cash dividend, which has caused confusion in the marketplace because the information has been disseminated unevenly. When this has occurred, some market participants had become aware of the information (which impacts the pricing of the security) and had adjusted their quotes and/or trading activity accordingly. Others, however, had been unaware of this information and did not adjust their quotes and/or trading activity, thus resulting in anomalous pricing. In these situations, unlike Nasdaq-listed stocks, Nasdaq was not able to halt trading, gather information and issue a clarifying UPC notice. Rather, trading continued despite the uneven distribution of information or the distribution of misinformation, while Nasdaq staff attempted to gather information to clarify the situation. To minimize the potential for disorderly markets and investor confusion, the NASD and Nasdaq are proposing to halt trading and quotations in an OTCBB security when the issuer fails to give the NASD notice of the information specified in Exchange Act Rule 10b–17.

Finally, the NASD and Nasdaq are proposing to amend the Plan Of Allocation And Delegation Of Functions By NASD To Subsidiaries to clarify that the Stockwatch section of Nasdaq would have authority to effectuate OTCBB halts

2. Statutory Basis

The NASD and Nasdaq believe that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[20] which requires, among other things, that the Association's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. In addition, the NASD and Nasdaq believe that the proposal is consistent with the provisions of Section 15A(b)(11) of the Act.[21] Section 15A(b)(11) of the Act requires that the rules of a registered national securities association be designed to produce fair and informative quotations, prevent fictitious or misleading quotations and to promote orderly procedures for collecting, distributing, and publishing quotations. As noted above, because the proposed rule change will expand Nasdaq's authority to initiate trading halts in OTCBB issues based on regulatory halts imposed by other markets or regulatory authorities, the proposed rule will prevent fraudulent practices and protect investors. Moreover, the proposal will authorize Nasdaq to halt trading when there is a failure to timely provide the NASD with information mandated by Exchange Act Rule 10b–17, which if not timely and evenly disseminated could have a dramatic impact on the pricing and trading of OTCBB issues. Thus, the proposal is designed to protect investors and to produce fair and informative quotations, prevent fictitious or misleading quotations and to promote orderly procedures for collecting, distributing, and publishing quotations.

B. Self-Regulatory Organization's Statement on Burden on Competition

The NASD and Nasdaq do not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

1999), 64 FR 11124 (March 8, 1999). The NASD and Nasdaq will monitor developments regarding Exchange Act Rule 25c2–11 and plan to make any necessary changes to conform the rules proposed in this filing with any changes to Exchange Act Rule 15c2–11.

[15] *See* NASD Rule 4120(a)(3)(ii).

[16] *See* Amendment No. 1, *supra* note 3.

[17] *See* 17 CFR 240.10b–17.

[18] *Id.*

[19] *See* NASD Rule 4210(a)(5).

[20] 15 U.S.C. 78*o*–3(b)(6).

[21] 15 U.S.C. 78*o*–3(b)(11).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Persons making written submissions should file six copies thereof the the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD.

All submissions should refer to File No. SR–NASD–99–33 and schould be submitted by February 15, 2000.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority. [22]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 00–1698 Filed 1–24–00; 8:45 am]

BILLING CODE 8010–01–M

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–42343; File No. SR–NYSE–99–47]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the New York Stock Exchange, Inc. To Amend NYSE Rule 431 (''Margin Requirements'')

January 14, 2000.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 13, 1999, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NYSE proposes to amend NYSE Rule 431, ''Margin Requirements,'' to establish margin requirements for day trading in customer accounts of member organizations. The text of the proposal is below. Deletions are in brackets, and additions are in italics.

Rule 431—Margin Requirements

No change to 431(a) through (b)(3).

(b)(4) equity of at least $2,000 except that cash need not be deposited in excess of the cost of any security purchased (this equity and cost of purchase provision shall not apply to ''when distributed'' securities in a cash account). *The minimum equity requirement for a ''pattern day trader'' is $25,000 pursuant to paragraph (f)(8)(B)(iv)(1) of this Rule.*

Withdrawals of cash or securities may be made from any account which has a debit balance, ''short'' position or commitments, provided it is in compliance with Regulation T of the Board of Governors of the Federal Reserve System and after such withdrawal the equity in the account is at least the greater of $2,000 *($25,000 in the case of ''pattern day traders'')* or an amount sufficient to meet the maintenance margin requirements of this Rule.

No change to 431(c) through (f)(8)(A)(iii).

(f)(8)(B) Day Trading.

(i) The term ''day trading'' means the purchasing and selling *or the selling and purchasing* of the same security on the same day *in a margin account except for:*

(a) a long security position held overnight and sold the next day prior to any new purchases of the same security, or

(b) a short security position held overnight and purchased the next day prior to any new sales of the same security.

(ii) [A ''day trader'' is any customer whose trading shows a pattern of day trading.] *The term ''pattern day trader'' means any customer who executes four (4) or more day trades within five (5) business days. However, if the number of day trades is 6% or less of total trades for the five (5) business day period, the customer will no longer be considered a pattern day trader and the special requirements under paragraph (f)(8)(B)(iv) of this Rule will not apply.*

(iii) The term ''day trading buying power'' means the equity in a customer's account at the close of business of the previous day, less any maintenance margin requirement as prescribed in paragraph (c) of this Rule, multiplied by four, for equity securities.

Whenever day trading occurs in a customer's margin account the [margin to be maintained] *special maintenance margin required for the day trades in equity securities* shall be [the margin on the ''long'' or ''short'' transaction, whichever occurred first, as required pursuant to the other provisions of this Rule. When day trading occurs in the account of a ''day trader'' the margin to be maintained shall be the margin on the ''long'' or ''short'' transaction, whichever occurred first, as required by Regulation T of the Board of Governors of the Federal Reserve System or as required pursuant to the other provisions of this Rule, whichever amount is greater.] *25% of the cost of all the day trades made during the day. For non-equity securities, the special maintenance margin shall be as required pursuant to the other provisions of this Rule. Alternatively, when two or more day trades occur on the same day in the same customer's account, the margin required may be computed utilizing the highest (dollar amount) open position during that day. To utilize the highest open position computation method, a record showing the ''time and tick'' of each trade must be maintained to document the sequence in which each day trade was completed.*

(iv) Special Requirements for Pattern Day Traders

(1) Minimum Equity Requirement for Pattern Day Traders—The minimum equity required for the accounts of customers deemed to be pattern day traders shall be $25,000. This minimum equity must be maintained in the customer's account at all times (see Supplementary Material .40 of this Rule).

(2) Pattern day traders cannot trade in excess of their day trading buying power as defined in paragraph (f)(8)(B)(iii) above. In the event a pattern day trader exceeds its day trading buying power which creates a special maintenance margin deficiency, the following actions will be taken by the member organization.

(a) The account will be margined based on the cost of all the day trades made during the day, and

(b) The customer's day trading buying power will be limited to the equity in the customer's account at the close of business of the previous day, less the maintenance margin required in paragraph (c) of this Rule, multiplied by two, for equity securities.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

(3) Pattern day traders who fail to meet their special maintenance margin calls as required within five business days from the date the margin deficiency occurs will be permitted to execute transactions only a cash available basis for 90 days or until the special maintenance margin call is met.

(4) Pattern day traders are restricted from utilizing the guaranteed account provision pursuant to paragraph (f)(4) of this Rule for meeting the requirements of paragraph (f)(8)(B).

(5) Funds, deposited into a day trader's account to meet the minimum equity or maintenance margin requirements of this Rule 431(f)(8)(B) cannot be withdrawn for a minimum of two business days following the close of business on the day of deposit.

(f)(8)(C) When the equity in a customer's account, after giving consideration to the other provisions of this Rule, is not sufficient to meet the requirements of paragraph (f)(8)(A) or (B) additional cash or securities must be received into the account to meet any deficiency within [seven] *five* business days of the trade date.

In addition, on the sixth business day only, member organizations are required to deduct from net Capital the amount of unmet maintenance margin calls pursuant to SEA Rule 15c3–1.

* * * * *

Supplementary Material

.10–.20 No change.

.30 In the event that the organization at which a customer seeks to open an account knows or has a reasonable basis to believe that the customer will engage in pattern day trading, then the minimum equity required under paragraph (f)(8)(B)(iv)(1) above ($25,000) must be deposited in the account prior to commencement of day trading.

.40 When a customer engages in pattern day trading, the minimum equity required under paragraph (f)(8)(B)(iv)(1) above ($25,000) must be deposited in the account before such customer may continue day trading.

.50 For purposes of paragraph (f)(8)(B)(iv)(2)(a) above, ''time and tick'' (i.e., calculating margin utilizing each trade in the sequence that it is executed, using the highest open position during the day) may not be used for a pattern day trader who exceeds their day trading buying power.

.60 For purposes of paragraph (f)(8)(B)(iii) and (iv)(2)(b), the day trading buying power for non-equity securities may be computed using the applicable special maintenance margin requirements pursuant to other provisions of this Rule.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NYSE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NYSE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NYSE Rule 431 to implement specific requirements for day trading in customer accounts of member organizations. The primary purpose of the proposal is to require that minimum levels of equity and margin be deposited and maintained in day trading accounts sufficient to support the risks associated with day trading activities.

NYSE Rule 431 prescribes the minimum margin amount required to be maintained in customer accounts of member organizations. As a result of recent amendments to federal margin regulations and a rapidly changing industry environment, the Exchange established, in April 1996, a Rule 431 Committee (the ''Committee'') to review margin requirements and make recommendations for change. The Committee established subcommittees to review specific provisions of NYSE Rule 431. A special subcommittee was formed recently to address the risks associated with day trading in customer accounts. The Exchange's Board of Directors has approved a number of proposed amendments resulting from Committee recommendations.

This proposal amends NYSE Rule 431 to establish special maintenance margin requirements for customers that engage in day trading, and specific minimum equity requirements and buying power limitations for customers that demonstrate a pattern of day trading.

According to the Exchange, the recent growth and advances in technology have contributed to a dramatic increase in day trading by customers and in the establishment of broker-dealers whose primary business is to provide customers with direct links to the securities markets by allowing them to trade their own portfolios on-line. In this environment, day traders attempt to make profits on intra-day price movements of stock in the securities markets.

The proposed amendments to NYSE Rule 431(f)(8)(B) define ''day trading'' as ''the purchase and sale of the same security in the same day in a margin account.'' An exception to the definition is provided when: (1) a long security position is carried in the account overnight, and sold the next day prior to any new purchases of that security; or (2) a short security position is carried overnight and purchased the next day prior to any new sales of that security, (*i.e.,* closing transactions to wrap-up the prior day's activities prior to *any new* purchases or sales of the same security). While such transactions would not fall within the definition of day trading, any further commitments with respect to that security (*i.e.,* any subsequent purchase or sale) would be deemed day trading.

A customer will be deemed as a ''pattern day trader'' if there are four or more day trades within five business days in an account, provided that the number of day trades is more than 6% of total trades in the account for the five day period.[3] The 6% criteria is proposed so that customers who engage in a large number of transactions overall are not inappropriately deemed a pattern day trader solely because they exceeded the ''more-than-four-trade'' standard. For example, a customer who transacts four day trades within five business days and who also has a total of 100 transactions in that time period would not be deemed a pattern day trader, because less than 6% of the total trades were day trades.

The proposal also defines ''day trading buying power'' to provide a maximum level of day trading allowed by ''pattern day traders'' without restrictions. For equity securities, buying power is the equity in the account at the close of the business day, less any maintenance margin, multiplied by four. For non-equity securities, buying power shall be computed using applicable special maintenance margin requirements pursuant to other provisions of the Rule.

The proposed amendments require day traders to maintain special maintenance margin commensurate with their levels of day trading activity. For day trades in equity securities, the required special maintenance margin is 25% of the cost of all day trades during the day. For non-equity securities, margin required is the same as maintenance margin required pursuant to other provisions of NYSE Rule 431. However, when two or more day trades occur on the same day in the customer's account, the required margin may be based on the highest open position

[3] ''Pattern day trading'' status is determined on a rolling five business day basis. Telephone conversation among Donald van Weezel, Managing Director, Regulatory Affairs, NYSE; Albert Lucks, Director, Credit Regulation, NYSE; and Nancy Sanow, Senior Special Counsel, Division of Market Regulation; Thomas McGowan, Assistant Director, Division of Market Regulation; Joseph Morra, Attorney; and Melinda Diller, Attorney, Commission, January 7, 2000.

during that day. This computation requires maintenance of ''time and tick'' records to document the sequence in which each day trade was completed.

Further, under the amended Rule, the time frame for meeting day trading special maintenance margin calls will be reduced from seven business days to five business days. If the special maintenance margin call is not met within five business days from the date the special margin deficiency occurred, pattern day traders will be restricted to day trading on a cash available basis only for 90 days, or until the special call for additional funds is met. Member organizations will incur a one time capital charge for the amount of any unmet deficiency on the sixth business day.

Currently, NYSE Rule 431 requires $2,000 minimum equity for a customer to open a margin account. The Exchange is proposing to require that a pattern day trader's account maintain a minimum equity of $25,000 at all times. In the event that a pattern day trader's account falls below the required minimum equity, no further day trades will be permitted until the requisite equity level is maintained. In addition, member organizations that have advance knowledge or reason to believe that a new account will pattern day trade must require the customer to deposit $25,000 minimum equity into the account prior to the commencement of day trading activity.

The proposal will also restrict pattern day traders from trading in excess of their day trading buying power. If the day trading buying power is exceeded, and this results in a special maintenance margin deficiency, the following actions must be taken by member organizations: (i) the account will be margined based on the total cost of all day trade purchases for that day; and (ii) the customer's day trading buying power will be reduced by the maintenance margin amount required.

To provide greater financial stability to such accounts, the proposal requires that a day trading customer deposit into the day trading account a sufficient amount of money to meet minimum equity and maintenance margin requirements. Such deposits will not be allowed to be withdrawn for at least two business days.

In addition, pattern day traders will be prohibited from utilizing ''cross guarantees'' otherwise permitted in margin accounts. These prohibitions are intended to address instances where margin calls in day trading accounts are met by cross-guarantees within different customer accounts at the same broker-dealer. The net effect of these prohibitions is to require that each pattern day trading account meets its requirements independently by utilizing funds actually on deposit in the account.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(5)(b) of the Act,[4] which requires that the rules of the Exchange be designed to promote just and equitable principles of trade and to protect the investing public.

The Exchange believes that the proposed rule change is also consistent with Section 7(a) of the Act[5] and with the rules and regulations of the Board of Governors of the Federal Reserve System, because it prevents the excessive use of credit for the purchase or carrying of securities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the Exchange consents, the Commission will:

A. by order approve the proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549–0609. Copies of the submissions, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any persons, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR–NYSE–99–47 and should be submitted by February 15, 2000.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[6]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 00–1699 Filed 1–24–00 8:45 am]

BILLING CODE 8010–01–M

[4] 15 U.S.C. 78f(b)(5).

[5] 15 U.S.C. 78g.

[6] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–42350; International Series Release No. 1211; File No. SR–NYSE–00–01]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Continuing Annual Listing Fees for Canadian Companies

January 19, 2000.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 4, 2000, the New York Stock Exchange, Inc. (''NYSE'' or Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its customs and practices for calculating continuing annual listing fees for Canadian companies.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

It has been the custom and practice of the Exchange to calculate the continuing annual fee for Canadian companies listed before September 8, 1989 on the basis of total worldwide shares, with a 50% discount for companies with more than half of their operations outside the United States. The continuing annual fee for Canadian companies listed after September 8, 1989 and all other non-U.S. companies has been calculated based on shares issued in the U.S. The proposed change will calculate continuing annual fees for all Canadian companies based on shares issued in the U.S., thereby conforming the continuing annual fee for Canadian companies listed before September 8, 1989, to the standard applied to all other non-U.S. companies.

2. Statutory Basis

The Exchange believes the basis under the Act for the proposed rule change is the requirement under Section 6(b)(4) [3] that an Exchange have rules that provide for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. by order approve the proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.[4]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR–NYSE–00–01 and should be submitted by February 15, 2000.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 00–1735 Filed 1–24–00; 8:45 am]

BILLING CODE 8010–01–M

[3] 15 U.S.C. 78f(b)(4).

[4] The Exchange requested accelerated approval in its filing with the Commission. However, the Exchange retracted its request in a telephone conversation between Amy Bilbija, Counsel, NYSE, and Terri Evans, Special Counsel, and Heather Traeger, Attorney, Division of Market Regulation, SEC, on January 11, 2000.

[5] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–42349; File No. SR–PCX–99–37]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Pacific Exchange, Inc. Authorizing the PCX ITS Coordinator to Accept Inbound Commitments on Behalf of Other PCX Specialists

January 19, 2000.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 5, 1999, the Pacific Exchange, Inc. (''PCX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. PCX submitted an amendment on November 2, 1999 (''Amendment No. 1''),[3] and an amendment on December 7, 1999 (''Amendment No. 2'').[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The PCX is proposing to adopt a new rule to allow the ITS Coordinator [5] in a given equity issue to accept ITS

[1] 5 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Letter from Michael Pierson, Director, Regulatory Policy, PCX, to Marla Chidsey, Law Clerk, Division of Market Regulation, Commission, dated November 1, 1999. Amendment No. 1 clarifies whether the ITS coordinator must still confirm with other PCX specialists, executions made on behalf of those other PCX specialists, before executions occur.

[4] *See* Letter from Michael Pierson, Director, Regulatory Policy, PCX, to Marla Chidsey, Law Clerk, Division of Market Regulation, Commission, dated December 6, 1999. Amendment No. 2 adds Rule 5.20(a)(xi) defining the term ''PCX Coordinating Specialist'' as the specialist responsible for coordinating the acceptance of inbound ITS commitments.

[5] The Commission would like to clarify that the term ''ITS Coordinator'' is used interchangeably with the term ''PCX Coordinating Specialist'' as defined in new Rule 5.20(a)(xi).

commitments on behalf of other specialists in that issue.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the PCX included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The PCX has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

At the PCX, there are generally two registered specialists per equity issue traded on the Exchange.[6] However, there is only one specialist per issue who acts as the ITS Coordinator. The ITS Coordinator is generally responsible for coordinating acceptance of incoming ITS commitments among the specialists in a particular stock. The PCX expects that there will continue to be only one ITS Coordinator per stock after the Exchange expands the number of specialists per issue.

Currently, any PCX specialist may send an outbound ITS commitment to another market center without that ITS Coordinator's assistance. A PCX specialist who is not an ITS Coordinator may also receive inbound ITS commitments without the involvement of the ITS Coordinator, as long as the ITS Coordinator is not designated to participate in the trade as a result of the inbound commitment.[7] However, if an inbound commitment involves more than one PCX specialist as the contra side, then the ITS Coordinator is required to coordinate the execution of the commitment among the PCX participants verbally.

The current PCX rules do not expressly authorize the ITS Coordinator to accept ITS commitments on behalf of other specialists. The ITS Coordinator needs to obtain the verbal consent of the other specialist before accepting an inbound commitment on behalf of that other specialist. The PCX is now proposing to provide the ITS Coordinator with the express authority to accept ITS commitments on behalf of other specialists. The Exchange believes that this rule change is necessary in order to assure that there will be no delays in the acceptance of inbound ITS commitments, where there is more than one specialist quoting at the price of the inbound commitment.[8]

For example, assume Specialist A and Specialist B (PCX specialists) are both bidding $20 (the national best bid) for 500 shares of XYZ stock. If the PCX receives an inbound ITS commitment to sell 1,000 shares of stock, and if Specialist A is the ITS Coordinator, then Specialist A will confirm with Specialist B that 500 shares of XYZ may be accepted by Specialist A on Specialist B's behalf. The proposed rule change would allow Specialist A to accept the 500 shares on Specialist B's behalf, on the ground that Specialist B's bid for 500 shares is still outstanding at the time that Specialist A receives the inbound commitment for 1,000 shares. Whenever an inbound ITS commitment is received on the PCX, the specialists whose quotes prompted the inbound commitment will be notified by a ''shadow'' message that the inbound commitment has been received on the PCX.[9]

Specifically, the PCX is proposing to adopt new Rule 5.20, Commentary .04, which will provide that in the case of the assignment of an ITS stock to more than one PCX Registered Specialist, the PCX Coordinating Specialist or PCX Registered Specialist at whose ITS station an ITS commitment to trade is received is authorized to accept such commitment at the PCX bid or offer price, if still available (or at a better price if available), and up to the size of the PCX bid or offer without the need to communicate with other PCX members.

2. Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Section 6(b)(5),[11] in particular, in that it is designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to promote just and equitable principles of trade and to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. by order approve such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing including whether the proposed rule is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the PCX. All submissions should refer to File No. SR–PCX–99–37 and should be submitted by February 15, 2000.

[6] The PCX expects that there will be more than one specialist per stock when its competing specialist program is implemented. *See* Exchange Act Release No. 41327 (April 22, 1999), 64 FR 23370 (April 30, 1999).

[7] The ITS Coordinator need not coordinate the commitment if he or she is not quoting at the price of the inbound commitment and is not representing an order at that price.

[8] Priority and parity rules will not be affected by the proposed rule change. Telephone conversation between Michael Pierson, Director, Regulatory Policy, PCX, and Christine Richardson, Attorney, and Marla Chidsey, Attorney, Division of Market Regulation, Commission (January 18, 2000).

[9] *See also* Amendment No. 1.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 00–1736 Filed 1–24–00; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–42346; File No. SR–Phlx–99–57]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to the Permanent Approval of the Elimination of Position and Exercise Limits for FLEX Equity Options

January 18, 2000.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'' or ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 4, 2000, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Phlx. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Phlx requests permanent approval for the elimination of position and exercise limits[3] on Flexible Exchange Options on equity securities (''FLEX equity options'').

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Phlx requests permanent approval of the pilot program eliminating position and exercise limits on FLEX equity options. FLEX equity options at the Phlx have been trading since January 1998.[4] The Commission approved the elimination of position and exercise limits on FLEX equity options, on a two-year pilot basis, concurrently with the approval of the trading of FLEX equity options.[5]

In addition to eliminating position and exercise limits, the pilot program required that a member or member organization (other than a Specialist or Registered Options Trader) report to the Exchange information for each account that maintains a position on the same side of the market in excess of the position limit established pursuant to the applicable exchange rule for Non-FLEX Equity options of the same class. The report included information regarding the FLEX Equity option position, positions in any related instrument, the purpose or strategy for the position, and the collateral used by the account.[6]

Furthermore, the Commission, in its order approving the pilot program, required the Exchange to submit a report containing a description of: (i) the types of strategies used by FLEX Equity options market participants and whether FLEX Equity options are being used in lieu of existing standardized equity options; (ii) the type of market participants using FLEX Equity option both before and during the pilot program, including how the utilization of FLEX Equity options has changed; (iii) the average size of FLEX Equity option contracts both before and during the pilot program, the size of the largest FLEX Equity option contract on any given day both before and during the pilot program, and the size of the largest FLEX Equity option held by any single customer/member both before and during the pilot program; and (iv) any impact on the prices of underlying stocks during the establishment or unwinding of FLEX positions that are greater than three times the standard position limit. Phlx filed its report, which will be discussed below, on July 15, 1999.

2. Statutory Basis

The basis under the Act for the proposed rule change is the requirement under Section 6(b)(5)[7] that an Exchange have rules that are designed to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change will impose no burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room, located at the above address. Copies of such filing will also be available for inspection and copying at

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[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Position limits impose a ceiling on the number of option contracts in each class on the same side of the market (*i.e.,* aggregating long calls and short puts or long puts and short calls) that can be held or written by an investor or group of investors acting in concert. Exercise limits prohibit an investor or group of investors acting in concert from exercising more than a specified number of puts or calls in a particular class within five consecutive business days.

[4] Securities Exchange Act Release No. 39549 (January 14, 1998), 63 FR 3601 (January 23, 1998) (approving SR–Phlx–96–38).

[5] The Commission notes that it recently approved identical proposed rule changes from the American Stock Exchange, Chicago Board Options Exchange and the Pacific Exchange. *See* Securities Exchange Act Release No. 42223 (December 10, 1999), 64 FR 71158 (December 30, 1999) (approving SR–Amex–99–40, SR–PCX–99–41, and SR–CBOE–99–59).

[6] The Exchange also required that an updated report be filed when a change in the options position occurred or when a significant change in the hedge of that position occurred.

[7] 15 U.S.C. 78f(b)(5).

the principal office of the Exchange. All submissions should refer to File No. SR–Phlx–99–57 and should be submitted by February 15, 2000.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with the requirements of Sections 6 and 11A of the Act.[8] Specifically, the Commission believes that the rule proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission also believes that the proposed rule change is consistent with Section 11A of the Act in that the permanent elimination of position and exercise limits for FLEX Equity options allows the Exchange to better compete with the growing over-the-counter (''OTC'') market in customized equity options, thereby encouraging fair competition among brokers and dealers and exchange markets. The attributes of the Exchange's options markets versus a OTC market include, but are not limited to, a centralized market center, an auction market with posted transparent market quotations and transaction reporting, parameters and procedures for clearance and settlement, and the guarantee of The Options Clearing Corporation (''OCC'') for all contracts traded on the Exchange.

The Commission has generally taken a gradual, evolutionary approach toward expansion of position and exercise limits. Given that the current pilot program has run for the past two years without incident, the Commission believes that it is appropriate to approve the pilot on a permanent basis, First, the FLEX Equity options market is characterized by large, sophisticated institutional investors (or extremely high net worth individuals), who have both the experience and ability to engage in negotiated, customized transactions. For example, with a required minimum size of 250 contracts (or the number of contracts having $1 million of underlying equivalent value) to open a transaction in a new series,[9] FLEX Equity options are designed to appeal to institutional investors, and it is unlikely that many retail investors would be able to engage in options transactions at that size. Second, all of the Exchange's other current rules and provisions governing FLEX Equity options remain applicable.[10] Third, the OCC will serve as the counter-party guarantor in every exchange-traded transaction. Fourth, the proposed elimination of position and exercise limits for FLEX Equity options could potentially expand the depth and liquidity of the FLEX equity market without significantly increasing concerns regarding intermarket manipulations or disruptions of the options or the underlying securities. Fifth, the enhanced reporting requirements should help the Exchange to monitor accounts under risk and to take any appropriate action. Finally, the Exchange's surveillance program will be applicable to the trading of FLEX Equity options and should detect and deter trading abuses arising from the elimination of position and exercise limits.

As described above, the Exchange has adopted important safeguards that will allow it to monitor large positions in order to identify instances of potential risk and to assess additional margin and/or capital charges, if necessary. The Exchange requires each member or member organization (other than a Specialist, a Registered Options Trader, a Market Maker, or a Designated Primary Market Maker) that maintains a position on the same-side of the market in excess of the position limit level established pursuant to the applicable Exchange rule [11] for Non-FLEX Equity options of the same class to report information to the exchange regarding the FLEX Equity option position, positions in any related instrument, the purpose or strategy for the position, and the collateral used by the account. By monitoring accounts in excess of the Non-FLEX Equity option position limit in this manner, the Exchange should be provided with the information necessary to determine whether to impose additional margin and/or whether to assess capital charges upon a member organization carrying the account. In addition, this information should allow the Exchange to determine whether a large position could have an undue effect on the underlying market and to take the appropriate action.

The Commission believes that it is reasonable to treat FLEX Equity options differently than regular standardized options. FLEX options compete directly with OTC options. The Commission believes that it would be beneficial to attract OTC activity back to a more transparent market with a clearinghouse guarantee. Hence, a liberalization of position limits for FLEX Equity options is a measured deregulatory means to enable the Exchange to compete with the OTC market while preserving important oversight safeguards.

As noted above, the Exchange was required to submit a report assessing the effects of the pilot program. This information was required to allow the Commission to valuate the consequences of the program and to determine whether permanent approval was appropriate. The Commission has reviewed Phlx's report. Although the Commission cannot entirely rule out the potential for future adverse effects on the securities markets for the FLEX Equity options or component securities underlying FLEX Equity options, the report supports permanent approval of the pilot because such effects and abuses have not occurred over the two year pilot period.

In the report, the Exchange indicates that there were no instances of any unusual market effects developing out of FLEX trades. Through 1998, there were a total of 189 trades, 47 transacted by institutions and 142 undertaken by retail customers. The average institutional trade size was 772 contracts with the largest trade involving 8,000 contracts. Retail investor trades averaged 120 contracts with the largest trade involving 1,760 contracts. [12] During 1998, four firms executed trades on behalf of a total of 15 retail customers. Based on the above, the Exchange concludes that that elimination of position and exercise limits for FLEX Equity options did not have any impact on the prices of the underlying stocks during the establishment or unwinding of FLEX Equity positions.

Finally, given the size and sophisticated nature of the FLEX Equity options market, the reporting and margin requirements, and the fact that the pilot program has run the past two years without incident, the Commission

[8] *See* 15 U.S.C. 78f(b) and 78k–1. In approving this rule change, the Commission notes that it has considered the proposal's impact on efficiency, competition, and capital formation, consistent with Section 3 of the Act. *Id.* at 78c(f).

[9] *See* Phlx Rule 1079(a)(8)(A)(ii).

[10] *See* Phlx Rule 1079.

[11] *See* Phlx Rule 1001.

[12] The Commission notes that the minimum value size for an opening transaction (other than FLEX quotes responsive to a FLEX request for quotes) in any FLEX series in which there is no open interest at the time the request for quotes is submitted is the lesser of 250 contracts or the number of contracts overlying $1 million in the underlying securities. However, the minimum value size for a transaction in any currently-opened FLEX series is 100 contracts in the case of opening transactions for FLEX Equity options and 25 contracts in the case of closing transactions in FLEX Equity options. *See* Phlx Rule 1079(a)(8)(A)(ii) and (a)(8)(B)(i).

believes that eliminating position and exercise limits for FLEX Equity options on a permanent basis does not substantially increase manipulative concerns. The Commission continues to believe that the enhanced market surveillance of large positions should help the Exchange to take the appropriate action in order to avoid any manipulation or market risk concerns. The Commission expects the Exchange to take prompt action, including timely communication with the Commission and other marketplace self-regulatory organizations responsible for oversight of trading in FLEX options and the underlying stocks, should any unanticipated adverse market effects develop. In summary, because of the special nature of the FLEX Equity markets, the Commission believes that the Exchange's proposals should be approved on a permanent basis. In permanently approving the proposals, the Commission believes that the distinctions between the FLEX Equity options market and the standardized equity options market, as described above, warrant the different regulatory applications of position and exercise limits under the Act.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. Specifically, the Commission believes that because permanent approval of the proposal will allow the pilot program to continue uninterrupted based on the same terms and conditions of the original pilot, it is consistent with the protection of investors and the public interest to approve the proposed rule changes on an accelerated basis. Furthermore, as noted above, the Commission recently approved identical proposed rule changes from the American Stock Exchange, Chicago Board Options Exchange and the Pacific Exchange.[13] A full 21-day comment period was provided for those proposals and no comments were received. Accordingly, the Commission believes it is consistent with Section 6(b)(5) and Section 19(b)(2) of the Act to grant accelerated approval to the proposed rule change.[14]

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[15] that the proposed rule change (SR–Phlx–99–57) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 00–1737 Filed 1–24–00; 8:45 am]

BILLING CODE 8010–01–M

[13] *See supra* note 5.

[14] 15 U.S.C. 78f(b)(5) and 78s(b)(2).

[15] 15 U.S.C. 78s(b)(2).

[16] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice No. 3207]

Bureau of Oceans, International Environmental and Scientific Affairs; Public Meeting to Discuss Preparations for Negotiations on an Annex to the United States-Canada Air Quality Agreement to Address the Transboundary Problem of Ground-Level Ozone

SUMMARY: The United States government, through an interagency working group chaired by the U.S. Department of State, is seeking authority to negotiate an annex to the United States-Canada Air Quality Agreement of 1991. The proposed annex would seek to address transboundary ground-level ozone air quality problems by establishing commitments to reduce emissions of major constituents of air pollution. In preparation for the proposed negotiations, the United States will establish a negotiating team consisting of representatives of the U.S. Department of State, the U.S. Environmental Protection Agency, and other interested U.S. government agencies. In addition, three representatives of interested party groups (one each from industry/mining/labor, U.S. states, and environmental groups) will be invited to participate on the U.S. delegation to the talks. The first negotiating session is expected to take place in Ottawa, Canada, in February 2000. The U.S. Department of State will host a public meeting in advance of this session to outline issues likely to arise in the context of the negotiations, to invite public comment, and to invite interested parties to collaborate on selecting their group's representative on the U.S. delegation. The public meeting will take place on Friday, February 4, 2000, from 9:00 a.m. to 11:00 a.m. in Room 1107 of the U.S. Department of State, 2201 C Street NW, Washington, D.C. To expedite their entrance into the building, attendees should provide to Eunice Mourning of the Office of Environmental Policy, U.S. Department of State (tel. 202–647–9266, fax 202–647–5947) their name, organization, date of birth and Social Security number by close of business on Wednesday, February 2, 2000. Attendees should enter the C Street entrance and bring picture identification with them. For further information, please contact Ms. Cornelia Weierbach, U.S. Department of State, Office of Environmental Policy (OES/ENV), Room 4325, 2201 C Street NW, Washington DC 20520. Phone 202–647–4548, fax 202–647–5947, e-mail weierbachcm@state.gov.

SUPPLEMENTARY INFORMATION:

Air Quality Cooperation With Canada

The United States and Canada committed themselves to addressing transboundary air pollution issues in the 1991 United States-Canada Air Quality Agreement. Since that Agreement entered into force, work has focused on achieving reductions in emissions of the two major acid rain pollutants: sulfur dioxide (SO_2) and nitrogen oxides (NO_X). Both parties have recorded excellent progress in complying with the SO_2 and NO_X emission reduction goals in the Agreement. Cooperative efforts on transboundary air pollution issues have led to the recognition that the U.S. and Canada have substantial common interests in the mitigation of ground-level ozone and particulate matter pollution.

In April 1997, President Clinton met with Canadian Prime Minister Chretien to discuss, among other issues, bilateral transboundary pollution control initiatives. At that time, the U.S. Environmental Protection Agency (EPA) Administrator and the Canadian Minister of the Environment signed the Program to Develop a Joint Plan of Action for Addressing Transboundary Air Pollution. The focus of this initiative was on ground-level ozone and particulate matter. In June 1998, these officials endorsed a report from the U.S.-Canada Air Quality Committee in which the Committee undertook to deliver, by April 1999, recommendations on the negotiation of an ozone annex to the U.S.-Canada Air Quality Agreement. On April 6, 1999, the Committee recommended the negotiation of an ozone annex to the U.S.-Canada Air Quality Agreement. Both the Administrator and the Minister agreed with this recommendation.

U.S. Domestic Framework for Controlling Ground-Level Ozone and Related Precursors

The United States has a strong regulatory program under the Clean Air Act (the Act) to reduce significantly emissions of ozone forming pollutants—NO_X and volatile organic compounds

(VOCs). This regulatory program is expected to form the basis of any commitments made by the U.S. under an ozone annex to the U.S.-Canada Air Quality Agreement.

The EPA has established national ambient air quality standards (NAAQS) for several pollutants, including ozone. To help achieve these air quality standards, EPA has issued a series of national regulations over the past 20 years designed to continue to diminish significantly emissions of VOCs and NO_X from light-duty vehicles, and NO_X from heavy-duty vehicles. In addition, EPA has begun phasing in control programs to reduce these emissions from non-road engines. It has also reduced sulfur in diesel fuels, and required cleaner, less volatile gasoline (*i.e.*, gasoline with a lower Reid Vapor Pressure) in most urban areas in the country. Several additional programs and regulations have been or are being phased in to further reduce emissions of NO_X, sulfur and VOCs from vehicles and/or fuels.

Under the Act, EPA requires stringent levels of control for newly built or modified industrial sources of ozone precursor emissions of NO_X and VOCs. EPA has also issued a series of emission standards that are significantly reducing emissions of NO_X from existing industrial sources.

Relation to the UNECE LRTAP Protocol

Parties to the U.N. Economic Commission for Europe's (UNECE) Convention on Long-Range Transboundary Air Pollution (LRTAP) recently signed a Protocol to Abate Acidification, Eutrophication, and Ground-Level Ozone (the LRTAP Protocol). The U.S. and Canada are both Parties to the LRTAP Convention, and each has signed the Protocol. Under the LRTAP Protocol, the U.S. and Canada have agreed to bring forward emission reduction commitments for SO_2, NO_X, and VOCs when negotiations on an ozone annex to the U.S.-Canada Air Quality Agreement are completed. The agreements in the LRTAP Protocol were based on an understanding by the European parties that the U.S. and Canada intended to negotiate an ozone annex, and would be committing to specific control programs and/or emission reductions under that annex. Their obligations under the annex would then be incorporated automatically into the LRTAP Protocol. Negotiation of this annex would, therefore, provide the basis of commitments under the LRTAP Protocol.

Participation of Interested Party Representatives on the U.S. Delegation

In order to further the public interest, the Department of State, in consultation with other U.S. government agencies, will invite three representatives from among all interested members of the public to participate in the negotiations as (non-U.S. government) members of the U.S. delegation. One individual will be invited to represent each of the following groups: industry/mining/labor, U.S. states, and environmental/public interest groups. Organizations that are members of each group are invited to nominate a spokesperson and collaborate on the selection of the representative who will participate on the U.S. delegation.

The spokesperson of each group should notify the Office of Environmental Policy, U.S. Department of State, not later than February 11, 2000, of the group's selection of its representative. Further discussion of this process will take place at the February 4, 2000 public meeting.

Timetable and Point of Contact

The United States and Canada expect to begin negotiations on the ozone annex in February 2000, and expect to complete negotiations by the end of 2000, with negotiating sessions to occur every three to four months. In preparation for the proposed negotiation, the Administration is preparing its position for the negotiation, and has scheduled a public meeting to be held on Friday, February 4, 2000 from 9:00 a.m. to 11:00 a.m. in Room 1107 of the U.S. Department of State. Members of the Interagency Committee who will participate in the proposed negotiation will provide an overview of U.S. preparations for the first session. The U.S. Department of State is issuing this notice to help ensure that interested and potentially affected parties are aware of and knowledgeable about these negotiations, and have an opportunity to offer comments. Prior to subsequent briefings, we will be contacting organizations/individuals that have expressed an interest by mail, fax or e-mail. Those organizations/individuals which cannot attend the February 4, 2000 meeting, but wish to either submit a written comment or to remain informed, should provide Eunice Mourning of the Office of Environmental Policy, U.S. Department of State (phone 202–647–9266; fax 202–647–5947) with their statement and/or their name, organization, address, telephone and fax numbers, and their e-mail address.

Dated: January 19, 2000.

Daniel Fantozzi,

Director, Office of Environmental Policy.

[FR Doc. 00–1733 Filed 1–24–00; 8:45 am]

BILLING CODE 4710–06–P

TENNESSEE VALLEY AUTHORITY

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Tennessee Valley Authority (Meeting No. 1515).

TIME AND DATE: 9 a.m. (CST), January 27, 2000.

PLACE: TVA Environmental Research Center Auditorium, Muscle Shoals, Alabama.

STATUS: Open.

Agenda

Approval of minutes of meeting held on December 8, 1999.

New Business

B—Purchase Award

B1. Supplement to contract with U.S. Fleet Leasing for fleet maintenance services.

B2. Cooperative/contract agreement with Bicentennial Volunteers, Incorporated, for volunteer, special projects, and staff augmentation services.

C—Energy

C1. Supplement to Contract No. 99PPW–235218–002 with ABB Environmental Systems to design, manufacture, and deliver selective catalytic reduction process equipment for any TVA fossil plant.

C2. Supplement to Contract No. 98P6D–195379 with General Electric Company for the manufacture and turnkey installation of new simple cycle dual fuel combustion turbine generating units.

E—Real Property

E1. Public auction sale of approximately 0.23 acre of land located on Cherokee Lake in Grainger County, Tennessee (Tract No. XCK–581) to resolve an existing house encroachment on one lot and to provide adequate area on a second adjoining lot to permit home construction.

E2. Grant of permanent easement, without charge, except for payment of TVA's administrative costs, to the State of Tennessee for highway improvement purposes, affecting 5 acres of land on Watts Bar Lake in Rhea County, Tennessee (Tract No. XTWBR–141H).

E3. Grant of a permanent recreation easement, without charge, except for payment of TVA's administrative costs,

to the City of Clinton, Tennessee, affecting approximately 3.9 acres of land on Melton Hill Lake in Anderson County, Tennessee (Tract No. XTMHR–19RE).

E4. Grants of two permanent easements, without charge, except for payment of TVA's administrative costs, to Notla Water Authority for a water treatment facility and raw water intake site, affecting approximately 21 acres of land located on Nottely Lake in Union County, Georgia (Tract No. XTNLR–34WP and XTNLR–35E).

E5. Sale of noncommercial, nonexclusive permanent easements to Mark Margetts (Tract No. XTELR–211RE), Oscar Lidstrom (Tract No. XTELR–213RE), and Michael Campbell (Tract No. XTELR–214RE) for construction and maintenance of recreational water-use facilities, affecting approximately 0.34 acre of Tellico Lake shoreline in Loudon and Monroe Counties, Tennessee.

E6. Grant of a permanent easement, without charge, except for TVA's administrative costs, for the upgrade of a wastewater treatment plant, to Jefferson City, Tennessee, affecting approximately 1.3 acres of land on Cherokee Lake in Jefferson County, Tennessee (Tract No. XTCK–64SP).

E7. Public auction sale of approximately 3.4 acres of a portion of the Oxford, Mississippi, primary substation property located in Lafayette County, Mississippi (Tract No. XOXPSS–1).

E8. Public auction sale of approximately 3.07 acres of TVA land (the site of the former Mayfield, Kentucky, Area Operating Headquarters) located in Graves County, Kentucky (Tract No. XMAH–1).

F—Unclassified

F1. Filing of condemnation cases to acquire permanent easements and rights-of-way for electric transmission lines at the Shelby-Covington Tap to Brighton Transmission Line, in Tipton County, Tennessee, and Murfreesboro-Smyrna No. 2 Transmission Line, in Rutherford County, Tennessee.

For more information: Please call TVA Public Relations at (423) 632–6000, Knoxville, Tennessee. Information is also available at TVA's Washington Office (202) 898–2999.

Dated: January 20, 2000.

Edward S. Christenbury,

General Counsel and Secretary.

[FR Doc. 00–1702 Filed 1–24–00; 11:00 am]

BILLING CODE 8120–08–M

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Aviation Proceedings, Agreements filed during the week ending January 14, 2000

The following Agreements were filed with the Department of Transportation under the provisions of 49 U.S.C. sections 412 and 414. Answers may be filed within 21 days after the filing of the application.

Docket Number: OST–2000–6774.
Dated Filed: January 10, 2000.
Parties: Members of the International Air Transport Association.
Subject: PSC/Reso/102 dated December 16, 1999.
Finally Adopted Resos/Recommended Practices r1–49 Minutes—PSC/Minutes/012 dated December 16, 1999.
Intended effective date: June 1, 2000.

Docket Number: OST–2000–6786.
Dated Filed: January 11, 2000.
Parties: Members of the International Air Transport Association.
Subject: PTC3 0403 dated 7 January 2000.
Mail Vote 059—Resolution 070tt—TC3 Excursion Fares between South East Asia and South Asian Subcontinent.
Intended effective date: 1 April 2000.

Dorothy W. Walker,

Federal Register Liaison.

[FR Doc. 00–1728 Filed 1–24–00; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart Q During the Week Ending January 14, 2000

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart Q of the Department of Transportation's Procedural Regulations (See 14 CFR 302.1701 et seq.). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: OST–2000–6777.
Dated Filed: January 11, 2000.
Due Date for Answers, Conforming Applications, or Motions to Modify Scope: February 8, 2000.
Description: Application of Trans Borinquen Air, Inc. pursuant to 49 U.S.C. Section 41102 and Subpart Q, applies for a certificate of public convenience and necessity authorizing Foreign Charter Air Transportation between the United States, Puerto Rico, Dominican Republic and the Caribbean.

Dorothy W. Walker,

Federal Register Liaison.

[FR Doc. 00–1729 Filed 1–24–00; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Jefferson, Clear Creek, Summit, Eagle, and Garfield Counties, Colorado

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Intent.

SUMMARY: The FHWA is issuing this notice to advise the public that a programmatic Environmental Impact Statement (EIS) will be prepared for the I–70 Mountain Corridor from the intersection of State Highway C470 in Jefferson County to Glenwood Springs in Garfield County, a distance of approximately 140 miles crossing five counties in Colorado.

FOR FURTHER INFORMATION CONTACT: Mr. Scott Sands, FHWA Colorado Division, 555 Zang Street, Room 250, Denver, CO 80228, Telephone: 303/969–6730, extension 362.

SUPPLEMENTARY INFORMATION: Pursuant to Section 102(2)(C) of the National Environmental Policy Act of 1969, as amended (NEPA), and as implemented by the Council on Environmental Quality (CEQ) regulations (40 CFR parts 1500–1508) and FHWA regulations (23 CFR part 771), the FHWA, in cooperation with the Colorado Department of Transportation (CDOT), is issuing this notice of intent to prepare a programmatic Tier 1 EIS. The EIS will be prepared in compliance with CEQ regulations at 40 CFR 1501.7 and as authorized by 40 CFR 1502.20 and 23 CFR 771.111(g), to take a broad view of the transportation issues and alternative solutions to assist in identifying needed safety and mobility improvements and reducing congestion on the I–70 Mountain Corridor. The Federal Railroad Administration, though not having jurisdiction over the project, will serve as a cooperating agency, providing technical assistance on rail technology.

The U.S. Environmental Protection Agency also will serve as a cooperating agency. In addition, FHWA and CDOT will coordinate closely with the U.S. Forest Service, Federal Transit Administration, and other federal, state, and local agencies throughout the preparation of the programmatic EIS.

Recognizing the need to act on projected increases in congestion and other mobility problems that have been forecasted over a period of the next 20 years, CDOT commissioned the I–70 Mountain Corridor Major Investment Study (MIS), which was completed in late 1998. The recommended improvements resulting from the MIS address alternatives for increased safety and to accommodate existing and future traffic demand. Reference is made to such MIS, which is available for examination at the Colorado Department of Transportation, Region One, 18500 East Colfax Avenue, Aurora, Colorado 80011.

As the next step and to meet objectives in the MIS, CDOT planned to prepare a site-specific EIS to address a 16-mile-long corridor between U.S. 40 and Floyd Hill, Clear Creek County (**Federal Register** Vol. 64, No. 103, pages 29079–29080, May 28, 1999), an area in need of immediate improvements, in conjunction with a secondary and cumulative impact study of the entire I–70 Mountain Corridor. However, in response to public concern, CDOT will postpone the preparation of the site-specific EIS and begin preparation of the programmatic EIS.

The programmatic EIS will enable CDOT and FHWA to address the transportation problems of the I–70 Mountain Corridor comprehensively as part of the overall I–70 Mountain Corridor transportation system. The overall project termini will extend from C470 to Glenwood Springs in order to assess the transportation problems within the I–70 Mountain Corridor. While the project termini are proposed to match the problem area, some of the proposed solutions will extend into other major locales or corridors (*e.g.,* metropolitan Denver area). The transportation elements identified in the MIS include fixed guideway transit, improved rubber tire transit, highway improvements, aviation, and alternate routes. These and any other reasonable alternatives identified through public comment during scoping will be addressed. The programmatic EIS will develop a 20-year transportation plan and a 50-year vision for the I–70 Mountain Corridor with the intent to balance competing interests and uses of the corridor. The 20-year plan will be a cost-constrained plan that will prioritize improvements and establish procedures for site-specific environmental studies. The programmatic EIS will identify the locations, modes of transportation, critical environmental resources, and general mitigation policy for the preferred alternative.

The approach to the assessment of environmental impacts will begin with agency and public scoping to identify the issues and concerns associated with the corridor. The results of scoping will help define the alternatives and the scope of the environmental studies to be conducted. Alternatives proposed in the MIS and identified through scoping will be evaluated and screened to narrow the range of alternatives considered for the I–70 Mountain Corridor programmatic EIS. Alternatives examined will be eliminated either through screening or advanced to environmental analysis for the programmatic EIS. The assessment will focus on cumulative environmental impacts. The studies and assessment will be documented in the draft programmatic EIS. After its publication, the draft programmatic EIS will be available for agency and public review and comment, and public hearings will be held. On the basis of the draft programmatic EIS and the comments received, a preferred alternative 20-year plan and 50-year vision will be selected and preparation of the final programmatic EIS and Record of Decision will proceed.

The Record of Decision for the programmatic EIS will not result in the environmental clearance of any I–70 transportation-related improvements. However, individual projects could proceed for I–70 improvements if they comply with 23 CFR 771.111(f) criteria: (1) Connect logical termini and be of sufficient length to address environmental issues on a broad scope, (2) have independent utility or independent significance, and (3) not restrict consideration of alternatives for other reasonably foreseeable transportation improvements. To date, projects that comply with 23 CFR 771.111(f) include the Eagle County Airport Interchange, Hogback Park-n-Ride, Georgetown Rockslide Mitigation Project, Colorado Intermountain Fixed Guideway Authority Demonstration and Testing Project, Intermountain Connection Project, and Eisenhower Tunnel Lighting Improvements. If any other projects emerge during the programmatic EIS that comply with 23 CFR 771.111(f), they will be noticed publicly in advance. At present, it is anticipated that the I–70 Mountain Corridor programmatic EIS process will be completed in late 2002.

Integral with the programmatic EIS process, CDOT and FHWA will conduct an extensive and broad public involvement program to keep federal, state, and local agencies, organizations, and interested individuals informed and to provide ample opportunities for such agencies, organizations, and the public to participate throughout the three-year process. To ensure that the full range of issues and alternatives related to this proposed action are identified and addressed, written comments, suggestions, or questions should be directed to the FHWA at the address provided above or directed to:

Ms. Cecelia Joy, Planning and Environmental Manager, Colorado Department of Transportation-Region 1, 18500 East Colfax Avenue, Aurora, Colorado 80011, Telephone: 303/757–9112.

Information describing the purpose of the project, proposed alternatives, area to be evaluated, public involvement program, and preliminary project schedule will be available upon request by contacting Cecelia Joy at the address and telephone number noted above. Scoping comments may be made verbally or in writing to Ms. Joy and at future public meetings, the locations, dates, and times of which will be announced through public notice (newspaper advertisements and other means), as contemplated by 40 CFR 1506.6 and the following CDOT public notice procedure for comparable actions.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program)

Issued on: January 13, 2000.

Ronald A. Speral,

Program Team Leader, Colorado Division, Federal Highway Administration, Lakewood, Colorado.

[FR Doc. 00–1710 Filed 1–24–00; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Merced County, CA

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 expressway

project in Merced County,in Merced County, California.

FOR FURTHER INFORMATION CONTACT: Mr. Robert F. Tally, Team Leader, District Operations—North, California Division, 980 9th Street, Suite 400, Sacramento, CA 95814–2724, Telephone: (916) 498–5020.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the California Department of Transportation (Caltrans) and the Merced County Department of Public Works, will prepare an environmental impact statement (EIS) on a proposal to construct a regional arterial, the Campus Parkway, in Merced County. The proposed project would involve the construction of an alignment, between the State Route 99/Mission Avenue Interchange to the southwest and the Bellevue Road to the northeast. The project would be approximately 10.5 kilometers (6.5 miles) in length.

Construction of this corridor is considered necessary to provide for the locally projected future traffic demand and conform with the regional transportation planning for the year 2020. The proposed project would provide access to the Merced's eastern industrial area, the northern area of the city of Merced, and the University Community Specific Use Development Plan area near Lake Yosemite, which encompasses the site for the campus of the University of California at Merced. Alternatives under consideration include: (1) Taking no action and (2) constructing a four-lane limited access highway on the ultimate six-lane Right-of-Way. Incorporated into and studied with the various build alternatives will be design variations of grade and alignment.

Letter describing the proposed action and soliciting comments will be sent to appropriate Federal, State, and Local agencies, and to private organizations and citizens who have previously expressed or are known to have interest in this proposal. Public information meetings will be held in Merced County between March and November 2000. In addition, a public hearing will be held. Public notice will be given of the time and place of the meetings and hearing. The draft EIS will be available for public and agency review and comment prior to the public hearing. No formal scoping meeting is planned at this time.

To ensure that the full range of issues relate to this proposed action are addressed and all significant issues are identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA at the address 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: January 19, 2000.

Robert F. Tally,

Team Leader, District Operations—North California Division, Federal Highway Administration.

[FR Doc. 00–1712 Filed 1–24–00; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 33844]

Kansas City Southern Industries, Inc., et al.—Corporate Family Transaction Exemption

Kansas City Southern Industries, Inc. (KCSI), Kansas City Southern Lines, Inc. (KCSL), The Kansas City Southern Railway Company (KCSR), KCS Transportation Company (KCST), Gateway Western Railway Company (GWWR), and Gateway Eastern Railway Company (GWER) (collectively, applicants),[1] have filed a verified notice of exemption. The exempt transaction involves KCSR's acquisition of KCST's rail subsidiaries, GWWR and GWER, through acquiring KCST's stock from KCSL.

The applicants reported that they intended to consummate the transaction immediately upon the effective date of the exemption. The earliest the transaction could be consummated was January 17, 2000, 7 days after the exemption was filed.[2]

The purpose of the transaction is to facilitate the planned spinoff of KCSI's financial subsidiaries into a corporation separate from KCSI, and to bring all of KCSI's commonly controlled railroads under the direct control of KCSR.

This is a transaction within a corporate family of the type specifically exempted from prior review and approval under 49 CFR 1180.2(d)(3). The applicants state that the transaction will not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Although applicants do not expect any employees to be adversely affected by this control transaction, they have agreed to apply employee protective conditions pursuant to 49 U.S.C. 11326(a). Therefore, any employees adversely affected by the control transaction will be protected by the conditions set forth in *New York Dock Ry.—Control—Brooklyn Eastern Dist.,* 360 I.C.C. 60 (1979).

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to reopen the proceeding to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to reopen will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 33844, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on William A. Mullins, Esq., Troutman Sanders, LLP, 1300 I Street, N.W., Suite 500 East, Washington, DC 20005–3314.

Board decisions and notices are available on our website at ''WWW.STB.DOT.GOV.''

Decided: January 18, 2000.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 00–1648 Filed 1–24–00; 8:45 am]

BILLING CODE 4915–00–P

[1] KCSI is a publicly traded, noncarrier holding company with both rail and nonrail assets. KCSL, a noncarrier holding company which owns direct and indirect interests in rail transportation companies, is a direct wholly owned subsidiary of KCSI. KCSR, a Class I rail carrier operating in the States of Nebraska, Iowa, Kansas, Missouri, Oklahoma, Arkansas, Texas, Louisiana, Mississippi, Tennessee, and Alabama, is a wholly owned subsidiary of KCSL and an indirect wholly owned subsidiary of KCSI. KCST, a noncarrier, is a wholly owned subsidiary of KCSL and an indirect wholly owned subsidiary of KCSI. KCST owns all of the stock of GWWR, a Class II rail carrier operating in the States of Kansas, Missouri and Illinois. GWWR owns all of the stock of GWER, a Class III rail carrier operating in the State of Illinois.

[2] Upon completion of the transaction, KCSR will indirectly control GWWR and GWER.

DEPARTMENT OF THE TREASURY

Customs Service

[T.D. 00–6]

Bonds; Approval To Use Authorized Facsimile Signatures and Seals

The use of facsimile signatures and seals on Customs bonds by the

following corporate sureties has been approved effective this date: Hartford Casualty Insurance Company, Hartford Fire Insurance Company.

Authorized facsimile signature on file for: James M. Gorman, Attorney-in-fact.

The corporate sureties have provided the Customs Service with a copy of the signature to be used, copies of the corporate seals, and certified copies of the corporate resolutions agreeing to be bound by the facsimile signatures and seals. This approval is without prejudice to the sureties' right to affix signatures and seals manually.

Dated: January 19, 2000.

Jerry Laderberg,

Chief, Entry Procedures and Carriers Branch.

[FR Doc. 00–1683 Filed 1–24–00; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0114]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a previously approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on the information needed to determine a veteran's marital status.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before March 27, 2000.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20S52), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. Please refer to ''OMB Control No. 2900–0114'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Public Law 104–13; 44 U.S.C., 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (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 or the use of other forms of information technology.

Title: Statement of Marital Relationship, VA Form 21–4170.

OMB Control Number: 2900–0114.

Type of Review: Extension of a previously approved collection.

Abstract: VA Form 21–4170 is used to develop the evidence necessary to make a determination as to whether a claimed common law marriage can be recognized by VA.

Without this information, VA would have no means of determining the proper marital status of the veteran.

Affected Public: Individuals or households.

Estimated Annual Burden: 3,000 hours.

Estimated Average Burden Per Respondent: 15 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 6,000.

Dated: December 23, 1999.

By direction of the Secretary.

Sandra McIntyre,

Management Analyst, Information Management Service.

[FR Doc. 00– 1716 Filed 1–24–00; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0321]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a previously approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed for a veterans service organization to represent a claimant in the prosecution of a VA claim.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before March 27, 2000.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20S52), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. Please refer to ''OMB Control No. 2900–0321'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Public Law 104–13; 44 U.S.C., 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (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 or the use of other forms of information technology.

Title: Appointment of Veterans Service Organization as Claimant's Representative, VA Form 21–22.

OMB Control Number: 2900–0321.

Type of Review: Extension of a previously approved collection.

Abstract: The form is used by VA beneficiaries to appoint any one of a number of recognized service organizations to represent them in the prosecution of their VA claims. The information is used to determine who has access to the beneficiary's claim file. In addition, it determines who has the right to receive copies of correspondence from VA to the beneficiary. Title 38, U.S.C. 5902 (b)(2), provides that VA may recognize representatives of service organizations to assist beneficiaries in the prosecution of VA claims, but that no individual shall be recognized unless such individual has filed a power of attorney, executed in a manner prescribed by VA.

Affected Public: Individuals or households.

Estimated Annual Burden: 27,083 hours.

Estimated Average Burden Per Respondent: 10 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 325,000.

Dated: December 23, 1999.

By direction of the Secretary.

Sandra McIntyre,

Management Analyst, Information Management Service.

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45 CFR Parts 1355, 1356 and 1357

Title IV–E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Parts 1355, 1356 and 1357

RIN 0970–AA97

Title IV–E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews

AGENCY: Administration on Children, Youth and Families (ACYF), Administration for Children and Families (ACF), Department of Health and Human Services (DHHS).

ACTION: Final Rule.

SUMMARY: This final rule amends existing regulations concerning Child and Family Services by adding new requirements governing the review of a State's conformity with its State plan under titles IV–B and IV–E of the Social Security Act (the Act), and implements the provisions of the Social Security Act Amendments of 1994 (Pub. L. 103–432), the Multiethnic Placement Act (MEPA) as amended by Pub. L. 104–188, and certain provisions of the Adoption and Safe Families Act (ASFA) of 1997 (Pub. L. 105–89).

In addition, this final rule sets forth regulations that clarify certain eligibility criteria that govern the title IV–E foster care eligibility reviews which the Administration on Children, Youth and Families conducts to ensure a State agency's compliance with statutory requirements under the Act, and makes other technical changes to the race and ethnicity data elements in the Adoption and Foster Care Analysis and Reporting System (AFCARS).

EFFECTIVE DATE: March 27, 2000.

FOR FURTHER INFORMATION CONTACT: Kathy McHugh, Director, Policy Division, Children's Bureau, Administration on Children, Youth and Families at (202) 401–5789.

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I. Background

Titles IV–B and IV–E of the Social Security Act (the Act) are the primary sources of Federal funds for State child welfare services, foster care and adoption assistance. The Adoption Assistance and Child Welfare Act of 1980 (Pub. L. 96–272), amended title IV–B child welfare services to institute financial incentives for States to provide certain protections for children in foster care under section 427 of the Act. Public Law 96–272 also established Part E of title IV of the Act, ''Federal Payments for Foster Care and Adoption Assistance.'' The foster care component of the Aid to Families with Dependent Children (AFDC) program, which had been an integral part of the AFDC program under title IV–A of the Act, was transferred to the new title IV–E, effective on October 1, 1982.

In August 1993, under the Omnibus Budget Reconciliation Act of 1993, Public Law 103–66, Congress again amended title IV–B, creating two subparts and extending the range of child and family services funded under title IV–B to include family preservation and family support services. The family preservation and support services were designed to strengthen and support families and children in their own homes, as well as children in out-of-home care.

Later, through the Social Security Amendments of 1994, Congress repealed section 427 and amended section 422 of the Act to include, as State plan assurances, the protections formerly required in section 427 of the Act. As a result, ACF is no longer conducting ''427'' reviews to determine if a State is eligible to receive additional title IV–B, subpart 1 funds. Besides mandating the Secretary to promulgate regulations for reviews of State child and family service programs, the amendments to the Act at section 1123A required the Department to make technical assistance available to the States, and afforded States the opportunity to develop and implement corrective action plans designed to ameliorate areas of nonconformity before Federal funds are withheld due to the nonconformity.

In 1994, Congress passed the Multiethnic Placement Act (MEPA), Public Law 103–382, to address excessive lengths of stay in foster care experienced by children of minority heritage. One factor believed to be contributing to these excessive lengths of stay in foster care was State agencie' attempts to place children of minority heritage in foster and adoptive homes with parents of similar racial or ethnic backgrounds. The MEPA forbids the delay or denial of a foster or adoptive placement based on the race, color, or national origin of the prospective foster parent, adoptive parent, or child involved. At the same time, Congress added a title IV–B State plan requirement to section 422(b)(9) of the Act, to compel States to make diligent efforts to recruit prospective foster and adoptive parents who reflect the racial and ethnic diversity of the children in the State for whom foster and adoptive homes are needed.

As originally enacted, section 553 of MEPA permitted States to consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster or adoptive parent to meet the needs of a child of such background, as one of several factors in making foster and adoptive placements. In 1996, through section 1808, ''Removal of Barriers to Interethnic Adoptions,'' of the Small Business Job Protection Act (Pub. L. 104–188), Congress repealed section 553 of MEPA, believing that the ''permissible consideration'' language therein was being used to obfuscate the intent of MEPA. Section 1808 of Public Law 104–188 amended title IV–E by adding a State plan requirement, section 471(a)(18) of the Act, which prohibits the delay or denial of a foster or adoptive placement based on the race, color, or national origin of the prospective foster parent, adoptive parent, or child involved. Section 1808 of Public Law 104–188 also dictates a penalty structure and corrective action planning for any State that violates section 471(a)(18) of the Act.

On November 19, 1997, President Clinton signed the first broad-based child welfare reform legislation since Public Law 96–272 was enacted in 1980. The Adoption and Safe Families Act (ASFA) of 1997, Public Law 105–89, seeks to provide States with the necessary tools and incentives to achieve the original goals of Public Law 96–272: safety; permanency; and child and family well-being. The impetus for the ASFA was a general dissatisfaction with the performance of State' child welfare systems in achieving these goals for children and families. The ASFA seeks to strengthen the child welfare system's response to a child's need for safety and permanency at every point along the continuum of care. In part, the law places safety as the paramount concern in the delivery of child welfare

services and decision-making, clarifies when efforts to prevent removal or to reunify a child with his or her family are not required, and requires criminal record checks of prospective foster and adoptive parents. To promote permanency, ASFA shortens the time frames for conducting permanency hearings, creates a new requirement for States to make reasonable efforts to finalize a permanent placement, and establishes time frames for filing petitions to terminate the parental rights for certain children in foster care.

II. Approach

A. Consultation With the Field

A Notice of Proposed Rulemaking (NPRM) was published in the **Federal Register** on September 18, 1998 (63 FR 50058–50098) with a 90-day public comment period. We received 176 letters within that period from State and local child welfare agencies, national and local advocacy groups for children, educational institutions, and individual social workers. Other commenters on the NPRM included: Members of Congress, providers of child welfare services, State and local courts, national and State associations representing groups of practitioners, Indian tribes, and local community organizations.

Prior to developing the NPRM, we consulted extensively with the child welfare field. We conducted a series of focus groups related to the child and family services reviews with representatives of State programs and national organizations, as well as with family and child advocates. In addition, State and Federal teams conducted 12 in-depth on-site pilots of the child and family services reviews that shaped our development of the regulation. We also conducted pilots of the title IV–E eligibility reviews in 12 States during the fiscal years 1995 through 1998. Shortly after the enactment of ASFA, we held focus groups in Washington, D.C. and in each of the 10 Federal regions to obtain input from the field on the implementation of the new law.

B. Analysis and Decision-Making

We received a wide range of written comments on the NPRM, representing a multitude of perspectives on Federal monitoring of State child welfare programs and meeting title IV–E statutory requirements. We received widespread support for an outcomes-focused approach to the child and family services reviews and the inclusion of a program improvement process subsequent to determinations of substantial nonconformity, and have thus retained these features in the final rule. We also received comments expressing concerns about other provisions of the NPRM.

The major concerns from commenters centered around provisional and two-tiered licensing systems for foster care homes, objectivity and clarity of substantial conformity determinations in the child and family services reviews, the enforcement of the Multiethnic Placement Act (as amended), documentation of reasonable efforts and other judicial determinations, and exemptions and exceptions from the termination of parental rights provisions. We amended and clarified many aspects of the final rule in response to these major issues and to other comments. To guide us in maintaining an appropriate balance in our analysis of the comments and decisionmaking for the final rule we used several principles. Those principles are to:

Focus on Achieving the Goals of Safety, Permanency and Well-being in State Child Welfare Systems

We believe that the Adoption and Safe Families Act of 1997 clearly establishes safety, permanency and well-being as the key goals for State child welfare systems. We were mindful, therefore, to have regulatory provisions that would support these statutory goals. For example, in the NPRM we proposed to prohibit provisional, or less than full licensure of foster care providers for title IV–E purposes. Many commenters opposed this prohibition for various reasons. Some were concerned that since relative caregivers were often granted less than full licensure, disallowing this practice for title IV–E purposes would reduce kinship care and the stability it can provide in a child's life. While we encourage States to consider permanency in kinship care arrangements, the ASFA clearly requires the safety of the child to be the paramount concern that will guide all child welfare services. In addition, the statute on its face requires that a home is fully licensed or approved as meeting the State's licensing standards for the purpose of title IV–E eligibility. Therefore, we decided to retain the proposed prohibition on less than full licensure, in part because the statute as amended by ASFA compels us to ensure that children are in safe placements.

We also chose to strengthen our focus on safety, permanency and well-being in the child and family services reviews in a number of ways. Many commenters were unclear about how we would measure these outcomes, so we have strengthened our process for measuring and determining substantial conformity with the safety and permanency outcomes in particular, through the statewide assessment. We also heard concerns that one of the safety outcomes was in fact two separate outcomes, so we have divided the first safety outcome accordingly. We believe that these modifications will help clarify our expectations for States to achieve these outcomes.

Another example of strengthening our focus on permanency is in the termination of parental rights provisions. Many commenters believed that certain groups of children in foster care should be exempted from the application of the provision for States to file a petition to terminate parental rights. Consistent with the statutory framework and desire for timely permanency for all children in foster care, we have clarified that no group of children is to be exempted from the TPR provision and State or tribal agencies may make exceptions to the TPR requirements only on a case-by-case basis.

Move Child Welfare Systems Toward Achieving Positive Child and Family Outcomes While Maintaining Accountability

As we noted in the NPRM, we have dramatically changed the focus of State program reviews by examining the results that child and family services programs achieve, rather than the accuracy and completeness of the case file documentation. Most commenters overwhelmingly supported this approach as one that would improve the provision of child welfare services for children and families, and we have thus retained a focus on outcomes in the final rule.

Some of the comments, however, also suggested that the flexibility that is inherent in an outcomes-based approach must be properly balanced with sufficient Federal oversight and State accountability. We agree that flexibility and accountability must be balanced, and have strengthened several provisions in the final rule in this respect. For example, for States who were determined to be out of substantial compliance on a child and family services review, we proposed to allow States two years, with a possible extension to three years, to complete a program improvement plan. Some commenters supported this length of time as sufficiently flexible to address needed areas of improvement, while others believed the program improvement period to be too long. In response, we have clarified that we do not expect States to take the full two

years to complete program improvement in all cases, and note that a State will only be able to extend a program improvement plan to three years in rare circumstances subject to the approval of the Secretary. Finally, we will apply penalties for nonconformity as soon as a State fails to improve on an area of nonconformity within the interval noted in the program improvement plan, rather than at the conclusion of the entire plan. We believe that these changes to the final rule properly focus the State on achieving outcomes while maintaining flexibility and accountability.

We also believe it necessary to ensure State accountability in the areas of documentation of reasonable efforts and contrary to the welfare determinations and requirements related to enforcement of section 471(a)(18) of the Act. Some commenters were concerned that the documentation requirements and enforcement of section 471(a)(18) of the Act were too inflexible. However, we believe that State accountability and Federal oversight in these critical areas of child and family protections and anti-discrimination consistent with the statute, will lead to better outcomes for children and families.

Use Non-Regulatory Resources to Support Federal Statutory and Regulatory Provisions

As we analyzed the comments, we carefully considered whether Federal regulations were the appropriate vehicle to address certain comments. We believe that we can better respond to some comments in a venue separate from the regulatory process, such as through technical assistance activities or program guidance.

For instance, some commenters requested regulations on title IV–E training or programs under title IV–B of the Act. We have very limited authority to expand the scope of the final rule beyond the issues presented for public comment in the NPRM, but we are now aware of certain issues that we may consider for future clarification. Other commenters asked for specific guidance on working to reunify children with parents who have substance abuse problems, or guidelines for judges on reasonable efforts, while others requested information about ''best practices'' in concurrent planning. We are committed to providing practice level guidance and will provide technical assistance in a variety of forms rather than in regulation. Other commenters requested Federal funds to subsidize legal guardianships, or train courts and their staff. Under current authority, title IV–E funds cannot be used for these purposes. However, we can direct States to our resource centers who may have information on seeking non-Federal funding sources for such initiatives.

C. Regulation in Context

This final rule incorporates many provisions of recently enacted legislation, including the Adoption and Safe Families Act of 1997, the Multiethnic Placement Act of 1994 as amended, and the Social Security Act Amendments of 1994. We received some comments that criticized us for not focusing on the requirements of ASFA and other amending legislation. We believe that some commenters were unclear that, to a large extent, provisions of ASFA, MEPA, etc. amend the Social Security Act (the Act), and that we refer to the requirements by their citation in the Act, rather than their citations in the amending legislation. We believe that this final rule does address the requirements of the amending legislation in the context of the existing requirements of titles IV–B and IV–E of the Act.

In addition to the guidance provided by this final rule, we encourage administrators to use the appropriate statutes as references in implementing Federal requirements. Also, the final rule amends existing regulations at 45 CFR part 1355 and 45 CFR part 1356. Therefore, we encourage the reader to examine and implement the rules herein in conjunction with existing regulations that have not been amended.

III. Discussion of Major Changes and Provisions of the Final Rule

Discussed below are some of the major changes and provisions of the final rule. A more thorough response to the individual comments can be found in the section-by-section discussion.

A. Definitions

Overall, we received comments that requested greater clarity on several definitions. We frequently encountered comments that noted that the Federal definitions did not encompass the variety of State definitions or practice. Where a definition was not essential to the proper implementation of the program, we chose to be flexible and leave definitions to the State's discretion. In particular, we deleted definitions of a ''full hearing'' and a ''temporary custody hearing'' as the comments revealed that they were limiting and not helpful to States. We also received comments that requested additional definitions for terminology used in the statute or in the regulation, *e.g.*, ''compelling reasons,'' ''aggravated circumstances,'' and ''reasonable efforts.'' In most cases we chose not to regulate additional definitions as we do not wish to be more prescriptive and restrict State flexibility.

The proposed definition of the ''date a child is considered to have entered foster care'' elicited many comments requesting more clarity and State flexibility. In response, we have revised the definition to mirror the statutory language more closely. The ''date a child is considered to have entered foster care'' is no longer different for children placed in foster care under voluntary placement agreements, but more consistently applied. We also have clarified that a State can use a date earlier than the outside Federal limit set in the statute to begin the ''clock'' for satisfying the requirements for holding periodic reviews, permanency hearings, and for the termination of parental rights (TPR).

We received many comments on the definition of a ''foster family home'' that urged us to allow provisional licensure and a two-tiered system of licensing and approval. Despite these comments, we are prohibiting these practices, consistent with the statute, to ensure that children receiving title IV–E funds are placed safely in licensed homes. In recognition that some time may lapse between the date when a foster family home satisfies all requirements for licensure or approval and the actual date the license is issued, we will allow States to claim title IV–E reimbursement during this period, not to exceed 60 days. To accommodate those States where current State practice is not consistent with the requirements for foster family homes, we will allow a six-month period for States to bring current foster family homes to the appropriate licensing standards.

B. Child and Family Services Reviews

We received many comments in response to the proposed child and family services review process that have helped us strengthen it significantly from that proposed in the NPRM. In the NPRM and in the early pilot reviews, we relied heavily on the findings from the on-site reviews to make determinations about substantial conformity. In the final rule, we believe we have balanced our use of statewide quantitative indicators with case-specific qualitative observations in our decision-making about substantial conformity. Among the major changes we have made in the child and family review process are the following: We have strengthened the use of the statewide assessment, selected particular statewide data indicators to use in determining substantial

conformity, more clearly defined the process for reviewing the systemic factors, clarified the criteria for determining substantial conformity, increased the frequency of full reviews for States not in substantial conformity, added a discrepancy resolution process, and added graduated penalties for continuous nonconformity.

Most of the comments we received, particularly from the States, strongly favored the change to the results-and outcome-based review process proposed in the NPRM from the prior emphasis on compliance with procedural requirements. Similarly, we received very strong support for proposing a review process that provides time for States to improve programs and enhance services to children and families rather than one that imposes immediate penalties for nonconformity with certain requirements. A number of comments also indicated concerns about the details of the review process and raised issues about the overall approach that ACF is taking in reinventing the child and family services reviews.

Since we did not include all of the details of the reviews in the proposed rule, we would like to explain the procedures in more detail prior to addressing the major changes we made to the child and family services review.

We will review State programs in two areas: (1) Outcomes for children and families in the areas of safety, permanency, and child and family well-being; and (2) systemic factors that directly impact the State's capacity to deliver services leading to improved outcomes. The outcomes are as follows:

Safety Outcomes

1. Children are, first and foremost, protected from abuse and neglect.

2. Children are safely maintained in their homes whenever possible and appropriate.

Permanency Outcomes

1. Children have permanency and stability in their living situations.

2. The continuity of family relationships and connections is preserved for children.

Child and Family Well-Being Outcomes

1. Families have enhanced capacity to provide for their children's needs.

2. Children receive appropriate services to meet their educational needs.

3. Children receive adequate services to meet their physical and mental health needs. Each outcome is evaluated by using specific performance indicators and two outcomes are evaluated using data indicators as well.

State programs will also be reviewed to determine the extent to which the State agency has implemented State plan requirements that build the capacity to deliver services leading to improved outcomes. We describe such State plan requirements as systemic factors. These systemic factors include: (1) Statewide information systems; (2) case review system; (3) quality assurance system; (4) staff and provider training; (5) service array; (6) agency responsiveness to the community; and (7) foster and adoptive parent licensing, recruitment and retention. Each of the systemic factors subject to review is based on specific State plan requirements. Our review and assessment of the systemic factors will be based on the extent to which the State is in conformity with those State plan requirements.

We also want to clarify how the various components of the review process will inform decisions regarding substantial conformity.

Four sources of information are included in the child and family services reviews in order to make decisions about substantial conformity:

- Statewide AFCARS and NCANDS data on foster care, adoption and child protective services, including the State's performance on statewide data indicators with respect to the national standards for such;
- Narrative information on outcomes and systemic factors;
- Case-specific qualitative information and family interviews on outcomes; and
- Interviews with non-case-specific State and local community representatives on outcomes and systemic factors.

To complete this review effort, several tools will be used, including:

- A field-tested CFSR procedures manual that addresses the steps to be followed in the reviews and supplements information included in the rule;
- A statewide assessment instrument that directs the utilization of statewide foster care, adoption and child protection data to complete a narrative discussion of the outcomes and systemic factors reviewed, and the State's performance in meeting the standards for the statewide data indicators;
- An on-site intensive review instrument;
- Interview protocols for use with State and local stakeholders; and
- A summary of findings and recommendations form that enables the review team to address each outcome and systemic factor reviewed. This form, when completed, serves as the report of the review findings to the State.

There are five steps in the review process, from the point of initiating the review to assessing penalties where determinations of nonconformity are made:

- Prior to the State beginning work on the statewide assessment, ACF prepares and transmits data profiles of the State's foster care and child protective service populations, using AFCARS and NCANDS data submitted by the State. Some examples of the data included in the profiles include the length of stay in foster care, foster care re-entries, and repeat maltreatment rates of children. The data will indicate whether or not the State meets the national standards for those statewide data indicators used to determine substantial conformity.
- The State then completes the statewide assessment. This task requires the State to examine the data relative to the State programs, goals, and objectives, and consider them in light of the outcomes for children and families subject to review. The State also addresses in narrative the systemic issues under review relative to their influence on the State's capacity to deliver effective services. Based on the quantitative and qualitative findings of the statewide assessment, the State and the ACF Regional Office jointly make decisions about the locations of the on-site review activities and the types of cases that will be reviewed on-site.
- The on-site review is conducted by a joint Federal-State team that combines both the outcomes and the systemic factors being reviewed. In reviewing for the outcomes, a sample of cases is reviewed intensively using information from the case record and interviews with family members, the caseworker, and service providers involved with the family. The findings from the sample of cases are combined with the State's performance on selected Statewide data indicators to make determinations about substantial conformity on the outcomes. In reviewing for the systemic factors, interviews are conducted with State and local representatives, *e.g.*, courts, other agencies, foster families, and foster care review boards. The information from these stakeholder interviews is combined with information on the systemic factors in the statewide assessment to make determinations about substantial conformity on the systemic factors.
- The review team recommends a determination regarding substantial conformity, for each of the outcomes and systemic factors reviewed. The basis for the determinations is a

combination of quantitative and qualitative information from the statewide assessment and the on-site review related to each outcome and systemic factor.

- States are immediately informed of any penalties associated with outcome and systemic factors determined not to be in substantial conformity. Program improvement plans are developed to address each area of nonconformity and the State has a limited period of time to successfully complete the program improvement plan before penalties are actually taken.

A number of the comments we received reflected a need for more clarity regarding the overall process. As noted earlier, we did not include all the details of the reviews in the proposed rule, but chose to regulate only the basic framework of the process, including the overall approach to the reviews, the standards for substantial conformity, and the State plan requirements subject to review as required in section 1123A of the Act. We chose to address specifics about how the reviews will be conducted, the performance indicators that will be used to measure outcomes, and some aspects of the process for determining substantial conformity in a procedures manual we developed separately from the NPRM. This procedures manual will supplement the regulation with additional detail that State and Federal staff will need to conduct the reviews. The procedures manual will be in final form for the initial reviews to be conducted following publication of this rule.

While we recognize the need to be clear on the details of the review process, we also need to maintain the flexibility to make appropriate changes that support the results-focused approach to Federal reviews of State programs. Although we have field-tested the proposed review process extensively in 12 States to date, we believe that not regulating certain aspects of the review process affords both the Federal government and the States an ongoing opportunity to benefit from lessons learned in future reviews and make improvements to the process where needed.

We have made significant changes to the review protocol in response to the concerns raised through public comment. The most significant concerns relate to:

- The process and specific criteria for determining substantial conformity with State plan requirements;
- The degree of subjectivity involved in determining substantial conformity;
- The small sample size used in the on-site portion of the reviews; and,
- The amount of penalties associated with nonconformity.

The following addresses the major issues noted above that were the subject of the majority of the comments and changes to the regulation:

Determining Substantial Conformity With State Plan Requirements

Most of the respondents to the NPRM generally supported a determination of ''substantial conformity,'' rather than requiring a determination of conformity on each specific title IV–B and IV–E State plan requirement. Of particular concern to commenters were:

- The standards used to make determinations of substantial conformity for outcomes;
- The process for resolving discrepancies in the aggregate data from the statewide assessment and the information obtained from the on-site review; and,
- The criteria used to determine substantial conformity for the systemic factors being reviewed.

Standards used to make determinations of substantial conformity for outcomes. The primary concerns regarding this issue include a lack of clarity with respect to how substantial conformity is determined and the standards that States are expected to meet in achieving substantial conformity. Commenters particularly requested that we set a more tangible, objective standard for substantial conformity. In response to these comments, and concerns raised about the sample size for the on-site portion of the review, statewide data indicators that are measured against national standards, in combination with the findings of the on-site review, will be used to determine substantial conformity.

Statewide data indicators. The following statewide data indicators will be used in combination with findings of the on-site review to determine substantial conformity with the outcomes.

Outcome S1: Children are, first and foremost, protected from abuse and neglect. Data indicators: Repeat maltreatment. Of all children who were victims of substantiated or indicated child abuse and/or neglect during the period under review, what percentage had another substantiated or indicated report within a 12-month period?

Maltreatment of children in foster care. Of all children in foster care in the State during the period under review, what percentage was the subject of substantiated or indicated maltreatment by a foster parent or facility staff?

Outcome P1: Children will have permanency and stability in their living situations. Data indicators: Foster care re-entries. Of all children who entered care during the period under review, what percentage re-entered foster care within 12 months of a prior foster care episode?

Length of time to achieve the permanency plan.

Of all children who were reunified with their parents or caretakers at the time of discharge from foster care, what percentage was reunified in less than 12 months from the time of the latest removal from home?

Of all children who exited care to a finalized adoption, what percentage exited care in less than 24 months from the time of the latest removal from home?

Stability of foster care placement. Of all children served who have been in foster care less than 12 months from the time of the latest removal from home, what percentage have had no more than two placement settings?

Length of stay in foster care. For a recent cohort of children entering foster care for the first time in the State, what is the median length of stay in care prior to discharge?

The national standard for each statewide data indicator identified above will be based on the 75th percentile of all State' performance for that data indicator, as reported in AFCARS and NCANDS. We considered using the 90th percentile and the median to establish the national standard and rejected both because these standards, respectively, were deemed either too high or too low. This is illustrated, based on 1998b (April 1–September 30) AFCARS data, and 1997 NCANDS data (available for repeat maltreatment only) in the chart below.

Measure	Median	75th	90th
% of children with repeat maltreatment within a 12-month period	11	7	2
% of children re-entering foster care	20	13	6
% of children reunified in less than 12 months from latest removal	72	80	88
% of children adopted in less than 24 months from the latest removal	16	26	43
% of children in care less than 12 months with no more than 2 placements	63	77	85

Measure	Median	75th	90th
Median length of stay in foster care prior to discharge (months)	18	12	10

Note: Data for maltreatment of children in foster care is not available for the purposes of this illustration, but will be available when we calculate the standard.

We recognize that we have set a high standard. However, we think it is attainable and that our overall approach for moving States to the standard through continuous improvement is sound.

We anticipate that the standard for each data indicator based on AFCARS data will be derived from the 1998b, 1999c (complete Federal fiscal year) and 2000a (October 1–March 31) reporting periods and the standard for each data indicator based on NCANDS data will be derived from the 1997 and 1998 reports. However, if we have more current and complete data available, for example the 1998 and 1999 NCANDS reports, we will use these data submissions to develop the standard. By using multiple reporting periods we will increase the number of States that participate in setting the standard.

As we considered how to develop the national standard, we noticed that States with smaller caseloads were clustered in the upper percentiles with respect to performance on the data indicators. We did not want States with larger caseloads to be disadvantaged, therefore, we explored setting multiple standards based on caseload size. We derived the variable ''number of children in foster care per 10,000 children under 18 years old in the general population'' and used it to test State performance on certain statewide data indicators. We found no correlation between the variables. In short, caseload size was not useful in explaining the variation in State performance with respect to the national standards, so it was not considered in setting the national standards.

Because this concept of setting a national standard for data and basing substantial conformity, in part, on a State's ability to meet such a standard is untested, we purposely limited the number of outcomes to which we assigned statewide data indicators. For example, we did not assign data indicators to Safety Outcome #2 or Permanency Outcome #2, although we will consider adding indicators to those outcomes at a later time. We will also consider adding to or revising the data indicators listed above as needed. For example, we will consider adding timeliness of initiating investigations of child maltreatment to the safety outcomes later if there is a broad enough national data base through NCANDS to support that indicator. In addition, to date, there are no uniform national data indicators collected through AFCARS or NCANDS that can be used to review for the Well-being outcomes.

We expect the statewide data indicators to change over time and, therefore, did not regulate them. We chose to base the first set of statewide data indicators on the outcome measures that were developed in accordance with section 203 of the ASFA for two reasons:

- We received many comments requesting that the section 203 measures and the child and family services reviews be consistent with one another; and,
- The section 203 measures were developed in conjunction with a consultation group and were published in the **Federal Register** for public comment.

We would also like to note that many of the data indicators and performance measures we selected are consistent with and support the work of ACF in meeting the requirements of the Government Performance and Results Act of 1993 (GPRA). Under GPRA, Federal agencies are required to work with the States to establish performance goals and monitor performance results for all Federal programs. We believe that the outcomes and data indicators used in the CFSR support one of ACF's objectives under GPRA to increase the safety, permanency, and well-being of children and youth.

We have, however, in regulation, retained our authority to add new data indicators, change existing data indicators, and suspend the use of data indicators as appropriate. We took a similar approach to setting the national standards. The standards will not change every year. Rather, we have retained our authority to periodically review and revise the standards if experience with the reviews indicates adjustments are necessary.

Findings from the on-site portion of the review. During the on-site portion of the review, a set of performance indicators is used to review the outcome and determine the extent to which the outcome has been achieved. Since the individual circumstances of each child and family are unique, the performance indicators serve most effectively as a guide to help the reviewer gather appropriate information from a variety of sources. Experience has taught us that reviewing only the information that is recorded in a written case record is insufficient for assessing outcome achievement. Therefore, the reviewer explores the performance indicators through the case record review and through interviews with the individuals relevant to each case. Some components of the indicators are quantitative, such as the number of entries into foster care a child has experienced or the number of reports of maltreatment that have been received on a child. However, there are also indicators that are qualitative in nature that help explain the circumstances behind the numbers, such as reasons for re-entry into foster care or the nature of the reports of maltreatment received on a child. Indicators are rated as an area of strength or an area in need of improvement. For outcomes that have multiple indicators, if all but one of the indicators are rated as a ''strength,'' the outcome is determined ''substantially achieved'' in that particular case. We learned from the pilots that the information gathered in the on-site review using instruments structured in this way most often led reviewers to a general consensus regarding the degree of outcome achievement.

Standard for substantial conformity with the outcomes. For the outcomes to which statewide data indicators are assigned, a State must meet both the national standard for the statewide data indicators and substantially achieve the outcome in 90 percent (95 percent in reviews subsequent to the initial review) of the cases reviewed on-site to be considered in substantial conformity. We will resolve any discrepancies between the Statewide data and the on-site review findings so that substantial conformity does not rely totally on one or the other information source. This approach permits on-site exploration of the reasons why performance with respect to the statewide data indicators might not be an accurate indicator of statewide performance. Outcomes for which there are no assigned statewide data indicators must be substantially achieved in 90 percent (95 percent in reviews subsequent to the initial review) of the cases reviewed on-site to be considered in substantial conformity.

Program improvement regarding statewide data indicators. Any State found not to be in substantial conformity with an outcome must enter into a program improvement plan. When the national standard is not met on any of the statewide data indicators used to determine substantial conformity, States must engage in continuous improvement toward the national standard in the program improvement plan. This means that ACF will negotiate with the State to determine how much progress toward meeting the standard, in terms of absolute percentage points, the State

will make to successfully complete a program improvement plan. We retain final authority to determine how much improvement the State must make. In reviews subsequent to the initial child and family services review, we will consider prior program improvement efforts, including continuous improvement in meeting the national standard, when negotiating the degree of improvement required to successfully complete a program improvement plan.

Resolving discrepancies in the aggregate data from the statewide assessment and the information obtained from the on-site review pertaining to the outcomes. We received a number of comments addressing this issue, particularly concerning how discrepancies between the two sets of information will be resolved. New § 1355.33(d) provides more detailed information on the steps we will take to resolve discrepancies between the aggregate data and the findings of the on-site portion of the review. In order to resolve discrepancies between the statewide assessment and the findings of the on-site portion of the review we will provide the State the option of either of the following:

- The submission of additional information by the State that will explain or resolve the discrepancy, such as additional data or analysis of the existing data, or
- ACF and the State will review additional cases, but only for the indicators with a discrepancy that must be resolved. The total number of cases reviewed may not exceed 150 cases, and will represent a statistically significant sample with a 90 percent (or 95 percent in subsequent reviews) compliance rate, a tolerable sampling error of 5 percent, and a confidence coefficient of 95 percent. The conclusions made from reviewing the additional cases will form the basis for determining substantial conformity.

Criteria used to determine substantial conformity for the systemic factors being reviewed. The concerns related to determining substantial conformity for the systemic factors: (1) Statewide information systems, (2) case review system, (3) quality assurance system, (4) staff and provider training, (5) service array, (6) agency responsiveness to the community, and (7) foster and adoptive parent licensing, recruitment and retention were similar to those for the outcome areas: A lack of clarity on how substantial conformity is determined and on the standards that States are expected to meet in achieving substantial conformity. In response to these concerns, we have established a process for rating the State's conformity with State plan requirements that is based on information obtained from the statewide assessment and the on-site stakeholder interviews. Information from the statewide assessment and interviews with stakeholders on-site must support a determination of substantial conformity. The review team will rate the State's performance for each systemic factor using a Likert-type scale, with criteria attached to each rating, based on the total information obtained from a variety of stakeholders interviewed on-site.

Except for ''information system capacity,'' all of the systemic factors reviewed have more than one State plan requirement associated with them that are included in the review process. A State's conformity with each systemic factor will be rated on a scale of 1–4, based on the extent to which there are processes in place which meet the State plan requirements associated with that systemic factor. For example:

Not in substantial conformity		Substantial conformity	
1	2	3	4
None of the State plan requirements is in place.	Some or all of the State plan requirements are in place, but more than one of the requirements fails to function at the level described in each requirement*.	All of the State plan requirements are in place, and no more than one of the requirements fails to function as described in each requirement*.	All of the State plan requirements are in place and functioning as described in each requirement.

*For the systemic factor, ''information system capacity,'' if it is determined that a system is in place but not functioning at the level described in the one State plan requirement reviewed, that factor is rated a ''2'', rather than a ''3''.

The statewide assessment requires the State to evaluate each of the State plan requirements. Information from that source is used in part to determine how the State is complying with each State plan requirement. During the on-site review, selected local and statewide stakeholders will be interviewed and asked a series of questions that relate to the State plan requirements. Not every stakeholder interviewed will be able to address each systemic issue thoroughly. Thus, for each systemic factor, the review team must use the total information obtained from all the interviews to evaluate the extent to which the requirements are being met. Both the information from the statewide assessment and the stakeholder interviews must indicate that the State should receive a ''3'' rating or better for that systemic factor in order for the State to be found in substantial conformity. To ensure objectivity in the information gathered through stakeholder interviews, we have amended the regulation at § 1355.33(c)(4)(iv) to set minimum requirements with respect to the selection of stakeholders who must be interviewed.

Subjectivity in Determining Substantial Conformity

Many respondents to the NPRM indicated that we needed to strengthen the rule to assure increased objectivity in making determinations of substantial conformity. Given the focus of the reviews on qualitative measures and degrees of outcome achievement, concerns raised included reviewers making subjective judgments on outcome achievement, holding States accountable for these judgments, and a lack of clarity on the standards used to make decisions.

We agree that the need to insure objectivity in the decision-making process is extremely important. In fact, we realized early in the design process of the reviews that proposing a results-focused review, as opposed to the checklist-style reviews of documentation conducted in the past, would raise concerns about the level of objectivity in the reviews. However, to design a review process that focuses on results and outcomes we must evaluate not only what happens to children and families as a result of the State' interventions, but the circumstances and mitigating factors that affect both the interventions and the results. To accomplish this, our review process must utilize both quantitative and qualitative assessments. We also realize that determinations regarding outcome

achievement in the areas of safety, permanency and well-being require judgments based on the specific circumstances of individual children and families, and that we need to standardize the criteria for making those judgments in order to ensure objectivity.

As noted in the NPRM, we included several criteria and procedures in the pilot reviews that were designed to make the reviews as objective as possible and to result in consistency among reviewers and across States in making critical judgments about outcome achievement. Those measures include:

- Using statewide aggregate data and qualitative information from the statewide assessment to understand and interpret the status of outcomes and systemic factors;
- Applying uniform criteria or performance indicators that guide reviewers to an accurate conclusion about the extent to which the outcome is being achieved in each case;
- Training State and Federal reviewers in the use of standardized review instruments and protocols; and,
- Using a quality assurance procedure during the course of the review by requiring local team leaders to review case ratings and debrief daily with reviewers to ensure that criteria are applied consistently.

In piloting the reviews, we also determined that the objectivity and uniformity of the process could be strengthened in several areas. For example, we learned that the Statewide assessment was prepared differently among the pilot States and that the manner of collecting the data for the safety and permanency profiles was not uniform, particularly in States where AFCARS or NCANDS data were unavailable. These factors made it difficult to rely upon information in the statewide assessment.

In regard to case selection, we found that the manner of selecting cases for the on-site review varied among States in ways that made it difficult to assure randomness. Through the pilots and the comments we received on the instruments, we became aware that the protocols used to review cases could be improved to reflect, more objectively, those factors that determine conformity with State plan requirements.

In response to these lessons and others, we have strengthened the provisions for objectivity in the reviews by adding a number of measures to the final rule and the CFSR procedures manual. We are also making substantial changes to the content of the instruments used in the reviews that will assist in making objective determinations and addressing the relevant areas of State plan conformity.

Most of the comments regarding subjectivity were related to the on-site review. The comments we received concerning subjectivity in the review process arise from genuine concerns that States be held accountable to an objective set of criteria. We also have learned from the pilot reviews that we must be willing to accept the professional judgment of reviewers in determining substantial conformity. Where there are adequate procedures in place to assure consistency and accuracy in decision-making, as we have described above, we believe professional judgments will be objective.

We recognize that it is much more difficult to determine whether or not a child is safe than it is to determine, for example, that a date on a court order meets specified time frames. Reviewing for outcomes requires gathering both qualitative and quantitative information, examining the information within an appropriate context and, ultimately, making a judgment about how well the outcome is or is not being achieved. Caseworkers in the field must make these judgments every day, and children's lives depend upon the accuracy of that process. A review process that only checks for procedural requirements and does not evaluate the quality of the decision-making process and service delivery that we expect of caseworkers is not likely to yield findings that will help States improve those processes where needed.

Sample Size for On-Site Reviews

In the NPRM, we proposed to review a sample of 30–50 cases. Most of the comments we received indicated strong concerns that reviewing only 30–50 cases may not be representative of the State' service populations and would not lead to credible judgments of substantial conformity. A number of commenters questioned how such a small sample could be statistically valid and expressed concern over imposing penalties based on a small sample of cases. Some respondents indicated a fear that we would be basing decisions about substantial conformity on ''anecdotal'' information in the absence of a much larger sample.

Clearly, to many of the commenters, sample size is a major issue, and we wish to explain our rationale for making only modest changes to this feature of the review in the final rule, based on the lessons we learned in the course of piloting the new review process. We want to emphasize that two changes also address these concerns about the sample size: Adding the statewide data indicators and a process to resolve discrepancies that may include reviewing additional cases.

- We found little discrepancy between the statewide data and the findings from the small sample. We should note that we experienced minimal disagreement among reviewers (State and Federal) and between the statewide data and the findings made on the basis of the small samples in the pilot reviews. The findings of the pilots were similar to those noted in State quality assurance systems, where those systems were in place in pilot States. In most situations, the findings provided State officials with sufficient details about the functioning of their programs to make improvements where needed and to build on existing strengths in their programs.
- We learned that we cannot make accurate decisions in a results-focused review by only reviewing documentation in records. We began by pulling a large sample in the first four pilot States. We conducted a record review in all the cases, similar to prior reviews, except we were attempting to capture both qualitative outcome and quantitative information from the records. In a smaller subsample of the larger sample, we interviewed the relevant parties and focused less on record documentation and more on what was actually occurring in each case. Inevitably, the review team found that the small sample and the strategy of in-depth analysis through interviews was a more reliable source of information on outcomes and conformity with applicable requirements. The information obtained solely from the case records was often incomplete, not current, and left information gaps. Basically, we learned that we cannot apply traditional checklist-type reviews of documentation to determine the quality of decision-making and service delivery.
- We learned that reviewing cases intensely, including all the relevant interviews, requires a large number of staff resources and is an extremely time-consuming process. The process of reviewing case records and conducting multiple interviews in each case reviewed, combined with other review team activities, allows a reviewer time for only two cases, possibly three, in one week. Even with a sample size of 50 cases, the process requires a team of approximately 25 reviewers in order to complete the on-site review in one week. Increasing the sample to 150 cases or more would mean that either a team of 75 reviewers would be needed to review a State in one week, or 25

reviewers would have to remain on-site for three weeks to complete the review. Either option creates unreasonable expectations for States and the Federal government in terms of staff resources and cost and, therefore, does not constitute a cost-effective approach to the reviews.

As originally proposed in the NPRM, the sample would be comprised of both in-home and foster care cases. In-home cases do not provide insight into the State's performance with respect to the permanency outcomes, meaning that not every case in the sample would inform decisions regarding substantial conformity for the permanency outcomes. On the other hand, we need to assure that the sample accurately captures information on in-home service cases in order to examine the safety outcomes based on recent practice and for children who never entered the foster care system.

Therefore, in certain circumstances, the sample size may be increased to assure that all program areas identified in the statewide assessment for further review are adequately represented. In addition, we are requiring, in regulation, that the sample of 30–50 cases include children who entered foster care in the State during the year under review.

We have also added provisions to the rule for resolving discrepancies between the aggregate data and the findings of the on-site review that address the sample of cases reviewed. We are providing States the option of resolving such discrepancies through the submission of additional information, or by ACF and the State reviewing additional cases that, in combination with the 30–50 cases reviewed on-site, will be a sufficient number to comprise a statistically significant sample. ACF and the State will determine jointly the exact number of additional cases to be reviewed, however, the total number of cases may not exceed 150. We chose a maximum of 150 cases because it exceeds the highest number of cases necessary to review a sample that will be statistically significant with a compliance rate of 90 percent (or 95 percent for subsequent reviews), a tolerable sampling error of 5 percent and a confidence coefficient of 95 percent. In order to assure that the sample of cases reviewed in the on-site review and the additional cases actually comprise one random sample, we will randomly select the oversample of 150 cases for the on-site review, from which a subsample of 30–50 cases will be drawn. If the State chooses a review of additional cases to resolve a discrepancy, those cases will be selected from the same oversample. In this manner, we believe we will address concerns about the size of the sample, particularly in cases where discrepancies in the findings exist and must be resolved.

We recognize that the sample size does not represent a faultless approach to reviewing State programs, and we fully understand the varying perspectives on this issue. We must emphasize, however, that the quality of information gathered from the overall process, and not the on-site sample in isolation, will benefit children and families by tracking their outcomes and allowing States to focus on program improvements where needed.

Penalties Associated With Nonconformity

We have made an important change in the final rule regarding withholding of funds in situations where States remain in nonconformity continuously on the same outcomes or systemic factors, and for States that elect not to engage in a program improvement plan. The final rule provides for graduated penalties in successive reviews if areas of nonconformity remain uncorrected. We have also applied the maximum withholding to those States that do not implement program improvement plans to correct the areas of nonconformity.

The comments we received on the imposition of penalties raised a number of issues that we considered in making this change to the rule. Some comments indicated concerns that the Federal government is not meeting its stewardship responsibilities by not taking a more aggressive approach to penalizing States found not to be in substantial conformity. Other comments indicated that the potential for penalties is substantial and could have a serious effect on the capacity of States to administer their programs. We also were encouraged to use the process for imposing penalties to assure that program improvements are made when and where they are needed.

We wish to note that we have not proposed an ''all or nothing'' approach to penalizing States. We have been faithful to the statutory mandate that applicable penalties be commensurate with the extent of nonconformity. Further, we have designed a review process that is based on substantial conformity with the requirements, rather than total compliance without exception, to be consistent with the statutory mandate. Penalties are attached to each outcome and systemic factor determined to be in nonconformity. We are providing time-limited opportunities for States to make needed program improvements prior to withholding of Federal funds for nonconformity. Only when States fail to take advantage of program improvement opportunities or complete a plan successfully will they be faced with an actual loss of Federal funding as a result of the child and family services reviews.

At the same time, we have taken seriously the stewardship responsibilities of the Federal government in enforcing conformity with State plan requirements. These responsibilities are clear and we have not abandoned them. We intend to withhold Federal funds where States are not using those funds to achieve their designated purpose. To clarify that the need to make program improvements will be strongly enforced, we are strengthening sections of the final rule to assure that penalties will be taken in a timely and certain manner.

We do not wish to impose penalties in a manner that will impair a State's ability to provide essential services to children and families. However, we have a responsibility to assure that State plan requirements are met and that children and families are served in ways that will provide for their safety, permanency, and well-being.

C. Enforcement of Section 471(a)(18) of the Act

We received a large response to the section of the regulation that enforces the Multiethnic Placement Act, as amended. Several commenters sought practice guidance on how to implement the law. We believe that we have addressed these issues in other forums through policy issuances and HHS-funded technical assistance and guides. Other commenters were concerned that we were not maintaining the partnership approach exemplified in the child and family services reviews. We have made no changes to the regulation in response to these comments, since we find that the statute is definitive in the manner in which we are to implement corrective action and enforce compliance with section 471(a)(18) of the Act.

In response to other comments, we have:

- Clarified that we will consider a State in violation of section 471(a)(18) when it maintains a policy, practice, law or procedure that, on its face, clearly violates section 471(a)(18) of the Act;
- Required States to notify ACF upon a final court finding that the State has violated section 471(a)(18) of the Act;
- Allowed States up to 30 days to develop a corrective action plan to respond to a violation of section 471(a)(18) of the Act resulting from a

State's statute, regulation, policy, procedure or practice, and six months in which to complete the plan;

- Clarified which title IV–E funds will be reduced in the event of a violation of section 471(a)(18) of the Act; and
- Added a definition of the term ''entity.''

D. Reasonable Efforts and Contrary to the Welfare Determinations and Documentation

Many commenters believed that the requirements for reasonable efforts and contrary to the welfare determinations as proposed were inconsistent with current State practice. In some instances we agree that the regulation was unnecessarily restrictive, and have made the following changes to preserve State flexibility while keeping within the statute and maintaining the integrity of the program:

- Removed the distinction between emergency and non-emergency removals in the sections of the rule on contrary to the welfare and reasonable efforts to prevent removal. This change is in response to concerns that the distinction was artificial.
- Allowed States up to 60 days to obtain a judicial determination with regard to reasonable efforts to prevent removal of a child from home. This responds to concerns that our proposed policy restricted the timing for obtaining such a determination to a specific date rather than within a specified time frame.
- Consolidated the requirements regarding reasonable efforts to reunify the child with the family and efforts to make and finalize alternate permanent placements into a single requirement to be more consistent with actual State practice. Within 12 months of the date the child is considered to have entered foster care, the State is to obtain a judicial determination that the State agency made reasonable efforts with respect to the permanency plan that is in effect.

In other areas, we explained why we are maintaining our policy position rather than changing the regulation in response to commenter' concerns. We affirmed that judicial determinations regarding contrary to the welfare and reasonable efforts are inextricably linked to a child's eligibility for title IV–E. The statute makes these judicial determinations eligibility requirements which we cannot change despite the many opposing comments. We also retained the requirement for the State to make a contrary to the welfare determination in the first court order sanctioning the removal of the child from the home, because it is a longstanding critical protection for children and families. Finally, we are not relaxing the documentation requirements or allowing *nunc pro tunc* orders because we wish to preserve the certainty that these determinations are made in accord with the statute.

E. Case Plans and Case Review Requirements

To clarify our existing policy with regard to the timing of the case plan, we have amended the regulation to allow States up to 60 days from a child's removal from the home to develop the case plan. We also made a significant policy shift in the requirements for subsequent permanency hearings. We are now requiring subsequent permanency hearings for all children, including children placed in a permanent foster home or a preadoptive home. We believe that the ASFA compels us to ensure, through the protection of a permanency hearing, that permanency will be achieved for these children.

We received a significant number of requests to limit the TPR provision to only certain groups of the foster care population. We are unable to make this change in the regulation, as no statutory authority exists for doing so, and the clear intent of ASFA was to speed critical decision-making for all children in foster care. We clarify in the final rule that the exceptions to the requirement to file a petition for TPR must be done on a case-by-case basis and added additional examples of a compelling reason. We also clarify that States must begin the process of finding and approving an adoptive family for a child when the State files a petition for TPR.

F. Title IV–E Reviews

We made several changes to strengthen and clarify the title IV–E reviews. The title IV–E reviews are designed to review the eligibility of children in foster care and providers receiving title IV–E funds. Those changes to the final rule include:

- Clarifying that when using an alternate sampling methodology when AFCARS data are unavailable, we will review a six-month period that coincides with the AFCARS reporting period;
- Allowing all State' initial primary reviews to be held at a 15 percent threshold of ineligible cases regardless of whether or not the review occurs within the first three years of the final rule;
- Providing, on a case-by-case basis, an extension of a program improvement plan when a legislative change is necessary for the State to achieve substantial compliance; and
- Increasing the initial amount of time to develop a program improvement plan from 60 days to 90 days for States found not to be in substantial conformity as a result of a title IV–E foster care eligibility review.

G. Special Populations

Several issues of note recurred as themes throughout the comments and the regulation. One was the application of the rules to certain populations, such as Indian tribal children, adjudicated delinquent children, and unaccompanied refugee minors. We clarify how in particular the provisions of the final rule apply to these populations of children, but also emphasize that overall the statute must apply to these children as they would any other child in foster care. We have no statutory authority to exempt any group from provisions such as the safety requirements or termination of parental rights requirements. Furthermore, we strongly believe that, while these requirements must apply to all children, the statute affords the State agency the flexibility to engage in appropriate individual case planning.

For Indian tribes, numerous other issues were raised with regard to how title IV–E requirements and, more specifically, the recent amendments made by the Adoption and Safe Families Act apply to Indian tribes as sovereign nations. While we are committed to the government-to-government relationship between the Federal government and Indian tribes, the foster care program under title IV–E is statutorily targeted to State agencies, and Indian tribes cannot receive title IV–E funds directly. Indian tribes can gain access to title IV–E funds on behalf of title IV–E eligible children if they enter into agreements with State agencies. Accordingly, Indian tribes must operate within the parameters of a particular State plan and the specifics of the agreement. Some commenters also requested that we explain how the requirements of the Indian Child Welfare Act work in the context of the ASFA. Although we can affirm that States must comply with ICWA and that nothing in this regulation supersedes ICWA requirements, we cannot expound on ICWA requirements since they fall outside of our statutory authority.

IV. Section-by-Section Discussion of Comments

Part 1355—General

Section 1355.20 Definitions

This section amends 45 CFR 1355.20 to revise the definitions of foster care and foster family home and to define new terms used throughout the regulation.

Child care institution. Comment: Some commenters requested that we provide more specific guidance or parameters to determine whether a facility is a ''child care institution'' and offered a variety of suggestions and recommendations. For example, one commenter asked that we confirm whether the definition of ''child care institution'' precludes group child care programs from taking steps to assure safety for foster children, including locking facility doors at night and taking other reasonable measures to prevent foster children from leaving the facility without consent.

Response: We understand the desire for more expansive guidance for determining whether a facility is appropriate for title IV–E eligible children. We strongly believe that any such guidance should be developed with input from the field. We have begun this consultation process by inviting comments on a notice published in the **Federal Register** on December 7, 1998 (63 FR 67484). That notice specifically requested comments on defining appropriate child care facilities in which children adjudicated delinquent may be placed. Taking into account the comments received on the **Federal Register** notice, we are considering our options for setting forth more expansive guidance for identifying child care institutions that are appropriate for title IV–E eligible children.

Comment: One commenter suggested that language such as ''or tribal licensing authorities'' be inserted after ''State'' to clarify the definition of ''child care institutions'' on Indian reservations.

Response: We concur with the commenter and have revised the definition in the final rule to reflect the tribal licensing authority.

Comment: One commenter noted that many ''child care institutions'' care for more than 25 children.

Response: The limit of 25 children, by statute, specifically applies to public child care institutions and not private facilities. Therefore, no changes to the final rule are warranted.

Date a child is considered to have entered foster care.

Comment: We received a great number of comments and suggestions regarding how to define the date a child is considered to have entered foster care in accordance with section 475(5)(F) of the Act (the date the State is to use in calculating when to hold periodic reviews in accordance with section 475(5)(B) of the Act, permanency hearings in accordance with section 475(5)(C) of the Act, and for complying with the termination of parental rights (TPR) provision under section 475(5)(E) of the Act). Some commenters wanted us to define the term by using the date on which the child actually enters foster care and the agency assumes responsibility for the placement and care of the child. Others suggested that we define the term based on a variety of other points in time, such as: The date of a judicial determination that it was contrary to the child's welfare to remain at home; the date of the full hearing; the date of the initial shelter care hearing; the date of removal; or, the date a petition for removal is filed. Many commenters observed that, by linking the date the child is considered to have entered foster care to a finding of abuse or neglect and the agency receiving responsibility for placement and care of the child, we incorrectly implied that the aforementioned decisions occur at the same hearing when, in fact, these judicial decisions are often made at separate hearings.

Response: The time frames for considering when a child has entered foster care, *i.e.*, the earlier of a judicial finding of abuse or neglect or 60 days from the date the child is removed from the home, are statutory. However, nothing precludes a State from using a point in time that is earlier than that required by statute or regulation, such as the date the child is physically removed from the home. We have changed the regulation to reflect this option. Clearly, if a State uses the date a child is physically removed from the home, the requirements for holding periodic reviews, permanency hearings, and complying with the TPR provision within the time frames prescribed would be satisfied.

We also have removed to the reference to the agency's responsibility for the placement and care of the child so that the definition more closely follows the statutory language and is consistent with actual practice.

Comment: One commenter suggested that the time a child spends in shelter care not be factored into calculating the timing for holding periodic reviews, permanency hearings, and for complying with the TPR provision.

Response: Under long-standing Departmental policy, shelter care is considered a form of foster care (see the definition of ''foster care'' at 45 CFR 1355.20). Shelter care is one of many possible settings in which children in foster care are placed. Therefore, time spent in shelter care counts in determining when to hold periodic reviews, permanency hearings, and for complying with the TPR provision. We have made no changes to the final rule in response to this comment.

Comment: One commenter requested that we delete the word ''physically'' from the regulatory definition of the date a child is considered to have entered foster care to adhere strictly to the statutory language which provides no qualification of the term ''removal.''

Response: While we have deleted the word ''physically'' from the definition, we have retained the policy on physical removals because it is consistent with the intent of ASFA regarding expedited permanency. Linking the definition of the date a child is considered to have entered foster care to a physical removal ensures that children do not languish in care awaiting a judicial order that says that the child is removed from the home.

We have, however, created an exception. Under § 1356.21(k), we permit constructive removals (*i.e.*, paper removals) to equalize the situation in relative and nonrelative foster family homes. If a child is constructively removed from the home, the date he or she is considered to have entered foster care, absent a finding of abuse or neglect, is the date that is 60 days from the date of the constructive removal. We have amended the regulatory text by cross-referencing § 1356.21(k), which sets the parameters for the acceptable forms of removals.

Comment: One commenter was concerned about what appeared to be an inconsistency between the date a child is considered to have entered foster care and the timing for developing case plans. The outside limit for considering a child to have entered foster care is 60 days from the date of removal, while § 1356.21(g)(2) requires case plans to be developed within 60 days of the State agency '' * * * assuming responsibility for providing services including placing the child * * *''

Response: We understand the confusion and have amended the regulatory language at § 1356.21(g)(2) to state clearly that case plans must be developed within 60 days of the date the child is removed from the home.

Comment: We received several comments opposing the manner in which we applied this definition to

voluntary placement agreements. In the NPRM, we set the date a child is considered to have entered foster care for a child placed via a voluntary placement agreement as the date the voluntary placement agreement is signed by all relevant parties. Many commenters wanted to be able to use the date the child actually is placed in foster care since the child may not enter foster care the same day the agreement is signed. Some commenters believed we lacked a statutory basis for not applying section 475(5)(F) of the Act to all children, irrespective of how they enter foster care.

Response: We concur that it is more appropriate to adopt a consistent application of section 475(5)(F) of the Act for all children. We have amended the definition of the date a child is considered to have entered foster care so that it makes no distinction for children who enter foster care via a voluntary placement agreement. Therefore, children placed in foster care via a voluntary placement agreement will be considered to have entered foster care no later than 60 days after the child is removed from the home.

We want to take this opportunity, however, to note that the purpose of the 60-day limit at section 475(5)(F) of the Act is to ensure that periodic reviews, permanency hearings, and application of the TPR provision are not delayed as a result of contested involuntary removals. The danger of such a delay often does not exist when children are removed from their homes pursuant to a voluntary placement agreement. When children are removed from home via a voluntary placement agreement, we encourage States to use the date the child is placed in foster care (rather than 60 days later) as the date for calculating when to hold periodic reviews, permanency hearings, and for complying with the TPR provision.

Comment: A few commenters requested guidance on how to apply the definition to children who are voluntarily relinquished by their parents for adoption.

Response: The date a child is considered to have entered foster care according to the statute is the earlier of a judicial finding of abuse or neglect or 60 days from the date the child was removed from the home. Typically, there is no finding of abuse or neglect in a voluntary relinquishment, so the date of entry into foster care would be no later than 60 days from the date the child was removed from the home.

Comment: One commenter requested that we specifically clarify, in regulation, that the date the child is considered to have entered foster care does not affect the date Federal financial participation (FFP) may be claimed for foster care maintenance payments. One commenter observed that there is a connection between maintaining eligibility for title IV–E funding and the date a child is considered to have entered foster care.

Response: Both commenters are correct. Establishing initial eligibility for title IV–E funding and initial claiming for FFP have no relationship to the date the child is considered to have entered foster care defined at section 475(5)(F) of the Act. The purpose of that provision is to set the ''clock'' for determining when to satisfy the requirements for holding periodic reviews, permanency hearings, and the TPR provision. A child's initial eligibility for title IV–E funding is not related to this time frame. We have amended the regulation at § 1355.20 accordingly.

The date a child is considered to have entered foster care is, however, related to maintaining a child's eligibility for title IV–E funding. Under § 1356.21(b)(2), we require the State to use the date the child is considered to have entered foster care in determining when to obtain a judicial determination that it made reasonable efforts to finalize a permanency plan. We intentionally linked the timing for obtaining this judicial determination to the date the child is considered to have entered foster care so that such determinations could occur at the permanency hearing, the logical time for making such determinations.

Comment: Several commenters requested guidance for applying the statutory definition of the date a child is considered to have entered foster care to children who are adjudicated delinquent, particularly for those children who enter foster care subsequent to placement in a detention facility.

Response: In general, a date that is no later than 60 days from the date the child was physically removed from his or her home should be used in calculating when to satisfy the requirements for holding periodic reviews, permanency hearings, and for complying with the TPR provision, because judicial determinations regarding abuse or neglect are not typically made for children who are adjudicated delinquent. For children who enter foster care subsequent to placement in a detention facility, States should follow existing policy as stated in ACYF–PA–87–02 in calculating when to develop case plans, hold periodic reviews and permanency hearings, and comply with the TPR provision.

ACYF–PA–87–02 requires States to satisfy the requirements for developing case plans, holding periodic reviews and permanency hearings (the requirements at section 427 of the Act at the time ACYF–PA–87–02 was written) for all children supervised by or under the responsibility of another public agency with which the title IV–B/IV–E agency has an agreement under title IV–E, and on whose behalf the State makes title IV–E foster care maintenance payments. Since the State cannot claim Federal financial participation under title IV–E for children in detention facilities, the ''clock'' for calculating when to comply with the requirements for developing case plans, holding periodic reviews and permanency hearings, and the TPR provision begins when the child is placed in foster care.

Although the ASFA was passed long after ACYF–PA–87–02 was issued, we think that the existing policy is an appropriate interpretation of section 475(5)(F) with respect to adjudicated delinquents who enter foster care subsequent to placement in a detention facility.

Comment: A few commenters suggested that we adjust the date a child is considered to have entered foster care for Indian children to accommodate the time involved in tribal identification and notification required by the Indian Child Welfare Act.

Response: We are sensitive to the fact that tribal identification and notification may take time and limit the amount of time the tribe or State has in making reasonable efforts to finalize a permanency plan prior to the permanency hearing. However, we have no authority to set a different ''date of entry into foster care'' for a particular group of the foster care population. Nothing precludes the agency and court at the permanency hearing from taking into consideration the amount of time it took the State to comply with tribal identification and notification requirements when determining appropriate permanency plans for Indian children.

Comment: Several commenters did not want the definition of the date a child is considered to have entered foster care to apply to the six-month periodic reviews. The commenters are concerned that, if the definition were so applied, children could potentially be in foster care for eight months before a review is held.

Response: We chose to apply section 475(5)(F) of the Act to the six-month periodic reviews, permanency hearings, and the TPR provision, for two reasons. First, nothing prohibits the State from holding six-month periodic reviews

based on the date the child is physically removed from the home. Second, setting different ''clocks'' for calculating when to hold periodic reviews and permanency hearings, and for complying with the TPR provision would add administrative burdens on States.

For example, we believe that we would encumber State systems by requiring a State to hold six-month periodic reviews based on the date the child is removed from the home while holding permanency hearings based on section 475(5)(F) of the Act. In that situation, the State would be obliged to hold two periodic reviews prior to the permanency hearing, the second of which would have to be held two months before the permanency hearing if the date of entry into foster care were 60 days from the date the child is removed from the home. Therefore, we have not made any changes to the final rule as a result of this comment.

Foster care. No comments were received on this definition and therefore no changes are being made to the language proposed in the NPRM.

Foster care maintenance payments. Comment: One commenter questioned our ability to revise the definition of foster care maintenance payments to include travel for visits with workers, which is currently covered as a title IV–E administrative expense. Another commenter recommended that a revision to the definition be made to include the travel costs for a parent to visit his/her child(ren) as an allowable title IV–E foster care maintenance payment cost.

Response: The first commenter's observation is correct. Including the phrase ''agency workers * * *'' in the definition goes beyond the statute and was an error on our part. The statute clearly allows reasonable travel by the child for visitation with family. We have revised the definition in the final rule, deleting the words ''agency workers,'' to conform to the statute. ACYF–PIQ–97–01 addresses the second commenter's request to expand foster care maintenance payments to include travel by the parent(s). Such costs are service related and may be charged to title IV–B, title XX or the State. No change has been made to expand foster care maintenance payments to include other travel.

Comment: We received several requests to expand the definition of foster care maintenance payments to cover a variety of items. For example, one commenter recommended that a State be able to claim child care when the foster parent is attending a school meeting or medical and mental health staffings for another foster child in his/her care.

Response: The definition of foster care maintenance payments cited in the NPRM mirrors the statutory language at section 475(4) of the Act. We do not have the authority to extend the definition beyond the statute. Furthermore, ACYF–PIQ–97–01 explains that child care provided to a foster child when a foster parent is attending activities that go beyond the scope of ''ordinary parental duties'' are reimbursable under title IV–E. The PIQ provides a thorough discussion on the child care costs that can be included in the title IV–E foster care maintenance payment.

Comment: One commenter asked if the State could seek foster care maintenance payments for appropriate child care costs if the State has a two-tiered licensing system, ''licensed'' for center-based and ''regulated'' for home-based child care.

Response: A State's use of specific terminology or type of child care licensing system has no bearing on whether the costs of child care can be included in title IV–E foster care maintenance payments. As long as the child care facility or individual (in the case of home-based child care) is licensed, or otherwise officially authorized or approved by the State as meeting the requirements for a child care facility, the State may claim the costs of allowable child care as part of a foster care maintenance payment.

Comment: Two commenters requested that the language in the preamble to the NPRM which stated that payments for child care could be a separate payment to the child care provider or included in the basic maintenance payment be inserted in the regulatory text of the final rule.

Response: We agree and have amended the regulation accordingly.

Foster family home. Comment: We received many comments on the definition of ''foster family home'' and related concerns regarding title IV–E eligibility and reimbursement. Several commenters noted that in some States, the terms ''approved'' and ''licensed'' are interchangeable, while in other States there are separate standards for each of these categories. States sometimes establish separate standards, *i.e.*, approval and provisional licensure, as opposed to full licensure, for relative caretakers. Some commenters suggested that we allow States to claim title IV–E for eligible children placed with relative caretakers who meet the State standards for approval or provisional licensure, rather than the State's higher standards for full licensure. Some commenters noted that relative placements encourage continuity in a child's life, allowing the child to maintain a sense of identity and minimize separation and attachment issues. One commenter expressed a belief that the statutory language of ''licensed or approved'' implies that different standards are acceptable. Another commenter suggested that to require that approval and licensure be held to the same standard is an extremely problematic higher standard than has been required in the past.

Response: We have given considerable thought to these comments and have tried to balance the integrity of the requirement, the safety of the child and existing State licensing practices. We did not change the requirements: (1) That approved foster family homes must meet the same standards as licensed foster family homes; or (2) that relatives must meet the same licensing/approval standards as nonrelative foster family homes for the reasons below.

Section 471(a)(10) of the Act requires that a State's title IV–E plan provide for the establishment or designation of a State authority that is responsible for establishing and maintaining standards for foster family homes and child care institutions. This section also requires that the title IV–E State plan provide for the application of these standards to ''any'' foster family home or child care institution receiving either title IV–B or title IV–E funds. Further, the statutory definition of ''foster family home'' in section 472(c) of the Act states that a foster family home is a home ''* * * which is licensed by the State in which it is situated or has been approved (by the State licensing authority) as meeting the standards established for such licensing.'' Clearly, the statute did not intend that there be separate standards for licensing and approval.

The plain language of the statute requires that, to be considered a foster family home for the purpose of title IV–E eligibility, the home must be either licensed or approved as meeting State licensing standards. It also is clear from the language in section 471(a)(10) of the Act that the State licensing standards must be applied to ''any'' foster family home that receives funding under titles IV–E or IV–B. The licensing provisions of the Act make no exceptions for different categories of foster care providers, including relative caretakers.

In past title IV–E foster care eligibility reviews, we have verified the existence of a license without differentiating among the types, and we understand State concerns in this regard. We also agree that placements that meet the

child's need for attachment and continuity should be encouraged. We further recognize that, consistent with section 471(a)(19) of the Act, States must consider giving preference to a relative caregiver, provided that the relative caregiver meets all relevant State child protection standards. However, given the emphasis in ASFA on child safety, and the plain language of the statute with respect to the licensing requirements, we believe that it is incumbent upon us, as part of our oversight responsibilities, to fully implement the licensing and safety requirements specified in the statute by requiring that foster care homes, whether relative or nonrelative, be fully licensed by the State.

Comment: In some States, relative caretakers must meet the standards for full licensure, but the State allows for a waiver of certain provisions for these specific caretakers. One commenter asked if the language requiring that ''approved'' and ''licensed'' homes meet the same standard would restrict the use of these waivers to approve relative foster family homes. Other commenters requested that we continue our current policy of allowing certain requirements to be waived for relatives.

Response: Waivers are not addressed in the regulatory text. However, as we have explained in ACYF–PIQ–85–11, special situations may arise with relative caretakers in individual cases where there are grounds for waiving certain requirements, such as square footage of the relative's home. The safety standards, however, cannot be waived in any circumstance. ACYF–PIQ–85–11 has not been withdrawn and, therefore, continues to reflect current policy. To the extent that waivers are allowed, they must be granted on a case-by-case basis, based on the home of the relative and the needs of the child. The State may not exclude relative homes, as a group, from any requirements.

Comment: Several commenters requested that we reconsider our position on requiring that a foster family home be fully licensed before the State is eligible to claim for title IV–E. We were advised that in some States, a provisional license is issued so that a child may be placed in a foster home while the State is awaiting criminal background checks or waiting for the prospective foster parents to complete required training. In other States, a provisional license is issued to all new foster homes during a probationary period, even though the home meets the requirements for a full license or approval.

Response: We considered the commenter' suggestions, but we believe that the statute requires a foster family home to meet all of the State requirements for full licensure or approval to be eligible for title IV–E purposes. Accordingly, if a State issues an interim license (provisional, emergency, etc.) pending satisfaction of all licensing standards (*e.g.*, while the State is awaiting the results of a criminal records check or the completion of training), then the State may not claim title IV–E funds on behalf of a child in that home.

Since there seems to be some confusion over the nomenclature used in the draft regulation, we have revised the regulatory language in § 1355.20 to remove the reference to provisional licensure and to articulate that before a State may claim title IV–E funds, it must find that the home meets the State's licensing standards.

Comment: Several commenters offered varying suggestions on the concept of allowing retroactive payments. Generally, the commenters suggested that we allow States to claim title IV–E reimbursement back to the date of placement once the home becomes fully licensed.

Response: The statute predicates foster family home eligibility on licensure or approval of the home. Allowing retroactive payments to the child's date of placement would be inconsistent with this requirement. In addition, we do not wish to provide financial incentives for States to place children in homes before the safety of the children in those homes can be assured.

However, we recognize that some time may elapse between the date that satisfaction of the requirements is received and documented and the date on which the license is actually issued. We have concluded that 60 days is an ample period of time to allow between the time the State receives all the information on a home and the date on which the full license is issued. Therefore, we are permitting States to claim title IV–E reimbursement during the period of time between the date a prospective foster family home satisfies all requirements for licensure or approval and the date the actual license is issued, not to exceed 60 days.

Comment: One commenter requested that we allow States a six-month period to grandfather in homes that are currently operating under a provisional license, so long as the safety of the child is preserved.

Response: We will allow States a grace period to bring homes currently operating with less than a full license or approval to full licensure/approval status. Accordingly, if a State is currently claiming title IV–E foster care for a foster family home that does not meet fully the State licensing standards, the State has no more than six months from the effective date of this final rule to grant a full license or approval for these homes. After that date, a State may not claim title IV–E funds for any child in a home that does not meet the State's full licensing or approval standards.

Comment: One commenter suggested that provisional and emergency licensure be defined, and a distinction be drawn between these two types of licenses.

Response: The terms provisional licensure and emergency licensure are not used in the regulation. Thus, we see no reason to impose a definition of these terms on States.

Comment: One commenter recommended that the definition of ''foster family home'' begin with a statement indicating that this definition is for purposes of title IV–E foster care so that it is not wrongly applied to exclude non-licensed placements from the section 422 requirements.

Response: We concur with the commenter and have revised the regulation to clarify that the definition relates to title IV–E eligibility only. It should be noted that section 471(a)(10) of the Act more broadly requires that a State's title IV–E plan provide that a State's established licensing standards apply to ''any'' foster family home or child care institution receiving either title IV–B or IV–E funds. This is a State plan conformance issue, however, and not a title IV–E eligibility issue.

Comment: A commenter opposed inclusion of group homes, agency operated boarding homes and other institutional settings in the definition of ''foster family home.'' The commenter noted that Congress clearly has indicated a desire to avoid a child's placement in such settings unless it is necessitated by repeated extreme disruptions of the preferred family settings. It was suggested that the definition include only homes of individuals or families licensed or approved by the State licensing or approval authorities that provide 24-hour out-of-home care for children.

Response: Group homes, agency operated boarding homes and other facilities have been included in the definition of ''foster family home'' since the title IV–E regulations were issued in 1983. The purpose of including these facilities has been to assure that all foster care placements meet the minimum safety requirements by being licensed or approved under State law or

rules. We believe this is a safety issue for children and not a statement of placement preference; therefore, we have retained the language in the final rule.

Comment: We received some comments concerning the licensing of homes by tribal authorities. A few commenters suggested that tribes should have the authority to license tribal homes irrespective of where they are located, and that the language in the definition of ''foster family home'' implies that tribes only have the authority to license homes that are on or near reservations. A couple of commenters suggested that not to allow tribes this authority would be a violation of tribal sovereignty and jurisdiction. One commenter suggested that this is an overreaching of the Federal government rather than a safety issue. It was suggested that HHS strike ''or with respect to foster family homes on or near Indian reservations'' from the definition.

Response: The authority of Indian tribes to license homes that are ''on or near Indian reservations'' has been part of the title IV–E regulations since May 23, 1983. This provision is consistent with the Indian Child Welfare Act (ICWA) of 1978. Section 1931 of ICWA authorizes Indian tribes and tribal organizations to establish and operate child and family services programs ''on or near reservations,'' including a system for licensing or otherwise regulating Indian foster and adoptive homes. We are maintaining the language to remain consistent with the ICWA.

Comment: One commenter asked whether the definition of ''foster family home'' should be interpreted to mean that homes approved through the tribal process must meet the same standard as homes licensed by the State.

Response: The definition of ''foster family home'' should not be interpreted in that manner. The definition of ''foster family home'' gives tribal licensing or approval authorities the jurisdiction to license or approve homes that are on or near Indian reservations. This is consistent with ICWA at section 1931(b) which states that for purposes of qualifying for funds under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe is equivalent to licensing or approval by a State. The authority to license or approve includes the authority to set standards.

Comment: One commenter was concerned about the requirement that approved and licensed homes must meet the same standard. The commenter noted that States sometimes use waivers to approve Indian foster homes which may not meet certain criteria, such as square footage requirements, in order to comply with the ICWA placement preferences. The commenter recommended that we include language to assure that this type of waiver continues to be permissible.

Response: Our current policy, set forth in ACYF–PIQ–85–11, recognizes that there may be exceptional circumstances that arise with a specific relative caretaker where there are grounds for waiving a licensing requirement, such as square footage, in order to place a child. The policy set forth in that issuance applies also to licensing or approving tribal relative foster homes, either by a State or tribal licensing authority. This waiver authority does not extend to all foster homes, but only to relative homes in certain circumstances delineated in ACYF–PIQ–85–11, as determined by the licensing authority on a case-by-case basis. We did not address the issue of waivers in the NPRM or final rule, but clarify here that the existing policy stands.

Full hearing. Comment: Several commenters objected to a definition for ''full hearing'' because it did not coincide with some States' terminology. Many commenters requested clarification, while others recommended changes in the definition that would accommodate the specific terms and proceedings used in their States.

Response: We defined a full hearing in an attempt to establish a universal term for the hearing at which the State agency is assigned responsibility for placement and care of a child who is removed from home. Given the multiple requests for clarification and the conflicting nature of the recommendations, it is likely that any definition for ''full hearing'' would be problematic given the variety of State-specific practices. Therefore, we have deleted this definition from the final rule.

Full review. No comments were received on this definition and therefore no changes are being made to the language proposed in the NPRM.

Legal guardianship. Comment: A few commenters supported the definition of legal guardianship as written in the proposed rule. However, some commenters requested clarification that the term ''custody,'' as used in the definition, refers only to physical custody of the child rather than legal custody. The commenters asserted that some States retain legal custody of the child in guardianship situations.

Response: The definition in the final rule is taken directly from the statute which makes no distinction between physical and legal custody. We believe that the definition is intended to include all legal guardianship arrangements that are permanent.

Comment: A commenter wanted to know how the Federal definition for legal guardianship will be applied to States that do not have the same definition in their State statutes.

Response: There is no Federal requirement for States to have the statutory definition of legal guardianship in State law. The statute requires States to evaluate certain permanency goals, including legal guardianship, for children during the development of the case plan and the course of a permanency hearing. We believe that the definition was developed to clarify that States should consider legal guardianships that are permanent and self-sustaining as a permanency option for children in foster care.

Comment: There were several comments on funding legal guardianships. We received a suggestion that title IV–E funding be made available for subsidized legal guardianship. Another commenter asked for clarification on financial and medical assistance available for children placed in legal guardianship and how to access funding for legal guardianship. A third commenter requested that we clarify that a State is not precluded from providing financial assistance in legal guardianships.

Response: While legal guardianship arrangements may be appropriate permanency plans, we have no statutory authority to make title IV–E funding available for subsidized legal guardianships. However, some States are using title IV–E funds to subsidize legal guardianships under the terms of a title IV–E demonstration waiver approved by the Secretary. The statute does not preclude States from subsidizing legal guardianships with State funds.

Comment: A commenter requested that we make a greater distinction between legal guardianships and other living arrangements such as permanent foster care placements and parent-child relationships. The commenter believed that children placed in legal guardianships often are not subject to ongoing judicial review, and that in contrast to parent-child relationships, a child is not entitled to inherit from a guardian, and vice versa.

Response: The term legal guardianship should be used in reference to the requirements on reasonable efforts to finalize a permanency plan, case plans,

permanency hearings, and TPR. In that context, States determine whether a legal guardianship is the most appropriate permanency option for a child. We do not believe it is appropriate for us to regulate the definition of a legal guardianship further.

Comment: One commenter requested guidance on the use of legal guardianship as a permanency option. The commenter requested that we share lessons learned from the title IV–E demonstration waiver States.

Response: Information on the findings from the States with demonstration waivers will be disseminated when available. This information will be better provided through our resource centers and technical assistance activities rather than through regulation.

National Child Abuse and Neglect Data System (NCANDS). No comments were received on this definition and therefore no changes are being made to the language proposed in the NPRM.

Partial Review. The Department is responsible for State compliance with all aspects of the title IV–B and IV–E plan requirements and not only the elements covered by the child and family service reviews. Accordingly, we have revised the definition of ''partial review,'' to clarify its application to title IV–E and title IV–B compliance issues that are outside the scope of the child and family services review. This partial review may cover whatever the Secretary considers necessary to make a determination regarding State plan compliance. An example of an area which is not subject to the full child and family services review but subject to a partial review is compliance with AFCARS. The procedures and standards for AFCARS compliance are set forth in 45 CFR 1355.40.

Permanency Hearing. Comment: One commenter disagreed with the requirement that permanency hearings be held within 12 months of the date a child is considered to have entered foster care. The commenter felt that it did not give families sufficient time to make their homes ready for the child to return.

Response: The requirement to conduct permanency hearings no later than 12 months from when a child enters foster care is statutory. One of the main purposes of ASFA was to encourage States and parents to achieve permanency for children in a more timely manner.

Comment: One commenter did not think that permanency hearings should be conducted by any entity other than a court.

Response: The option for administrative bodies, appointed or approved by the court, to conduct permanency hearings is expressly permitted at section 475(5)(C) of the Act.

Comment: Several commenters were opposed to the requirement that any body that conducts permanency hearings may not be part of or under the supervision or direction of the State agency. One commenter asked if this requirement extended to other public agencies with which the State agency has an agreement.

Response: Critical decisions that have a significant effect on the lives of children and their families are made at permanency hearings. The purpose of requiring courts to oversee permanency hearings is to ensure that these hearings are conducted by an impartial body, which includes any body appointed or approved by the court to provide this oversight in its stead. An administrative body that is part of the State agency or under its direction or supervision would not meet the test of impartiality.

The requirement does extend to other public agencies with which the State agency has an agreement. In accordance with ACYF–PIQ–85–2, title IV–E requirements extend to any other public agency with which the State agency enters an agreement for the performance of title IV–E administrative functions, including responsibility for placement and care of the child.

Comment: One commenter requested that the definition of ''permanency hearing'' be revised to indicate specifically that a tribal agency is permitted to appear before a tribal court and that the tribal court has the authority to make all the necessary rulings with respect to permanency hearings.

Response: The statutory and regulatory language both clearly indicate that permanency hearings may be held before a tribal court. The references to State courts in the permanency hearing requirements in section 475(5)(C) of the Act and in the definition of permanency hearing at § 1355.20 should be understood to include tribal courts.

Comment: A few commenters requested additional guidance regarding whether reunification efforts can be extended beyond the permanency hearing or if an alternate permanency plan must be set at the permanency hearing if the child and family cannot be reunited at that time.

Response: A major purpose of ASFA is to promote timely permanency planning. We recognize, however, that there are situations when reunification cannot occur within 12 months but it is not appropriate to abandon it as the permanency plan at the permanency hearing. It is acceptable to extend reunification efforts past the permanency hearing if the parent(s) has been diligently working toward reunification and the State and court expect that reunification can occur within a time frame that is consistent with the child's developmental needs.

Comment: One commenter wanted to know if the permanency hearing was similar to a dispositional hearing or an administrative review. This commenter also wanted to know if the hearing could still be held within 18 months of a child entering foster care.

Response: The ASFA changed the name of the former ''dispositional hearing'' to ''permanency hearing'' and the timing was changed from 18 months to 12 months (see p. 50072 of the NPRM). No statutory flexibility exists with respect to the time line in the ASFA for conducting permanency hearings.

Comment: One commenter asked that we clarify whether the permanency goal of placement with a fit and willing relative was optional because the commenter's State had eliminated it as a permanency goal. A few commenters asked that we specifically identify placement in ''another planned permanent living arrangement'' as the appropriate permanency option for all unaccompanied refugee minors. These commenters requested that, in establishing placement in ''another planned permanent living arrangement'' as the appropriate permanency option for unaccompanied refugee minors, this group of the foster care population be exempted from the requirement to provide a compelling reason for not setting reunification, adoption, legal guardianship or placement with a fit and willing relative as the permanency plan.

Response: We do not believe it is appropriate for ACF or States to exclude any permanency options from consideration or to identify one permanency goal as the appropriate permanency goal for an entire group of the foster care population. Permanency planning is based on the best interests, individual needs, and circumstances of the child. The requirement to document, to the court, a compelling reason for setting a permanency plan other than reunification, adoption, legal guardianship, or placement with a fit and willing relative is statutory and cannot be waived for any group of the foster care population.

Comment: We had several commenters request that we include

placement in a permanent foster family home and emancipation in the list of permanency goals at section 475(5)(C) of the Act that are exempt from the compelling reason requirement in that section. Some commenters also asked us to include long term foster care and emancipation as other planned permanent living arrangements.

Response: Section 475(5)(C) of the Act specifies that the only permanency options the State may set without a compelling reason to do so include reunification, adoption, legal guardianship, or placement with a fit and willing relative. Therefore, ''another planned permanent living arrangement'' would be any permanent living arrangement that is not enumerated in statute.

Comment: One commenter suggested that we amend the section of the definition that describes the decisions to be made at a permanency hearing. The commenter suggested that the term ''should'' be replaced with ''will'' in the definition. The commenter thinks the term ''will'' is consistent with ASFA's intent to ensure permanency while ''should'' is noncommittal.

Response: We agree and have amended the language accordingly.

Comment: One commenter was opposed to the prohibition of paper reviews, *ex parte* hearings, and agreed orders as satisfying the requirements of a permanency hearing.

Response: Section 475(5)(C) of the Act requires the State to ensure ''* * * procedural safeguards shall also be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child's placement, and to any determination affecting visitation privileges of parents * * *.'' In our view, paper reviews, *ex parte* hearings, and agreed orders fail to provide these important safeguards. No change was made to the regulation based on this comment.

Comment: One commenter was opposed to the use of the term ''compelling reason'' for setting another planned permanent living arrangement as the permanency plan. The commenter feels the term suggests a legal burden of proof that is not appropriate for establishing permanency plans.

Response: The term ''compelling reason'' is taken directly from the statutory language. Moreover, the term was adopted because far too many children are given the permanency goal of long-term foster care, which is not a permanent living situation for a child. The requirement is in place to encourage States to move children from foster care into the most appropriate permanent situation available.

Comment: We received several comments regarding the preamble language to paragraph 1356.21(g) in the NPRM which states that States should exhaust all efforts to place a child in a permanent home outside the foster care system before placing the child in a permanent foster care setting. The commenters feel this language has created a standard above the ''compelling reason'' requirement prescribed in statute.

Response: We want to clarify that the language should not be interpreted to set a standard above what is set in statute. It was intended to encourage States to seriously consider placement options outside of foster care before settling on a permanent foster care placement as the permanency plan.

Statewide Assessment (formerly State self-assessment). No comments were received on this definition, so we made no changes to the definition itself. We did, however, change the name from ''State self-assessment'' to ''statewide assessment.'' The term ''statewide assessment'' more accurately reflects the comprehensive nature of the assessment conducted during the first phase of a child and family services review.

Temporary custody proceeding.

Comment: Several commenters objected to a definition for a temporary custody proceeding. Some commenters expressed confusion while others asserted that the definition, especially in combination with the definition for a ''full hearing,'' did not accurately reflect the variety of State proceedings where placement and care responsibility is granted to the State agency.

Response: In the proposed rule we defined ''temporary custody proceeding'' as the first judicial proceeding held at or shortly after the emergency removal of a child from the home. We intended to clarify when the State court must make certain reasonable efforts and contrary to the welfare judicial determinations. However, we concur that a Federal definition for a temporary custody proceeding is not helpful in clarifying when the court must make certain title IV–E eligibility determinations, and we have deleted the definition.

Sections 1355.31–1355.37 The Child and Family Services Reviews

Section 1355.31 Elements of the Child and Family Services Review System

This section describes the scope of the child and family services reviews as including programs administered by States under titles IV–B and IV–E of the Act.

All of the relevant comments on this section are addressed in the following sections.

Section 1355.32 Timetable for the Reviews

This section specifies the review timetable for the initial and the subsequent reviews as required by section 1123A of the Act, and sets forth rules for reinstatement of reviews based on information that a State is not in substantial conformity.

Section 1355.32(a) Initial Reviews

This section sets forth the timetable for the initial child and family services reviews.

Comment: We received many comments concerning the time that it will take for States to become familiar with the new review process. Most of the commenters indicated that it will take significant time for States to prepare for the reviews and requested that ACF add to this section a requirement that we provide an advance six-month, or longer, notification to States prior to initiating the review process. Similarly, most of these commenters indicated that the six-month period proposed between publication of the final rule and initiation of the new review schedule is necessary and some comments suggested that a longer time frame to begin reviews is desirable. A small number of comments dissented on this provision.

Response: We acknowledge that advance notice and preparation are required for the child and family services reviews. The exact period of preparation may vary by State and may change as the States and ACF become more familiar with the process. Taking into consideration that Federal staff will also require a period of time to prepare adequately for each review, we do not anticipate lack of advance notice becoming an issue. Therefore, we do not intend to regulate the notification period. We have, however, extended the time for completing the initial reviews to up to 4 years following the effective date of the final rule.

Comment: We received comments requesting coordination among the components of the child and family services reviews with other Federal planning and review functions, *i.e.*, coordinating the statewide assessment with the CFSP and coordinating the reviews with the title IV–E reviews.

Response: We have designed the child and family services reviews to build on and coordinate with the process in place

for title IV–B State planning as set forth in 45 CFR part 1357. The timing of the statewide assessments will, in part, be determined by the timing of the actual reviews which will vary from State to State, and coordination with the timing of the annual progress and services reports (APSRs) may not be possible.

We considered combining the child and family services and the title IV–E reviews but believe that conducting the two reviews at the same time would pose a serious burden on States, given the intensity of the review processes and the level of State effort required for each. We will coordinate the actual timing of the two different reviews such that States will not be over-burdened.

Section 1355.32(b) Reviews Following the Initial Review

This section sets forth the timetables for subsequent child and family services reviews.

Comment: We received a range of comments on the proposed frequency of the reviews. Although a number of comments supported the proposed schedule, some commenters suggested that reviewing at five-year intervals for States determined to be in substantial conformity is insufficient to assure the safety and permanency of children. Others suggested that the interim statewide assessments should not be required at three-year intervals if the State is in substantial conformity, but should either be eliminated or occur less frequently.

Response: We proposed a five-year review cycle for States found in substantial conformity and do not think that it compromises our ability to ensure children's safety and permanency for the following reasons:

sbull; A full or partial child and family services review can be reinstated whenever information from any source indicates that the State is not in substantial conformity;

- The standard for achieving substantial conformity is high;
- States in substantial conformity are required to complete a statewide assessment at the three-year point between full reviews;
- The title IV–B five-year Child and Family Services plan, and the related annual updates, provide significant insight into the functioning of the State child welfare program and a mechanism for identifying potential conformance issues with respect to safety and permanency.

Because we believe that other types of reviews and information gathering provide insight into State performance between on-site reviews, we have not changed the requirement to review States every five years if they are determined to be in substantial conformity. Likewise, we have not eliminated or changed the requirement for the statewide assessment to be completed every three years because we believe that the use of information from that source is an important mechanism for helping States maintain successful performance.

In order to address the comments about assuring the safety and permanency of children between reviews, we have changed the requirement for States determined not to be in substantial conformity to be reviewed at two-year intervals, rather than three-year intervals.

Section 1355.32(c) Reinstatement of Reviews Based on Information That a State Is Not in Substantial Conformity

This section sets forth the requirements for a reinstatement of a full or partial review and describes the types of information that may require a review.

Comment: We received many comments suggesting that the regulation should denote that ACF and the State negotiate a specific time frame for the receipt of additional information as part of the detailed inquiry to determine if more frequent reviews should be reinstated, and that only after that time has been exceeded should we be authorized to proceed with an additional review.

Response: The time frame and circumstances of the request for information will vary depending upon the nature of the information required to determine if more frequent reviews should be reinstated. We have a responsibility to assure compliance with State plan requirements and it may be necessary to require information of a particular nature within a specific time frame. Thus, we will not provide for a negotiated time frame.

Comment: We received many comments indicating concern about the sources of information that could trigger reinstatement of reviews based on information that a State is not in substantial conformity. Specifically, objections were raised regarding inclusion of information from public and private organizations and from the disposition of class action lawsuits. The main concern was the accuracy of information from these and other sources.

Response: Section 1123A(b)(1)(C) of the Act gives the Secretary the authority to reinstate more frequent reviews based on information indicating that the State may not be in conformity with the State plan. The statute is silent with respect to the source of the information that would trigger an unplanned review. Therefore, we deleted the list of potential sources of information that could trigger an investigation and, instead, reiterated the statutory language.

We do recognize that the specific sources mentioned in the NPRM, and others not mentioned, may not always provide accurate information about the State' compliance with State plan requirements. The provision for ACF to conduct detailed inquiries prior to initiating more frequent reviews is designed to address this issue by ascertaining the validity of the information. A decision whether or not to reinstate reviews to determine substantial conformity will only be made after the validity of the information is determined.

Comment: We received questions concerning the process for reinstating reviews based on information that a State may not be in substantial conformity. Specifically, questions were raised about the content and format of the more frequent reviews.

Response: The reinstatement of reviews could take the form of a full or partial review, both of which are defined in § 1355.20. We prefer not to specify an exact format for each reinstated review in the rule, since the nature of the concerns triggering the review and the intensity of reviews needed will vary. We have, however, clarified in the regulation that any inquiry conducted by ACF does not replace a full review as scheduled according to § 1355.32(b).

Section 1355.32(d) Partial Reviews Based on Noncompliance With State Plan Requirements That are Outside the Scope of a Child and Family Services Review

This new section was added to set parameters for addressing noncompliance with title IV–B and IV–E State plan requirements that are outside the scope of a child and family services review.

Comment: A few commenters questioned our proposal to review for only certain State plan requirements in the child and family services reviews, rather than all State plan requirements.

Response: We have selected those requirements for the child and family services review that are most directly related to the achievement of successful outcomes in the areas of safety, permanence and child and family well-being. However, the State remains responsible for complying with all State plan requirements for titles IV–B and IV–E, even if each requirement is not

subject to review in the child and family services review. Therefore, we have added § 1355.32(d) to clarify that we will use a partial review to determine conformity with State plan requirements outside the scope of the child and family services reviews. Because defining the variety of State plan compliance issues in advance is not possible, we will approach each circumstance on a case-by-case basis. Consistent with section 1123A, the necessary elements of the program improvement plan and, if necessary, the amount of the withholding, will be commensurate with the extent of the State's non-conformity.

Section 1355.33 Procedures for the Review

This section sets forth the review process and outlines general procedures for the statewide assessment and the on-site review.

Comment: Overall, we received many comments from the States favoring the use of the statewide assessment process and applauding the partnership between State and Federal reviewers who comprise the proposed review teams. Many comments indicated support for the joint planning of the on-site review and the proposal that it be guided by information in the statewide assessment. Others wrote in support of the increased focus on outcomes from prior reviews and the comprehensive nature of the reviews in covering the range of child and family services.

Response: None needed.

Comment: We received comments regarding the review' reliance on existing data sources, specifically AFCARS. Some comments supported the use of existing data sources for the reviews, while some suggested that these data may not be reliable or capable of addressing safety and permanency adequately.

Response: We understand the concerns regarding the AFCARS data and acknowledge that the data in the earliest AFCARS submissions had weaknesses with respect to quality. The quality of the data has increased with every submission and we see this trend continuing as a result of three factors:

(1) *Penalties.* Since October 1994, States have been required to participate in AFCARS and, beginning in Federal fiscal year 1998, penalties were imposed on States not in compliance with AFCARS submission requirements. The number of States submitting penalty-free data has increased significantly since penalties have been imposed.

(2) *State self-analysis prior to submission.* Two types of software are available to afford States the opportunity to ensure the quality of their data prior to submitting it to ACF. The first performs more than 800 checks on various relationships among AFCARS data elements to ensure the accuracy of the data. The second is the same software ACF uses to assess data quality and is the basis for imposing penalties.

(3) *Incentives.* Two sources provide incentives for improving AFCARS data. First, the ASFA established the Adoption Incentive Program, section 473A of the Act, under which States receive a bonus for increasing the numbers of children adopted out of the public child welfare system. While the statute provides flexibility with respect to data sources used for establishing initial baselines, AFCARS data must be used in calculating bonuses for the number of adoptions over the baseline. Second, under section 479A of the Act, the Department is required to develop a set of outcome measures based, to the maximum extent possible, on AFCARS data. State performance will be rated based on these outcome measures.

AFCARS is the statutorily-mandated information collection system for the Federal child welfare programs. Thus, it is the appropriate data source for use in Federal reviews.

Section 1355.33(a) The Full Child and Family Services Reviews

This section states that the review will be a two-phase process and describes the composition of the review team.

Comment: We received a number of comments about the composition of the review team, including requests for specific representatives on the team, such as representatives of citizen review panels. Some commenters raised concerns that the training and backgrounds of review team members reflect strength in child welfare practice. One respondent suggested that representatives of the Department's Office for Civil Rights (OCR) in particular receive training in the processes and issues covered by the child and family services reviews.

Response: We recognize the necessity of having reviewers who are knowledgeable about child and family services and this is an important matter for internal ACF consideration. However, the existing regulations that implement title IV–B of the Act specify the types of representatives with whom the State should consult in its planning processes, and we anticipate that States will utilize many of these same individuals or types of representatives in staffing the child and family services review teams. We will also provide guidance to States for the selection of team members and train both Federal and State members of the review teams on the review procedures as the reviews are conducted. For those reasons, we did not regulate the specific State or Federal representatives who will participate on the review team.

Section 1355.33(b) Statewide Assessment

This section describes the first phase of the full review, the statewide assessment.

Comment: There were a wide variety of concerns about objectivity in the review process, most of which were directed toward the sample of cases to be reviewed on-site and the role of the statewide assessment.

Response: We are making revisions to the following sections of the rule to increase the objectivity of the reviews and support accurate determinations of substantial conformity:

- In § 1355.33(b)(1), we require that the statewide assessment address each systemic factor under review, including the statewide information system, case review system, quality assurance system, staff training, service array, agency responsiveness to the community, and foster and adoptive parent licensing, recruitment and retention.
- In § 1355.33(b)(2), we require that the State, using data from AFCARS, NCANDS, or, for the initial review, another source approved by ACF, assess the outcome areas of safety, permanency, and well-being of children and families served by the State agency, including a discussion of the State's performance in meeting the national standard established for the statewide data indicators.
- In § 1355.33(b)(5), we require that the completed statewide assessment include a list of all the persons external to the State agency who had input into the preparation of the statewide assessment in order to assure that the required participation and consultation in § 1355.33(a)(2)(ii) and (iv) actually occurred.
- In § 1355.33(b)(6), we require that the State submit the statewide assessment to ACF within 4 months of our transmission of the information for the statewide assessment to the State. We anticipate that we will need 60 days to review the statewide assessment and notify the State of any potential areas that might be an issue during the on-site review. It will also afford the State an opportunity to gather additional information in advance of the review to clarify any concerns raised; and,

• In § 1355.33(c)(5), we regulate the size of the on-site sample of cases to be reviewed and require that the cases be selected randomly from AFCARS and NCANDS, or, for the initial review, another approved source. This will promote consistency and help to eliminate bias in the sample.

Comment: We received a few comments that expressed concern about the use of the statewide assessment in county-administered States. Commenters noted that particular items in the statewide assessment have the potential for variance among counties.

Response: We recognize the issues raised by reviewing programs in county-administered versus State-administered systems. Following the pilot reviews, however, we concluded that we could not design a separate review process to measure State compliance for county-administered system. States, not counties, are ultimately responsible and held accountable for compliance with State plan requirements. The statewide assessment is designed to be completed by the State, not by individual counties, and responses should reflect official State policies and the most typical State practice, while noting where outstanding exceptions exist.

Section 1355.33(c) On-site Review

This section describes the second phase of the full review, the on-site review.

Comment: We received some comments about the geographic areas to be covered by the on-site review as stated in paragraph (c)(1) through (3). In particular, some concern was expressed that including the State's largest metropolitan area would lessen the representativeness of the sample and would target the area of the State with the most resources. Another comment requested that the review also include rural areas of the State.

Response: Urban areas often provide a disproportionate number of families who have contact with the child welfare system. In order to serve its stated purpose of improving outcomes for children and families, the proposed review process must include this population of children and families. For example, the reviews could not accurately claim to represent statewide issues in Illinois without reviewing Chicago, in New York without reviewing New York City, or in California without reviewing Los Angeles. It is also important to represent the range of other environments in the State including rural and suburban areas with their unique family and resource issues. However, since the reviews will only permit on-site activities in a limited number of locations, we prefer not to regulate geographic sites other than the largest metropolitan area. Beyond that, we have provided for the statewide assessment to guide the State and Regional ACF Offices in determining the most appropriate review sites given each State's unique characteristics, issues and population.

Comment: We received comments requesting that specific representatives be interviewed as part of the on-site review process as described in paragraph (c)(4). Most often, the commenters suggested a requirement that parents and adoptive parents be included, as well as the courts or administrative body that conducts administrative reviews in the States. One respondent also noted that special consideration should be given to the circumstances under which children and families should or should not be interviewed and the weight that should be given their responses.

Response: Parents and adoptive parents will be routinely interviewed on cases selected for the on-site review. While the rule does not specify the community stakeholders who will be interviewed in addition to the case-specific representatives, a number of representatives with both statewide and local perspectives on the systemic functioning of the child and family services delivery system will be interviewed. Representatives from the courts or other administrative review bodies will be included, as well as children's guardians ad litem and other individuals representing the child's best interests. We are producing, separate from the rule, a procedures manual for use in conducting the reviews that lists the community representatives to be interviewed. The procedures manual and the training provided by ACF to the reviewers will also address the circumstances under which children and families should or should not be interviewed.

Comment: Some commenters requested that we require case information obtained by reviewers to be kept confidential.

Response: All case-specific information disclosed during a child and family services review is confidential. Both titles IV–B and IV–E have restrictive disclosure provisions (found at section 471(a)(8) of the Act and 45 CFR 205.50). One of the purposes for which a State is authorized to disclose such information, however, is for an audit or similar activity conducted by the Department in connection with the State plan. Further, Federal regulations at 45 CFR 205.50 require that recipients of information concerning children and families receiving assistance and/or services from the title IV–B/IV–E agency be held to the same standards of confidentiality as the agency. The confidentiality standards for case-specific information are addressed in the procedures manual for use in conducting the child and family services review. In addition, the confidentiality of case records routinely will be reinforced during reviewer training prior to each review.

States have complete flexibility in establishing procedures to ensure that confidentiality requirements are met. During the pilot reviews, some States chose to require the reviewers who were not State or Federal employees to sign confidentiality agreements prior to reviewing confidential information.

Comment: We received a number of comments requesting that we not use the term ''social worker'' unless it is a specific reference to professionally trained social workers, *i.e.*, persons with B.S.W. or M.S.W. degrees.

Response: Recognizing that not all caseworkers in public agencies have academic degrees in social work, we are changing the term ''social worker'' in the rule to ''caseworker.''

Section 1355.33(d) Resolution of Discrepancies Between the Statewide Assessment and the On-site Review

This new section was added to describe the steps we will take in resolving discrepancies between the aggregate data and the findings of the on-site review.

ACF will provide States with the option of submitting additional information to resolve the discrepancy, or for ACF and the State to review additional cases, using only those indicators in which the discrepancy occurred. ACF and the State will determine an additional number of cases to be reviewed, not to exceed a total of 150 cases. As described in section 1355.33(c)(6), the additional cases, in combination with the 30–50 cases reviewed on-site, will comprise a statistically significant sample with a 90 percent (or 95 percent for subsequent reviews) compliance rate, a tolerable error rate of 5 percent, and a confidence coefficient of 95 percent. We will pull the additional cases from an oversample of cases for the on-site review, so that both sets of cases will comprise one sample. Only those indicators in which the discrepancy occurred will be subject to review.

Section 1355.33(e) Partial Review (1355.33(d) in the NPRM)

This section describes the partial review process.

We redesignated § 1355.33(d) as § 1355.33(e) and made a technical edit to clarify that the partial review requirements in this section relate to the partial child and family services reviews. We have also clarified that a partial review does not substitute for the regularly scheduled full reviews.

Section 1355.33(f) Notification (1355.33(e) in the NPRM)

This section describes the manner in which ACF will notify States of whether the State is operating in substantial conformity.

Comment: Some comments requested that the regulation require more detail to be included in the ACF notification letter to States, informing them if they are operating, or not operating, in substantial conformity.

Response: In the interest of providing the States with timely feedback on the child and family services reviews, we have designed a review process that is less dependent upon lengthy reports than in the past. The review team will provide the State with verbal information on the findings of the review throughout the on-site review and subsequent exit conference. The written description of the findings will begin with the evaluation of the statewide assessment and will be updated as a result of the on-site review. The notification to the State following the on-site review is a confirmation of those findings and will provide specific information to allow a State to know where it is operating in or out of conformity.

Section 1355.34 Criteria for Determining Substantial Conformity

This section pertains to the criteria that must be satisfied to find a State in substantial conformity, including a discussion of outcomes, level of achievement of outcomes, and criteria related to a State agency's capacity to deliver services leading to improved outcomes for children and families.

Section 1355.34(a) Criteria To Be Satisfied

This section describes the elements on which a State's substantial conformance with title IV–B and title IV–E State plan requirements will be based.

Comment: Some respondents requested that decisions regarding substantial conformity not be reliant on the resolution of discrepancies between aggregate data from the statewide assessment and the findings of the on-site review.

Response: It was always our intention to resolve discrepancies between aggregate data from the statewide assessment and the findings of the on-site review. Now that substantial conformity is based on statewide data indicators, as well as the findings of the on-site review, we believe that if significant discrepancies occur among the sources of information used to determine substantial conformity, they must be reconciled so an accurate determination can be made. To clarify our procedures to resolve these discrepancies, we are adding a new § 1355.33(d) that gives States the option of either submitting additional information to resolve discrepancies between the statewide data indicators, or the State and ACF reviewing additional cases for the indicators where the discrepancy exists.

Section 1355.34(b) Criteria Related to Outcomes

This section sets forth the criteria related to outcomes that will be evaluated to determine a State's substantial conformance.

Comment: We received many comments supporting the proposed approach of limiting the reviews to those State plan requirements that relate specifically to outcomes and the delivery of improved services. Some comments questioned the authority of HHS to select only certain State plan requirements for review in the child and family services reviews.

Response: The child and family service reviews focus on the most prominent aspects of the programs under review, specifically child safety, permanency for children in foster care, and well-being of all the children served by the programs. This focus in no way alters the requirements imposed on States to operate their programs in conformity with all applicable State plan requirements.

Therefore, in response to this comment, a new paragraph (d) under § 1355.32, ''Partial reviews based on noncompliance with State plan requirements that are outside the scope of a child and family services review'' has been added to clarify parameters for addressing issues regarding compliance with title IV–B and title IV–E State plan requirements that are outside the scope of these reviews. If needed, we will conduct partial reviews to resolve such issues regarding compliance. Partial reviews of this nature will not necessarily follow the prescribed format of the child and family services review. Rather, such partial reviews will address whatever the Secretary deems necessary in order to make a determination concerning State plan compliance.

If a State is determined to be out of compliance with a State plan requirement under either title IV–E or title IV–B, there will be an opportunity for program improvement, consistent with section 1123A of the Act, before funds are withheld.

Comment: A significant number of comments noted that Safety Outcome #1 is actually two separate outcomes.

Response: We agree and have revised § 1355.34(b)(1)(i)(A) and (B). We separated Safety Outcome #1 into its two component parts and will use them as the two safety outcomes, replacing the current Safety Outcome #2 (The risk of harm to children will be minimized.). The two safety outcomes now read as follows:

Outcome S1: Children are, first and foremost, protected from abuse and neglect.

Outcome S2: Children are safely maintained in their homes whenever possible and appropriate.

In this manner, we will address safety as a State's primary concern while measuring compliance with the statutory requirement to maintain children safely in their own homes when possible.

Comment: One commenter questioned whether safely maintaining children in their own homes is, in fact, a safety outcome. The commenter suggested that it would be more appropriately assessed as a permanency outcome.

Response: Although this outcome addresses decisions about whether to remove children and place them in foster care or maintain them in their own homes, it is, in fact, a safety outcome. ASFA is clear that the child's health and safety must be the primary concern in decisions to remove or to reunify. In reviewing the circumstances of those children who remain in their own homes, we intend to review for their safety and well-being, and not for the foster care provisions under the permanency outcomes that are not applicable to them. We will evaluate the permanency outcomes only for those children who have been removed from their homes and placed in foster care, since foster care is intended to be a temporary setting.

Comment: We received numerous comments questioning the applicability of certain performance indicators to their related outcomes. One example cited was Well-Being Outcome #1, Families have enhanced capacity to provide for their children's needs. Commenters raised concerns that the performance indicators associated with it are measures of process and do not equate with enhanced capacity for parents.

Response: For each outcome to be reviewed, we selected indicators that, if met, are both within the scope of the State agency's range of responsibilities and are likely to promote outcome achievement. Each of the on-site indicators includes a subset of questions and issues that permits reviewers to explore the indicator below the surface level. We believe that this type of exploration during the on-site review is necessary to evaluate the quality of work and the successful achievement of outcomes for children and families. It is unlikely that individual performance indicators, in isolation, can be used to evaluate the outcomes accurately. In combination, however, the set of performance indicators associated with each outcome will provide a balanced perspective on the outcome.

Comment: A number of comments were received indicating concern that Well-Being Outcome #2, Children receive appropriate services to meet their educational needs, is not an outcome that can necessarily be achieved by the child welfare system. Other comments were received questioning if this outcome, as it is stated, meets the definition of an outcome.

Response: The outcome delineated in § 1355.34(b)(1)(iii)(B), addresses the responsibilities of public child welfare agencies in regard to the educational needs of children in their care and custody. Certain aspects of the educational status of children are not within the control of the public child welfare agency. We are reluctant to describe the outcome in more definitive terms and hold the State accountable for educational outcomes that must be addressed primarily through the State's educational agencies. Rather, we have proposed to review those responsibilities that the State child welfare agency legitimately has in this area: Considering and addressing educational needs for children in case planning; obtaining and considering educational records for children in its care; and, where appropriate, advocating for children's educational needs with the education authorities in the State.

Comment: A few commenters raised concerns that length of stay in foster care and number of adoptions from the public child welfare system were not included as outcomes for the child and family services reviews.

Response: We agree that it is critical to track the length of a child's stay in foster care and the number of adoptions from the public child welfare system. We have included length of stay as a statewide data indicator and we are addressing numbers of adoptions by looking at the length of time between a child's entry into foster care and a finalized adoption. In this manner, we capture not only the number of adoptions but also assess State performance in expediting this permanency goal.

Comment: Commenters noted that some of the outcomes and indicators may not be appropriate for all types of cases in the system, particularly the well-being outcomes as they relate to families who are receiving child protective services.

Response: We recognize that not all of the outcomes and indicators will be applicable to every type of case reviewed. In most areas, we have allowed for nonapplicability to be noted on the review instrument. However, we also believe that the well-being outcomes very often do apply to children and families who are served in their own homes, in addition to children placed in out-of-home care. For example, the well-being outcomes address issues such as: A family's ability to meet a child's needs; educational achievements of children; and children's physical and mental health needs. We believe that these are concerns that should be addressed by child welfare systems regardless of whether the child is in out-of-home-care or not.

Comment: We received many comments urging consistency between the outcomes used in the child and family services reviews, and those outcomes that will be included in the annual report to Congress on State performance.

Response: We agree with the commenters that it is critical that we coordinate the annual report on State performance in child welfare, required by Section 203 of the ASFA, with the child and family services reviews and have taken the necessary steps to do so. Specific statewide data indicators, drawn from the outcome measures included in the annual report, in addition to the findings of the on-site review, will be used as the basis for determinations of substantial conformity on one outcome measure of safety and one of permanency. As we gain experience in using statewide data indicators for making determinations of substantial conformity, such data indicators may change. However, we have committed in regulation, to the extent practical and feasible, to keeping the data indicators used in the child and family services review consistent with the measures developed pursuant to section 203 of the ASFA.

Section 1355.34(c) Criteria Related to State Agency Capacity to Deliver Services Leading to Improved Outcomes for Children and Families

This section describes criteria for seven core systemic factors that will be evaluated to determine the State agency's capacity to deliver services that improve outcomes for children and families.

Comment: A number of comments suggested a need for greater detail in the regulation on how determinations of substantial conformity will be made for the systemic factors being reviewed.

Response: A detailed description of the changes to the process for making determinations of substantial conformity can be found under the ''Discussion of Major Changes and Provisions of the Final Rule'' section. We amended § 1355.34(c) so that determining substantial conformity with the systemic factors includes a process by which the review team rates the State's conformity with State plan requirements, based on information obtained from the statewide assessment and the on-site review. Information from BOTH the statewide assessment and the on-site portion of the review must support a determination of substantial conformity. State performance will now be rated for each systemic factor, using a Likert-type scale, *e.g.*, 1–4 with criteria attached to each rating, based on the total information obtained from a variety of stakeholders interviewed on-site.

Comment: We received several comments suggesting that States found to be in substantial conformity on the outcomes should not be reviewed for conformity with the systemic factors, stating that these are process measures. Other comments requested deleting some of the systemic requirements.

Response: The purpose of the child and family services reviews is to determine compliance with State plan requirements as well as the outcomes for children. Some requirements are related directly to outcomes in the areas of safety, permanency, and well-being, while others are related to systemic factors that States are accountable for implementing in return for receipt of Federal funds. We do not believe that a process limited to procedural requirements can assure improved outcomes for children and families. We do believe, however, that the presence of specific systemic factors is essential to assuring that States have the capacity to deliver services in a manner that is most likely to help children and families achieve desirable outcomes. We cannot forego the responsibility to

review systemic factors, and abandoning that responsibility would weaken the potential of the child and family service review process to help States identify areas where needed improvements can lead to better outcomes.

Comment: We received a number of comments requesting that the child and family services reviews include the full range of training activities permitted under title IV–E, including pre-employment training of State staff and long-term training that permits staff to obtain social work degrees.

Response: We have proposed to review staff and provider training according to State plan requirements in those areas, as stated in the NPRM. Although pre-employment and long-term staff training are allowable title IV–E training costs, there are no State plan requirements for these activities that would be subject to the child and family services review.

Comment: Several commenters expressed concern that the child and family services review does not include the ASFA requirements.

Response: The child and family services review does examine a State's compliance with several requirements of the ASFA. However, the rule does not specifically cite the ASFA in identifying those State plan requirements under review. The ASFA is not cited because it primarily amends the Social Security Act, which is the authorizing legislation for the Federal child welfare programs.

Comment: We received a comment that the NPRM fails to recognize two distinct case review systems in Public Law 96–272 and ASFA and does not acknowledge the value of the periodic case review system in place since 1980. The comment noted that periodic review should be recognized as necessary to insure safety and permanency.

Response: This comment seems to confuse the State's periodic administrative or judicial review of individual cases with the Federal review of State plan requirements. The purpose of the child and family service review, in part, is to test whether a State has appropriately implemented the case review system required by Public Law 96–272 and strengthened by ASFA. We concur with the commenter that periodic reviews and other requirements of the case review system are critical protections for children and help to promote timely permanency.

Comment: We received some comments questioning the applicability of the review of State plan requirements to the tribes and the Indian Child Welfare Act (ICWA), and whether a State's compliance with ICWA will be part of the review. Some commenters raised questions about how particular State plan requirements will be considered for tribes that receive their title IV–B allocations directly.

Response: In both the statewide assessment and the on-site review instruments, we have included items that address how States are meeting ICWA requirements. Further, in the pilot reviews, we found that the review process helped us successfully assess whether or not the interaction between the State and tribes satisfied title IV–B and title IV–E requirements for tribal children. However, the child and family services reviews are not intended to review for ICWA compliance, per se, but to review for the effectiveness of the broad child and family service system relative to State plan requirements. Further, the reviews are based on the entire child and family service system as indicated by the use of AFCARS and NCANDS data as an integral part of the process, and assessing penalties for nonconformity on a pool of funds that includes both titles IV–B and IV–E. For these reasons, we did not tailor the CFSR specifically to examine ICWA requirements.

Similarly, because the child and family service reviews are designed to review the entire system of child and family services, which includes both titles IV–B and IV–E, this review process is not designed for tribes that receive title IV–B funding only. Furthermore, section 1123A of the Act directed the Department to develop a review system for State compliance with the State plans under titles IV–B and IV–E of the Act. Therefore, tribes that receive title IV–B allocations will not be reviewed under the child and family services review process.

Section 1355.34(d) Availability of Review Instruments

This section states that copies of the review instruments will be made available to the State.

Comment: We received several comments in response to our request for suggestions on the most effective method for keeping States updated on the content of the review instruments. One of the recommendations was to provide States with a copy of the instrument that will be used for the review at least six months before the review is conducted.

Response: We appreciate the State' need to have as much advance exposure as possible to the most current review instruments. We anticipate revising the instruments as appropriate, based on lessons learned from ongoing reviews and from State' feedback to us. Given that we expect the statewide assessment process to take approximately six months, we easily anticipate having review instruments available to the State well before the on-site portion of the review is conducted. In addition, we plan to post the instruments on the ACF website (http://www.acf.dhhs.gov/programs/cb/) in order to make the most current version of the instruments available at all times.

Section 1355.35 Program Improvement Plans

This section pertains to the development of program improvement plans for States determined not to be in substantial conformity with State plan requirements, including the time frames for submission and implementation of the plans.

Section 1355.35(a) Mandatory Program Improvement Plan

This section describes elements of a program improvement plan for those States found not to be operating in substantial conformity.

Comment: We received comments concerning Federal technical assistance to States upon a finding of nonconformity, ranging from a need to develop the capacity for technical assistance prior to initiating reviews to suggesting that the need for technical assistance is not a valid reason for delaying penalties or the frequency of reviews.

Response: Section 1123A of the Act requires that States be afforded opportunities to correct areas of nonconformity with the use of technical assistance prior to having penalties withheld. While we have not regulated this aspect of the review process, we are committed to developing effective sources and means for providing technical assistance to States.

Comment: We received many comments concerning possible conflicts between program improvement plans and requirements for State consent decrees. Concerns were raised that program improvement plans not be required to include any action steps or goals that are inconsistent with a State's consent decree. Some respondents also requested that the provisions of a State's consent decree not automatically be required to be included in a program improvement plan.

Response: ACF is responsible for reviewing compliance with State plan requirements, and we must assure that the program improvement plan addresses applicable requirements. We did not include any provisions in the NPRM that would require States to include the provisions of consent

decrees into program improvement plans. We cannot assure that the provisions of a State's consent decree do not conflict with Federal requirements. It is the State' responsibility to ensure that no such conflict exists. We are willing to work with States to minimize such conflict within our statutory and regulatory mandates.

Comment: We received a small number of comments suggesting that States determined not to be in substantial conformity should be penalized for ASFA violations immediately, rather than suspending the penalties pending implementation of a program improvement plan. The same comments suggested that the term ''program improvement plan'' deviates from the ''corrective action'' language of the statute and undermines the enforcement role of HHS.

Response: Section 1123A(b) of the Act requires that States be afforded the opportunity to correct areas of noncompliance prior to withholding Federal funds. ASFA primarily amends sections of the Social Security Act to which section 1123A applies. Moreover, ASFA did not supercede section 1123A, nor did it amend section 1123A to require immediate penalties for failure to comply with the ASFA requirements.

The use of the term ''program improvement plan'' in no way deviates from statutory requirements since the result is still that the State must correct any identified areas of nonconformity with State plan requirements. The term ''program improvement plan'' underscores the intent of the reviews to serve as a means of assisting States to help families and children experience improved outcomes as a result of the services provided by the State and funded by the State and Federal governments. Failure to successfully complete a program improvement plan will result in penalties.

Section 1355.35(b) Voluntary Program Improvement Plan

This section sets forth the condition, under which States found to be operating in substantial conformity may voluntarily develop and implement a program improvement plan.

There were no comments on this section and no changes have been made to this section.

Section 1355.35(c) Approval of Program Improvement Plans

This section sets forth the approval process for the program improvement plan.

Comment: With a few exceptions, most of the comments we received on the time frames for submitting and re-submitting program improvement plans following reviews encouraged us to lengthen the time frames.

Response: We recognize that the development and revision of program improvement plans requires considerable effort. Given the complexity of the issues that will be addressed in many program improvement plans, we are extending the length of time for the initial submission of the program improvement plan by the State to ACF from 60 days to 90 days. We are retaining the 30-day time frame for re-submitting plans that are not initially approved by ACF. Given the potential consequences for children and families of delaying efforts to correct areas of need, we do not believe we can further lengthen the time frames to develop the plans.

Section 1355.35(d) Duration of Program Improvement Plans

This section sets forth the time frame for successful completion of provisions in a State's program improvement plan.

Comment: We received a number of comments in favor of the two-year maximum time frame for implementing program improvement plans, with the opportunity for a one-year extension in certain circumstances. Some comments, however, indicated the time period was too long and should be shortened.

Response: We have retained this feature in the final rule. However, not all program improvement plans will require two years to implement and the specific time frame for each State's plan will be negotiated and agreed upon between the State and ACF. We are aware though, from the complex issues being litigated or settled by a number of States on behalf of their child welfare systems, that some improvements will require extensive periods of time to implement. Systemic changes that lead to identifiable improvements in the outcomes for children and families cannot always be achieved by simply modifying a policy, creating new tracking procedures or implementing new standards. However, in consideration of the comments on this issue and those pertaining to § 1355.36 that we strengthen the certainty of a penalty when a State fails to make program improvements, we are making the following changes in the rule for the time allotted to implement program improvement plans:

- ACF will require time frames for a program improvement plan to be consistent with the seriousness and complexity of the remedies required for any areas determined not in substantial conformity.
- We are requiring in paragraph (d)(2) that particularly egregious areas of nonconformity impacting the safety of children in the State's responsibility receive priority in both the content and time frames of the program improvement plans and must be satisfactorily addressed in less than two years.
- We are adding a requirement to paragraph (d)(3) that the Secretary approve any extensions of deadlines in the program improvement plans and any requests to extend the program improvement plan by a third year. The circumstances under which requests for extensions would be approved are expected to be very rare and will require compelling documentation. Requests for extensions must be received by ACF at least 60 days prior to the affected completion date.
- Finally, in paragraph (d)(4) we are requiring that monitoring of the implementation of the State' program improvement plans include quarterly status reports by the States to ACF, unless the State and ACF agree to less frequent reports. These reports will inform ACF of the State's progress in implementing the plan.

Section 1355.35(e) Evaluating Program Improvement Plans.

This section describes the joint process the State agency and ACF will use to evaluate the program improvement plan. This section also describes the frequency of evaluating progress and the terms for renegotiating a program improvement plan.

No comments were received on this section. Changes were made to this section only to the extent necessary to keep it consistent with the changes made to the other sections of § 1355.35.

Section 1355.35(f) Integration of Program Improvement Plans With CFSP Planning.

This section requires that elements of the program improvement plan be incorporated into the goals and objectives of the State's CFSP and annual reviews and progress reports related to the CFSP.

No comments were received on this section and no changes have been made to the final rule.

Section 1355.36 Withholding Federal Funds Due to Failure To Achieve Substantial Conformity or Failure to Successfully Complete a Program Improvement Plan

This section sets forth the penalties associated with a State's failure to operate a program in substantial conformity; implements the statutory

requirement to specify the methods for withholding Federal funds for substantial nonconformity; and describes the amount of Federal funds that are subject to a penalty. The suspension of withholding during the course of a State's program improvement plan, and termination of the penalty upon successful completion of the plan are also discussed.

Section 1355.36(a) For the Purposes of This Section

This section defines ''title IV–B funds'' and ''title IV–E funds'' for the purpose of this section.

Comment: We received comments that the regulation, rather than the preamble, should state that the title IV–E administrative costs to which withholding applies does not include funds allocated for training.

Response: In the proposed rule, we specified that the administrative costs of the foster care maintenance payments program are included in the pool of funds from which penalties will be assessed. In the final rule, rather than listing those title IV–E components that are excluded from the penalty pool, we have amended the regulatory language to more specifically identify the administrative costs of the foster care maintenance payments program as the source of title IV–E funds for the penalty pool.

Section 1355.36(b) Determination of the Amount of Federal Funds To Be Withheld

This section describes the manner in which ACF will determine the amount of the State title IV–B and IV–E funds to be withheld if the State is not operating in substantial conformity.

Comment: We received many comments in favor of the proposal that funds not be withheld from a State if the determination of nonconformity was caused by the State's correct use of formal written statements of Federal law or policy provided by HHS, but a few comments objected to this provision.

Response: This is a statutory requirement under section 1123A of the Act. Therefore, we have not made changes to the final rule.

Comment: We received comments regarding the proposed requirement that, upon finding that a State is not in substantial conformity, funds be withheld for the year under review and for each succeeding year until the State's failure to comply is ended either through the successful completion of a program improvement plan or until a subsequent full review determines the State is operating in substantial conformity. The commenter requested assurance that withholding is not unnecessarily extended because of HHS'' lack of capacity to assess the completion of the plan or to conduct another review.

Response: The rule specifies the time frames for conducting reviews and for the duration of program improvement plans. Adherence to those time frames should limit delays in determining the status of the State' substantial conformity. We do not believe any change to the regulation is necessary.

Comment: We received many comments pertaining to the amount of the penalties. The comments ranged from the suggestion that the proposed penalties are too low to the idea that they are too high. Some respondents expressed concern about the cumulative effects of penalties for a variety of Federal reviews of child welfare programs and systems, and urged us to consider a consolidated penalty proposal based on a performance-based incentive system for child welfare or a reinvestment policy for nonconformity. Comments on the pool of funds from which penalties will be taken ranged from requests to specifically limit the pool to increasing it to include additional funds.

Response: We have given serious consideration to the comments on the amount of the penalties and the pool from which they are to be taken and believe that a change is warranted. We wish to promote practice improvements through the review process, and do not wish to use the penalty process to prevent States from making the needed improvements. However, we must make clear that the failure to correct areas of nonconformity identified in the reviews will result in substantial financial penalties. Therefore, we have added sections 1355.36(b)(7) and (b)(8) to provide a graduated penalty for continuous nonconformity.

To strengthen our commitment to program improvement through the review process, we have added these sections to the final rule that will increase the penalty for outcomes and systemic factors that remain in continuous nonconformity on successive reviews. States that continue to remain out of substantial conformity on successive reviews can now be penalized up to two percent per outcome or systemic factor at the second full review in which the nonconformity continues, and up to three percent per outcome or systemic factor at the third and subsequent full reviews in which the nonconformity continues. We believe the possibility of increased withholding of funds will encourage States to engage in active program improvement planning and make efforts to resolve areas of nonconformity as early as possible.

We believe that this revised penalty structure is in accordance with the Social Security Act Amendments of 1994 (Pub. L. 103–342), since we are making the amount of the penalty commensurate with the level of nonconformity and providing States an opportunity to engage in corrective action prior to withholding funds. We tried to establish penalties in amounts that create significant motivators for States to improve programs while not denying services to needy children that are critical to their safety, permanency, and well-being. We believe the approach contained in these final rules balances the issues in a manner that promotes the overall goal of program improvement in States.

The State's entire title IV–B allocation is included in the pool from which penalties will be taken because we are reviewing for all the programs funded by title IV–B in the State. A portion of the title IV–E administrative funds is included in the pool from which penalties will be taken, since a smaller percentage of title IV–E requirements are reviewed in the child and family services reviews.

In addressing the comments that advocated for funding reinvestment, the statute specifically mandates withholding Federal funds as penalties for nonconformity, rather than reinvesting. Also, the statutes for various programs carry penalty provisions that HHS cannot waive in favor of a consolidated, performance-based incentive system in child welfare.

We recognize the commenter' concerns that States found to be the most egregious in their non-conformity, based on the child and family services reviews, may also be determined out of conformity in other reviews, *e.g.*, title IV–E eligibility reviews and other reviews that cover related issues and requirements. Such States could be exposed to multiple penalties in a fiscal year. We strongly encourage States in those situations to take full advantage of the opportunities for technical assistance and program improvement planning in order to increase the effectiveness of their programs and improve the outcomes of children and families served by the programs.

Section 1355.36(c) Suspension of Withholding

This section describes the circumstances under which ACF will suspend the withholding of funds for those States found not to be operating in substantial conformance.

We did not receive comments on this particular section and have made no changes to the regulation.

Section 1355.36(d) Terminating the Withholding of Funds

This section describes the circumstances under which ACF will terminate the withholding of State funds related to nonconformity.

We did not receive comments on this particular section and have made no changes to the regulation.

Section 1355.36(e) Withholding of Funds

This section describes the circumstances under which ACF will withhold funds for those States determined not to be in substantial conformity.

Comment: A number of commenters suggested that we emphasize that penalties will be enforced.

Response: As we consider the amount of the penalty and the provisions for withholding funds due to nonconformity, we think that this is an area where stronger provisions are needed. We want to convey in the rule our sense of urgency about the need to implement needed improvements in child and family services and to make the application of penalties consistent with that sense of urgency. As a result, we have amended the regulatory language at § 1355.36(e)(2) so that proposed penalties associated with a particular outcome or systemic area will be imposed when the State fails to come into substantial conformity or fails to make the necessary progress with respect to the statewide data indicators by the date specified in the PIP, rather than waiting for the completion of the entire PIP. Some problems may only require six months to fix, for example, while others may require the full two years. In this manner, if the State is required to complete an action step in six months, fails to do so, and the Secretary does not approve an extension, an immediate penalty will be assessed for that area of nonconformity. We also added a provision at § 1355.36(e)(4) that applies the maximum withholding of funds of 42 percent of the pool to States that elect not to engage in program improvement planning or to otherwise correct areas determined not to be in substantial conformity.

Comment: There were several alternatives suggested regarding the basis for computing interest on penalties and the time frame during which interest will accrue.

Response: The Department has established regulations with respect to interest on withheld funds to which we are bound.

Section 1355.37 Opportunity for Public Inspection of Review Reports and Materials

This section provides that States must make certain sources of information related to the child and family services reviews available for public inspection.

Comment: We received several comments requesting that States be given flexibility in the methods of making the review reports and materials available for public inspection. Some commenters suggested we take a more prescriptive approach with respect to this issue.

Response: Given the variance across State systems, we think it is important to permit States flexibility in satisfying this requirement. While the suggestions we received regarding ways States should publicize information related to the child and family services review were excellent, they would be more appropriately deployed through technical assistance efforts with States rather than requiring them through regulation.

Comment: We received comments requesting that ACF provide official public notice of reviews in advance of the reviews.

Response: We are considering options for implementing this suggestion. However, we do not believe it is an appropriate issue for regulation.

Section 1355.38 Enforcement of Section 471(a)(18) of the Act Regarding the Removal of Barriers to Interethnic Adoption

This section implements the enforcement of section 471(a)(18) of the Act which specifically prohibits the denial of the opportunity to any person to become an adoptive or a foster parent, or the delay or denial of the placement of a child in an adoptive or foster family home on the basis of the race, color, or national origin of the child or of the adoptive or foster parent. In addition to the specific comments on § 1355.38, we received a number of general comments and requests related to the statutory language itself at section 471(a)(18) of the Act.

Many commenters requested that the final rule include a section on what constitutes a delay or denial of a child's adoptive or foster care placement and when race, color, or national origin can be used in child placement decisions. Several commenters also requested that the final rule include a discussion of good social work practice and define ''best interest of the child'' as it relates to section 471(a)(18) of the Act. A large number of commenters also requested that the final rule include language that stated that compliance with section 471(a)(19) (which allows the State to give preference to a relative over a non-related caregiver) and section 422(b)(9) (which requires the State to make diligent efforts to recruit potential foster and adoptive families that reflect the ethnic and racial diversity of children needing an adoptive or foster home) would not be considered a violation of section 471(a)(18) of the Act.

Also, many commenters believed the tone of the section to be adversarial and requested that the section be revised to mirror the partnership approach used in the child and family services review. A few commenters believed the enforcement of section 471(a)(18) of the Act is too heavily focused on the rights of adults rather than the needs of the child. Additionally, a few commenters were concerned that vigorous enforcement of section 471(a)(18) of the Act may have a negative effect on the quality of services available to children.

In contrast to these comments, one commenter voiced concern that § 1355.38 did not adequately enforce section 471(a)(18) of the Act. The commenter believed that additional enforcement mechanisms and administrative authority should be included in the final rule.

The regulatory language in § 1355.38 closely follows the statutory language and represents our commitment to diligently enforce these provisions of law. We have made only limited revisions to this portion of the regulation in response to comments, as we believe that enforcement of section 471(a)(18) of the Act is clearly defined by the statute. We would like to note that the statutory language guiding this section is very different from that underpinning the child and family services reviews, and it is this distinction that accounts for the difference in the approaches taken.

The request for guidance on what constitutes a delay or denial of a child's adoptive or foster care placement and when race, color, or national origin can be used in child placement decisions; a discussion section on good social work practice; and the inclusion of a definition of ''best interest of the child'' as it relates to section 471(a)(18) of the Act all represent practice level issues. Practice level issues are more appropriately addressed through technical assistance rather than regulation. Also, the determination of delay or denial in foster care or adoption is based on the facts of the specific case. Thus, we did not include

any additional guidance in the final rule.

We also did not include qualifying statements regarding relative preference and/or diligent recruitment in the final rule. The activities regulated in this final rule are procedural directives for implementation of financial sanctions. Thus, we do not intend to cite all the activities which may or may not violate section 471(a)(18) of the Act. Given the number of comments received, we are providing the following discussion on relative preference and diligent recruitment as they relate to section 471(a)(18) of the Act:

- Section 471(a)(19) of the Act allows the State to give preference to an adult relative over a nonrelated caregiver, when placing a child for adoption or in foster care provided that the relative caregiver meets all relevant child protection standards. Relative preference recognizes the importance of maintaining biological relationships. Prioritizing biological ties is not a form of race preference; rather it is an acknowledgment of the significance of these ties. Relatives come under the same scrutiny as nonrelatives and must meet the same Federal title IV–E requirements to become foster and/or adoptive parents. In all circumstances, the best interests of the child must determine a placement decision. A State's appropriate use of the relative placement preference does not constitute a violation of section 471(a)(18) of the Act.
- Section 422(b)(9) of the Act requires the State to make diligent efforts to recruit potential foster and adoptive families that reflect the ethnic and racial diversity of children in the State needing an adoptive or foster home. Diligent recruitment activities are necessary to ensure that all qualified members of a community, who may be excluded from or reluctant to request services, have the opportunity to become a foster or adoptive parent. Diligent recruitment can provide a broad pool of placement resources for those children waiting for foster or adoptive homes. A State's general diligent recruitment activities do not constitute a violation of section 471(a)(18) of the Act. General diligent recruitment activities should not discriminate on the basis of race, color or national origin by excluding families who are not targeted for services and denying them the opportunity to be a part of the pool of available families for children of different backgrounds.
- The purpose of the Multiethnic Placement Act of 1994 (MEPA) was threefold: (1) To decrease the length of time a child waits to be adopted; (2) to prevent discrimination in foster care and adoption; and (3) to promote the recruitment of ethnic and minority families that reflect the children in the public child welfare system. We do not interpret any of these purposes to be mutually exclusive. In the Removal of Barriers to Interethnic Adoption (IEP) provisions, which amended MEPA, Congress further clarified that race, color, or national origin should not be routinely considered in foster care and adoption placements. The IEP also contained enforcement provisions. The IEP did not change the recruitment provision contained at section 422(b)(9) of the Act.

We recommend that the State or entity review Federal policy guidance already issued on the MEPA, as amended by IEP (found at *http://www.acf.dhhs.gov/programs/cb/).* Additionally, both the Office of Civil Rights (OCR) and ACF Regional Offices stand ready to provide guidance to any State with a specific policy question.

Rather than attempting to identify the multiple situations which may lead to a violation of section 471(a)(18) of the Act, we have found that providing technical assistance to specific State questions is most useful. Technical assistance is available through the ACF and OCR regional offices, as well as through the federally funded national resource centers. Periodically the Department will review the issues raised to determine the need for additional guidance.

Specific questions and comments are addressed in the following paragraphs.

Section 1355.38(a) Determination That a Violation Has Occurred in the Absence of a Court Finding

This section sets forth the requirements for determining a violation of section 471(a)(18) of the Act during the course of a child and family services review, the filing of a complaint, or some other mechanism.

Comment: One commenter requested clarification of the term ''entity in the State'' as used in section 471(a)(18) of the Act, specifically if it includes private agencies. Another commenter inquired about the application of section 471(a)(18) of the Act to court findings and if ACF has the authority to sanction the court as an ''entity.''

Response: We have added a definition for ''entity'' in § 1355.20 in response to this comment. According to the statute any entity in a State that receives title IV–E funds must comply with section 471(a)(18) of the Act. We define the term ''entity'' to include private agencies. A State court is not an ''entity,'' for purposes of this provision, to the extent that it issues decisions or opinions, or performs other judicial functions. If, on the other hand, an administrative arm of a State court carries out title IV–E administrative functions pursuant to a contract with the State agency, then it is an ''entity'' for these narrow purposes. If the private agency, an administrative arm of the court, or any other entity is found not to be in compliance with section 471(a)(18) of the Act, ACF has the authority to collect all of the title IV–E funds received by the entity for the quarter the violation occurred.

Comment: Several commenters requested that the final rule contain the ''HHS criteria'' that ACF will use to determine if a violation of section 471(a)(18) of the Act has occurred.

Response: HHS has not developed any specific ''criteria'' for determining if a violation of section 471(a)(18) of the Act has occurred. HHS will determine on a case-by-case basis whether the State has delayed or denied a child's adoptive or foster care placement or denied a person the opportunity to become an adoptive or foster parent based on race, color, or national origin. It is impossible to define every situation and circumstance that would result in a civil rights violation. Thus, the regional office will review the specific facts of each case to determine if a State or entity is in violation of section 471(a)(18) or if a policy or practice is consistent with previously issued guidance. No change has been made to the final rule as a result of this comment.

Comment: One commenter requested that the final rule provide guidance on how a complaint from a prospective foster or adoptive parent who is not selected for a specific placement and is of a different race, color, or national origin of the child to be placed, will be handled (*i.e.*, the roles of all parties involved, if the State will have an opportunity to respond to the allegation, etc.).

Response: We have not defined specific procedures for the determination of a violation, or the procedures for handling allegations of a violation in regulation, as we expect that these determinations will be made on a case-by-case basis and rely on the specific facts of each situation.

Comment: Many commenters requested that the final rule detail the contents of the notification letter that ACF will provide to the State found to be in violation of section of 471(a)(18) of the Act and suggested that the letter include specific information on the roles and responsibilities of HHS and the State.

Response: We intend to draw on this suggestion, and others like it, in

preparing the internal agency procedures that will be used to investigate and respond to a violation of section 471(a)(18) of the Act. However, we believe this level of specificity is inappropriate for regulation. No change has been made to the final rule.

Comment: Several commenters objected to the phrase ''* * * if applied, would likely result in a violation against a person * * *'' in paragraph (a)(2)(iii). The commenters stated that this ambiguous phrase may result in a violation being based on a hypothetical situation.

Response: We concur with the commenters that the phrase ''* * * would likely result * * *'' may appear ambiguous. We have reworded paragraph (a)(2)(iii) to clarify that a violation will be based on policies, procedures, practices, regulations, and laws that on their face violate the law.

Section 1355.38(b) Corrective Action and Penalties for Violations With Respect to a Person or Based on a Court Finding

This section sets forth the requirements for corrective action and penalties for a violation of section 471(a)(18) of the Act with respect to a person or based on a court finding.

Comment: One commenter requested that we define the term ''court finding,'' to clarify what court is being referred to in this section as it relates to the assessment of penalties for a violation of section 471(a)(18) of the Act.

Response: While we do not intend to define the term ''court finding,'' we would like to clarify that any Federal or State court's finding of a violation of section 471(a)(18) of the Act may result in the assessment of a penalty by ACF. Under the statute, an individual who believes that he or she has been aggrieved by a section 471(a)(18) violation, may bring action in the United States District Court. The final rule will not be this specific because the District Court finding can be appealed to a higher court; thus a court other than the United States District Court may ultimately determine that a 471(a)(18) violation has taken place.

Comment: Several commenters opposed the immediate assessment of the penalty for a violation with respect to a person, suggesting that there should be an opportunity for corrective action beforehand.

Response: We believe that the statute is clear at 474(d)(1) that there is to be an immediate penalty, without corrective action beforehand, where there is a violation with respect to a person. This is consistent with the Department's commitment to aggressive enforcement of section 471(a)(18) of the Act. Thus, no change has been made to the final rule as a result of these comments.

Comment: Several commenters opposed the immediate assessment of a penalty for a violation based on a court finding, suggesting that ACF/OCR investigations be the sole basis for assessing a penalty.

Response: Section 474(d)(3) of the Act affords an individual who is aggrieved by a violation of section 471(a)(18) of the Act the right to file a lawsuit against the State or entity. In accordance with the statute, a violation with respect to an individual requires an immediate penalty if the court finds that the State has violated section 471(a)(18) of the Act. Thus, we do not intend to investigate a case where the court has already rendered a finding. If a State, an entity, or an individual is dissatisfied with the court's finding, the appropriate action of recourse is to appeal through the judicial system. No change has been made to the final rule as a result of these comments.

Comment: Several commenters expressed concern about dual penalties (from both the Court and ACF) that States may incur based on a court finding of a violation of section 471(a)(18) of the Act.

Response: We do not believe that dual penalties will result from the situation as described. The statute allows for an individual aggrieved by a violation of section 471(a)(18) of the Act the right to bring action and seek relief from the State. If the court finds that the individual has been aggrieved by the State, it is possible that monetary compensation may be awarded to the individual as relief for the State's action. This monetary award is not a penalty. Penalties by ACF are required by the statute when the State violates the law. No change has been made to the final rule as a result of these comments.

Comment: A few commenters recommended that the final rule require the State to notify ACF of a court's finding that the State is in violation of section 471(a)(18) of the Act, since ACF will not be a party to the proceedings.

Response: We agree with the commenter' recommendation and have revised the final rule to require a State found by a court to be in violation of section 471(a)(18) to notify ACF. A new paragraph, § 1355.38(b)(4), requires the State to notify the appropriate ACF regional office of the violation within 30 days from date of entry of the final judgement once all appeals have been exhausted, declined, or the appeal period has expired.

Section 1355.38(c) Corrective Action for Violations Resulting From a State's Statute, Regulation, Policy, Procedure, or Practice

This section sets forth the requirements for corrective action when a State's statute, regulation, policy, procedure, or practice is found to be in violation of section 471(a)(18) of the Act.

Comment: We received several comments relating to the time period provided for corrective action. One commenter stated that six months for corrective action is too short, while another commenter stated that six months is excessively long.

Response: The statute specifies at 474(d)(1) of the Act, that the time period to implement a corrective action plan for section 471(a)(18) of the Act must not exceed six months. We have made a change to the regulation to require a State to complete a corrective action plan within six months. All corrective action plans will not require six months to complete. ACF has the authority to establish a shorter time frame for the completion of the corrective action plan consistent with the seriousness, complexity, and the remedy required by the violation.

Comment: Another commenter recommended that the time limit for ACF to approve or disapprove a State's corrective action plan be defined in the final rule to avoid a State's being penalized due to delayed action by ACF.

Response: ACF recognizes the need for approving corrective action plans in a timely manner but did not include the commenter's recommendation in the final rule. To respond to the commenter's concern we have revised § 1355.38(c)(1). The State will have 30 days after receipt of written notification of noncompliance with section 471(a)(18) of the Act, to develop a corrective action plan and submit it to ACF for approval. Once the corrective action plan is approved by ACF, the State will have six months to complete the corrective action and come into compliance before a penalty is applied. The calculation for the six months will begin after ACF has approved the plan.

A State's completion of a corrective action plan within the specified time will not, in itself, prevent the assessment of a penalty. The completed corrective action plan must result in the State coming into compliance with section 471(a)(18) of the Act to avoid incurring a penalty. We have revised the final rule to clarify this point at § 1355.38(c)(1) and also at (g)(1)–(4).

Additionally, we have revised § 1355.38(c)(3) to provide the State with

an additional 30 days to revise and resubmit the corrective action plan in the event the State's corrective action plan is not approved by ACF. If the State fails to resubmit the corrective action plan within the 30 days, a penalty will be assessed.

Comment: One commenter was concerned that §§ 1355.38(c)(1) and (g)(3) were inconsistent. The commenter believed paragraph (c)(1) provides a State with six months before assessing a penalty while paragraph (g)(3) imposes a reduction beginning with the quarter that the State received notification.

Response: Paragraphs (c)(1) and (g)(3) are not inconsistent. Paragraph (c)(1) provides the State with six months to complete corrective action before a penalty is assessed. Paragraph (g)(3) defines the starting point for assessing the penalty in the event a State declines to participate in corrective action or fails to successfully complete the corrective action plan within six months.

Comment: One commenter disagreed with the use of the word ''implement,'' in original paragraph (c)(4), to mean ''begin'' and stated that ''implement'' means to ''complete.''

Response: In light of the addition of up to a 60-day period for the State to develop the corrective action plan, we have revised the definition of ''implement'' in the final rule to mean ''complete.'' Paragraphs (c)(4) and (5) were deleted and paragraph (c)(1) now reads that a State in violation of section 471(a)(18) of the Act will have six months to complete corrective action and come into compliance once its plan has been approved before a penalty is assessed.

Comment: One commenter requested that the State be allowed to make changes to the corrective action plan without incurring additional penalties.

Response: As written, the regulation does not preclude the State from making changes to the corrective action plan. The changes made to the corrective action plan must be approved by ACF and completed within the original six-month time frame.

Section 1355.38(d) Contents of a Corrective Action Plan

This section describes the contents of a corrective action plan.

We did not receive comments related to this section but have revised this section to coincide with changes made in § 1355.38(c). Paragraph (d)(4) defines the completion date for the corrective action and deletes the option to extend the corrective action completion date.

Section 1355.38(e) Evaluation of Corrective Action Plans

This section describes the evaluative steps that ACF will take to review the implementation of corrective action plans submitted by States who have been found to be in violation of section 471(a)(18) of the Act.

We received no comments related to this section but revised this section to coincide with changes made to § 1355.38(c) and (d). This section now states that ACF will evaluate the corrective action plan within 30 days of the six-month completion date.

Section 1355.38(f) Funds To Be Withheld

This section defines the term ''title IV–E funds'' in the context of this section.

Comment: One commenter requested clarification on the use of the word ''claims.''

Response: In describing the penalty for a violation of section 471(a)(18) of the Act, the statute at 474(d)(1) uses the phrase, ''otherwise payable to the State under this part'' in reference to the amount of title IV–E funds to be reduced. We interpret this to mean the Federal share of allowable title IV–E costs paid or advanced to the State and have revised § 1355.38(f) in the final rule to reflect this interpretation. The reader should note that it does not matter whether the costs are reported as a current expenditure or as an adjustment; all title IV–E funds expended during the quarter(s) the State is determined to be in violation of section 471(a)(18) of the Act will be subject to a penalty.

Section 1355.38(g) Reduction of Title IV–E Funds

This section describes the circumstances under which a State's title IV–E funds will be reduced by ACF due to a violation of section 471(a)(18) of the Act.

Comment: Several commenters expressed concern about ACF's authority to continue a penalty into the next fiscal year.

Response: The regulation does not provide for a continuation of a penalty into the subsequent fiscal year if a State fails to come into compliance. ACF may and has the authority to initiate a full or partial review in a subsequent fiscal year for those States that are in violation of section 471(a)(18) of the Act and have failed to complete corrective action to come into compliance. Thus, any statute, regulation, policy, procedure or practice that remains uncorrected from a previous fiscal year may result in a new finding of a violation of noncompliance with section 471(a)(18) of the Act. We will not disregard an uncorrected violation simply because a fiscal year has ended. It is part of the Department's oversight responsibility to ensure that all States are in compliance with section 471(a)(18) of the Act at any given time and any uncorrected violation may be subject to a review at the beginning of a new fiscal year.

Comment: One commenter is concerned that the use of fiscal sanctions for every quarter that the State has not completed a corrective action plan is overly harsh.

Response: We are unable to modify the penalty structure as it is defined in law. The statute clearly states that penalties are to be applied quarterly when a State is in violation of section 471(a)(18) or has not successfully implemented a corrective action plan; and that the penalty will be applied until the State achieves compliance or until the end of the fiscal year.

Comment: Several commenters requested that the final rule permit the suspension of the penalty while the State appeals a court finding of a violation of section 471(a)(18) of the Act.

Response: We concur and have included such language in the final rule at paragraph (g)(6). This clarifies that penalties will not be imposed until a final determination regarding a violation is made through the judicial appeal process.

Section 1355.38(h) Determination of the Amount of Reduction of Federal Funds

This section describes the specific amount a State's title IV–E funds will be reduced by ACF in the event of a section 471(a)(18) violation and provides instructions related to interest liability.

Comment: One commenter requested that the final rule clarify that the calculation of the penalty is quarterly.

Response: We have revised paragraph (h) to clarify that the penalty is calculated and assessed quarterly.

Comment: One commenter believed that five percent is the penalty and not a cap.

Response: Five percent is both a penalty and a cap. The statute at section 474(d)(1) of the Act requires that the third or subsequent violation(s) in a fiscal year will result in a five percent reduction of title IV–E funds payable to the State in that quarter. The statute also sets an annual cap whereby no State's fiscal year payment will be reduced by more than 5 percent.

Comment: One commenter requested clarification on the State agency's

responsibility for interest if an entity such as a private agency violates section 471(a)(18) of the Act.

Response: The State agency or entity that has been found to be in violation is responsible for the interest. No change has been made to the final rule.

Section 1355.39 Administrative and Judicial Review

This section provides States found not to be in substantial conformity with titles IV–B and IV–E State plan requirements, or in violation of section 471(a)(18) of the Act, with an opportunity to appeal.

Comment: One commenter recommended that the final rule provide the State with the right to immediately appeal a determination of substantial nonconformity or require ACF to provide the State with a detailed report of the reasons underlying the finding prior to the development and implementation of a program improvement plan.

Response: A final determination regarding State nonconformity is not made until the State has had an opportunity for corrective action. Therefore, it would be premature to provide for an appeal to the DAB prior to that time. However, we will provide written notification, within 30 days following the child and family services review, that the State is, or is not, operating in substantial conformity. While we understand the commenter's desire to have a detailed report of the review findings, specifying the details of the notification letter is not appropriate for regulation. Additionally, we have designed the review process to be less dependent upon a lengthy report. The team will provide the State with verbal information on the findings of the review throughout the on-site review and subsequent exit conference. The notification letter will confirm findings of the onsite review, which builds on information initially reported in the State prepared statewide assessment, and will include sufficient information for a State to know where it is operating in or out of conformity. No change has been made to the final rule.

Comment: One commenter recommended that the final rule require ACF to assume the responsibility for any costs related to the development and implementation of the program improvement plan in the event ACF determines that the State is not operating in substantial conformity but a subsequent DAB decision finds that the State is operating in substantial conformity.

Response: We do not concur with the commenter's proposal that ACF should assume full costs for the program improvement plans in the event the DAB overturns an ACF finding of substantial nonconformity. The State may claim FFP for appropriate program improvement plan activities under title IV–E.

Comment: One commenter stated that if private agencies are to be sanctioned for a violation as ''entities in the State,'' they should have an opportunity for appeal.

Response: We concur with the commenter and have revised the final rule to allow such entities the opportunity to appeal to the DAB.

Section 1355.40 Foster Care and Adoption Data Collection

We have made a technical amendment to conform with new Federal requirements related to the collection of race and ethnicity data. On October 30, 1997, the Office of Management and Budget (OMB) published a notice in the **Federal Register** (62 FR 58781–58790) announcing its decision to revise Statistical Policy Directive No. 15, *The Race and Ethnic Standards for Federal Statistics and Administrative Reporting.* OMB's Statistical Policy standards provide a common language to promote uniformity and comparability of data on race and ethnicity for the population groups specified in the directive. The Department is required to collect information in accordance with the directive's standards.

The revised standards have five categories for data on race: American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, and White. The new standards allow individuals of mixed race to identify with more than one race. Also, OMB revised the two categories for data on ethnicity to: ''Hispanic or Latino'' and ''Not Hispanic or Latino.'' The AFCARS currently collects information on the race and ethnicity of children in foster care and those who have been adopted, foster parents, and adoptive parents. However, we must change the definitions of the racial classifications, revise ethnicity classifications, and allow multiple-race identification in AFCARS race data elements to comply with the OMB Directive. In ACYF–CB–PI–99–01 (issued January 27, 1999) we informed States of the required changes to the AFCARS collection of race data as a result of a change in OMB policy. States were directed to change race and ethnicity collections for the report period beginning October 1, 1999. Since these changes are already underway in the States and a matter of HHS policy, we are codifying these changes as technical amendments in this final rule.

Section 1355.40(a) Scope of the Data Collection System

We removed a reference to the former protections in section 427 of the Act in paragraph (a)(2) and replaced it with the correct citation. Congress repealed section 427 of the Act with Public Law 103–432, effective October 1, 1997. The protections previously included in section 427 of the Act are now included as assurances in section 422(b)(10) of the Act.

Appendix A to Part 1355

In Appendix A to part 1355, Section I, we included the new race and ethnicity classifications consistent with OMB's Statistical Policy Directive Number 15. All of the foster care race elements (elements II.C.1, IX.C.1 and IX.C.3) are listed in the element chart alphabetically as they are in the directive.

In section II to appendix A, we removed the obsolete reference to the section 427 protections and replaced it with the correct statutory reference. In Section II, II.C.1, we added new race definitions and made an editorial change regarding how a person's race and ethnicity is determined. Consistent with the OMB Directive, we make this change to emphasize that self-identification or self-reporting is the preferred method of gathering information on race or ethnicity except where this is not practical. Obviously, in the case of young children, racial or ethnic self-identification is not practical and is therefore primarily determined by the parent. We recommend that caseworkers ask children (if age appropriate) and adults to identify all the racial categories that apply.

In ACYF–CB–PI–99–01 we provided policy guidance on the use of the category ''unable to determine'' as it applies to situations where a parent or other adult caretaker is unwilling to identify their race or that of the child. We have included that clarification in this regulation. If a parent or caretaker is unwilling to identify a race, then the State should classify the information as ''unable to determine,'' indicating that the State attempted to gather the information but was unable to do so. This will provide for better data as the State will not overstate the amount of missing data for this element and jeopardize conformity with the missing data standards. Finally, we amend the way that a State must code the data for the race categories to properly identify a single race, multiple race or ''unable to determine'' response.

We have made changes similar to those above in Section II, II.C.2, which define the Hispanic and Latino ethnicity classifications. In addition, we have deleted the last sentence of the paragraph that required the State to indicate that the child is not of Hispanic ethnicity only when the origin of the child is clear. We believe that this distinction is unnecessary and inconsistent with our approach to other regulatory definitions on race and ethnicity.

In Section II, IX.C, we now cross-reference only the definitions of race and ethnicity classifications used in the section on child demographics (II.C). The existing regulations also cross-reference the definition of ''unable to determine,'' however, this definition as stated is not applicable to adults. For adults, the code ''f. unable to determine,'' must be used only in circumstances where the parent is unwilling to identify his or her race or ethnicity. During AFCARS pilot reviews, we found that States were inappropriately coding missing information as ''unable to determine.'' When data is missing or not known because the State has not asked an individual for information on race or ethnicity, the response must be left blank.

Finally, in Section II, we have deleted paragraph IX.D on coding ethnicity data. This paragraph incorrectly cross-referenced the section on disabilities. We have incorporated the relevant portions of the instruction in paragraph IX.C.

Appendix B to Part 1355

In appendix B to part 1355, we have made the same amendments to the race and ethnicity adoption data elements as those listed above for the foster care elements.

Appendix D to Part 1355

In appendix D to part 1355, we amended the race and ethnicity elements in the foster care and adoption record layouts consistent with the OMB directive. We amended the coding notes that precede each record layout table to clarify that the race classifications are now elements where more than one response is allowed.

We also made a technical change to the foster care and adoption record layouts to accommodate the year 2000 century date change. Prior to October 1996, States were required by regulation to report date information in decade format. In response to the year 2000 and the data issues associated with the processing of date information, we issued an information memorandum, ACYF–IM–CB–96–08 (April 17, 1996), requiring States to report in century date format. We are now making the requisite technical change to the regulation.

Appendix E to Part 1355

In appendix E to part 1355, we made several technical edits to replace all references to ''Hispanic origin'' with ''Hispanic or Latino ethnicity'' in order to be consistent with the OMB directive (see element charts and Section B.2.a.(8)). In section A.2.a.(18) for foster care and section B.2.a.(9) for adoption, we have added an internal consistency validation for race elements. Internal consistency validations evaluate the logical relationship between data elements in a record. We also revised cross-references to the internal consistency checks throughout the Appendix to accommodate the addition.

Part 1356—Requirements Applicable to Title IV–E

Section 1356.20 State Plan Document and Submission Requirements

Section 1356.20(e)(4) State Plan Document and Submission Requirements

This section implements the authority of ACF Regional HUB Directors and Administrators and the Commissioner of ACYF to approve State plans and amendments that govern State programs under section 471 of the Act.

No comments were received on this section and no changes were made in the final rule.

Section 1356.21 Foster Care Maintenance Payments Program Implementation Requirements

In this section, we clarified existing policies and set forth additional foster care maintenance requirements which have a direct impact on determining the eligibility of children in the title IV–E foster care program.

Comment: A few commenters were concerned that § 1356.21 of the regulation was not sensitive to and appeared inconsistent with the Indian Child Welfare Act (ICWA).

Response: The purpose of the regulation is to implement the title IV–E foster care program, not the requirements of the ICWA. We want to be clear that nothing in these regulations supersedes the requirements of the Indian Child Welfare Act. States must continue to comply fully with ICWA.

Comment: We received a large number of general comments expressing disappointment that following the outcome orientation of the child and family services review that § 1356.21 of the regulation reverts to a process orientation.

Response: We agree, this section of the regulation is process-oriented. The purpose of this section is to regulate title IV–E eligibility criteria and procedural requirements, which are inherently process-oriented.

Comment: One commenter suggested we provide language throughout this section that distinguishes title IV–E eligibility criteria from State plan requirements.

Response: Title IV–E eligibility criteria are distinguished from State plan requirements in § 1356.21. We have amended § 1356.71(f) and (g) to clearly enumerate the title IV–E eligibility criteria. However, we agree that we may have caused some confusion by addressing a particular State plan requirement in the reasonable efforts section relating to permanency hearings that must be held within 30 days of a judicial determination that reasonable efforts to reunify a child and family are not required. Also, the leading sentences to § 1356.21(h) suggest that the permanency hearing is an eligibility criterion. We have deleted language that could cause any confusion between title IV–E eligibility criteria and State plan requirements.

Comment: Some commenters recommended that the regulations include a new section that describes tribal authority and responsibilities in satisfying title IV–E requirements when tribes and States enter into title IV–E agreements. One commenter also requested that the suggested section include a provision that permits the Secretary to waive title IV–E provisions with respect to any title IV–E agreement between an Indian tribe and a State. The commenter believed such a provision would make it easier for State-tribal agreements to be established.

Response: The regulations are written from the perspective of the State agency because the statute makes the State child welfare agency ultimately responsible for the proper administration of the title IV–E program. Section 472(a)(2) of the Act permits other public agencies to have responsibility for placement and care of children in foster care under an agreement with the State child welfare agency. The State and the public entity with which it is entering into an agreement, whether it is a tribe, juvenile justice agency, etc., must determine between themselves how roles and responsibilities for meeting title IV–E requirements will be shared. The requirements of the title IV–E program do not, and cannot, change merely because a public entity other than the

State child welfare agency has responsibility for placement and care of certain children in foster care. Tribes and other public entities with which the State agency has entered into agreements do, however, have the latitude to develop their own procedures for satisfying title IV–E requirements as long as the State child welfare agency's ultimate responsibility for compliance is assured. We have not made any changes to the regulation based on these comments.

Section 1356.21(a) Statutory and Regulatory Requirements of the Federal Foster Care Program

This section introduces the title IV–E implementation requirements for eligibility of Federal financial participation (FFP) under the title IV–E foster care program.

Comment: One commenter observed that §§ 1356.22 and 1356.30 should be included in the references in this paragraph.

Response: We concur and have amended the paragraph accordingly.

Section 1356.21(b) Reasonable Efforts

This section sets forth the ASFA requirement that the State hold the child's health and safety as its paramount concern when making reasonable efforts.

Comment: We received several suggestions to include, in the regulation, the preamble language at page 50073 of the NPRM which describes the threefold purpose of the reasonable efforts requirements. The basis for this suggestion was a concern that the focus of the regulation was on the steps the State agency must take in order to access Federal funds rather than the intent of the statute. The commenters believe the inclusion of this language in the regulation will provide an outcome oriented balance to the process orientation of this section of the regulation.

Response: We concur and have amended § 1356.21(b) accordingly.

Comment: Many commenters requested that we delete the preamble language at page 50073 of the NPRM that provides examples of questions the courts should consider in determining whether the agency satisfied the reasonable efforts requirements. These commenters are concerned that examples provided in regulation or policy guidance become de facto policy. Conversely, we received many comments not only supporting the list in question, but encouraging us to include it in the text of the regulation and expand it to include more guidance on reasonable efforts to make and finalize permanent placements.

Response: We intend for examples to set parameters for the appropriate use of the flexibility that is inherent in some title IV–E provisions. We believe the examples will be helpful to State child welfare agencies in preparing for hearings at which reasonable efforts determinations are to be made. We do, however, think the list is more appropriate as policy guidance rather than regulatory text and therefore, did not change the regulation to include the examples.

Comment: One commenter suggested that we include regulatory language which places the burden of proof in satisfying the reasonable efforts requirements on the State agency.

Response: We believe that the very nature of the reasonable efforts determination indicates the burden of proof is on the State agency. Section 472(a)(1) of the Act requires that the court determine whether the State agency made reasonable efforts in accordance with section 471(a)(15) of the Act. We believe that the suggested change is unnecessary, therefore, and have made no changes to the regulation.

Comment: We received a few comments suggesting that we have no statutory basis for requiring a judicial determination that the State made reasonable efforts to prevent the child's removal from his/her home, to reunify the child and family, and to make and finalize an alternate permanent placement when the child and family cannot be reunited. We also received several comments supporting the requirement for three separate reasonable efforts determinations but questioning our authority to link title IV–E funding to such determinations.

Response: The judicial determinations are based in the statute. Section 472(a)(1) of the Act contains two eligibility criteria. The first pertains to the child's removal from home. Such removal must be based on a voluntary placement agreement or a judicial determination that it was contrary to the child's welfare to remain at home. The second eligibility criterion requires a judicial determination that the State made reasonable efforts of the type described in section 471(a)(15) of the Act. Section 471(a)(15) of the Act requires the State agency to make reasonable efforts to prevent the child's removal from his/her home, to reunify the child and family, and to make and finalize an alternate permanent placement when the child and family cannot be reunited. The requirements for judicial determinations regarding reasonable efforts are title IV–E eligibility criteria. If the eligibility criteria are not satisfied, the child is not eligible for title IV–E funding.

Comment: One commenter suggested we permit a 60-day extension to the time frames prescribed in the regulation for obtaining judicial determinations regarding reasonable efforts to address the problem of continuances.

Response: We are sympathetic to the issue of continuances. However, we believe that the need for timely judicial determinations is more appropriately addressed by building capacity through training judges and attorneys rather than extending the time frames for satisfying title IV–E eligibility criteria. Therefore, we have not modified the regulation in response to this comment.

Comment: We received a few comments observing that a sentence in the preamble for this section mistakenly read, ''Congress provided a list of circumstances in which reasonable efforts are required.''

Response: Yes, this was a misprint. The sentence should have read, ''Congress provided a list of circumstances in which reasonable efforts are **not** required (emphasis added).''

Section 1356.21(b)(1) Judicial Determination of Reasonable Efforts To Prevent a Child's Removal From the Home

This section sets forth the statutory requirement of a judicial determination that reasonable efforts were made to prevent removal of a child from his or her home.

Comment: Numerous commenters informed us that the distinction we made between emergency and non-emergency removals was not reflective of State practice.

Response: We concur that the distinction was not useful. We have removed the distinction and consolidated the requirements for reasonable efforts to prevent removals into a single paragraph, (b)(1). States will now have up to 60 days from the time a child is removed from the home to obtain a judicial determination regarding reasonable efforts to prevent removal.

Comment: We received an overwhelming number of comments on the timing prescribed for obtaining judicial determinations that the State made reasonable efforts to prevent removals. The proposed language required such determinations to be made ''* * * at the first full hearing pertaining to the removal of the child or no later than 60 days after a child has been removed from home, whichever is first.'' Commenters interpreted this

language to preclude such determinations from being made at an earlier time, thus delaying title IV–E eligibility.

Response: We did not intend to prohibit these determinations from being made at an earlier time and we have amended the regulation language in paragraph (b)(1)(i) accordingly. The rule now requires the State agency to obtain a judicial determination that it either made or was not required to make reasonable efforts to prevent a child's removal from home no later than 60 days from the date the child was removed from the home.

Comment: Many commenters believed that we were overly harsh in prohibiting title IV–E eligibility for an entire foster care episode if the reasonable efforts to prevent removal requirements were not satisfied. Some suggested that the State be permitted to establish the child's eligibility when and if this requirement is met at a later date.

Response: The requirement for the State to make reasonable efforts to prevent removals is a fundamental protection under the Act and one of several title IV–E eligibility criteria used in establishing eligibility. From both a practice and an eligibility perspective, it is impossible for the State to provide efforts to prevent the removal of a child from home after the fact.

In terms of practice, there is a profound effect on the child and family once a child is removed from home, even for a short time, that cannot be undone. If the child is returned after services have been delivered, or even immediately, the State has reunified the family, not prevented a removal.

The statute requires that title IV–E eligibility be established at the time of a removal. If the State does not make reasonable efforts to prevent a removal or fails to obtain a judicial determination with respect to such efforts, the child can never become eligible for title IV–E funding for that entire foster care episode because there is no opportunity to establish eligibility at a later date. Once title IV–E eligibility is initially established, the judicial determination regarding the reasonable efforts the State made to finalize a permanency plan is required to maintain title IV–E eligibility.

Comment: A couple of commenters stated that it was impossible to satisfy the proposed requirements for making reasonable efforts to prevent removals for unaccompanied refugee minors.

Response: We have no authority to waive title IV–E eligibility requirements for any child or group of children. If the State wishes to claim title IV–E funds for unaccompanied refugee minors, then all title IV–E eligibility criteria must be satisfied.

Section 1356.21(b)(2) Judicial Determination of Reasonable Efforts to Finalize a Permanency Plan

This section (formerly § 1356.21(b)(3) and (b)(4) of the NPRM) describes the requirements for obtaining a judicial determination to finalize a permanency plan.

Comment: Most commenters expressed confusion regarding when the ''clock'' starts for obtaining judicial determinations that the State made reasonable efforts to reunify the child and family or to make and finalize an alternate permanency plan. A few commenters observed that often the permanency plan may change from reunification to an alternate permanency plan prior to the State obtaining a judicial determination regarding its efforts to reunify the child and family. These commenters requested clarification about which permanency plan the court must rely on to make its determination in such situations. A couple of commenters suggested that we not permit States to change the permanency plan outside a permanency hearing or without a court order so that the court has an opportunity to determine if the State agency did make reasonable efforts to reunify the child and family before sanctioning the change in the permanency plan.

Response: After reviewing the comments and the proposed requirements, we determined that our proposal in the NPRM with respect to reasonable efforts to reunify a child and family and to make and finalize alternate permanency plans was confusing and not responsive to actual practice. To simplify the requirements, we have consolidated the reasonable efforts requirements regarding efforts to reunify the child and family and to make and finalize alternate permanent placements into a single requirement related to making reasonable efforts to finalize a permanency plan. In new paragraph (b)(2), we require the State to obtain a judicial determination that it made reasonable efforts to finalize the permanency plan that is in effect, regardless of what it is, within 12 months of the date the child is considered to have entered foster care in accordance with the definition of such at § 1355.20. The State must obtain such a determination every 12 months thereafter while the child is in foster care. Our purpose in imposing this policy, as stated in the NPRM, is to tie the timing for obtaining reasonable efforts determinations regarding permanency to the timing of the permanency hearing because it is a logical determination to make at such hearings and it would ease administrative burden.

In determining whether the State made reasonable efforts to finalize a permanency plan, the court's determination should be based on the permanency plan that is in effect at the time at which the agency is seeking such a determination. We are not requiring the State to obtain judicial determinations on its efforts regarding permanency plans that it has abandoned.

We realize that obtaining reasonable efforts determinations regarding finalizing permanency plans every 12 months while a child is in foster care is a significant departure from current practice and that States will need transition time to implement this requirement for children who have been in foster care for more than 12 months. Therefore, we will not take adverse action against States who cannot comply with this requirement for a period of 12 months from the effective date of this final rule.

Finally, we think it appropriate to permit the State agency to alter the permanency plan outside a permanency hearing and will not require the court to approve such a plan before the State agency can act on it. When a State agency has placement and care responsibility for a child, it is responsible for setting and acting on the appropriate permanency plan. We understand that, in some States, courts provide such active oversight during the course of a permanency hearing that the court actually sets the permanency plan. That is the State's prerogative. Federal law does not require the courts to play such a prescriptive role in the permanency planning process. Section 475(5)(C) of the Act requires the court to review the permanency plan presented to it by the State agency.

Comment: We received several comments objecting to the proposal that children, for whom judicial determinations are not made regarding reasonable efforts to reunify and to make and finalize alternate permanency plans, become ineligible for title IV–E funding until such a determination is made.

Response: We did not amend the regulation based on these comments because the requirements for judicial determinations are statutory. To be eligible for title IV–E funding, section 472(a)(1) of the Act requires the State to obtain a judicial determination regarding its reasonable efforts of the type described in section 471(a)(15) of

the Act. Section 471(a)(15) of the Act, among other things, requires the State to make reasonable efforts to finalize permanency plans. If these criteria are not satisfied, the child is ineligible for title IV–E funding.

Comment: We received a number of comments opposing the requirement that judicial determinations regarding reasonable efforts to finalize permanency plans be made at least every 12 months. These commenters suggested that such determinations should be required every six months to be consistent with the ASFA's focus on expedited permanency.

Response: We agree that six-month intervals for making determinations regarding reasonable efforts to effect a permanency plan may provide an incentive for expediting permanency. However, requiring such judicial determinations to be made at the interval suggested would limit the flexibility provided at section 475(5)(B) of the Act for holding the periodic reviews required therein before an administrative body rather than a court. We cannot justify a requirement that would limit flexibility provided by the statute, particularly since we know it would place a significant burden on the courts and State agencies. Therefore, we have made no changes to the regulation.

We believe that the six-month periodic reviews will encourage a timely permanency planning process. These reviews must determine, in part: ''the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan * * * and to project a likely date by which the child may be returned to and safely maintained in the home or placed for adoption or legal guardianship.'' Thus, the statute already compels States to review reasonable efforts to achieve permanency every six months.

Comment: One commenter requested that we amend the regulatory language to ensure that courts oversee reunification efforts between unaccompanied refugee children and the party designated as the child's permanent placement.

Response: The courts oversee the State agency's efforts to finalize permanency plans, regardless of what the permanency plan is or with whom the child is to be placed. Therefore, we do not believe we must regulate such an assurance for a particular group of children in foster care.

Section 1356.21(b)(3) Circumstances in Which Reasonable Efforts Are Not Required to Prevent a Child's Removal From Home or to Reunify the Child and Family

This section (formerly § 1356.21(b)(5) in the NPRM) describes the circumstances in which reasonable efforts to prevent a removal or to reunify a child with his or her family are not required.

Comment: Many commenters requested additional guidance in defining aggravated circumstances in which reasonable efforts are not required. The majority of commenters supported State autonomy in identifying those aggravated circumstances but wanted further guidance or clarification.

Response: Congress provided specific examples of aggravated circumstances in the statute which we have included in the regulation. Section 471(a)(15)(D)(i) of the Act requires the State to define, in law, those aggravated circumstances in which reasonable efforts are not required. We believe that the State legislative process will produce decisions that are based on public debate, consideration, and broad input from all interested and relevant parties. We strongly believe that providing Federal guidance beyond what is included in the statute is inconsistent with the intent of the statute to provide States with maximum flexibility in this area.

Comment: Several commenters urged us to permit the court to determine that reasonable efforts are not required in circumstances other than those enumerated at section 471(a)(15)(D) of the Act when the State agency provides evidence to that effect. These commenters believe that the interpretation that they are requesting is consistent with the Rule of Construction at section 478 of the Act. Many commenters made this suggestion because they were uncomfortable with the preamble discussion which submits that an assessment of the family that indicates that the child is not safe in the home would satisfy the reasonable efforts requirements.

Response: We understand the commenter' concern; however, the statute specifically enumerates those circumstances in which reasonable efforts are not required. Section 478 of the Act clarifies that the State court continues to have discretion when making judgements about the health and safety of the child. However, it does not grant ACF the authority to add or change the list at section 471(a)(15)(D) of the Act. As written, the statute requires the State to make reasonable efforts in all cases unless one of the circumstances at section 471(a)(15)(D) of the Act exists.

The aforementioned interpretation of the statute should not be construed to support unwarranted attempts to preserve families. Rather, when reasonable efforts are required, the State agency and the courts must determine the level of effort that is reasonable, based on safety considerations and the circumstances of the family. Sometimes, based on its assessment of a family, the State agency determines that it is reasonable to make no effort to maintain the child in the home or to reunify the child and family. In such circumstances, if the court determines that the agency's assessment of the family is accurate and its actions were appropriate, the court should find that the agency's efforts in such cases were reasonable, not that reasonable efforts were not required.

Comment: One commenter recommended that we permit Indian tribes to identify in tribal code those aggravated circumstances in which reasonable efforts are not required in accordance with section 471(a)(15)(D)(i) of the Act.

Response: When entering into a title IV–E agreement with a State, the tribe must adhere to the list of aggravated circumstances defined in State law. The statute at section 471(a)(15)(D)(i) specifically requires that the aggravated circumstances in which reasonable efforts are not required be defined in State law. Moreover, other public agencies and tribes that enter into agreements with the State agency are not operating or developing their own title IV–E program separate and apart from that operated under the State plan. Rather, the agency or tribe is agreeing to operate the title IV–E program established under the State plan for a specific population of children in foster care. Therefore, the other public agency or tribe is bound by any State statute related to the operation of the title IV–E program. We expect the State child welfare agency to engage the tribes, and any other agency with which it has title IV–E agreements, in developing its list of aggravated circumstances.

Comment: In the preamble to proposed § 1356.21(b)(5), we explained that a court determination that reasonable efforts to prevent a child's removal were not required did not remove the State's obligation to make reasonable efforts to reunify the child and family. Only a judicial determination that reasonable efforts to reunify the child and family are not required removes that obligation. Several commenters requested that we

eliminate this requirement because they believe it to be unduly burdensome.

Response: We believe that States will frequently encounter circumstances in which they are exempt from making efforts to prevent a child's removal from the home but it is appropriate to make reasonable efforts to reunify the child and family. We think the policy described in the comment above ensures that decision making is based on the individual circumstances of the child and family rather than blanket exceptions. Moreover, the statute supports such an interpretation. Section 471(a)(15)(D) of the Act enumerates circumstances in which reasonable efforts of the type described at section 471(a)(15)(B) of the Act are not required. Two distinct types of reasonable efforts are described at section 471(a)(15)(B) of the Act: to prevent removals; and to reunify children and their families. Therefore, a judicial determination exempting the State from providing each type of reasonable effort must be made. We have retained this requirement.

Comment: A couple of commenters requested that we clarify that we are not prescribing the timing for judicial determinations that reasonable efforts are not required to reunify the family.

Response: The commenters are correct that we are not prescribing the time frame for judicial determinations that reasonable efforts to reunify the child and family are not required. We do not think it is appropriate to prescribe a time frame for obtaining such a determination and have made this clarification in paragraph (b)(3). However, all judicial determinations with respect to reasonable efforts to prevent removals, even determinations that such efforts are not required, must be obtained within the time frame prescribed in paragraph (b)(1), within 60 days of the date the child is removed from the home.

Comment: We received a number of comments regarding the list of felonies at § 1356.21(b)(5) used to identify when reasonable efforts are not required. The comments included requests for clarification regarding whether a criminal conviction is required, support for requiring a criminal conviction, and opposition to requiring a criminal conviction.

Response: We have amended § 1356.21(b)(3)(ii) to clarify that a parent must be convicted of one of the felonies enumerated before the court can determine that reasonable efforts are not required. (We have similarly amended language in § 1356.21(i)(1)(iii) which requires TPR when a parent is convicted of one of the enumerated felonies). The statutory language specifically calls for a court of competent jurisdiction to find that one of the felonies was committed. In our opinion, this language requires a criminal conviction. As we stated in the NPRM, however, in circumstances in which the criminal proceedings have not been completed or are under appeal, the court that hears child welfare dependency cases determines whether it is reasonable to attempt to reunify the child with his/her parent. It is important for this decision to be based on the developmental needs of the child and the length of time associated with completion of the criminal proceedings or the appeals process.

Section 1356.21(b)(4) Concurrent Planning

This section (formerly § 1356.21(b)(6) in the NPRM) implements the statutory provision which provides States the option of using concurrent planning.

Comment: One commenter suggested that we require an assessment of every family to determine the appropriateness of concurrent planning before the State implements it for that family.

Response: We agree that the commenter's suggestion is consistent with good practice. However, it would be overly prescriptive to include such a requirement in regulation since concurrent planning is an option for the State, and not a mandate.

Comment: One commenter encouraged us to prohibit States from using concurrent planning for unaccompanied refugee minors.

Response: The choice to engage in concurrent planning is optional and should be made on a case-by-case basis. We see no reason to prohibit the use of this technique for a particular group of children in foster care.

Comment: One commenter asked if the State must present the concurrent plan to the court and if the court must make a reasonable efforts determination with respect to the concurrent plan.

Response: The answer to both questions is no. The State is not required to present the plan for the purposes of obtaining a reasonable efforts determination by the court. The concurrent planning option is addressed in the reasonable efforts section because, among other things, that section of the regulation addresses permanency planning activities, of which concurrent planning is one.

Comment: One commenter suggested we broaden the concurrent planning language in the regulation to include all types of permanency plans. As presented in the NPRM, we only address concurrent planning with respect to reunification and adoption. The commenter thinks the regulation should clarify that concurrent planning may be used regardless of what the alternate permanency plan is.

Response: We agree and have amended the language in paragraph (b)(4) accordingly.

Section 1356.21(b)(5) Use of the Federal Parent Locator Service

This section (formerly § 1356.21(b)(7) in the NPRM) provides for the use of the Federal Parent Locator Service (FPLS) to search for absent parents in order to expedite permanency for children.

Comment: A number of commenters suggested we provide guidance regarding the timing for use of the Federal Parent Locator Service. Comments ranged from suggesting that we encourage States to locate absent parents and/or putative fathers as soon as possible to requiring that such searches take place within 30 days of the child entering foster care.

Response: While we agree with the idea that searches for absent parents should be conducted as soon as possible after a child enters care, we do not think it is appropriate to include such practice level guidance in regulation. We have, however, made an editorial change in paragraph (b)(5) to note that we are not restricting when a State can seek the services of the FPLS.

Section 1356.21(c) Contrary to the Welfare Determination

This section sets forth the requirements that there be a judicial determination stating that remaining in the home would be contrary to the child's welfare.

Comment: We received numerous comments regarding the distinction in the NPRM between emergency and non-emergency removals. The comments were similar to those we received regarding reasonable efforts to prevent removals; that the distinction is not consistent with actual practice in many States.

Response: We concur and have removed the distinction between emergency and non-emergency removals in the final rule. Now a State will need to obtain a contrary to the welfare determination in the first court order removing the child from the home, regardless of whether there is an emergency or non-emergency situation.

Comment: Commenters overwhelmingly opposed our proposed requirement that contrary to the welfare determinations be made at the first hearing pertaining to the child's removal from home. The commenters said we were inappropriately overturning policy established by the

Departmental Appeals Board (DAB) decision #1508, which permitted States up to six months to obtain a contrary to the welfare determination.

Response: We recognize that some States may have made changes to their contrary to the welfare policies based on this DAB decision. However, at the time that the DAB made that ruling, the Department did not have regulations addressing the timing of contrary to the welfare determinations. Therefore, we are now taking this opportunity to clarify in regulation our policy on this issue. Our reasons for establishing this policy are set forth below:

The contrary to the welfare determination was the first of the existing protections afforded to children and their families by the Federal foster care program and has been in effect since the inception of the program in 1961 when it was operated under title IV–A. The statute then, and now, recognizes the severity of removing a child, even temporarily, from home. This protection is in place because Congress believed that judicial oversight would prevent unnecessary removals and act as a safeguard against potential inappropriate agency action. This policy is consistent with Congressional intent and stands as proposed in the NPRM. The contrary to the welfare determination must be made in the first court order sanctioning the removal of the child from home, as is explicitly required at section 472(a)(1) of the Act.

Comment: Several commenters requested that we clarify that we did not intend to consider an emergency order (sometimes referred to as a ''pick-up order'' or ''ex-parte order'') as the first court ruling for the purpose of meeting the contrary to the welfare requirements.

Response: We did not make any distinction about the type of order in which the contrary to the welfare determination is required. We mean the very first court order pertaining to the child's removal from home. If the emergency order is the first order pertaining to a child's removal from home, then the contrary to the welfare determination must be made in that order to establish title IV–E eligibility. We understand that some States must change their practices and even State statutes to meet this requirement. The critical nature of this protection requires us to maintain this policy.

Comment: One commenter suggested we eliminate the contrary to the welfare requirement because it provides an incentive for workers not to remove children from their homes.

Response: The contrary to the welfare determination is a statutory requirement and a critical protection that must be afforded to all children and their families to assure that unnecessary removals are minimized. We have, therefore, made no change to the regulation.

Comment: A few commenters opposed the policy to make children for whom the contrary to the welfare requirements are not satisfied ineligible for title IV–E funding. Commenters thought we were particularly harsh in making the child ineligible for that entire foster care episode.

Response: Consistent with the reasonable efforts to prevent removals requirements, the contrary to the welfare determination is a critical statutory protection and a criterion for establishing title IV–E eligibility. Once a child is removed from home, the State cannot go back and fix an inappropriate removal. If a child's removal from home is not based on a judicial determination that it was contrary to the child's welfare to remain in the home, the child is ineligible for title IV–E funding for the entire foster care episode subsequent to that removal because there is no opportunity to satisfy this eligibility criterion at a later date. The same does not hold true for all other eligibility criteria. For example, judicial determinations regarding reasonable efforts to finalize a permanency plan, placement in a licensed foster family home or child care institution, and State agency responsibility for placement and care are all title IV–E eligibility criteria that can be reestablished if lost or established at a later time if missing at the beginning of a foster care episode. This is not the case with the contrary to the welfare determination.

Comment: A number of commenters pointed out a technical discrepancy between the contrary to the welfare and reasonable efforts to prevent removals requirements regarding the consequence for not meeting these requirements. In the NPRM, we stated that, if the reasonable efforts to prevent removals requirements are not met, the child is ineligible for title IV–E funding for the remainder of ''that stay'' in foster care. The language for the contrary to the welfare determination states that the child is not eligible for the duration of ''his/her'' stay in foster care. The commenters are concerned that the language for the contrary to the welfare requirements could be construed to mean the child is never eligible for title IV–E funding again.

Response: We have amended the language at § 1356.21(c) so that it is consistent with that at § 1356.21(b)(1). If the contrary to the welfare requirements are not satisfied, the child is not eligible for title IV–E funding for the remainder of that stay in foster care.

Comment: One commenter suggested that unaccompanied refugee minors be exempt from the contrary to the welfare requirements.

Response: We have no authority to waive or exempt any group of children in foster care from this provision. It is a title IV–E eligibility criterion that must be satisfied if a State claims title IV–E funding for a child.

Comment: A few commenters requested that we accept a judicial determination that the removal of the child from the home was in the best interests of society in satisfying the contrary to the welfare requirements.

Response: This suggestion would not comport with the law or the intent of the title IV–E foster care program. The statute is clear that for title IV–E purposes a removal from the home must be based on a determination that remaining in the home would be contrary to the child's welfare. We have clarified this requirement previously in ACYF–PIQ–91–03 which states that, ''* * * if the court order indicates only that the child is a threat to the community, such language would not satisfy the requirement for a determination that continuation in the home would be contrary to the child's welfare * * *''. We find no basis to overturn this policy as it is intended to ensure that children are not unnecessarily removed from their homes and is based on the child's best interests.

Section 1356.21(d) Documentation of Judicial Determinations

This section establishes the documentation requirements for the reasonable efforts and contrary to the welfare determinations.

Comment: Many commenters wrote in support of our proposed policy of requiring judicial determinations to be explicit, made on a case-by-case basis, and so stated in the court order. Others felt that we were being overly prescriptive in this section. Those commenters expressed concern that this requirement prohibits the use of preprinted forms that include checklists for making the necessary judicial determinations. A few suggested that we permit the court order to reference the facts in a court report, related psychiatric or psycho-social report, or sustained petition to demonstrate that the determination was based on the individual circumstances of that case. A few commenters even suggested that we delete the paragraph in its entirety.

Response: In keeping with the supportive comments we received on

the need for individualized judicial determinations, we have not made changes in this section, but would like to clarify our reasons for the policy. Our purpose for proposing this policy can be found in the legislative history of the Federal foster care program. The Senate report on the bill characterized the required judicial determinations as ''* * * important safeguard(s) against inappropriate agency action * * *'' and made clear that such requirements were not to become ''* * * a mere *pro forma* exercise in paper shuffling to obtain Federal funding * * *'' (S. Rept. No. 336, 96th Cong., 2d Sess. 16 (1980)). We concluded, based on our review of State' documentation of judicial determinations over the past years, that, in many instances, these important safeguards had become precisely what Congress was concerned that they not become.

Our primary concern is that judicial determinations be made on a case-by-case basis and it was not our intent to create a policy that was overly prescriptive and burdensome. States have a great deal of flexibility in satisfying this requirement. The suggestion that the court order reference the facts of a court report, related psychiatric or psycho-social report, or sustained petition as a mechanism for demonstrating that judicial determinations are made on a case-by-case basis is an excellent one and would satisfy this requirement. If the State can demonstrate that such determinations are made on a case-by-case basis through a checklist then that is acceptable also.

Comment: A few commenters asked for clarification regarding the language that must be contained in judicial determinations that satisfy title IV–E eligibility criteria. The commenters wanted to know if these determinations needed to use the exact terms ''reasonable efforts'' and ''contrary to the welfare.''

Response: Existing policy does not require the judicial determinations to use the exact terminology of the statute. We have no intention of overturning this policy. In fact, in the preamble to this section in the NPRM, we specifically stated that,

> * * * (t)he judicial determinations themselves need not necessarily include the exact terms ''contrary to the welfare'' and ''reasonable efforts,'' but must convey that the court has determined that reasonable efforts have been made or are/were not required (as described in section 471(a)(15) of the Act), and that it would be contrary to the welfare of a child to remain at home.

Comment: One commenter was opposed to our requiring specific judicial determinations. The commenter felt we should be able to cull out the fact that the court made the appropriate determinations by reading the hearing record.

Response: While we can allow some flexibility in this area, it is a statutory requirement that the specific judicial determinations regarding reasonable efforts and contrary to the welfare be explicit in court orders. Section 1356.21(d)(1) of the regulation states that we will accept transcripts of the court proceedings if the necessary judicial determinations are not explicit in the court orders.

Comment: Overwhelmingly, commenters were opposed to the prohibition on nunc pro tunc orders. Commenters generally felt that the States would be punished for the failure of the court to fulfill its responsibility. Some commenters suggested we permit nunc pro tunc orders only to clarify or correct technical errors.

Response: We placed the ban on nunc pro tunc orders because we discovered that they were being used months, sometimes years, later to meet reasonable efforts and contrary to the welfare requirements that had not been met at the time the original hearing took place. We are sensitive to the issue of technical errors. However, it is permissible for States to use transcripts of court proceedings to verify that judicial determinations were made in the absence of the necessary orders. We have, therefore, made no changes to the regulation to modify the ban on nunc pro tunc orders.

Comment: Some commenters opposed our decision not to accept judicial determinations regarding reasonable efforts and contrary to the welfare determinations which merely reference State statute.

Response: We believe that judicial determinations should be as meaningful as possible and child-specific in order to ensure that the circumstances of each child are reviewed individually. We believe that explicit documentation is a way to ensure that such determinations actually occur and could find no compelling argument to change our position. We will not accept judicial determinations that merely reference State statute to satisfy the reasonable efforts and contrary to the welfare determinations.

Section 1356.21(e) Trial Home Visits

This section defines trial home visits for the purposes of establishing title IV–E eligibility.

Comment: Most commenters supported allowing title IV–E eligibility to continue for six months while a child is on a trial home visit.

Response: No response is necessary to these comments, but we changed the term ''foster care setting,'' to ''foster care,'' to have consistent terminology throughout the rule.

Comment: A commenter sought clarification of whether there is a regulatory definition of a trial home visit.

Response: There is no regulatory definition of the term ''trial home visit,'' as it is within the State's discretion to define. We do not believe that it would be appropriate for us to develop a regulatory definition. We also do not believe that we could develop a definition that would be inclusive of the variety of State policies on trial home visits or that a definition would be helpful. In practice, a trial home visit is intended to be a short term option in preparation for returning the child home permanently.

Comment: A commenter asserted that the law does not recognize or define a trial home visit, and therefore, we have no authority to require a determination of title IV–E eligibility for children who reenter foster care after a trial home visit that lasts more than six months.

Response: While it is true that the statute does not explicitly address trial home visits and determinations of title IV–E eligibility, we believe our policy is consistent with the statute. Further, we are allowing maximum flexibility to States regarding establishing title IV–E eligibility if the child reenters foster care. If a trial home visit continues for an extended period, the circumstances of the original removal are likely to have changed. For that reason, a State must determine title IV–E eligibility upon a child's reentry into foster care. When a trial home visit extends beyond six months and the child returns to foster care, the child is then considered to be entering a new placement.

Comment: A commenter sought clarification on whether a continuance of a hearing scheduled to address the trial home visit satisfied the requirement that for title IV–E funding to continue, a court must order a longer visit.

Response: The provision establishes a six-month outer limit for a trial home visit, except when a court orders a longer visit. A court continuance of a hearing regarding the trial home visit does not satisfy this requirement.

Section 1356.21(f)—Case Review System

This section establishes the case review system requirements for the title IV–E foster care program.

Comment: A few commenters requested that the regulations contain more guidance on how the case review system could determine the safety of the child and ensure that the child was maintained safely in the home.

Response: We believe that we can better respond to these comments through the provision of technical assistance as this is more of a practice issue. Nor do we think that prescribing how a State must maintain a child's safety would be useful, since safety considerations will vary on a case-by-case basis.

Comment: Another commenter suggested that the time frames for all case review requirements (permanency hearings, TPR and periodic reviews) were arbitrary, and should not be prescribed in regulations. The commenter recommended that the time frames should be flexible to accommodate court calendars.

Response: We do not have the authority to waive time frames for case review requirements because the law requires that States hold court hearings and periodic reviews within very specific time frames. We believe that States must be held accountable to these statutory time frames, and therefore, offer no changes to the case review system. A major goal of ASFA was to tighten case review time frames to prevent children from experiencing extended stays in foster care.

Section 1356.21(g) Case Plan Requirements

This section establishes the development and documentation requirements for case plans.

Comment: The majority of commenters on this section supported the requirement in § 1356.21(g)(1) that States develop the case plan with the child's parent or guardian.

Response: None needed.

Comment: Several commenters suggested that we amend § 1356.21(g)(1) to instruct the State to document a parent's inability or refusal to participate in the development of the case plan. Another commenter suggested that we require a State to document in the case plan the efforts caseworkers employed to engage the parent in the development of the plan.

Response: We expect that States will document efforts made to engage parents in developing the case plan, but we do not believe that it is necessary to prescribe this documentation. We believe it is especially critical that caseworkers engage parents early on because of the new time frames for permanency established by the ASFA.

Comment: A couple of commenters suggested that case plans be developed within 30 days of a State agency assuming responsibility for placement and providing services. One commenter believed that according to our proposed rule, case plans might not be developed until 120 days after a child has been actually removed from the home.

Response: The proposed rule at § 1356.21(g)(2) mirrored the language in existing regulations which required the case plan to be developed within 60 days of a State assuming responsibility for providing services, including placing the child. We are not convinced that shortening the time frame for developing case plans to 30 days will have any measurable effect on the quality and function of a case plan, and therefore, are not changing the regulation in this manner. We believe that one of the commenters may have misinterpreted the proposed rule to mean that States have up to 60 days from the date the child is considered to have entered care according to 475(5)(F) of the Act to develop the case plan. We would like to clarify that the date the child is considered to have entered foster care is irrelevant for purposes of developing the case plan. Rather, the case plan must be developed within 60 days of the child's removal from the home.

Comment: Some commenters suggested that we require specific steps in § 1356.21(g)(5) that a State should take to make and finalize alternate permanency placements.

Response: We believe that the specific steps a State agency makes to finalize alternate permanency placements are practice issues that need to be determined on a case-by-case basis. Therefore, we are not including these specific steps in regulation. A State agency can best formulate the steps necessary to achieve permanency based on the best interests of the child and the child's permanency plan. Court review and oversight of the permanency plan should provide an adequate check on State efforts in this area.

Comment: A few commenters suggested that we include in the final rule the language from section 475(1)(E) of the Act, which requires States, at a minimum, to document the steps and child-specific recruitment efforts if the child's permanency goal is adoption or placement in another permanent home. A couple of commenters also requested that we include in the final rule the statutory examples of child-specific recruitment efforts, *i.e.*, the use of State, regional and national adoption exchanges.

Response: We agree that a clearer statement of the requirement to document the steps to permanently place the child is warranted. We have, therefore, made changes to the language and included it in a new paragraph, 1356.21(g)(5). We have amended the language in the regulation so that the documentation of ''child specific recruitment efforts'' is only applicable to children with case plan goals of adoption and not to other permanency goals. We believe that the illustrative list which mentions adoption exchanges and the reference to recruitment limits the requirement to children with case plan goals of adoption. States still need to document the steps taken to secure a permanent placement for children with alternate permanency goals.

Comment: A commenter requested clarification on the differences between a case plan and a permanency plan.

Response: We use the term ''case plan'' to refer to a plan developed to meet the statutory requirements of sections 422(b)(10)(B)(ii), 471(a)(16), 475(1) and 475(5)(A) of the Act. The case plan is a written document which includes, in part: a description of the child's placement; a discussion of the safety and appropriateness of the placement; a plan for ensuring that the child and family receive services designed to facilitate the return of the child to a safe home or to another permanent placement; the health and educational records of the child; when appropriate, a description of the programs and services which will facilitate the child's transition from foster care to independent living; and, documentation of the steps to place the child in a permanent living arrangement.

The ''permanency plan,'' while it may be described in the case plan or may be a portion of the case plan, is what the planned permanency living arrangement will be for the child, *e.g.*, reunification with the family, or adoption. We understand that some States use the term ''permanency plan'' synonymously with ''case plan,'' because it conveys what the case plan is designed to accomplish. We do not believe that it is necessary to require States to use distinct terminology, as long as States meet the requirements of the statute and regulations.

Comment: A commenter suggested that we require courts to approve case plans.

Response: There is no statutory basis for requiring judicial approval of the State agency's case plan document. The court's role is to: exercise oversight of the permanency plan; review the State agency's reasonable efforts to prevent

removal from the home, reunify the child with the family and finalize permanent placements; and to conduct permanency hearings. The State agency is responsible for developing and implementing the case plan. We see no additional benefit in requiring court approval of the case plan.

In addition, we are clarifying in the regulation at § 1356.21(g)(3) that it is not permissible for courts to extend their responsibilities to include ordering a child's placement with a specific foster care provider. To be eligible for title IV–E foster care maintenance payments the child's placement and care responsibility must either lie with the State agency, or another public agency with whom the State has an agreement according to section 472(a)(2) of the Act. Once a court has ordered a placement with a specific provider, it has assumed the State agency's placement responsibility. Consequently, the State cannot claim FFP for that placement.

Comment: A couple of commenters requested that we specify that long term foster care is an appropriate permanency goal for unaccompanied refugee minors.

Response: The determination of the appropriateness of a permanency goal must be made by the State on a case-by-case basis and take into consideration the best interests of the child. The State agency is the responsible party for making this determination, with the oversight of the court. We, therefore, will not regulate appropriate permanency goals for any group of children.

Comment: A commenter suggested that we require case plans to address the child's developmental needs and acquisition of life skills.

Response: We believe that the statute at section 475(1) of the Act already requires States to document how the services provided will meet the needs of the child, and in the case of a child whose goal is independent living, the programs and services that will enable the child to transition into independent living. We do not believe that any additional regulation in this area is required.

Section 1356.21(h) Application of Permanency Hearing Requirements

This section implements the new ASFA requirements related to permanency hearings and modifies and clarifies existing policy. It also sets forth requirements for an administrative body appointed or approved by the court to conduct permanency hearings.

Comment: One commenter was concerned that children would become ineligible for title IV–E funding if the permanency hearing requirements were not satisfied as prescribed.

Response: We agree that the language at paragraph (h)(1) presented the permanency hearing as an eligibility criterion. That is not the case and we have amended the paragraph to clarify that, in meeting the requirements of the permanency hearing, the State must comply with section 475(5)(C) of the Act and this paragraph. The permanency hearing is a State plan requirement. It is not a title IV–E eligibility criterion. If the State fails to meet the permanency hearing requirements, it is out of compliance with the State plan. The child does not become ineligible for title IV–E funding.

Comment: We received a number of comments regarding paragraph (h)(2) which provides guidance related to determining for whom the State must hold permanency hearings. Commenters thought the paragraph was confusing and unclear about whether we were referring to initial or subsequent permanency hearings. We also received a request not to refer to these permanent placements as ''court sanctioned'' because the commenter felt the terminology meant the court chooses the placement, which would make the placement ineligible for title IV–E funding.

Response: In the NPRM, we proposed to retain the provision in the current regulation for permitting the State to waive subsequent permanency hearings for children placed in permanent foster family homes. The number of comments received prompted us to review this section of the proposed rule against the statutory language as amended by ASFA. Based on that review, we have decided to delete the paragraph in its entirety. When ASFA was passed the language from the definition of permanency hearing in section 475(5)(C) of the Act that addressed children remaining in foster care on a ''permanent or long term basis'' was removed. Instead, the ASFA requires the State to document a compelling reason for establishing a permanency plan that does not call for the child to exit foster care through reunification, adoption, legal guardianship, or placement with a fit and willing relative. Therefore, all children in foster care must be afforded the benefit of permanency hearings while they are in foster care.

Although the paragraph in question has been deleted from the regulation, we wanted to take this opportunity to respond to the observation that the State may not claim FFP when the court orders a specific placement for a child. The commenter is correct. Section 472(a)(2) of the Act requires responsibility for the child's placement and care to be with the State agency. When the court orders a specific placement, it in essence takes on the State's responsibility for the child's placement and the child becomes ineligible for title IV–E funding. To make this clear, we have amended § 1356.21(g) to note this restriction. The court may sanction a permanent foster family home through its oversight of the permanency plan, however, this does not give the court the authority to determine a specific placement for the child.

Finally, we recognize that States will need transition time to begin holding subsequent permanency hearings for children who formerly were exempt from this requirement. We will not take adverse action against a State that cannot comply with this requirement for a period of 12 months from the effective date of this final rule.

Comment: One commenter suggested that the requirement in paragraph (h)(2) for holding a permanency hearing within 30 days of a judicial determination that reasonable efforts are not required, be extended to circumstances beyond those identified at section 471(a)(15)(D) of the Act. Another wanted us to exempt unaccompanied refugee minors from this provision altogether.

Response: The statute is very specific to those circumstances enumerated at section 471(a)(15)(D) of the Act. We have no authority to expand that list. However, the State may hold a permanency hearing any time it deems it to be appropriate to do so. We also have no authority to exempt unaccompanied refugee minors from this requirement.

Comment: Some commenters noted that the language in § 1356.21(h)(3) (proposed § 1356.21(h)(4)) is inconsistent with the definition of ''permanency hearing'' at § 1355.20. The language at § 1356.21(h)(3) limited the alternate planned permanent living arrangement options to a foster family home.

Response: We concur with the commenter and have amended paragraph (h)(3) to use the exact statutory language, '' * * * another planned permanent living arrangement * * *.''

Comment: Some commenters objected to the inclusion of an example of a compelling reason for the State to choose another planned permanent living arrangement over reunification, guardianship, or adoption in the text of the regulation. These commenters believe that examples included in regulation become *de facto* policy.

Response: We do not believe that examples in regulation become *de facto* policy, nor were they intended to do so. However, we do not believe the example provided in the NPRM fully illustrates how to comply with this provision and have included additional examples in paragraph (h)(3) to more accurately reflect its intent.

Section 1356.21(i) Requirements for Filing a Petition to Terminate Parental Rights Per Section 475(5)(E) of the Social Security Act

This section implements the new ASFA provisions regarding termination of parental rights.

Comment: Many commenters sought exemptions for specific populations from the requirement for States to file or join TPR petitions for certain children who have been in foster care for 15 out of the most recent 22 months, abandoned infants, or children of parents who have committed certain felonies. Several commenters noted that many tribal cultures and traditions do not recognize the concepts of terminating parental rights and adoption, and requested a specific exemption from the application of the provision to tribes. Several commenters also wanted an exemption for unaccompanied refugee minors in foster care. The commenters noted that according to Federal regulations for child welfare services to unaccompanied refugee minors (see 45 CFR part 400, subpart H) such children ''are not generally eligible for adoption since family reunification is the objective of the [unaccompanied refugee minor child welfare] program.'' Similarly, some advocates and providers who work to preserve or reunify foreign-born children with their families, noted that the TPR requirement may hinder international reunification efforts by switching the focus from reunification to adoption after fifteen months. A few commenters also wanted exemptions for juveniles adjudicated delinquent, children voluntarily placed in foster care, and children deemed ''persons in need of services'' who are not considered abused or neglected.

Response: We have no statutory authority to provide an exemption for particular populations from the requirement to file a TPR for certain children. Thus, we did not make any exemptions to the requirement in the regulation. The TPR requirement is designed to encourage State agencies to make timely decisions about permanency for children in foster care. Congress developed the TPR provision to be applied to all children in foster care, whatever their entry point into the system. Exempting groups of children from the requirements would be contrary to ASFA's goal to shorten children's time in foster care. However, we are changing § 1356.21(i)(2)(ii) in two ways. First, to clarify that the State agency must apply the exceptions to the requirement to file a petition for TPR by considering the best interests of the individual child on a case-by-case basis. Second, we added two more examples of compelling reasons regarding unaccompanied refugee minors and situations involving international legal or foreign policy issues.

Comment: A commenter requested an explanation of how the TPR requirement applies to Indian tribes and the relationship to Indian Child Welfare Act requirements. A commenter suggested that the regulation clarify that tribal agencies can elect not to file a petition for TPR in certain circumstances.

Response: The Indian Child Welfare Act of 1978 (ICWA), Public Law 95–608, was passed in response to concerns about the large number of Indian children who were being removed from their families and tribes and the failure of States to recognize the culture and tribal relations of Indian people. ICWA, in part, creates procedural protections and imposes substantive standards on the removal, placement, termination of parental rights and consent to adoption of children who are members of or are eligible for membership in an Indian tribe. The addition of the requirement in section 475(5)(E) of the Act to file a petition for TPR for certain children in no way diminishes the requirements of ICWA for the State to protect the best interests of Indian children. Furthermore, States are required to comply with the ICWA requirements and develop plans that specify how they will comply with ICWA in section 422(b)(11) of the Act.

The requirement in section 475(5)(E) of the Act applies to Indian tribal children as it applies to any other child under the placement and care responsibility of a State or tribal agency receiving title IV–B or IV–E funds. While we recognize that termination of parental rights and adoption may not be a part of an Indian tribe's traditional belief system or legal code, we have no statutory authority to provide a general exemption for Indian tribal children from the requirement to file a petition for TPR. If an Indian tribe that receives title IV–B or IV–E funds has placement and care responsibility for an Indian child, the Indian tribe must file a petition for TPR or, if appropriate, document the reason for an exception to the requirement in the case plan, on a case-by-case basis.

Comment: We received many comments on the time frame in which a State must file a petition for TPR according to § 1356.21(i)(1)(i). Many commenters objected to our requiring a State to file a petition for TPR at the end of the child's fifteenth month in foster care, and suggested that we allow a grace period of up to 60 days. These commenters believed that to meet this time frame, a State agency would need to make decisions on permanency before the end of the fifteenth month, which they felt was unreasonable. A few commenters supported the provision as written. A commenter suggested that the State file before the end of the fifteenth month, and another suggested that we establish no time frames for filing the petition.

Response: We believe that States will have adequate time to prepare petitions for TPR, when appropriate, by the end of the child's fifteenth month in foster care. Furthermore, we can find no statutory basis for allowing a grace period for States to file a petition for TPR for children who have been in foster care for 15 out of the most recent 22 months. To meet the permanency hearing requirements, the State agency must prepare a permanency plan for the child to present to the court within 12 months. This will require the State agency to begin working with the family early on, so that the State agency can make appropriate decisions about permanency goals for the child, including whether to file a petition for TPR and pursue adoption.

Comment: A commenter suggested that once a State agency has determined that a child is an abandoned infant or a parent has committed certain felonies as described in section 475(5)(E) of the Act, the State file a petition within one week of that determination. The NPRM required that a State file such petitions within 60 days of the determination of abandonment or a parent's felony conviction.

Response: We do not concur with the commenter's suggestion to require a State to file a TPR petition within one week of a determination that the child is abandoned or that a parent has committed certain felonies. We continue to believe that 60 days is a reasonable period of time for the State agency to complete the necessary administrative and legal work required to file a petition for TPR.

Comment: A few commenters expressed uncertainty about whether a State must file a petition for TPR after a child has been in foster care for 15 months or 22 months.

Response: The State agency is required either to file a petition for TPR or document an exception to the requirement when a child has been in foster care for 15 cumulative months out of 22 months. If the child has been in care for 15 cumulative months, the State should not wait for 22 months of a child's stay in foster care to elapse before filing a petition for TPR. We do not believe that any change to the regulation is necessary.

Comment: A commenter expressed concern that the TPR requirement would be misinterpreted as prohibiting a State from filing a petition for TPR before a child has been in foster care for 15 months out of the most recent 22 months.

Response: We would like to clarify that a State continues to have the discretion to file a petition for TPR whenever it is in the best interests of the child to do so. In addition, Congress passed a Rule of Construction at section 103(d) of Public Law 105–89 reaffirming a State's ability to file a petition for TPR before it is mandated by Federal statute or for reasons other than those indicated in Federal law. Therefore, States should view the Federal statutory time frames of 15 out of 22 months of a child's stay in foster care as the maximum length of time that can elapse before a State agency must file a petition or document an exception for TPR.

Comment: We received a range of suggestions and comments on our proposal to exclude runaway episodes and trial home visits from the calculation of the 15-month time frame a child spends in foster care for TPR purposes. A few commenters opposed our exclusion of runaway episodes and trial home visits for various reasons. One commenter suggested that including trial visits and runaway episodes in the calculation was a way to ensure that no child languished in foster care. Another commenter suggested that we allow States to determine whether such time should be included. A third commenter was concerned that excluding runaway episodes and trial home visits increased the record keeping burden on States. A couple of commenters supported the provision as written. These commenters believed that our proposed policy is consistent with efforts to reunify the family when that is the goal.

Response: We considered all of these viewpoints and do not believe a change in the regulation is warranted. We believe that it is inappropriate to count time a child is on a runaway episode because during that time the agency is unable to provide services to the child or the family. Similarly, counting time when a child is at home with the family toward the time for calculating when to file a petition for TPR is inappropriate. While the child may be in the legal custody and under the supervision of the State agency, both the child and the parent consider him or her to be at home. However, as we discussed above, the State has the discretion to file a petition for TPR whenever it is in the best interests of the child to do so.

Comment: A commenter suggested that we define the number of calendar or business days that constitute a month for the purposes of calculating 15 out of the 22 most recent months for the TPR requirement. The commenter suggested we define a month as 30 days, presumably so that time less than a month spent in foster care would not be counted toward the requirement.

Response: We have decided not to define a ''month'' and leave it to the State's discretion.

Comment: We received a range of comments to our proposal that States need only apply the provision to file a TPR petition when a child has been in care 15 out of the most recent 22 months once, when the State determines that an exception applies. Several commenters voiced support for the proposed rule as written. Another commenter supported the proposed provision overall, but suggested that we include language in the regulation that explicitly requires States periodically, to reevaluate the need to file a petition for termination of parental rights. Many commenters opposed the provision believing that children may stay indefinitely in foster care once a State makes an exception to the TPR requirement.

Response: We understand the concern that children may continue to languish in foster care once a State applies an exception if this decision is never reevaluated. Nevertheless, we did not change the one-time application of the TPR provision for two reasons. First, the statutory construction of the provision makes it applicable only once. Second, we believe that there are at least two existing opportunities for the State to reevaluate an exception to the TPR requirement: the six-month periodic review and the permanency hearing.

We encourage States to use the six-month periodic review to review the continuing appropriateness of an exception to the requirement to file a petition for TPR within the context of the requirements in section 475(5)(B) of the Act. States also have another opportunity to reevaluate the decision not to pursue a TPR petition at the permanency hearing, which must be held at least every 12 months. The permanency hearing must address whether the child's permanency plan is to reunify the child with the family, file a petition for TPR and move toward adoption, or place the child with a fit and willing relative, legal guardian, or in another planned permanent living arrangement. The State is required to reevaluate the permanency plan during the course of the permanency hearing, regardless of whether the State agency has previously applied an exception to the requirement to file a petition for TPR. As such, we believe there are multiple safeguards to ensure that children do not languish in foster care.

Comment: A few commenters expressed doubt that States would use the exceptions in paragraph (i)(2) in appropriate cases and suggested that we discourage States from using the exceptions in the regulations. The commenters expressed concern that the exceptions could be used as a loophole to cover a State agency's deficiency in proper case planning or service delivery.

Response: We understand these concerns, however, the exceptions to the requirement to file a petition for TPR are statutory. We expect that States will apply the exceptions to filing a petition for TPR judiciously and on a case-by-case basis. We believe the intent of the requirement to file a petition for TPR for certain children was to encourage State agencies to make timely decisions about permanency for children in foster care. The exceptions were developed to allow State agencies to exercise individual case planning and seek an alternative permanent placement when adoption may not be appropriate or available for a child.

Comment: A couple of commenters raised concerns about the exception to filing a petition for TPR in situations where the child is placed with a relative. The commenters sought more guidance on how and when States should use this exception.

Response: The statute provides the State with the option not to file a petition for TPR when a child is placed with a relative. We encourage the use of relative placements as an option for ensuring that the child achieves permanency, and not only as a temporary placement. A State must continue to develop and reevaluate a child's case plan goal and conduct permanency hearings if the State decides not to file a petition for TPR because the child is placed with a relative. Relative placements should not preclude consideration of legalizing the permanency of the placement through adoption or legal guardianship.

Comment: The majority of comments supported our decision not to define the

term ''compelling reason,'' as it is used in section 475(5)(E) of the Act, to allow exceptions to the requirement to file a petition for TPR. A couple of commenters wanted us to define the term.

Response: We concur with the majority of commenters who did not want us to define the term ''compelling reason'' as used in the statute and have made no changes to the regulation. We believe that the determination of what constitutes a ''compelling reason'' must be based on the individual circumstances of the child and the family, and that a Federal definition would not be helpful in that process. We believe that the examples provided on possible compelling reasons provide adequate guidance about the practical application of this term without limiting a State's flexibility.

Comment: We received both criticism and support for listing two examples of a compelling reason not to file a petition for TPR. Many commenters did not want the two examples of compelling reasons included in the regulation for a variety of reasons. Some commenters believed that the examples would become ''de facto policy,'' and would therefore exempt groups of children from the requirement. Similarly, other commenters thought that specifying examples of compelling reasons was inconsistent with our decision not to define the term. Some commenters believed that the examples were too broad, and if used, would mitigate the effectiveness of the requirement.

On the other hand, many commenters supported the inclusion of the examples of compelling reasons. Some commenters expressed that the examples provided critical guidance to the field and would temper concerns about increases in the number of ''junk'' petitions and legal orphans. Other commenters wanted us to include the language from the preamble discussion on the examples in the regulation text, and some wanted us to expand the list of examples of compelling reasons. Commenters suggested that the expanded list of compelling reasons could include: A child belongs to a particular population (*i.e.*, adjudicated delinquents, Indian tribal children, and unaccompanied refugee minors); a child has not completed treatment in a residential facility; a child's parent had not been notified by the State agency that TPR was a possible outcome; a parent has made significant measurable progress to meet the requirements of the case plan; or, a child had a permanency goal other than adoption.

Response: In developing the two broad examples, we wished to provide some basic guidance to States short of the definition that most commenters opposed. We have, therefore, decided to retain the two examples of compelling reasons in the proposed regulation and added two additional examples. Unaccompanied refugee minors are those children who enter the country unaccompanied and are not destined to a parent, relative, or custodial adult. We received a number of comments noting that the Office of Refugee Resettlement (ORR) within the Department maintains a policy that reunification, in general, is the appropriate goal for these children while they are classified as unaccompanied refugee minors. ORR's regulation at 45 CFR part 400, Subpart H, defines an unaccompanied refugee minor and the rare circumstances in which adoption may be appropriate. In order to clarify that we do not intend to contradict HHS policy in this regard, we are listing this as another example of a compelling reason for not filing or joining a petition for TPR. We have also added a fourth example to address situations in which international legal or foreign policy considerations may affect a child's status. We are not including other populations as part of the examples of compelling reasons because we believe that the broad examples provide a framework that allows a State sufficient room to make decisions regarding filing a petition for TPR on a case-by-case basis that is in the best interests of an individual child.

Comment: One commenter suggested that the regulations clarify that compelling reasons for not filing for TPR may be defined in tribal policy. Another commenter suggested clarifying that the tribe rather than the State could document the compelling reason.

Response: The regulations are written from the State perspective because the State agency is ultimately responsible for the administration of the title IV–E program. If the tribe has responsibility for the placement and care of a child pursuant to a title IV–E agreement with a State, not only would it be permissible for the tribal agency to identify the compelling reason for not filing a petition for TPR, it would be the tribal agency's responsibility. Tribes and States may not develop a standard list of compelling reasons for not filing for TPR that exempts groups of children. Such a practice is contrary to the requirement that determinations regarding compelling reasons be made on a case-by-case basis.

Comment: A commenter suggested that we clarify the terminology for the second compelling reason example in § 1356.21(i)(2)(ii)(B) from ''insufficient grounds for filing a petition to terminate parental rights exist,'' to ''no grounds to file a petition to terminate parental rights exist.''

Response: We concur that the suggested language more accurately conveys our point that a compelling reason for not filing a petition for TPR may be that there are no grounds in State law on which to pursue a legal action to terminate parental rights. Therefore, we have made the suggested change in the regulation text. States, however, are not permitted to have State laws that carve out groups of the foster care population to be exempted from the requirement to file a petition for TPR.

Comment: A commenter wanted us to elaborate on the exception to TPR where the State has not provided the services identified in the case plan. The commenter may be concerned that we were not encouraging States to provide services in a more timely way. Another commenter questioned whether this exception also applied in situations where the specified services were not available, how the determination is made, and by whom.

Response: This exception to the requirement to file a petition for TPR is taken directly from the statute, as are all of the exceptions. We do not believe it is necessary to elaborate in the regulation on how the State agency should make the determination that the necessary services have not been provided. The exception affirms that the provision of services, early in a child's placement in foster care, is often crucial to either enabling the child to return to a safe and stable home or making a determination to move forward with a petition for TPR. By using the exception, a State agency can avoid penalizing the parent if the necessary services are not available or accessible to a parent or child. We encourage States to strengthen service delivery systems and to use this exception judiciously. We will be monitoring State' use of all of the exceptions in the child and family services review.

Comment: Many commenters sought clarification about the requirement at § 1356.21(i)(3) for a State concurrently to recruit and approve an adoptive family for a child while a State petitions for TPR. Most commenters wanted language added to the regulation text that interpreted the statutory provision to mean that a State agency should begin the process of finding an adoptive family at the time a petition for TPR is filed. Some commenters were concerned that the proposed rule and statutory language imply or encourage a State agency to wait until it has an adoptive family available for the child before the State agency proceeds with filing a

petition for TPR. Another commenter wanted to know if this requirement could be waived for children who did not have a goal of adoption.

Response: We understand the commenter' concern regarding the wording of this requirement and have made some changes to the regulatory language in § 1356.21(i)(3). The final rule now clarifies that the State must begin the process to find an adoptive family for the child concurrently with filing a petition for TPR. We believe that this provision was developed to ensure that a child does not wait unnecessarily between the time a TPR is granted and the child's permanent placement in a home. The requirement should not be interpreted to suggest that a State wait until an adoptive family is found for a specific child before a TPR petition is filed. We cannot waive the requirement to find an adoptive family for a child concurrently with the filing of a petition for TPR as there is no statutory authority to do so.

Comment: Several commenters sought clarification on whether the fact that a child had been in foster care for 15 out of the most recent 22 months was legal grounds for a State to file a TPR petition. Some commenters believed that we should specifically exclude the time frame as grounds for a TPR, while others thought that we should require or permit the time frame to be grounds for TPR.

Response: States are neither required nor prohibited by Federal statute from making a child's length of stay in foster care legal grounds to file or grant a petition for TPR. We have made no changes to the regulation in response to these comments.

Comment: A couple of commenters asked for greater specificity on the roles of the court and the agency with respect to the exceptions to filing a petition for TPR for certain children in foster care. In the preamble to the NPRM we noted that there was no requirement for the court to make a judicial determination if a State made a compelling reason exception to filing a petition for TPR. A commenter disagreed and suggested that Congressional intent was for the State agency to make an evidentiary case to the court regarding whether an exception was appropriate for the child. Another commenter suggested that we specify that court decisions prevail in situations where the court and State agency disagree on pursuing TPR.

Response: The requirement to file a petition for TPR or to document an exception to the requirement is the State agency's responsibility. The statutory language is clear that for a compelling reason, or any other exception to the requirement to file a petition for TPR, there is no requirement for a judicial determination. However, the State agency is to document in the case plan, which is available for court review, the compelling reason for why filing a petition for TPR is not in the best interests of the child. Clearly, courts play an important oversight role for children in foster care. The court exercises authority in making decisions at permanency hearings regarding the child's permanency plan. It is at these times that the court should review State agency decisions with regard to the requirement to file a petition for TPR. Finally, we have no authority to suggest that courts prevail in situations where there is a disagreement between the court and the State agency on filing a petition for TPR. We have made no change to the regulation in response to these comments.

Comment: Several commenters sought regulations on the responsibilities of courts and State agencies to finalize proceedings to terminate parental rights once the State agency has filed a petition for TPR. A couple of commenters proposed that we suggest a particular time frame for the court to finalize a TPR, and one suggested a time frame of six months. A third commenter suggested that we require the State agency to continue to file petitions for TPR if a court denies the original petition.

Response: We understand the concern that court and State agency delays occur once a petition for TPR is filed such that it could be several years before a child is finally adopted. However, our authority does not extend into the finalization of proceedings for termination of parental rights as this is a matter of State law. Therefore, we did not make any changes to the regulation in response to these comments.

Comment: A few commenters suggested that we note the importance of making reunification efforts with both parents and when necessary, filing TPR petitions on both parents.

Response: We believe that we have addressed this issue in a separate section of the regulation. We indicate in § 1356.21(b)(5) that State title IV–B/IV–E agencies can use the Federal Parent Locator Service (FPLS) in expediting permanency. In that paragraph we encourage States to use the FPLS to locate absent parents in order to explore permanent placements or pursue TPR. To avoid duplication, we chose to make such a statement in the reasonable efforts section to encourage States to find noncustodial parents early in a child's stay in foster care.

Comment: We received several comments that requested funding or program guidance on staff training, assessments, case planning, and concurrent planning around permanency.

Response: We believe that we can better provide practice-level guidance through technical assistance rather than through regulation.

Section 1356.21(j) Child of a Minor Parent in Foster Care

This section implements the statutory provision related to the title IV–E eligibility of the child of a minor parent who is in foster care.

Comment: A commenter suggested replacing ''must include amounts * * * '' to ''may include amounts * * * '' as some States give minor parents financial responsibility for the child.

Response: To revise this provision to be permissive would be in conflict with the statutory requirement. Section 475(4)(B) of the Act specifically requires that the foster care maintenance payment made on behalf of the minor parent ''shall'' include amounts that may be necessary to cover the foster care maintenance costs of a child of a minor parent when the parent and child are in the same foster family home or child care institution. We, therefore, did not change this paragraph of the regulation to reflect the commenter's suggestion.

Section 1356.21(k) Removal From the Home of a Specified Relative and § 1356.21(l) Living With a Specified Relative

Section 1356.21(k) describes, for the purposes of meeting the requirements of section 471(a)(1) of the Act, a ''removal.'' Section 1356.21(l) sets forth the required conditions for living with a specified relative prior to removal from the home.

Because of the complexity of this issue, we thought it best to explain again how the policy has changed before discussing the comments on this section of the regulation. To be eligible for title IV–E funding, a child must, among other things, be removed from the home of a relative as the result of a voluntary placement agreement or a judicial determination that continuation in the home would be contrary to the child's welfare. Under prior policy, we interpreted the term ''removal'' to mean a physical removal. As a result, if a child was residing with an interim caretaker who was a relative between the time the child lived with the custodial parent and when he or she entered foster care, and the State intended to remove custody from the

parent but let the child remain with that interim caretaker relative, the child could not be eligible for title IV–E funding because the child was not physically removed from the home of a relative. This policy created a disincentive for relative placements. To remove this inequity between relative and nonrelative caregivers, we now permit the removal of the child from the home, in such circumstances, to be a ''constructive'' (*i.e.*, a nonphysical) removal.

As a result of the comments we received on this proposed policy, we closely examined the examples provided in the preamble to the NPRM and the proposed regulatory text against the statute. As a result of this further review, we do not believe that example (3) on page 50078 of the preamble should have been included. In example (3), the living with and removal from requirements were satisfied by a *physical* removal from the interim relative caretaker with whom the child lived for seven months. A physical removal from the home of an interim relative caretaker cannot satisfy title IV–E eligibility because it is not the result of a voluntary placement or a judicial determination, as required by section 472(a)(1) of the Act.

We offer a summary of examples to clarify when a child would be eligible for title IV–E foster care under the rule. These examples presume that the child is eligible for AFDC (according to the State plan in effect on July 16, 1996) in the home of the parent or other specified relative:

- The child lived with either a related or nonrelated interim caretaker for less than six months prior to the State's petition to the court for removal of the child. The State licenses the home as a foster family home and the child continues to reside in that home in foster care. The child is eligible for title IV–E foster care if he or she lived with the parent within six months of the State's petition to the court, and was constructively removed from the parent (*i.e.*, there was a paper removal of custody).
- The child lived with either a related or nonrelated interim caretaker for more than six months prior to the State's petition to the court. The State licenses the home as a foster family home and the child remains in that home in foster care. The child is ineligible for title IV–E foster care since he or she had not lived with the specified relative within six months of the State's petition to the court, and was not removed from the home of a relative. (The constructive removal does not apply to this situation because it had been more than six months since the child lived with the parent.)
- The child lives with a related interim caretaker for seven months before the caretaker contacts the State to remove the child from his/her home. The agency petitions the court and the court removes custody from the parents and the agency physically removes the child from the home of the interim related caretaker. The child would not be eligible for title IV–E foster care since he or she had not lived with the parent or other specified relative from whom there was a constructive removal within six months of the initiation of court proceedings. (Although the child was physically removed from the home of the related interim caretaker, that removal cannot be used to determine title IV–E eligibility since the removal was not the result of a voluntary placement agreement or judicial determination, as required in section 472(a)(1) of the Act. Nor does constructive removal apply to this situation because it had been more than six months since the child lived with the parent from whom custody was removed.)
- The child lived with a nonrelated interim caretaker for seven months before the caretaker asks the State to remove the child from his/her home and place the child in foster care. The child is ineligible for title IV–E foster care because he or she had not lived with a parent or other specified relative within six months of the petition.
- The child is in a three-generation household in which the mother leaves the home. The grandmother contacts the State agency four months later and the agency petitions the court within six months of the date the child lived with the mother in the home. The State licenses the grandmother's home as a foster family home and the child continues to reside in the home in foster care. The child is eligible for title IV–E foster care since he or she lived with the parent within six months of the State's petition to the court, and was constructively removed from the parent's custody.

The regulatory text has been amended to reflect this change in policy and to more clearly delineate the requirements of living with and removal from the home of a specified relative.

Comment: Several commenters supported the policy on living with and removal from the home of a specified relative. One commenter noted that the new policy enhances a child's ability to remain with a relative and preserve the child's culture, as well as minimizes the number of out-of-home placements a child otherwise might experience.

Response: No changes were necessary in response to these comments.

Comment: Three commenters opposed the policy. Some of the commenters shared beliefs that: (1) The proposed policy creates a six-month statute of limitations period within which an abused and abandoned child must apply for foster care or be forever barred from receiving such benefits; (2) the policy impermissibly narrows title IV–E eligibility for children living with a relative; and (3) the policy discriminates against relative homes, and is in violation of the language and intent of ASFA.

Response: We have retained the proposed policy for the reasons that follow. In order to be eligible for title IV–E foster care, a child must be eligible for AFDC in his or her own home in the month of the voluntary placement agreement or initiation of court proceedings (*i.e.*, petition). However, if a child is not living with the custodial relative in the month of the voluntary placement agreement or petition, then the statute allows a six-month period during which the child may reside with an interim caretaker and still be eligible for title IV–E. In these circumstances, if a child is not living with the specified relative from whom he or she is being removed in the month of the voluntary placement agreement or petition, the child can be deemed eligible for that month if: (1) The child had been living with that specified relative at some time within the six-month period prior to that month; and (2) would have been eligible in the home of that specified relative in the month of the voluntary placement agreement or petition if the child had continued to reside with the relative. This is a longstanding Departmental policy based upon the statutory language in section 472(a)(4)(ii) of the Act, and consistent with the purpose of the program which is to provide continuing support for an AFDC-eligible child when he or she cannot live safely at home.

It is a misinterpretation to suggest that the proposed policy narrows title IV–E eligibility for children living with relative caretakers and is discriminatory against relatives as foster caretakers. Rather than limiting a child's eligibility or discriminating against relative homes, the policy supports children remaining with related caretakers when the State determines that they cannot live safely in their own homes, and applies the living with and removal from requirements equitably to both relative and nonrelative caretakers. Under the previous policy, if a parent left a child with a nonrelated caretaker and the agency petitioned the court for

removal of custody from the parent in less than six months from the date the child lived with the parent, the otherwise eligible child would have been eligible to receive title IV–E if the interim caretaker was subsequently licensed or approved as a foster family home by the State and the child remained in that home. Conversely, if the parent left the child with a related caretaker and the same circumstances existed, the otherwise eligible child would not have been eligible for title IV–E foster care because: (1) In the absence of the parents, the home and customary family setting was considered to have shifted to the home of the other relatives; and (2) the child was living with another relative at the time of petition and not physically removed from that home. The revised policy provides equitable treatment in either circumstance and encourages a child's continued placement with a relative caretaker when he or she cannot remain safely at home. The policy does not discriminate against relatives, and is consistent with the intent of ASFA.

Comment: Two commenters referenced the *Land* v. *Anderson* case and related litigation that are currently in the Ninth Circuit Court of Appeals. One commenter recommended that we follow the analysis in the *Land* v. *Anderson* case and the other commenter urged us to withdraw the proposed policy and await the outcome of the Ninth Circuit case.

Response: The final rule with respect to the issue before the above referenced court reflects longstanding Departmental policy that is in keeping with the statutory requirements. That policy continues to be in effect. Should the Ninth Circuit Court of Appeals rule against the Department, that decision would be subject to further review by the Supreme Court, and it would not, in any event, necessarily require a nationwide change in Federal law or policy. No changes were made to the regulation as a result of this comment.

Comment: One commenter suggested that the six-month time limit should be waived for relative care to support the child remaining with a family member.

Response: We are unable to waive the six-month time limit because it is statutory. The statute at section 472(a)(4) of the Act requires, among other things, that a child be living with and removed from the home of a specified relative at the time of the voluntary placement agreement or initiation of court proceedings. Section 472(a)(4)(B)(ii) of the Act provides an exception to that requirement by allowing a six-month period that the child can live with an interim caretaker and still be eligible for title IV–E foster care. We do not have the authority to waive a statutory provision and, therefore, did not revise the regulations. The flexibility we have afforded States, however, is to allow constructive removals (*i.e.*, paper or nonphysical removals) in order to provide equal treatment for related and nonrelated caregivers.

Comment: One commenter supported allowing ''legal'' removals, but did not believe that the revised interpretation of the removal requirement was clearly expressed. The commenter suggested language be included that more clearly states that ''legal'' removals are allowed.

Response: We concur with the comment and have revised the regulatory language to clarify that either physical or constructive removals are allowed.

Comment: A commenter suggested that ''interim caretaker'' be defined.

Response: We have revised the regulatory language to clearly provide for the use of constructive removals. In doing so, we have removed all references to interim caretakers. Therefore, there is no need to define this term in the regulation.

Comment: A commenter expressed concern that the restriction of ''within six months'' appears to contradict other areas of title IV–E eligibility where removal from the home of a specified relative is a determining factor.

Response: Removal from the home of a specified relative is one of several criteria for title IV–E eligibility, as is the six-month living with requirement. The commenter did not cite references for the sections of the Act about which the concern was raised and we do not find any specific citation that conflicts with the six-month limitation. No changes were made to the regulation based upon this comment.

Comment: One commenter asked if a child must be AFDC eligible as if he or she had been living in his or her home in the removal month even in circumstances where the child is not physically removed from that home.

Response: In determining title IV–E foster care eligibility, a child must be eligible for AFDC in the month in which either a voluntary placement agreement is entered into or a petition to the court is initiated to remove the child from his or her home. If the child is not living with a specified relative at that time, then section 472(a)(4)(B)(ii) of the Act allows a six-month period of time during which the child could have been living with an interim caretaker. Under these circumstances, a child can be considered AFDC eligible in the month of the voluntary placement agreement or petition if: (1) The child had been living with the specified relative at some time within the six-month period prior to that month; and (2) would have been eligible in the home of the specified relative in that month if he or she had continued to reside with the relative.

Comment: One commenter asked if there must be a physical removal for a child who lives with the same relative after legal custody is transferred to the State.

Response: Two possible scenarios can be derived from this question. In the first, a child is living with his or her parent, custody is transferred to the State but the child remains in the home of the parent. In this situation, the child is not in foster care and ineligible for title IV–E foster care. However, in a second scenario, the child is living with a related interim caretaker for less than six months prior to the State's petition to the court for removal of the child, and custody is removed from the parent. The related caretaker is licensed as a foster family home and the child continues to live in that home. In this situation, the child remains with the related caretaker, who is now a licensed foster parent, and the child is eligible for title IV–E foster care.

Comment: One commenter asked whether the child must have been living with the specified relative from whom custody is removed. The commenter pointed out that, at times, a child could be absent from such a home for six months or longer.

Response: Yes. The child must have been living with the specified relative from whom custody is removed at some time within the six-month period prior to the month of the voluntary placement agreement or initiation of court proceedings.

Comment: One commenter questioned the State agency's ability to make after the fact assessments of the need for foster care placement when families make such placements initially without the agency's involvement or determination that such placement/family disruption was necessary. The commenter expressed concern that this could create an incentive to get higher foster care rates in lieu of lower TANF rates.

Response: The purpose of title IV–E foster care is to provide assistance for the maintenance of AFDC-eligible children who cannot remain safely in their own homes. It is not for the purpose of maintaining children in the homes of noncustodial relatives when protection in their own home is not an issue. The revised policy assures equitable treatment for relative and nonrelative interim caretakers when the

child can no longer remain safely with the parent or other custodial relative. There are, however, certain requirements that must be met for AFDC-eligible children in every case: (1) There must be either a voluntary placement agreement between the custodial relative and the State agency, or court findings that it is contrary to the child's welfare to remain at home and that reasonable efforts have been made to prevent placement; (2) the foster care provider's home (whether related or not) must be fully licensed or approved in accordance with the State licensing standards; and (3) the protective and permanency requirements in the Act must be met. We want to emphasize that title IV–E foster care funds are available only when the child is at-risk in his or her own home and all other eligibility criteria are met.

Section 1356.21(m) Review of Payments and Licensing Standards

This section sets forth the State plan requirement regarding review of the appropriateness of payments under title IV–E, as well as State licensing/approval standards for foster homes. No comments were received on this paragraph and therefore we made no changes to the regulation.

Section 1356.21(n) Foster Care Goals

This section provides the requirements related to foster care goals that must be established by States.

Comment: One commenter requested an explanation of the criteria for these goals, and who will identify the goals.

Response: The criteria for establishing these goals, and who will identify the goals, is left to the individual States to determine. One example would be to set goals to reduce the number of children, in a given year, who have remained in foster care for at least 24 months by a certain percentage for each succeeding year and provide the steps that the State will take to achieve these incremental reductions. States also may want to align their foster care goals with those used for the annual report on State performance under section 479A of the Act.

Section 1356.21(o) Notice and Opportunity To Be Heard

This section implements the new requirement of the case review system that mandates giving notice of hearings and an opportunity to be heard to foster parents, preadoptive parents and relative caregivers.

Comment: We received several comments concerning the notification process for this requirement. Some commenters suggested that the regulation not be prescriptive concerning who must provide the notice, while others recommended that we clarify the manner in which the notice is given and who is responsible for providing the notice. One commenter cautioned that we not presume that foster parents will receive notice in the same manner as other parties. Another commenter suggested that the State agency be responsible for providing notice. One commenter raised a concern that more court hearings could occur as a result of improper notice. Another commenter recommended that we state the intent of this provision is for notice to be given in a timely manner and that the hearings be conducted in a location accessible to the child's family.

Response: We concur with the commenters who suggested that the regulation not be prescriptive with respect to who must provide the notice of the opportunity to be heard. Since the State title IV–B/IV–E agency has the ultimate responsibility for implementing the case review system requirements in section 475(5)of the Act and we do not regulate the courts, we believe that such decisions are best left to the State. Although we expect that a State will choose to use the same procedure for giving notice to foster parents, relative caretakers, and preadoptive parents as it does for the parents and others who are parties to the case, this is a State decision.

We also agree with the comment that suggested we clarify that the notification of the opportunity to be heard be given in a timely manner and have revised paragraph (o) accordingly. The right to notification of an opportunity to be heard is meaningless unless the individuals are notified of the opportunity to be heard at the review or hearing in a timely manner.

In addition, we understood the suggestion that we require that the location of the reviews and hearings be accessible to parents to mean the parents from whom the child was removed and not the foster parents, preadoptive parents or relative caretakers. We did not revise the regulation as a result of this comment since such a requirement is not covered by the statutory provision, the purpose of which is to afford the primary caregivers for a child who is in an out-of-home placement the opportunity to provide relevant information about the child at the review and hearing.

Comment: One commenter suggested that the regulatory language for this section be the same as that in the Act.

Response: These regulations implement the Act and clarify for States the requirements related to the statutory provisions. We believe that this section needs additional language to clarify the statutory provisions and therefore have not revised the regulation in the suggested manner.

Comment: One commenter suggested that we require States to provide extended family members with written notice of a child's entrance into foster care, timelines and permanency goals.

Response: States are not prohibited from providing extended family members with written notification of a child's entrance into foster care, if doing so is appropriate for the situation, in the best interests of the child, and consistent with the administration of the State's title IV–E State plan. However, we believe that the suggestion goes beyond the statutory authority; therefore we have not made this a requirement in the regulation.

Comment: One commenter requested more guidance on what documentation the State has to give caregivers, e.g., court reports, in preparation for their appearance in court. This commenter also requested that we require States to provide notice to caregivers who have had the child for at least three months during the two years preceding the hearing.

Response: The requirement that States give foster parents, preadoptive parents and relative caretakers notice of and an opportunity to be heard affords these individuals with a right to provide input to these reviews and hearings. However, it does not confer a right to appear in person at the review or hearing. The requirement can be met as the State sees fit, such as by notification to the individuals that they have an opportunity to attend the review or hearing and provide input, or notification that they can provide written input for consideration at the review or hearing. Since this provision does not make these individuals a legal party to the case and does not give them a right to appear at the review or hearing, it is up to the State to determine what documentation, if any, to provide, consistent with Federal and State confidentiality laws.

In addition, requiring that a State provide notice of an opportunity to be heard to previous caregivers goes beyond the statutory language. The statute requires only that notice be given to caregivers ''providing care'' for the child. This does not, however, prohibit a State from offering previous caregivers the opportunity to be heard, if the State determines it is appropriate for a particular child's situation.

Comment: We received several comments requesting clarification around the types of hearings these individuals should be attending, and the extent of their participation in the hearings. One commenter recommended that the regulation clearly lay out the types of hearings at which foster parents, preadoptive parents and relative caretakers have notice/opportunity to be heard. Some commenters pointed out that section 475(5)(G) of the Act gives foster parents, preadoptive parents, and relative caregivers the right to notice and the opportunity to be heard at ''any review or hearing,'' and is not limited to ''any review or permanency hearing.'' However, one commenter did not feel it would make sense to give them the opportunity to participate in purely procedural hearings, such as discovery hearings or hearings addressing purely legal issues. One commenter requested that HHS delete the requirement that these individuals be provided an opportunity to be heard at the six-month case reviews, and that the decision to invite individuals other than the biological parents should be made on a case-by-case basis.

Response: The proposed regulation provides the types of hearings and reviews that require notice and an opportunity to be heard for foster parents, preadoptive parents and relative caretakers. We made a minor revision to the regulatory language, however, to clarify that the review is the six-month periodic review as described in section 475(5)(B) of the Act. We did not make any further revisions as a result of these comments as we do not believe that they can be supported by the statute. The statute specifically requires that these caretakers be provided notice and an opportunity to be heard at ''any review or hearing'' held with respect to the child. We, therefore, do not have the statutory authority to waive that requirement by allowing a State to determine on a case-by-case basis whether these caretakers should be provided an opportunity to be heard at the reviews. Also, as stated above, the notice and opportunity to be heard does not mean that these individuals have to be invited to the reviews and hearings. This requirement can be met by providing the caretakers with an opportunity to present either written or oral input that can then be considered at the review or hearing.

Comment: Some commenters suggested that these individuals should not have the right to be present during entire hearings or access to confidential information regarding biological parents that is likely to be disclosed in a full hearing.

Response: We believe that the regulation is consistent with the statute with respect to the rights of the foster parents, preadoptive parents and relative caretakers regarding this provision and, therefore, did not make any changes. The provision only offers an opportunity to be heard and does not afford these individuals standing as a party in the case. As discussed in the preamble of the NPRM, the court, however, is not precluded from making appropriate rulings with respect to any of these individuals. Rather than prescribing in regulation that these individuals cannot be present during the entire hearing or be provided with confidential information, we believe those decisions are best left to the State and the court to determine, consistent with Federal and State confidentiality laws and the best interests of the child.

Comment: We received several comments concerning legal standing and party status for foster and preadoptive parents and relative caregivers. One commenter suggested adding language to the effect that the court can give standing to these individuals, and further recommended that the States set criteria for receiving standing, such as when the child has been in a particular foster home for a year. One commenter believes that these individuals need not be given the right to legal counsel because they do not have standing.

Response: State courts have the authority to make appropriate rulings with respect to these individuals. We believe that to impose requirements on States related to standing goes beyond the intent of the provision. In addition, the right to provide input on a case at a hearing does not convey the right to legal counsel to these individuals. We have not made any changes to the regulation in response to these comments.

Section 1356.22 Implementation Requirements for Children Voluntarily Placed in Foster Care

This section sets forth requirements States must meet to receive Federal financial participation (FFP) for children removed from home under a voluntary placement agreement.

Comment: We received several comments expressing concern around the application of the TPR requirement to children voluntarily placed in foster care. Some commenters believe that application of the TPR provision to this population goes beyond the statute. One commenter requested that unaccompanied refugee minors placed voluntarily be exempt from the TPR provision.

Response: We do not have the statutory authority to provide an exemption from the requirement to file a TPR for particular populations of children. Thus, we did not change the regulation to provide an exemption for children, including unaccompanied refugee minors, placed in foster care by a voluntary placement agreement. The TPR requirement is designed to encourage State agencies to make timely decisions about permanency for children in foster care. Congress developed the TPR provision to be applied to all children in foster care, whatever their entry point into the system. Exempting groups of children from the requirements would be contrary to ASFA's goal to shorten a child's time in foster care. Exceptions to the requirement to file a petition for TPR must be applied on a case-by-case basis considering the best interests of the child, consistent with § 1356.21(i)(2).

Comment: Many commenters expressed concern that there are insufficient protections for parents who voluntarily place their children in foster care, and that States have an affirmative obligation to notify parents of the ASFA requirements. Some commenters suggested that States be required to provide written notification to the parents or guardian at the time they voluntarily place their children in foster care of the requirements for periodic reviews, case plans, permanency hearings, and the TPR provisions.

Response: The statute and the regulation provide sufficient protections to parents who voluntarily place their children in foster care. Section 472(f)(2) of the Act requires that the voluntary placement agreement specify, at a minimum, the legal status of the child and the rights and obligations of the parents or guardian, the child, and the agency while the child is in an out-of-home placement. Further, the statute at section 472(g) of the Act suggests that a voluntary placement agreement is a temporary status, such that the parents or guardian have the capacity and right to revoke such agreement unless a court determines that return to the home would be contrary to the best interests of the child. The regulation at § 1356.22(c) emphasizes the rights of the parents in this regard as it requires the State to have uniform procedures, consistent with State law, for revocation by the parents of a voluntary placement agreement. In addition, the regulation at § 1356.21(g) requires that the case plan be developed jointly with the parent or guardian. Furthermore, it is incumbent

upon the State to work toward a timely reunification when the case plan goal is to return the child to his or her parents or guardian. We, therefore, do not believe that it is necessary to further prescribe what the State must present to the parents or guardian when they voluntarily place a child in foster care.

Comment: One commenter was opposed to the requirement that States establish a procedure for revocation of a voluntary placement agreement by the parents. The commenter believed that this is an unnecessary requirement unless the Department has evidence suggesting that parents have difficulty revoking these agreements and having their children returned.

Response: The requirement that States establish a procedure for revocation of a voluntary placement agreement is not new. This has been included in the voluntary placement agreement requirements since the regulations were issued in 1983. In fact, at that time, the Department determined that since the practice among States in returning children voluntarily placed is sufficiently responsive, we did not need to impose further requirements on States to specify the timing and procedures for the return home of a voluntarily placed child, as public comment had suggested at that time. We believe the requirement that the State have uniform procedures, consistent with State law, for revocation of such agreements provides a safeguard for parents who voluntarily place their children into foster care and, therefore, did not revoke this requirement.

Comment: One commenter suggested that § 1356.22(a)(3) be revised to read, ''45 CFR 1356.21 (f), (g), (h), and (i).''

Response: We concur with these comments and have amended the regulation accordingly. We agree that paragraph (f) should be included since it sets forth the sections of the statute to which a State must adhere in order to meet the case review system requirements. The case review system applies to all children in foster care, including children placed through a voluntary placement agreement. In addition, we concur with the inclusion of § 1356.21(g) in this provision since the State is required to develop a case plan for each child in foster care, including those voluntarily placed. We also agree with the exclusion of paragraph (j) since that sets forth the requirements for an infant born to, and placed with, a minor parent who is in foster care.

Section 1356.30 Safety Requirements for Foster Care and Adoptive Home Providers

This section pertains to safety requirements for foster care and adoptive home providers, and sets forth conditions under which States cannot license or approve foster and adoptive homes if the State finds that prospective foster or adoptive parents have been convicted of certain crimes.

Comment: We received several comments and questions regarding the application of the criminal records check requirement to the individuals and groups contained within the definition of foster care in § 1355.20 of the regulation. Some commenters recommended that the criminal records check provision not be applied to child care facilities or to unlicensed relatives. One commenter suggested that child care facilities not be included in the requirement, but that upon discovery of a criminal record, the facility be required to undertake corrective action.

Response: To address these comments, we would like to clarify the requirements for States that institute the criminal records check provision and the requirements for States that do not. The criminal records check provision does not extend to child care facilities; the statute specifically limits this requirement to prospective foster and adoptive parents. However, in order to be an eligible provider for title IV–E funding purposes, in all cases where no criminal records check is conducted, the licensing file must include documentation that safety considerations with respect to the caretakers have been addressed. This safety documentation requirement applies to child care institutions in every situation and to prospective foster and adoptive parents in States that opt out of the criminal records check provision. Since this provision is a title IV–E funding requirement, it does not extend to relative homes that are not licensed or approved in accordance with State licensing standards because children placed in such homes are not eligible for title IV–E funding.

Comment: Two commenters asked if this section applies to currently licensed foster parents and approved adoptive parents whose licensure or approval predates the passage of ASFA.

Response: The provision applies to ''prospective'' foster and adoptive parents. Therefore, the provision applies to foster and adoptive parents who are licensed or approved after the date of enactment of the law (November 19, 1997), or the approved delayed effective date if the State required legislation to implement the provision.

Comment: A commenter requested that we extend the requirements for a criminal records check by encouraging States to complete checks for any member of the household over the age of 18.

Response: To require that a State conduct criminal records checks for anyone other than prospective foster and adoptive parents goes beyond the statute.

Comment: One commenter requested clarification that this provision not be interpreted to require prospective foster/adoptive parents to be U.S. residents for the last five years. The commenter expressed belief that such an interpretation would be unfair to prospective caretakers of refugee minors.

Response: This provision does not impose a time-specified U.S. residency requirement on prospective foster and adoptive parents. However, for the State to claim title IV–E funds on behalf of a foster or an adoptive child, the prospective parent and the child must meet the requirements in the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 related to qualified aliens. ACYF–CB–PIQ–99–01 provides guidance with respect to when alien foster and adoptive parents and children can be eligible for title IV–E.

Comment: Several comments were received requesting flexibility in awarding adoptive/foster home licenses to individuals who have been convicted of certain crimes within the last five years. There is a concern regarding the requirement to automatically deny eligibility to prospective adoptive and foster parents who have had drug convictions within five years. It was recommended that States be allowed to make individual assessments of the prospective parent's ability to care for a child. Also, it was recommended that States have flexibility in decisions concerning rehabilitated relatives.

Response: The statute is very explicit in specifying that in such situations ''final approval shall not be granted.'' We, therefore, did not make the suggested changes because the statute does not support such an interpretation.

Comment: One commenter recommended that the phrase in § 1356.30(b)(4), ''violent crime, including rape, sexual assault * * *,'' be revised to reflect the ASFA language of ''crime involving violence.'' The commenter was concerned that certain nonviolent crimes, such as robbery, may involve violent actions that should be considered when determining the

suitability of prospective foster and adoptive parents.

Response: We concur with this comment and have revised the regulation to reflect the statutory language.

Comment: A commenter expressed concern with the inconsistency of allowing States to reunite children with biological parents who have committed certain crimes, but denying child placements with foster or adoptive parents who have committed these same crimes.

Response: We do not believe the statute is inconsistent in this regard. Although the safety of children is the paramount concern in both in-home and out-of-home situations, biological parents, who have certain rights with respect to their children, cannot be compared to a foster parent, who is a substitute caretaker when the child cannot be maintained safely in his or her own home. It is up to a State's discretion to determine, in individual cases, whether a child and biological parent should be reunited in cases where the parent has been convicted of certain crimes. It also is incumbent upon the State in its custodial role of a child to provide scrutiny of its foster parents to assure they meet certain established safety (and other) standards before a child is placed in the home.

Comment: A question was raised about whether ''a drug-related offense'' includes an alcohol-related felony conviction.

Response: The criminal records check provision at section 471(a)(20)(A) of the Act would apply in such situations. Alcohol is considered a drug and a felony conviction for an alcohol-related offense is a serious crime. Therefore, unless the State opts out of the provision, an alcohol-related felony conviction within the last five years would prohibit the State from placing children with the individual for the purpose of foster care or adoption under title IV–E.

Comment: One commenter supported the criminal records check provision, but raised a concern that prospective foster and adoptive parents not be subjected to duplicate or multiple requirements when several jurisdictions, with differing licensing and background checks, are involved. The commenter noted that involvement of multiple jurisdictions in an adoption may sometimes become a stumbling block to achieving permanency and finalizing adoptions.

Response: This issue is a matter of State discretion. The criminal records check provision is intended to assure the safety of children in foster care and adoptive placements. The State agency is responsible for determining the type of background checks necessary to meet the safety standards established by the State.

Comment: A commenter requested clarification concerning which criminal records check provisions apply to title IV–B and which apply to title IV–E. The commenter believes that § 1356.30(b), (c), and (d) are requirements only for title IV–E, and that (e) should be for children in licensed homes receiving title IV–E in States that opt out of the criminal records check requirement. The commenter suggests that an additional item (f) be added to address safety as a title IV–B requirement for all non-title IV–E out-of-home placements.

Response: The criminal records check requirement is both a title IV–E State plan provision and an eligibility requirement for title IV–E funding. The specific statutory language of the provision limits its authority to eligibility for the title IV–E foster care maintenance payment and adoption assistance programs under a State's title IV–E State plan. We, therefore, do not have the statutory authority to apply the requirement for criminal records checks to all non-title IV–E out-of-home placements of children and did not make this change in the regulation.

The regulation at § 1356.30(e), as proposed in the NPRM, would apply more broadly than only to those States that opt out of the criminal records check requirement. Since we may not have made this clear, we have separated the requirements of this paragraph into two sections for the final rule to clarify the criteria for title IV–E eligibility. We revised § 1356.30(e) to apply only in States that opt out of the criminal records check. We also added a paragraph (f) to set forth the safety requirements that must be addressed for child care institutions, which are not covered under the criminal records check provision. This revision only clarifies the requirements; it does not change the substance of the requirements in any way.

Comment: We received several comments concerning the inability to claim title IV–E until the criminal records check is completed. Commenters noted that the length of time required to complete background checks, particularly Federal Bureau of Investigations (FBI) checks, unfairly penalizes States. Several commenters recommended that States be allowed to claim FFP retroactively to the date of placement once the criminal records check has been completed, while others suggested that HHS allow provisional licensure for up to six months as long as application for the criminal records check is made within 30 days of placement. Another commenter suggested that States be allowed to claim FFP if the safety of the placement is documented, including checking the names of prospective parents against the State's child abuse registry, while awaiting completion of the background check.

Response: Federal matching funds for payments to foster family homes under title IV–E cannot be permitted until all State requirements for licensure are satisfied. Further, the criminal records check provision restricts eligibility for title IV–E funding until after the home has been finally approved for the placement of a title IV–E eligible child. In fact, the plain language of the criminal records check provision requires such checks on prospective foster and adoptive parents ''before'' the parent can be approved for ''placement of a child'' for whom foster care maintenance payments or adoption assistance payments ''are to be made.'' Accordingly, to allow a State to claim retroactively back to the date of placement would be in conflict with the statute which bases foster family home eligibility on licensure or approval of the home, including completion of a criminal records check.

However, we recognize that some time may elapse between the date the requirements are satisfied and the date on which the license or approval actually is issued to the foster home. We have concluded that 60 days is an ample period of time to allow between the time the State receives all the information on a home that is required to fully license or approve it and the date on which such license or approval is issued. Therefore, we have revised the definition of ''foster family home'' in the regulation to allow a State to claim title IV–E reimbursement for a period, not to exceed 60 days, between satisfaction of the approval or licensing requirements and the actual issuance of a full license or approval. This accommodation does not conflict with the statutory requirement that all licensure requirements must be satisfied before a foster home is eligible for title IV–E funding. Rather, it is recognition that a period of time may elapse between when the eligibility criteria are met and the time it takes a State to issue a license or approval.

Comment: One commenter opposed linking criminal records checks to title IV–E eligibility.

Response: Since the requirement for criminal records checks is statutorily linked to title IV–E eligibility, we did not change the regulation.

Comment: One commenter requested that we specify that the costs of conducting criminal records checks are allowable administrative costs under title IV–E.

Response: The regulations at § 1356.60(c)(2) allow States to claim costs associated with the recruitment and licensing of foster homes as administrative costs under title IV–E. ACYF–PA–83–01 identifies additional allowable administrative costs specific to the title IV–E adoption assistance program. Since the criminal records check provision is a condition of licensure or approval in States that do not opt out of the provision, costs associated with criminal records checks for prospective foster and adoptive parents are allowable under title IV–E when claimed pursuant to an approved cost allocation plan. No revisions were made to this section of the regulation since this is already covered in § 1356.60 which addresses fiscal requirements for title IV–E.

Comment: We received many comments concerning the levels of background checks required, *e.g.*, local, State, and Federal. Comments ranged from those that approve of State discretion in deciding what level of checks to conduct, to those that believe HHS should require both State and Federal background checks. One commenter suggested that we require all States to conduct Federal criminal records checks on prospective parents who have been living in a State for less than two years, while another suggested we require States to conduct background checks in States where the prospective parent previously resided.

Response: We have carefully considered the comments in this area. We concur with the commenters who approved of State discretion with respect to the level of background checks to conduct and, therefore, did not make any changes to the regulation. Although the comments with respect to expanding the criminal records check requirement were good suggestions, we believe that, in the absence of any statutory direction in this area, such decisions are best left to the State. We do, however, encourage States to be thorough in their safety assessments of foster homes and to utilize the information sources available to them to the fullest extent possible to assure the safety of children in out-of-home placements.

Comment: We received some comments suggesting that HHS require more extensive background checks, including child abuse registries, domestic violence registries, and adult protective services records.

Response: These are good suggestions and we encourage States to routinely include checks of State registries to assist in determining whether a potential foster family home is safe. However, we believe that to require a State to include such checks under this provision goes beyond the statutory authority.

Comment: One commenter expressed concern that past suspicions of child abuse and neglect will be discarded, and suggested that a National central registry be established for child abuse and neglect records.

Response: The establishment of a National central registry, and a requirement that States participate in such a registry, goes beyond the statutory authority. We did not make any changes to the regulations based on this comment since it does not relate directly to criminal records checks.

Comment: Two commenters expressed concern that States may opt out of the criminal records check requirement.

Response: The statute specifically makes the criminal records check requirement a State option. However, § 1356.30(e) and (f) of the regulation require States that opt out of the requirement to address and document safety in foster and adoptive homes, as well as child care institutions.

Comment: One commenter requested that the regulations be revised to specify that an Indian tribe may elect not to conduct or require criminal records checks on foster or adoptive parents if it obtains an approved resolution from the governing body of the Indian tribe.

Response: While we understand that Tribes often license or approve foster homes, we are unable to modify the regulation based on this comment. Tribes may only receive title IV–E funds pursuant to a title IV–E agreement with a State. A tribe that enters into such an agreement must comport with section 471(a)(20) of the Act and § 1356.30 in accordance with the State plan in order to receive title IV–E funding on behalf of children placed in the homes it licenses. The statute expressly gives the State the authority to opt out of section 471(a)(20) of the Act through State legislation or a letter from the Governor to the Secretary. Agreements between the State child welfare agency and other public agencies or tribes permit those entities to have placement and care responsibility for a particular group of the foster care population under the approved State plan. Such agreements do not permit other public agencies or tribes to develop a distinct title IV–E program separate from that operated under the approved State plan.

Comment: We received several comments asking for clarification concerning § 1356.30(e) and the procedures and documentation required to show that safety considerations have been made in States that have elected not to conduct or require criminal records checks. One commenter asked for guidance on what processes and procedures should be in place in lieu of a criminal records check. Another commenter suggested that the regulations require minimum documentation, such as: Written results of an on-site inspection of the home, group care facility, or institution; a statement that the home meets the minimal standards for health and safety; and an assurance that the caregivers have plans or procedures for protecting the safety of children.

Response: Although these were good suggestions, we do not believe that we have the statutory authority to specify the mechanism or documentation required to verify that safety considerations have been made. Although we leave that decision to the State, we continue to require that the licensing file for the foster family, adoptive family, child care institution and relative placement contain documentation that shows safety considerations have been addressed. In addition, we made a minor revision to the regulation to clarify that the documentation must verify that the safety considerations have been addressed. We strongly encourage States to conduct thorough safety checks and utilize all available information sources to the fullest to assure the safety of children in out-of-home placements.

Comment: One commenter asked for clarification that for States that have elected not to conduct or require criminal records checks, title IV–E may be claimed as long as the licensing file contains documentation that safety considerations have been addressed.

Response: We do not believe that a change is required in the regulation to confirm that title IV–E can be claimed in such circumstances. However, we have separated the requirements of this paragraph into two sections for the final rule to clarify the criteria for title IV–E eligibility. We revised § 1356.30(e) to apply only in States that opt out of the criminal records check. We also added a paragraph (f) to set forth the safety requirements that must be addressed for child care institutions, which are not covered under the criminal records check provision.

Section1356.50 Withholding of Funds for Noncompliance With the Approved Title IV–E State Plan.

Although we did not propose amendments to § 1356.50 of the regulations in the NPRM, we are amending it in this final rule to bring the cross-references contained therein into conformity with the new regulations.

Section 1356.60 Fiscal Requirements (Title IV–E)

This section sets for the fiscal requirements and available federal financial participation for title IV–E costs

In § 1356.60(b) we have made a technical amendment to the existing regulation with regard to matching for title IV–E training, in order to make it consistent with the statute. The existing regulation at § 1356.60(c)(4) authorizes States to use administrative funds at a matching rate of 50% for the training of foster and adoptive parents and staff of licensed or approved child care institutions that provide care for children receiving assistance under title IV–E. The existing regulation also limits associated costs to per diem and travel expenses. Since the promulgation of that regulation, the statute has been amended by section 13715 of the Omnibus Budget Reconciliation Act of 1993, to authorize State' use of training funds at a 75% match rate for the short-term training of current or prospective foster or adoptive parents as well as staff of licensed child care institutions. Under the statute, a State's claims may include but are not limited to per diem and travel.

The Department has followed the overriding statutory language since it was enacted (see ACYF–PI–94–15 and ACYF–PA–90–01). However, we would like to take this opportunity to make the regulatory language consistent with the statute. Because this change is technical in nature, and does not affect policy, we have included this change in this final rule. We are rescinding existing paragraph § 1356.60(c)(4) and amending § 1356.60(b)(1) to make this technical change.

Section 1356.71 Federal Review of the Eligibility of Children in Foster Care and the Eligibility of Foster Care Providers in Title IV–E Programs

This section sets forth the requirements governing Federal reviews of State compliance with the title IV–E eligibility provisions as they apply to children and foster care providers under paragraphs (a) and (b) of section 472 of the Act.

Section 1356.71(a) Purpose, Scope and Overview of the Process

Comment: Three commenters were of the opinion that the title IV–E review, because its major focus is on documentation, is inconsistent with the new outcomes-based review for child and family services. Two commenters said that this review relies solely on individual case eligibility for payments absent any consideration of good casework practice and procedures.

Response: The title IV–E foster care eligibility review and the child and family services review are different in purpose and scope. The purpose of the title IV–E eligibility review is to validate the accuracy of a State's claims to assure that appropriate payments are made on behalf of eligible children, to eligible homes and institutions, at allowable rates. These determinations are made most effectively by an examination of the case record and payment documentation. The title IV–E review has been revised, within existing statutory constraints, to strengthen the State and Federal partnership through the provision of corrective action and technical assistance. While we acknowledge the importance of positive outcomes for the children and families the title IV–E foster care program serves, we also acknowledge our attendant stewardship responsibility in the administration of this program.

Comment: We received five comments indicating that the title IV–E eligibility review penalizes child welfare agencies when certain eligibility requirements beyond the State's control, specifically those related to the documentation of judicial determinations, are not met.

Response: We recognize that child welfare agencies ultimately may be held accountable and lose title IV–E funding when documentation of the required title IV–E judicial determinations is not secured. Because the statute specifically requires judicial determinations regarding contrary to the welfare and reasonable efforts, however, we have no authority or flexibility to modify these requirements. Where the statute permits, we have afforded State child welfare agencies additional time to obtain the required judicial determinations.

Section 1356.71(b) Composition of Review Team and Preliminary Activities Preceding an On-Site Review

This section describes the composition of the on-site review team and the preliminary activities which the State must undertake prior to the on-site review.

Comment: We received four comments regarding the composition of the review team, including requests for specific representatives on the team, such as State foster care review board members, child advocates, and individuals with expertise on unaccompanied refugee minors. One commenter requested that we require States to include local agency staff on the review team.

Response: The purpose of the title IV–E financial review is to assess payment accuracy through an examination of case record documentation. Those individuals recommended above to participate on the title IV–E review team possess expertise that would be utilized more effectively on a review of service delivery issues, such as the child and family services review. During the title IV–E pilot reviews, we learned that the Federal/State team combination assisted States in identifying strategies for training, technical assistance and corrective action, and augmented the knowledge of State staff about title IV–E eligibility requirements. For these reasons, we see no benefit in expanding the review team composition to include external representatives. The State may, however, exercise its discretion in deciding the range of State and/or local staff to include on the team.

Comment: One commenter noted that the requirement that the State submit the complete payment history records for each sample case does not comport with the regulation governing records retention at 45 CFR part 74. The commenter inquired if ACF could require States to retain the payment history for a child in out-of-home care for more than three years. We received an additional comment about the difficulty of obtaining the payment history for a child in care for 10 years. A third commenter requested clarification regarding whether complete payment history encompassed only the six-month period under review or the complete life of the case. Another commenter said that complete payment history should be required only when the case is determined to be ineligible.

Response: There is no inconsistency between the requirement that a State provide the complete payment history and the regulation at 45 CFR 74.53(b) which, in pertinent part, states that ''Financial records * * * shall be retained for a period of three years from the date of submission of the *final expenditure report* * * .*'' (emphasis added). For a child in out-of-home care, the final expenditure report would not be submitted to ACF until such child is discharged from foster care. Since the title IV–E review is designed to look at a sample of more recent cases and because ASFA reinforces moving

children to permanency more expediently, we hope not to encounter any case where a child has been in foster care for 10 years. In those rare instances where we do review such a case, however, the payment history must reflect the title IV–E foster care payments for the duration of that child's placement, irrespective of the initial date of placement, if the case is still open and title IV–E payments continue to be made on that child's behalf. For these reasons, we do not agree that this requirement conflicts with 45 CFR part 74 and have made no modifications to this section.

We have concerns with the recommendation that the complete payment history be required only after a case is determined to be ineligible. The purpose of the title IV–E foster care eligibility review is to assure that appropriate payments are made on behalf of eligible children at allowable rates to eligible homes and institutions. Our experience has demonstrated that assuring that ''appropriate payments are made * * * at allowable rates'' is determined as the result of identifying duplicate payments, overpayments, underpayments, erroneous payments and related fiscal issues for each case under review at the time the case is being reviewed. Therefore, we have made no modification to this section.

Comment: We received one comment that ACF should allow sufficient time for States to prepare for the review.

Response: We acknowledge our responsibility to assure that States receive ample notice in order to prepare for a title IV–E review. We recognize that the specific preparation time may vary by State and may change as States become more familiar with the process. Taking into consideration the fact that Federal staff also will require time to prepare adequately for each review, we do not anticipate the lack of advance notice becoming an issue and, therefore, prefer not to regulate the notification period. We fully expect that States and Regional Offices will negotiate this aspect of the review in a mutually agreeable manner.

Section 1356.71(c) Sampling Guidance and Conduct of Review

This section describes the process to be used to select the title IV–E foster care sample of children to be reviewed.

Comment: Two commenters recommended that the description of the alternative sampling frame to be utilized when AFCARS data are unavailable or deficient should specify that the period under review is six months.

Response: We concur and have revised paragraph (c)(1) to clarify that the period under review is to be consistent with one AFCARS six-month reporting period when an alternative sampling methodology is utilized.

Comment: We received numerous comments about the sample that included a range of concerns regarding its statistical validity, its applicability to States of differing sizes with varying populations of children in foster care, its accuracy and its reliability. Three commenters questioned the rationale for random sampling as the preferred methodology. Several commenters objected to the error rate thresholds as abstract and unreasonably high. One commenter supported the thresholds as fair and reasonable. Several commenters urged us not to regulate the sampling methodology at all.

Response: The proposed sampling methodology is designed to provide national consistency in sample selection, reduce the burden on States associated with drawing their own samples, utilize the AFCARS database, and assure statistical validity. In our attempt to achieve a balance between partnership and stewardship, we considered and evaluated several sampling methodologies. The methodology chosen was the result of internal deliberations with ACF statisticians and is similar to the sampling methodology deployed throughout the history of the title IV–E reviews, with a significant modification that affords States an opportunity for program improvement prior to an extrapolated disallowance. We chose simple random sampling as the preferred methodology as we believe it will result in the most representative sample. However, we expect that States will work closely with ACF statisticians in pulling a sample that is representative and fair. We further expect that regulating the sample will afford States and ACF maximum accuracy, uniformity, consistency, and reliability.

Comment: One commenter found the terms ''first'' and ''second'' confusing, particularly when applied to the subsequent three-year reviews.

Response: We concur and have modified this and related sections to use the terms ''primary'' and ''secondary,'' respectively, to describe the reviews. The review of 80 cases is the primary review. In those instances where the 15 percent threshold is exceeded and the State enters into a PIP, followed by a review of 150 additional cases, this subsequent review will be referred to as the secondary review.

Comment: One commenter recommended that all States have an opportunity to have their primary review at the 15 percent threshold, since all primary reviews may not be completed within three years of the final rule. Another commenter noted that the title IV–E monitoring regulations do not indicate when ACF will begin conducting these reviews. A third commenter indicated that States should be afforded ample time to implement the various requirements.

Response: We agree in principle and have modified this section accordingly to reflect that each State's primary review will be subject to the 15 percent threshold. We fully anticipate that ACF and States will work together to assure that the primary reviews are held within a reasonable period of time after publication of the final rule. In any event, we do not expect that States will procrastinate in scheduling their primary reviews once they have been approached by ACF.

Comment: One commenter recommended that we delete the words ''determined to be'' from the discussion of disallowances in this section, noting that the disallowance will be applicable for the period of time that the case was ineligible and not from the date the reviewer discovered the ineligibility.

Response: We concur and have modified this section accordingly. Any disallowance will be applicable to the period of time during which the case is ineligible and not from the date the reviewer makes the determination of ineligibility.

Comment: Several commenters recommended that the secondary review should be limited to cases where children entered foster care after the PIP was implemented. Four commenters said that the final rules should not apply to children who entered foster care before the rule was finalized.

Response: We do not concur that the secondary review should include only cases of children who entered foster care after the program improvement plan was implemented or that the final rule apply only to children who entered foster care after its promulgation. We will apply the final rule prospectively so that States are only responsible for meeting the new requirements following the effective date of the final rule. Compliance with the requirements will be evaluated against the standards in effect at the time the action was taken. Therefore, the checklist will be modified so that we review for the ACF policy in effect at the time of the action and it reflects the transition time indicated in the pertinent sections of §§ 1355.20 and 1356.21(b)(2) related to

licensing of foster family homes and the reasonable efforts determination regarding finalizing permanency plans.

Comment: One commenter requested the discussion of the 10 percent and 15 percent error thresholds be clarified to make it apparent that the error threshold for the primary review is eight cases or fewer and four cases or fewer—not simply ''8'' and ''4.''

Response: We agree and have modified the regulations such that they consistently express that the error threshold for the primary review is eight or fewer and four or fewer cases—not simply eight or four. We further have revised this section to clarify that the error rate applicable to the secondary review of 150 cases is 10%.

Comment: One commenter requested that unaccompanied refugee minors be excluded from the sample of title IV–E cases reviewed.

Response: Any child on whose behalf title IV–E payments were made is subject to review. No statutory basis exists to exclude any specific population from review and, consequently, no modifications were made to this section.

Section 1356.71(d) Requirements Subject to Review

This section describes the requirements subject to the title IV–E eligibility reviews.

Comment: One commenter noted that section 475(1) of the Act was inappropriately cross-referenced in paragraph (2).

Response: We concur and have changed this cross-reference to § 1356.30 which addresses the safety requirements for foster care and adoptive home providers.

Comment: One commenter suggested that all title IV–E requirements be reviewed, including sections 471(a)(16), 475(1) and 475(5)(B) of the Act which are the requirements for case plans and six-month periodic reviews.

Response: The focus of the title IV–E foster care eligibility review is those child eligibility criteria set forth at section 472(a)(1)–(4) of the Act and the criminal records checks required at section 471(a)(20) of the Act. The sections noted by the commenter are addressed in the child and family services review of State plan requirements, and we made no changes to this section.

Section 1356.71(e) Review Instrument

This section informs States that a checklist will be used to substantiate child and provider eligibility during the on-site title IV–E foster care eligibility review.

Comment: Three commenters requested that the review instrument be made available immediately rather than upon publication of the final rule.

Response: It would be premature for us to publish the review instrument until the rule becomes final. Once that occurs, we will modify the instrument to reflect the final rule and make it publicly available.

Section 1356.71(f) Eligibility Determination—Child

This section sets forth the case record requirement of documentation to verify a child's eligibility.

Comment: Two commenters requested that the specific child eligibility requirements be included in this section.

Response: We concur that this would be helpful to States and have modified this section accordingly.

Section 1356.71(g) Eligibility Determination—Provider

This section sets forth the requirement for the licensing file for each case under review.

Comment: One commenter supports obtaining the licensing file and indicates that we should look ''beyond'' the actual license. Another commenter requested that the specific provider eligibility requirements be included in this section. A third commenter wanted to know the specific licensing standards to which States will be held accountable for the title IV–E foster care eligibility reviews. A fourth commenter requested clarification regarding the scope and extent of the provider review.

Response: The State plan requirement at section 471(a)(10) of the Act vests the State with the responsibility for establishing minimum licensing standards regarding safety, admissions policies, sanitation, and civil rights for foster family homes and child care institutions. The State is required to apply its licensing standards to any foster family home or child care institution receiving funds under titles IV–B and IV–E, and for the purposes of title IV–E, only place children in facilities that meet the Federal definition of a foster family home or child care institution. However, it is not within the scope of the title IV–E foster care eligibility review to examine the State licensing standards. For the title IV–E eligibility review, we will determine that the foster family home or facility has a valid license that encompasses the period of the child's stay under review and that the safety requirements at § 1356.30 have been addressed. We made no changes to the regulation as a result of this comment.

During a title IV–E eligibility review, we will examine a provider's license to determine that; it is an appropriate type of facility (*i.e.*, meets the definition of a foster family home or child care institution), the license is valid for the duration of the child's placement, and the safety requirements at § 1356.30 have been addressed. We made no changes to the regulation as a result of this comment.

Section 1356.71(h) Standards of Compliance

This section defines the terms ''substantial compliance'' and ''noncompliance,'' and describes the disallowances and program improvement plan process.

Comment: One commenter indicated that reviews should be conducted annually, as opposed to at three-year intervals. Another commenter recommended that we conduct monthly audits. A third commenter suggested reviews at five-year instead of three-year intervals after a State completes its primary review.

Response: The frequency of the title IV–E reviews is not statutorily mandated. We decided that three years was a reasonable time frame, considering that some States may be required to develop a PIP after their primary review. For some States, the PIP will be effective for as long as one year. Furthermore, the title IV–E review is not the sole mechanism in place to assure the propriety and accuracy of State' claiming procedures, since the ACF Regional Offices review the quarterly claims submitted by the States. For these reasons, and because States will be undergoing an intensive child and family services review following the publication of the final rule, we have made no modification to this section.

Comment: One commenter was of the opinion that more meaningful sanctions should be imposed. Another commenter supported ACF's proposal for the disallowance of funds, indicating that it provides an incentive for States to come into compliance.

Response: We carefully considered various options in developing the penalty structure for ineligible cases and believe that our proposal achieves the appropriate balance between partnership and stewardship. We have developed a more collaborative approach with the goal of bringing about the desired results utilizing a process that includes technical assistance and corrective action.

Section 1356.71(i) Program Improvement Plans

This section sets forth the requirement for States, determined not to be in substantial compliance, to develop a program improvement plan.

Comment: One commenter requested that we consider a provision for a State to negotiate the extension of a PIP in those instances when a legislative amendment is necessary for the State to achieve substantial compliance.

Response: We concur and have modified paragraph (i)(1)(i) to reflect that the duration of the program improvement plan will be determined jointly by the State and the ACF Regional Office, but shall not exceed one year, unless legislative action is required. In such cases, the State and ACF will negotiate the terms and length of the extension not to exceed the last day of the first legislative session after the date of the program improvement plan. We believe that this time frame is sufficient for a State to make necessary statutory changes to achieve substantial compliance.

Comment: Several commenters said that 60 days is insufficient time for a State to produce a comprehensive program improvement plan, since such a plan will require collaboration with multiple external entities. Proposed time frames ranged from 120 days to two years. Some commenters indicated that, under exceptional circumstances, a 30-day extension should be an option.

Response: An extensive period of time should not elapse from the completion of the on-site review to the development of the PIP. We do recognize, however, that occasionally circumstances may warrant the need for additional time for the State to collaborate with entities outside the child welfare agency, *e.g.*, the court system. We have, therefore, amended paragraph (i)(2) to reflect a modification from 60 days to 90 days for the development of the PIP.

Section 1356.71(j) Disallowance of Funds

This section sets describes how funds to be disallowed will be determined.

Comment: Two commenters noted that we reference a nonexistent paragraph ''(k)'' in the NPRM.

Response: We recognize this oversight and have removed the reference to paragraph (k) and clarified that, in the event that a State fails to submit a PIP, we will immediately proceed to the secondary review process.

Comment: One commenter noted that the sample period for a review after the completion of a PIP should be the first full AFCARS period subsequent to completion of the PIP.

Response: It is our intent to select a sample of cases from AFCARS for the secondary review after the PIP has been completed. In most instances, the most recent State AFCARS submission subsequent to the completion of the PIP will constitute the period under review.

Comment: One commenter recommends that the first review under the new protocol should be a joint pilot review with no disallowances taken in order to demonstrate ACF's assertion that the primary objectives of the reviews include promoting federal/state partnerships, focusing on program improvements and generating useful information.

Response: We conducted 12 title IV–E foster care eligibility pilot reviews over the past three years to inform the development of the new protocol. States were afforded many opportunities to volunteer for these pilots. We do not concur with the recommendation that we defer sanctions until after the primary review, since in the development of the process we already have suspended disallowances for more than three years.

Comment: One commenter requested clarification regarding the term ''universe of claims paid.'' Another commenter requested clarification regarding the scope of the title IV–E foster care disallowance and what was included in it.

Response: The term ''universe of claims paid'' means the Federal share of allowable title IV–E foster care maintenance payments and administrative costs for the period of time the case is ineligible. All title IV–E funds expended during the quarter(s) the case is ineligible will be subject to disallowance, including funds for administrative costs. We have revised this paragraph in the final rule to specify which funds will be reduced.

Part 1357—Requirements Applicable to Title IV–B

Section 1357.40 Direct Payments to Indian Tribal Organizations (Title IV–B, Subpart 1, Child Welfare Services)

This section provides the requirements for Indian Tribal Organizations to apply for and receive direct funds under title IV–B, subpart 1.

We made a technical change to § 1357.40 in the final rule to incorporate a 1995 change to the regulation that was mistakenly eliminated by a subsequent final rule. On June 2, 1995, we published a final rule (60 FR 28735–28737) amending the regulations governing direct payments to Indian Tribal Organizations (ITOs) for child welfare services. The revised regulations added a description of the formula used to calculate the amount of Federal funds available to eligible ITOs under title IV–B. A new paragraph, § 1357.40(g)(6), was added to implement the new formula. On November 18, 1996, we published a comprehensive final rule for title IV–B, Child and Family Services (61 FR 58632–58663), which amended § 1357.40 and inadvertently omitted the paragraph including the grant formula for ITOs.

We are taking this opportunity to restore the grant formula for ITOs to the regulation as we have been using this formula since it was effective in FFY 1996 (see ACYF–IM–CB–95–28). We have, therefore, made a technical amendment to add the grant formula in a new paragraph, § 1357.40(d)(6).

Impact Analysis

Executive Order 12866

Executive Order 12866 requires that regulations be drafted to ensure that they are consistent with the priorities and principles set forth in the Executive Order. The Department has determined that this rule is consistent with these priorities and principles. This final rule amends existing regulations concerning Child and Family Services by adding new requirements governing the review of a State's conformity with its State plan under titles IV–B and IV–E of the Social Security Act (the Act), and implements the provisions of the Social Security Act Amendments of 1994 (Pub. L. 103–432), the Multiethnic Placement Act (MEPA) as amended by Public Law 104–188, and certain provisions of the Adoption and Safe Families Act (ASFA) of 1997 (Pub. L. 105–89).

In addition, this final rule sets forth regulations that clarify certain eligibility criteria that govern the title IV–E foster care eligibility reviews that the Administration on Children, Youth and Families (ACYF) conducts to ensure a State agency's compliance with statutory requirements under the Act.

We received no comments on this section.

Executive Order 13132

Executive Order 13132 on Federalism applies to policies that have federalism implications, defined as ''regulations, legislative comments or proposed legislation, and other policy statements or actions that 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.'' This rule does not have federalism implications as defined in the Executive Order.

Family Well-Being Impact

As required by Section 654 of the Treasury and General Government Appropriations Act of 1999, we have assessed the impact of this final rule on family well-being. The final rule implements requirements of titles IV–B and IV–E of the Social Security Act relating to Federal monitoring and oversight of State child welfare programs. The rule will promote child safety, child and family well-being and permanence for those children who must be removed from their families temporarily to assure their safety. The final rule will help to ensure that States are taking appropriate steps to protect children and to strengthen, support and stabilize both biological and adoptive families.

Regulatory Flexibility Act of 1980

The Regulatory Flexibility Act (5 U.S.C. Ch. 6) requires the Federal government to anticipate and reduce the impact of rules and paperwork requirements on small businesses. For each rule with a ''significant number of small entities'' an analysis must be prepared describing the rule's impact on small entities. ''Small entities'' are defined by the Act to include small businesses, small nonprofit organizations and small governmental entities. These regulations do not affect small entities because they are applicable to State agencies that administer the child and family services programs and the foster care maintenance payments program.

We received no comments on this section.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act (Pub. L. 104–4) requires agencies to prepare an assessment of anticipated costs and benefits before proposing any rule that may result in an annual expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation).

Comment: One commenter argued that the regulation was not in compliance with the Unfunded Mandates Reform Act (UMRA) because the ASFA requirements significantly increase the administrative burden and cost for State courts and agencies, which are not offset by an increase in Federal funding.

Response: Section 201 of the UMRA states that, ''[e]ach agency shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' The UMRA is not applicable to the codification of the ASFA requirements because they are specifically set forth in law. Rather, it is the requirements and procedures of the child and family services review and the title IV–E eligibility review processes which come under the auspices of the UMRA.

This final rule does not impose any mandates on State, local, or tribal governments, or the private sector that will result in an annual expenditure of $100,000,000 or more. We anticipate that one-third (17) of the States will be reviewed under both review procedures each year and that, each year, approximately five States will be required to complete a corrective action plan in response to section 471(a)(18) compliance issues, for an annual cost of $352,420. This estimate is based on the burden hours associated with each information collection identified in the ''Paperwork Reduction Act'' section.

Congressional Review

This rule is not a major rule as defined in 5 U.S.C., Chapter 8.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104–13, all Departments are required to submit to the Office of Management and Budget (OMB) for review and approval any reporting or record-keeping requirements inherent in a proposed or final rule. This final rule contains information collection requirements in certain sections that the Department has submitted to OMB for its review.

The sections that contain information collection requirements are: 1355.33(b) on statewide assessments, and (c) on-site review; 1355.35(a) on program improvement plan; 1355.38(b) and (c) on corrective action plans; and 1356.71(i) on program improvement plan. Section 1356 on State plan document and submission requirements (OMB Number 0980–0141) and case plan requirements (OMB Number 0980–0140) contains information collections. However, these are approved collections and no changes are being made at this time.

The respondents to the information collection requirements in this rule are State agencies. The Department requires this collection of information: (1) In order to review State' compliance with the provisions of the statute and implementing regulations of titles IV–B and IV–E of the Act; and (2) effectively implement the statutory requirement at section 1123A of the Act which requires that regulations be promulgated for the review of child and family services programs, and foster care and adoption assistance programs for conformity with State plan requirements.

Comment: A few commenters noted that the estimate for the burden hours associated with § 1355.33(c), the on-site portion of the child and family services review, was too low. The commenters observed that extensive training is required to prepare reviewers.

Response: We agree and have amended the estimate accordingly. In addition, we have significantly increased the estimated burden for the on-site portion of the child and family services review to account for the logistics associated with scheduling interviews.

Collection	Number of respondents	Number of responses	Average burden hours per response	Total burden hours
1355.33(b)—Statewide assessment	17—State agencies administering the title IV–B & E Programs.	17	240	4,080
1355.33(c)—On-site review	17—State agencies administering the title IV–B & E programs.	595	18	10,710
1355.35(a)—Program improvement plan	17—State agencies administering the titles IV–B & IV–E programs.	17	80	1,360
1355.38(b) and (c)—Corrective action plan	5—State agencies administering titles IV–B and IV–E.	5	80	400
1356.71(i)—Program improvement plan	17—State agencies administering the title IV–E program.	17	63	1,071

We received and considered 38 letters in response to the preclearance Notice (63 FR 52703 (October 1, 1998)) published in order to obtain approval of this information collection under the Paperwork Reduction Act. Several commenters submitted comments on the October 1, 1998 Notice in conjunction with their comments on the NPRM. The comment period for the October 1, 1998 Notice closed on December 1, 1998 while the comment period for the NPRM closed on December 17, 1998. In our opinion, to consider late comments constitutes an arbitrary extension of the comment period for certain groups or individuals. Those comments pertaining to the October 1, 1998 Notice that were submitted in conjunction with the comments on the NPRM were late and were not considered.

In the October 1, 1998 Notice, we published, in their entirety, the statewide assessment, on-site review instrument, and stakeholder interview guide used in conducting the child and family service review. Overwhelmingly, the comments we received were very technical in nature. Commenters offered specific suggestions for rephrasing or adding questions, for quantifying responses, for changes in terminology, and for increasing the objectivity of the instruments. In response to the comments received, each instrument has undergone significant revision. We streamlined the statewide assessment so that it targets State performance in satisfying the relevant State plan requirements and reports on the statewide data indicators used for determining substantial conformity. The on-site review instrument and stakeholder interview guide have been revised to increase objectivity in drawing conclusions regarding the State's performance in achieving the outcomes and in implementing the systemic factors. Copies of the instruments will be distributed to all State agencies and posted on the ACF web site immediately following the effective date of this regulation.

List of Subjects

45 CFR Part 1355

Adoption and foster care, Child welfare, Grant programs-Social programs.

45 CFR Part 1356

Adoption and foster care, Grant programs-social programs

45 CFR Part 1357

Child and family services, Child welfare, Grant programs-Social programs

(Catalog of Federal Domestic Assistance Program Numbers 93.658, Foster Care Maintenance; 93.659, Adoption Assistance; and 93.645, Child Welfare Services—State Grants)

Approved: September 23, 1999.

Donna E. Shalala,

Secretary.

Dated: August 25, 1999.

Olivia A. Golden,

Assistant Secretary for Children and Families.

For the reasons set forth in the preamble we are amending 45 CFR parts 1355, 1356, and 1357 to read as follows:

PART 1355—GENERAL

1. The authority citation for part 1355 continues to read as follows:

Authority: 42 U.S.C. 620 *et seq.*, 42 U.S.C. 670 *et seq.*, 42 U.S.C. 1302.

2. Section 1355.20 is amended by revising the definition of *Foster care* and by adding the following definitions in alphabetical order to read as follows:

§ 1355.20 Definitions.

(a) * * *

Child care institution means a private child care institution, or a public child care institution which accommodates no more than twenty-five children, and is licensed by the State in which it is situated or has been approved by the agency of such State or tribal licensing authority (with respect to child care institutions on or near Indian Reservations) responsible for licensing or approval of institutions of this type as meeting the standards established for such licensing. This definition must not include detention facilities, forestry camps, training schools, or any other facility operated primarily for the detention of children who are determined to be delinquent.

* * * * *

Date a child is considered to have entered foster care means the earlier of: The date of the first judicial finding that the child has been subjected to child abuse or neglect; or, the date that is 60 calendar days after the date on which the child is removed from the home pursuant to § 1356.21(k). A State may use a date earlier than that required in this paragraph, such as the date the child is physically removed from the home. This definition determines the date used in calculating all time period requirements for the periodic reviews, permanency hearings, and termination of parental rights provision in section 475(5) of the Act and for providing time-limited reunification services described at section 431(a)(7) of the Act. The definition has no relationship to establishing initial title IV–E eligibility.

* * * * *

Entity, as used in § 1355.38, means any organization or agency (*e.g.*, a private child placing agency) that is separate and independent of the State agency; performs title IV–E functions pursuant to a contract or subcontract with the State agency; and, receives title IV–E funds. A State court is not an ''entity'' for the purposes of § 1355.38 except if an administrative arm of the State court carries out title IV–E administrative functions pursuant to a contract with the State agency.

Foster care means 24-hour substitute care for children placed away from their parents or guardians and for whom the State agency has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, child care institutions, and preadoptive homes. A child is in foster care in accordance with this definition regardless of whether the foster care facility is licensed and payments are made by the State or local agency for the care of the child, whether adoption subsidy payments are being made prior to the finalization of an adoption, or whether there is Federal matching of any payments that are made.

Foster care maintenance payments are payments made on behalf of a child eligible for title IV–E foster care to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel for a child's visitation with family, or other caretakers. Local travel associated with providing the items listed above is also an allowable expense. In the case of child care institutions, such term must include the reasonable costs of administration and operation of such institutions as are necessarily required to provide the items described in the preceding sentences. ''Daily supervision'' for which foster care maintenance payments may be made includes:

(1) *Foster family care*—licensed child care, when work responsibilities preclude foster parents from being at home when the child for whom they have care and responsibility in foster care is not in school, licensed child care when the foster parent is required to participate, without the child, in activities associated with parenting a child in foster care that are beyond the scope of ordinary parental duties, such as attendance at administrative or

judicial reviews, case conferences, or foster parent training. Payments to cover these costs may be: included in the basic foster care maintenance payment; a separate payment to the foster parent, or a separate payment to the child care provider; and

(2) *Child care institutions*—routine day-to-day direction and arrangements to ensure the well-being and safety of the child.

Foster family home means, for the purpose of title IV-E eligibility, the home of an individual or family licensed or approved as meeting the standards established by the State licensing or approval authority(ies) (or with respect to foster family homes on or near Indian reservations, by the tribal licensing or approval authority(ies)), that provides 24-hour out-of-home care for children. The term may include group homes, agency-operated boarding homes or other facilities licensed or approved for the purpose of providing foster care by the State agency responsible for approval or licensing of such facilities. Foster family homes that are approved must be held to the same standards as foster family homes that are licensed. Anything less than full licensure or approval is insufficient for meeting title IV-E eligibility requirements. States may, however, claim title IV-E reimbursement during the period of time between the date a prospective foster family home satisfies all requirements for licensure or approval and the date the actual license is issued, not to exceed 60 days.

Full review means the joint Federal and State review of all federally-assisted child and family services programs in the States, including family preservation and support services, child protective services, foster care, adoption, and independent living services, for the purpose of determining the State's substantial conformity with the State plan requirements of titles IV-B and IV-E as listed in § 1355.34 of this part. A full review consists of two phases, the statewide assessment and a subsequent on-site review, as described in § 1355.33 of this part.

* * * * *

Legal guardianship means a judicially-created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the person, custody of the person, and decision-making. The term *legal guardian* means the caretaker in such a relationship.

National Child Abuse and Neglect Data System (NCANDS) means the voluntary national data collection and analysis system established by the Administration for Children and Families in response to a requirement in the Child Abuse Prevention and Treatment Act (Pub. L. 93–247), as amended.

Partial review means:

(1) For the purpose of the child and family services review, the joint Federal and State review of one or more federally-assisted child and family services program(s) in the States, including family preservation and support services, child protective services, foster care, adoption, and independent living services. A partial review may consist of any of the components of the full review, as mutually agreed upon by the State and the Administration for Children and Families as being sufficient to determine substantial conformity of the reviewed components with the State plan requirements of titles IV-B and IV-E as listed in § 1355.34 of this part; and

(2) For the purpose of title IV-B and title IV-E State plan compliance issues that are outside the prescribed child and family services review format, *e.g.*, compliance with AFCARS requirements, a review of State laws, policies, regulations, or other information appropriate to the nature of the concern, to determine State plan compliance.

Permanency hearing means:

(1) The hearing required by section 475(5)(C) of the Act to determine the permanency plan for a child in foster care. Within this context, the court (including a Tribal court) or administrative body determines whether and, if applicable, when the child will be:

(i) Returned to the parent;

(ii) Placed for adoption, with the State filing a petition for termination of parental rights;

(iii) Referred for legal guardianship;

(iv) Placed permanently with a fit and willing relative; or

(v) Placed in another planned permanent living arrangement, but only in cases where the State agency has documented to the State court a compelling reason for determining that it would not be in the best interests of the child to follow one of the four specified options above.

(2) The permanency hearing must be held no later than 12 months after the date the child is considered to have entered foster care in accordance with the definition at § 1355.20 of this part or within 30 days of a judicial determination that reasonable efforts to reunify the child and family are not required. After the initial permanency hearing, subsequent permanency hearings must be held not less frequently than every 12 months during the continuation of foster care. The permanency hearing must be conducted by a family or juvenile court or another court of competent jurisdiction or by an administrative body appointed or approved by the court which is not a part of or under the supervision or direction of the State agency. Paper reviews, *ex parte* hearings, agreed orders, or other actions or hearings which are not open to the participation of the parents of the child, the child (if of appropriate age), and foster parents or preadoptive parents (if any) are not permanency hearings.

* * * * *

Statewide assessment means the initial phase of a full review of all federally-assisted child and family services programs in the States, including family preservation and support services, child protective services, foster care, adoption, and independent living services, for the purpose of determining, in part, the State's substantial conformity with the State plan requirements of titles IV–B and IV–E as listed in § 1355.34 of this part. The statewide assessment refers to the completion of the federally-prescribed assessment instrument by members of a review team that meet the requirements of § 1355.33(a)(2) of this part.

3. New §§ 1355.31 through 1355.39 are added to read as follows:

§ 1355.31 Elements of the child and family services review system.

Scope. Sections 1355.32 through 1355.37 of this part apply to reviews of child and family services programs administered by States under subparts 1 and 2 of title IV–B of the Act, and reviews of foster care and adoption assistance programs administered by States under title IV–E of the Act.

§ 1355.32 Timetable for the reviews.

(a) *Initial reviews.* Each State must complete an initial full review as described in § 1355.33 of this part during the four-year period after the final rule becomes effective.

(b) *Reviews following the initial review.*

(1) A State found to be operating in substantial conformity during an initial or subsequent review, as defined in § 1355.34 of this part, must:

(i) Complete a full review every five years; and

(ii) Submit a completed statewide assessment to ACF three years after the

on-site review. The statewide assessment will be reviewed jointly by the State and the Administration for Children and Families to determine the State's continuing substantial conformity with the State plan requirements subject to review. No formal approval of this interim statewide assessment by ACF is required.

(2) A State program found not to be operating in substantial conformity during an initial or subsequent review will:

(i) Be required to develop and implement a program improvement plan, as defined in § 1355.35 of this part; and

(ii) Begin a full review two years after approval of the program improvement plan.

(c) *Reinstatement of reviews based on information that a State is not in substantial conformity.*

(1) ACF may require a full or a partial review at any time, based on any information, regardless of the source, that indicates the State may no longer be operating in substantial conformity.

(2) Prior to reinstating a full or partial review, ACF will conduct an inquiry and require the State to submit additional data whenever ACF receives information that the State may not be in substantial conformity.

(3) If the additional information and inquiry indicates to ACF's satisfaction that the State is operating in substantial conformity, ACF will not proceed with any further review of the issue addressed by the inquiry. This inquiry will not substitute for the full reviews conducted by ACF under § 1355.32(b).

(4) ACF may proceed with a full or partial review if the State does not provide the additional information as requested, or the additional information confirms that the State may not be operating in substantial conformity.

(d) *Partial reviews based on noncompliance with State plan requirements that are outside the scope of a child and family services review.* When ACF becomes aware of a title IV–B or title IV–E compliance issue that is outside the scope of the child and family services review process, we will:

(1) Conduct an inquiry and require the State to submit additional data.

(2) If the additional information and inquiry indicates to ACF's satisfaction that the State is in compliance, we will not proceed with any further review of the issue addressed by the inquiry.

(3) ACF will institute a partial review, appropriate to the nature of the concern, if the State does not provide the additional information as requested, or the additional information confirms that the State may not be in compliance.

(4) If the partial review determines that the State is not in compliance with the applicable State plan requirement, the State must enter into a program improvement plan designed to bring the State into compliance. The terms, action steps and time-frames of the program improvement plan will be developed on a case-by-case basis by ACF and the State. The program improvement plan must take into consideration the extent of noncompliance and the impact of the noncompliance on the safety, permanency or well-being of children and families served through the State's title IV–B or IV–E allocation. If the State remains out of compliance, the State will be subject to a penalty related to the extent of the noncompliance.

(5) Review of AFCARS compliance will take place in accordance with 45 CFR 1355.40.

§ 1355.33 Procedures for the review.

(a) The full child and family services reviews will:

(1) Consist of a two-phase process that includes a statewide assessment and an on-site review; and

(2) Be conducted by a team of Federal and State reviewers that includes:

(i) Staff of the State child and family services agency, including the State and local offices that represent the service areas that are the focus of any particular review;

(ii) Representatives selected by the State, in collaboration with the ACF Regional Office, from those with whom the State was required to consult in developing its CFSP, as described and required in 45 CFR part 1357.15(l);

(iii) Federal staff of HHS; and

(iv) Other individuals, as deemed appropriate and agreed upon by the State and ACF.

(b) *Statewide assessment.* The first phase of the full review will be a statewide assessment conducted by the internal and external State members of the review team. The statewide assessment must:

(1) Address each systemic factor under review, including the statewide information system; case review system; quality assurance system; staff training; service array; agency responsiveness to the community; and foster and adoptive parent licensing, recruitment and retention;

(2) Assess the outcome areas of safety, permanency, and well-being of children and families served by the State agency using data from AFCARS, NCANDS, or, for the initial review, another source approved by ACF. The State must also analyze and explain its performance in meeting the national standards for the statewide data indicators;

(3) Assess the characteristics of the State agency that have the most significant impact on the agency's capacity to deliver services to children and families that will lead to improved outcomes;

(4) Assess the strengths and areas of the State's child and family services programs that require further examination through an on-site review;

(1) Include a listing of all the persons external to the State agency who participated in the preparation of the statewide assessment pursuant to §§ 1355.33(a)(2)(ii) and (iv); and

(2) Be completed and submitted to ACF within 4 months of the date that ACF transmits the information for the statewide assessment to the State.

(c) *On-site review.* The second phase of the full review will be an on-site review.

(1) The on-site review will cover the State's programs under titles IV–B and IV–E of the Act, including in-home services and foster care. It will be jointly planned by the State and ACF, and guided by information in the completed statewide assessment that identifies areas in need of improvement or further review.

(2) The on-site review may be concentrated in several specific political subdivisions of the State, as agreed upon by the ACF and the State; however, the State's largest metropolitan subdivision must be one of the locations selected.

(3) ACF has final approval of the selection of specific areas of the State's child and family services continuum described in paragraph (c)(1) of this section and selection of the political subdivisions referenced in paragraph (c)(2) of this section.

(4) Sources of information collected during the on-site review to determine substantial conformity must include, but are not limited to:

(i) Case records on children and families served by the agency;

(ii) Interviews with children and families whose case records have been reviewed and who are, or have been, recipients of services of the agency;

(iii) Interviews with caseworkers, foster parents, and service providers for the cases selected for the on-site review; and

(iv) Interviews with key stakeholders, both internal and external to the agency, which, at a minimum, must include those individuals who participated in the development of the State's CFSP required at 45 CFR 1357.15(1), courts, administrative review bodies, children's guardians ad litem and other

individuals or bodies assigned responsibility for representing the best interests of the child.

(5) The sample will range from 30–50 cases. Foster care cases must be drawn randomly from AFCARS, or, for the initial review, from another source approved by ACF and include children who entered foster care during the year under review. In-home cases must be drawn randomly from NCANDS or from another source approved by ACF. To ensure that all program areas are adequately represented, the sample size may be increased.

(6) The sample of 30–50 cases reviewed on-site will be selected from a randomly drawn oversample of no more than 150 cases. The oversample must be statistically significant at a 90 percent compliance rate (95 percent in subsequent reviews), with a tolerable sampling error of 5 percent and a confidence coefficient of 95 percent. The additional cases in the oversample not selected for the on-site review will form the sample of cases to be reviewed, if needed, in order to resolve discrepancies between the data indicators and the on-site reviews in accordance with paragraph (d)(2) of this section.

(d) *Resolution of discrepancies between the statewide assessment and the findings of the on-site portion of the review.* Discrepancies between the statewide assessment and the findings of the on-site portion of the review will be resolved by either of the following means, at the State's option:

(1) The submission of additional information by the State; or

(2) ACF and the State will review additional cases using only those indicators in which the discrepancy occurred. ACF and the State will determine jointly the number of additional cases to be reviewed, not to exceed a total of 150 cases to be selected as specified in paragraph (c)(6) of this section.

(e) *Partial review.* A partial child and family services review, when required, will be planned and conducted jointly by ACF and the State agency based on the nature of the concern. A partial review does not substitute for the full reviews as required under § 1355.32(b).

(f) *Notification.* Within 30 calendar days following either a partial child and family services review, full child and family services review, or the resolution of a discrepancy between the statewide assessment and the findings of the on-site portion of the review, ACF will notify the State agency in writing of whether the State is, or is not, operating in substantial conformity.

§ 1355.34 Criteria for determining substantial conformity.

(a) *Criteria to be satisfied.* ACF will determine a State's substantial conformity with title IV–B and title IV–E State plan requirements based on the following:

(1) Its ability to meet national standards, set by the Secretary, for statewide data indicators associated with specific outcomes for children and families;

(2) Its ability to meet criteria related to outcomes for children and families; and

(3) Its ability to meet criteria related to the State agency's capacity to deliver services leading to improved outcomes.

(b) *Criteria related to outcomes.*

(1) A State's substantial conformity will be determined by its ability to substantially achieve the following child and family service outcomes:

(i) *In the area of child safety:*

(A) Children are, first and foremost, protected from abuse and neglect; and,

(B) Children are safely maintained in their own homes whenever possible and appropriate;

(ii) *In the area of permanency for children:*

(A) Children have permanency and stability in their living situations; and

(B) The continuity of family relationships and connections is preserved for children; and

(iii) *In the area of child and family well-being:*

(A) Families have enhanced capacity to provide for their children's needs;

(B) Children receive appropriate services to meet their educational needs; and

(C) Children receive adequate services to meet their physical and mental health needs.

(2) A State's level of achievement with regard to each outcome reflects the extent to which a State has:

(i) Met the national standard(s) for the statewide data indicator(s) associated with that outcome, if applicable; and,

(ii) Implemented the following CFSP requirements or assurances:

(A) The requirements in 45 CFR 1357.15(p) regarding services designed to assure the safety and protection of children and the preservation and support of families;

(B) The requirements in 45 CFR 1357.15(q) regarding the permanency provisions for children and families in sections 422 and 471 of the Act;

(C) The requirements in section 422(b)(9) of the Act regarding recruitment of potential foster and adoptive families;

(D) The assurances by the State as required by section 422(b)(10)(C)(i) and (ii) of the Act regarding policies and procedures for abandoned children;

(E) The requirements in section 422(b)(11) of the Act regarding the State's compliance with the Indian Child Welfare Act;

(F) The requirements in section 422(b)(12) of the Act regarding a State's plan for effective use of cross-jurisdictional resources to facilitate timely adoptive or permanent placements; and,

(G) The requirements in section 471(a)(15) of the Act regarding reasonable efforts to prevent removals of children from their homes, to make it possible for children in foster care to safely return to their homes, or, when the child is not able to return home, to place the child in accordance with the permanency plan and complete the steps necessary to finalize the permanent placement.

(3) A State will be determined to be in substantial conformity if its performance on:

(i) Each statewide data indicator developed pursuant to paragraph (b)(4) of this section meets the national standard described in paragraph (b)(5) of this section; and,

(ii) Each outcome listed in paragraph (b)(1) of this section is rated as ''substantially achieved'' in 95 percent of the cases examined during the on-site review (90 percent of the cases for a State's initial review). Information from various sources (case records, interviews) will be examined for each outcome and a determination made as to the degree to which each outcome has been achieved for each case reviewed.

(4) The Secretary will, using AFCARS and NCANDS, develop statewide data indicators for each of the specific outcomes described in paragraph (b)(1) of this section for use in determining substantial conformity. The Secretary will add, amend, or suspend any such statewide data indicator(s) when appropriate. To the extent practical and feasible, the statewide data indicators will be consistent with those developed in accordance with section 203 of the Adoption and Safe Families Act of 1997 (Pub. L. 105–89).

(5) The initial national standards for the statewide data indicators described in paragraph (b)(4) of this section will be based on the 75th percentile of all State performance for that indicator, as reported in AFCARS or NCANDS. The Secretary may adjust these national standards if appropriate. The initial national standard will be set using the following data sources:

(i) The 1997 and 1998 submissions to NCANDS (or the most recent and complete 2 years available), for those

statewide data indicators associated with the safety outcomes; and,

(ii) The 1998b, 1999c, and 2000a submissions to AFCARS (or the most recent and complete report periods available), for those statewide data indicators associated with the permanency outcomes.

(c) *Criteria related to State agency capacity to deliver services leading to improved outcomes for children and families.* In addition to the criteria related to outcomes contained in paragraph (b) of this section, the State agency must also satisfy criteria related to the delivery of services. Based on information from the statewide assessment and onsite review, the State must meet the following criteria for each systemic factor in paragraphs (c)(2) through (c)(7) of this section to be considered in substantial conformity: All of the State plan requirements associated with the systemic factor must be in place, and no more than one of the state plan requirements fails to function as described in paragraphs (c)(2) through (c)(7) of this section. The systemic factor in paragraph (c)(1) of this section, is rated on the basis of only one State plan requirement. To be considered in substantial conformity, the State plan requirement associated with statewide information system capacity must be both in place and functioning as described in the requirement. ACF will use a rating scale to make the determinations of substantial conformity. The systemic factors under review are:

(1) *Statewide information system:* The State is operating a statewide information system that, at a minimum, can readily identify the status, demographic characteristics, location, and goals for the placement of every child who is (or within the immediately preceding 12 months, has been) in foster care (section 422(b)(10)(B)(i) of the Act);

(2) *Case review system:* The State has procedures in place that:

(i) Provide, for each child, a written case plan to be developed jointly with the child's parent(s) that includes provisions: for placing the child in the least restrictive, most family-like placement appropriate to his/her needs, and in close proximity to the parent' home where such placement is in the child's best interests; for visits with a child placed out of State at least every 12 months by a caseworker of the agency or of the agency in the State where the child is placed; and for documentation of the steps taken to make and finalize an adoptive or other permanent placement when the child cannot return home (sections 422(b)(10)(B)(ii), 471(a)(16) and 475(5)(A) of the Act);

(ii) Provide for periodic review of the status of each child no less frequently than once every six months by either a court or by administrative review (sections 422(b)(10)(B)(ii), 471(a)(16) and 475(5)(B) of the Act);

(iii) Assure that each child in foster care under the supervision of the State has a permanency hearing in a family or juvenile court or another court of competent jurisdiction (including a Tribal court), or by an administrative body appointed or approved by the court, which is not a part of or under the supervision or direction of the State agency, no later than 12 months from the date the child entered foster care (and not less frequently than every 12 months thereafter during the continuation of foster care) (sections 422(b)(10)(B)(ii), 471(a)(16) and 475(5)(C) of the Act);

(iv) Provide a process for termination of parental rights proceedings in accordance with sections 422(b)(10(B)(ii), 475(5)(E) and (F) of the Act; and,

(v) Provide foster parents, preadoptive parents, and relative caregivers of children in foster care with notice of and an opportunity to be heard in any review or hearing held with respect to the child (sections 422(b)(10)(B)(ii) and 475(5)(G) of the Act).

(3) *Quality assurance system:* The State has developed and implemented standards to ensure that children in foster care placements are provided quality services that protect the safety and health of the children (section 471(a)(22)) and is operating an identifiable quality assurance system (45 CFR 1357.15(u)) as described in the CFSP that:

(i) Is in place in the jurisdictions within the State where services included in the CFSP are provided;

(ii) Is able to evaluate the adequacy and quality of services provided under the CFSP;

(iii) Is able to identify the strengths and needs of the service delivery system it evaluates;

(iv) Provides reports to agency administrators on the quality of services evaluated and needs for improvement; and

(v) Evaluates measures implemented to address identified problems.

(4) *Staff training:* The State is operating a staff development and training program (45 CFR 1357.15(t)) that:

(i) Supports the goals and objectives in the State's CFSP;

(ii) Addresses services provided under both subparts of title IV–B and the training plan under title IV–E of the Act;

(iii) Provides training for all staff who provide family preservation and support services, child protective services, foster care services, adoption services and independent living services soon after they are employed and that includes the basic skills and knowledge required for their positions;

(iv) Provides ongoing training for staff that addresses the skills and knowledge base needed to carry out their duties with regard to the services included in the State's CFSP; and,

(v) Provides short-term training for current or prospective foster parents, adoptive parents, and the staff of State-licensed or State-approved child care institutions providing care to foster and adopted children receiving assistance under title IV–E that addresses the skills and knowledge base needed to carry out their duties with regard to caring for foster and adopted children.

(5) *Service array:* Information from the Statewide assessment and on-site review determines that the State has in place an array of services (45 CFR 1357.15(n) and section 422(b)(10)(B)(iii) and (iv) of the Act) that includes, at a minimum:

(i) Services that assess the strengths and needs of children and families assisted by the agency and are used to determine other service needs;

(ii) Services that address the needs of the family, as well as the individual child, in order to create a safe home environment;

(iii) Services designed to enable children at risk of foster care placement to remain with their families when their safety and well-being can be reasonably assured;

(iv) Services designed to help children achieve permanency by returning to families from which they have been removed, where appropriate, be placed for adoption or with a legal guardian or in some other planned, permanent living arrangement, and through post-legal adoption services;

(v) Services that are accessible to families and children in all political subdivisions covered in the State's CFSP; and,

(vi) Services that can be individualized to meet the unique needs of children and families served by the agency.

(6) *Agency responsiveness to the community:*

(i) The State, in implementing the provisions of the CFSP, engages in ongoing consultation with a broad array of individuals and organizations representing the State and county agencies responsible for implementing

the CFSP and other major stakeholders in the services delivery system including, at a minimum, tribal representatives, consumers, service providers, foster care providers, the juvenile court, and other public and private child and family serving agencies (45 CFR 1357.15(l)(4));

(ii) The agency develops, in consultation with these or similar representatives, annual reports of progress and services delivered pursuant to the CFSP (45 CFR 1357.16(a));

(iii) There is evidence that the agency's goals and objectives included in the CFSP reflect consideration of the major concerns of stakeholders consulted in developing the plan and on an ongoing basis (45 CFR 1357.15(m)); and

(iv) There is evidence that the State's services under the plan are coordinated with services or benefits under other Federal or federally-assisted programs serving the same populations to achieve the goals and objectives in the plan (45 CFR 1357.15(m)).

(7) *Foster and adoptive parent licensing, recruitment and retention:*

(i) The State has established and maintains standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or homes (section 471(a)(10) of the Act);

(ii) The standards so established are applied by the State to every licensed or approved foster family home or child care institution receiving funds under title IV–E or IV–B of the Act (section 471(a)(10) of the Act);

(iii) The State complies with the safety requirements for foster care and adoptive placements in accordance with sections 471(a)(16), 471(a)(20) and 475(1) of the Act and 45 CFR 1356.30;

(iv) The State has in place an identifiable process for assuring the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the State for whom foster and adoptive homes are needed (section 422(b)(9) of the Act); and,

(v) The State has developed and implemented plans for the effective use of cross-jurisdictional resources to facilitate timely adoptive or permanent placements for waiting children (section 422(b)(12) of the Act).

(d) *Availability of review instruments.* ACF will make available to the States copies of the review instruments, which will contain the specific standards to be used to determine substantial conformity, on an ongoing basis, whenever significant revisions to the instruments are made.

§ 1355.35 Program improvement plans.

(a) *Mandatory program improvement plan.*

(1) States found not to be operating in substantial conformity shall develop a program improvement plan. The program improvement plan must:

(i) Be developed jointly by State and Federal staff in consultation with the review team;

(ii) Identify the areas in which the State's program is not in substantial conformity;

(iii)Set forth the goals, the action steps required to correct each identified weakness or deficiency, and dates by which each action step is to be completed in order to improve the specific areas;

(iv) Set forth the amount of progress the statewide data will make toward meeting the national standards;

(v) Establish benchmarks that will be used to measure the State's progress in implementing the program improvement plan and describe the methods that will be used to evaluate progress;

(vi) Identify how the action steps in the plan build on and make progress over prior program improvement plans;

(vii) Identify the technical assistance needs and sources of technical assistance, both Federal and non-Federal, which will be used to make the necessary improvements identified in the program improvement plan.

(2) In the event that ACF and the State cannot reach consensus regarding the content of a program improvement plan or the degree of program or data improvement to be achieved, ACF retains the final authority to assign the contents of the plan and/or the degree of improvement required for successful completion of the plan. Under such circumstances, ACF will render a written rationale for assigning such content or degree of improvement.

(b) *Voluntary program improvement plan.* States found to be operating in substantial conformity may voluntarily develop and implement a program improvement plan in collaboration with the ACF Regional Office, under the following circumstances:

(1) The State and Regional Office agree that there are areas of the State's child and family services programs in need of improvement which can be addressed through the development and implementation of a voluntary program improvement plan;

(2) ACF approval of the voluntary program improvement plan will not be required; and

(3) No penalty will be assessed for the State's failure to achieve the goals described in the voluntary program improvement plan.

(c) *Approval of program improvement plans.*

(1) A State determined not to be in substantial conformity must submit a program improvement plan to ACF for approval within 90 calendar days from the date the State receives the written notification from ACF that it is not operating in substantial conformity.

(2) Any program improvement plan will be approved by ACF if it meets the provisions of paragraph (a) of this section.

(3) If the program improvement plan does not meet the provisions of paragraph (a) of this section, the State will have 30 calendar days from the date it receives notice from ACF that the plan has not been approved to revise and resubmit the plan for approval.

(4) If the State does not submit a revised program improvement plan according to the provisions of paragraph (c)(3) of this section or if the plan does not meet the provisions of paragraph (a) of this section, withholding of funds pursuant to the provisions of § 1355.36 of this part will begin.

(d) *Duration of program improvement plans.*

(1) ACF retains the authority to establish time frames for the program improvement plan consistent with the seriousness and complexity of the remedies required for any areas determined not in substantial conformity, not to exceed two years.

(2) Particularly egregious areas of nonconformity impacting child safety must receive priority in both the content and time frames of the program improvement plans and must be addressed in less than two years.

(3) The Secretary may approve extensions of deadlines in a program improvement plan not to exceed one year. The circumstances under which requests for extensions will be approved are expected to be rare. The State must provide compelling documentation of the need for such an extension. Requests for extensions must be received by ACF at least 60 days prior to the affected completion date.

(4) States must provide quarterly status reports (unless ACF and the State agree upon less frequent reports) to ACF. Such reports must inform ACF of progress in implementing the measures of the plan.

(e) *Evaluating program improvement plans.* Program improvement plans will be evaluated jointly by the State agency and ACF, in collaboration with other members of the review team, as

described in the State's program improvement plan and in accordance with the following criteria:

(1) The methods and information used to measure progress must be sufficient to determine when and whether the State is operating in subsequent substantial conformity or has reached the negotiated standard with respect to statewide data indicators that fail to meet the national standard for that indicator;

(2) The frequency of evaluating progress will be determined jointly by the State and Federal team members, but no less than annually. Evaluation of progress will be performed in conjunction with the annual updates of the State's CFSP, as described in paragraph (f) of this section;

(3) Action steps may be jointly determined by the State and ACF to be achieved prior to projected completion dates, and will not require any further evaluation at a later date; and

(4) The State and ACF may jointly renegotiate the terms and conditions of the program improvement plan as needed, provided that:

(i) The renegotiated plan is designed to correct the areas of the State's program determined not to be in substantial conformity and/or achieve a standard for the statewide data indicators that is acceptable to ACF;

(ii) The amount of time needed to implement the provisions of the plan does not extend beyond three years from the date the original program improvement plan was approved;

(iii) The terms of the renegotiated plan are approved by ACF; and

(iv) The Secretary approves any extensions beyond the two-year limit.

(f) *Integration of program improvement plans with CFSP planning.* The elements of the program improvement plan must be incorporated into the goals and objectives of the State's CFSP. Progress in implementing the program improvement plan must be included in the annual reviews and progress reports related to the CFSP required in 45 CFR 1357.16.

§ 1355.36 Withholding Federal funds due to failure to achieve substantial conformity or failure to successfully complete a program improvement plan.

(a) *For the purposes of this section:*

(1) The term ''title IV–B funds'' refers to the State's combined allocation of title IV–B subpart 1 and subpart 2 funds; and

(2) The term ''title IV–E funds'' refers to the State's reimbursement for administrative costs for the foster care program under title IV–E.

(b) *Determination of the amount of Federal funds to be withheld.* ACF will determine the amount of the State title IV–B and IV–E funds to be withheld due to a finding that the State is not operating in substantial conformity, as follows:

(1) A State will have the opportunity to develop and complete a program improvement plan prior to any withholding of funds.

(2) Title IV–B and IV–E funds will not be withheld from a State if the determination of nonconformity was caused by the State's correct use of formal written statements of Federal law or policy provided the State by DHHS.

(3) A portion of the State's title IV–B and IV–E funds will be withheld by ACF for the year under review and for each succeeding year until the State either successfully completes a program improvement plan or is found to be operating in substantial conformity.

(4) The amount of title IV–B and title IV–E funds subject to withholding due to a determination that a State is not operating in substantial conformity is based on a pool of funds defined as follows:

(i) The State's allotment of title IV–B funds for each of the years to which the withholding applies; and

(ii) An amount equivalent to 10 percent of the State's Federal claims for title IV–E foster care administrative costs for each of the years to which withholding applies;

(5) The amount of funds to be withheld from the pool in paragraph (b)(4) of this section will be computed as follows:

(i) Except as provided for in paragraphs (b)(7) and (b)(8) of this section, an amount equivalent to one percent of the funds described in paragraph (b)(4) of this section for each of the years to which withholding applies will be withheld for each of the seven outcomes listed in § 1355.34(b)(1) of this part that is determined not to be substantially achieved; and

(ii) Except as provided for in paragraphs (b)(7) and (b)(8) of this section, an amount equivalent to one percent of the funds described in paragraph (b)(4) of this section for each of the years to which withholding applies will be withheld for each of the seven systemic factors listed in § 1355.34(c) of this part that is determined not to be in substantial conformity.

(6) Except as provided for in paragraphs (b)(7), (b)(8), and (e)(4) of this section, in the event the State is determined to be in nonconformity on each of the seven outcomes and each of the seven systemic factors subject to review, the maximum amount of title IV–B and title IV–E funds to be withheld due to the State's failure to comply is 14 percent per year of the funds described in paragraph (b)(4) of this section for each year.

(7) States determined not to be in substantial conformity that fail to correct the areas of nonconformity through the successful completion of a program improvement plan, and are determined to be in nonconformity on the second full review following the first full review in which a determination of nonconformity was made will be subject to increased withholding as follows:

(i) The amount of funds described in paragraph (b)(5) of this section will increase to two percent for each of the seven outcomes and each of the seven systemic factors that continues in nonconformity since the immediately preceding child and family services review;

(ii) The increased withholding of funds for areas of continuous nonconformity is subject to the provisions of paragraphs (c), (d), and (e) of this section;

(iii) The maximum amount of title IV–B and title IV–E funds to be withheld due to the State's failure to comply on the second full review following the first full review in which the determination of nonconformity was made is 28 percent of the funds described in paragraph (b)(4) of this section for each year to which the withholding of funds applies.

(8) States determined not to be in substantial conformity that fail to correct the areas of nonconformity through the successful completion of a program improvement plan, and are determined to be in nonconformity on the third and any subsequent full reviews following the first full review in which a determination of nonconformity was made will be subject to increased withholding as follows:

(i) The amount of funds described in paragraph (b)(5) of this section will increase to three percent for each of the seven outcomes and each of the seven systemic factors that continues in nonconformity since the immediately preceding child and family services review;

(ii) The increased withholding of funds for areas of continuous nonconformity is subject to the provisions of paragraphs (c), (d), and (e) of this section;

(iii) The maximum amount of title IV–B and title IV–E funds to be withheld due to the State's failure to comply on the third and any subsequent full reviews following the first full review in which the determination of nonconformity was made is 42 percent

of the funds described in paragraph (b)(4) of this section for each year to which the withholding of funds applies.

(c) *Suspension of withholding.*

(1) For States determined not to be operating in substantial conformity, ACF will suspend the withholding of the State title IV–B and title IV–E funds during the time that a program improvement plan is in effect, provided that:

(i) The program improvement plan conforms to the provisions of § 1355.35 of this part; and

(ii) The State is actively implementing the provisions of the program improvement plan.

(2) Suspension of the withholding of funds is limited to three years following each review, or the amount of time approved for implementation of the program improvement plan, whichever is less.

(d) *Terminating the withholding of funds.* For States determined not to be in substantial conformity, ACF will terminate the withholding of the State's title IV–B and title IV–E funds related to the nonconformity upon determination by the State and ACF that the State has achieved substantial conformity or has successfully completed a program improvement plan. ACF will rescind the withholding of the portion of title IV–B and title IV–E funds related to specific goals or action steps as of the date at the end of the quarter in which they were determined to have been achieved.

(e) *Withholding of funds.*

(1) States determined not to be in substantial conformity that fail to successfully complete a program improvement plan will be notified by ACF of this final determination of nonconformity in writing within 10 business days after the relevant completion date specified in the plan, and advised of the amount of title IV–B and title IV–E funds which are to be withheld.

(2) Title IV–B and title IV–E funds will be withheld based on the following:

(i) If the State fails to submit status reports in accordance with § 1355.35(d)(4), or if such reports indicate that the State is not making satisfactory progress toward achieving goals or actions steps, funds will be withheld at that time for a period beginning October 1 of the fiscal year for which the determination of nonconformity was made and ending on the specified completion date for the affected goal or action step.

(ii) Funds related to goals and action steps that have not been achieved by the specified completion date will be withheld at that time for a period beginning October 1 of the fiscal year for which the determination of nonconformity was made and ending on the completion date of the affected goal or action step; and

(iii) The withholding of funds commensurate with the level of nonconformity at the end of the program improvement plan will begin at the latest completion date specified in the program improvement plan and will continue until a subsequent full review determines the State to be in substantial conformity or the State successfully completes a program improvement plan developed as a result of that subsequent full review.

(3) When the date the State is determined to be in substantial conformity or to have successfully completed a program improvement plan falls within a specific quarter, the amount of funds to be withheld will be computed to the end of that quarter.

(4) A State agency that refuses to participate in the development or implementation of a program improvement plan, as required by ACF, will be subject to the maximum increased withholding of 42 percent of its title IV–B and title IV–E funds, as described in paragraph (b)(8) of this section, for each year or portion thereof to which the withholding of funds applies.

(5) The State agency will be liable for interest on the amount of funds withheld by the Department, in accordance with the provisions of 45 CFR 30.13.

§ 1355.37 Opportunity for Public Inspection of Review Reports and Materials.

The State agency must make available for public review and inspection all statewide assessments (§ 1355.33(b)), report of findings (§ 1355.33(e)), and program improvement plans (§ 1355.35(a)) developed as a result of a full or partial child and family services review.

§ 1355.38 Enforcement of section 471(a)(18) of the Act regarding the removal of barriers to interethnic adoption.

(a) *Determination that a violation has occurred in the absence of a court finding.*

(1) If ACF becomes aware of a possible section 471(a)(18) violation, whether in the course of a child and family services review, the filing of a complaint, or through some other mechanism, it will refer such a case to the Department's Office for Civil Rights (OCR) for investigation.

(2) Based on the findings of the OCR investigation, ACF will determine if a violation of section 471(a)(18) has occurred. A section 471(a)(18) violation occurs if a State or an entity in the State:

(i) Has denied to any person the opportunity to become an adoptive or foster parent on the basis of the race, color, or national origin of the person, or of the child, involved;

(ii) Has delayed or denied the placement of a child for adoption or into foster care on the basis of the race, color, or national origin of the adoptive or foster parent, or the child involved; or,

(iii) With respect to a State, maintains any statute, regulation, policy, procedure, or practice that on its face, is a violation as defined in paragraphs (a)(2)(i) and (2)(ii) of this section.

(3) ACF will provide the State or entity with written notification of its determination.

(4) If there has been no violation, there will be no further action. If ACF determines that there has been a violation of section 471(a)(18), it will take enforcement action as described in this section.

(5) Compliance with the Indian Child Welfare Act of 1978 (Pub. L. 95–608) does not constitute a violation of section 471(a)(18).

(b) *Corrective action and penalties for violations with respect to a person or based on a court finding.*

(1) A State found to be in violation of section 471(a)(18) with respect to a person, as described in paragraphs (a)(2)(i) and (a)(2)(ii) of this section, will be penalized in accordance with paragraph (g)(2) of this section. A State determined to be in violation of section 471(a)(18) of the Act as a result of a court finding will be penalized in accordance with paragraph (g)(4) of this section. The State may develop, obtain approval of, and implement a plan of corrective action any time after it receives written notification from ACF that it is in violation of section 471(a)(18) of the Act.

(2) Corrective action plans are subject to ACF approval.

(3) If the corrective action plan does not meet the provisions of paragraph (d) of this section, the State must revise and resubmit the plan for approval until it has an approved plan.

(4) A State found to be in violation of section 471(a)(18) by a court must notify ACF within 30 days from the date of entry of the final judgement once all appeals have been exhausted, declined, or the appeal period has expired.

(c) *Corrective action for violations resulting from a State's statute, regulation, policy, procedure, or practice.*

(1) A State found to have committed a violation of the type described in paragraph (a)(2)(iii) of this section must develop and submit a corrective action plan within 30 days of receiving written

notification from ACF that it is in violation of section 471(a)(18). Once the plan is approved the State will have to complete the corrective action and come into compliance. If the State fails to complete the corrective action plan within six months and come into compliance, a penalty will be imposed in accordance with paragraph (g)(3) of this section.

(2) Corrective action plans are subject to ACF approval.

(3) If the corrective action plan does not meet the provisions of paragraph (d) of this section, the State must revise and resubmit the plan within 30 days from the date it receives a written notice from ACF that the plan has not been approved. If the State does not submit a revised corrective action plan according to the provisions of paragraph (d) of this section, withholding of funds pursuant to the provisions of paragraph (g) of this section will apply.

(d) *Contents of a corrective action plan.* A corrective action plan must:

(1) Identify the issues to be addressed;

(2) Set forth the steps for taking corrective action;

(3) Identify any technical assistance needs and Federal and non-Federal sources of technical assistance which will be used to complete the action steps; and,

(4) Specify the completion date. This date will be no later than 6 months from the date ACF approves the corrective action plan.

(e) *Evaluation of corrective action plans.* ACF will evaluate corrective action plans and notify the State (in writing) of its success or failure to complete the plan within 30 calendar days. If the State has failed to complete the corrective action plan, ACF will calculate the amount of reduction in the State's title IV–E payment and include this information in the written notification of failure to complete the plan.

(f) *Funds to be withheld.* The term ''title IV–E funds'' refers to the amount of Federal funds advanced or paid to the State for allowable costs incurred by a State for foster care maintenance payments, adoption assistance payments, administrative, and training costs under title IV–E and the State's allotment for the Independent Living program.

(g) *Reduction of title IV–E funds.*

(1) Title IV–E funds shall be reduced in specified amounts in accordance with paragraph (h) of this section under the following circumstances:

(i) A determination that a State is in violation of section 471(a)(18) of the Act with respect to a person as described in paragraphs (a)(2)(i) and (a)(2)(ii) of this section, or;

(ii) After a State's failure to implement and complete a corrective action plan and come into compliance as described in paragraph (c) of this section.

(2) Once ACF notifies a State, in writing, that it has committed a section 471(a)(18) violation with respect to a person, the State's title IV–E funds will be reduced for the fiscal quarter in which the State received such written notification and for each succeeding quarter within that fiscal year or until the State completes a corrective action plan and comes into compliance, whichever is earlier.

(3) For States that fail to complete a corrective action plan within 6 months, title IV–E funds will be reduced by ACF for the fiscal quarter in which the State received notification of its violation. The reduction will continue for each succeeding quarter within that fiscal year or until the State completes the corrective action plan and comes into compliance, whichever is earlier.

(4) If, as a result of a court finding, a State is determined to be in violation of section 471(a)(18) of the Act, ACF will assess a penalty without further investigation. Once the State is notified (in writing) of the violation, its title IV–E funds will be reduced for the fiscal quarter in which the court finding was made and for each succeeding quarter within that fiscal year or until the State completes a corrective action plan and comes into compliance, whichever is sooner.

(5) The maximum number of quarters that a State will have its title IV–E funds reduced due to a finding of a State's failure to conform to section 471(a)(18) of the Act is limited to the number of quarters within the fiscal year in which a determination of nonconformity was made. However, an uncorrected violation may result in a subsequent review, another finding, and additional penalties.

(6) No penalty will be imposed for a court finding of a violation of section 471(a)(18) until the judgement is final and all appeals have been exhausted, declined, or the appeal period has expired.

(h) *Determination of the amount of reduction of Federal funds.* ACF will determine the reduction in title IV–E funds due to a section 471(a)(18) violation in accordance with section 474(d)(1) of the Act.

(1) State agencies that violate section 471(a)(18) with respect to a person or fail to implement or complete a corrective action plan as described in paragraph (c) of this section will be subject to a penalty. The penalty structure will follow section 474(d)(1) of the Act. Penalties will be levied for the quarter of the fiscal year in which the State is notified of its section 471(a)(18) violation, and for each succeeding quarter within that fiscal year until the State comes into compliance with section 471(a)(18). The reduction in title IV–E funds will be computed as follows:

(i) 2 percent of the State's title IV–E funds for the fiscal year quarter, as defined in paragraph (f) of this section, for the first finding of noncompliance in that fiscal year;

(ii) 3 percent of the State's title IV–E funds for the fiscal year quarter, as defined in paragraph (f) of this section, for the second finding of noncompliance in that fiscal year;

(iii) 5 percent of the State's title IV–E funds for the fiscal year quarter, as defined in paragraph (f) of this section, for the third or subsequent finding of noncompliance in that fiscal year.

(2) Any entity (other than the State agency) which violates section 471(a)(18) of the Act during a fiscal quarter with respect to any person must remit to the Secretary all title IV–E funds paid to it by the State during the quarter in which the entity is notified of its violation.

(3) No fiscal year payment to a State will be reduced by more than 5 percent of its title IV–E funds, as defined in paragraph (f) of this section, where the State has been determined to be out of compliance with section 471(a)(18) of the Act.

(4) The State agency or entity, as applicable, will be liable for interest on the amount of funds reduced by the Department, in accordance with the provisions of 45 CFR 30.13.

§ 1355.39 Administrative and judicial review.

States determined not to be in substantial conformity with titles IV–B and IV–E State plan requirements, or a State or entity in violation of section 471(a)(18) of the Act:

(a) May appeal, pursuant to 45 CFR part 16, the final determination and any subsequent withholding of, or reduction in, funds to the HHS Departmental Appeals Board within 60 days after receipt of a notice of nonconformity described in § 1355.36(e)(1) of this part, or receipt of a notice of noncompliance by ACF as described in § 1355.38(a)(3) of this part; and

(b) Will have the opportunity to obtain judicial review of an adverse decision of the Departmental Appeals Board within 60 days after the State or entity receives notice of the decision by the Board. Appeals of adverse

Department Appeals Board decisions must be made to the district court of the United States for the judicial district in which the principal or headquarters office of the agency responsible for administering the program is located.

(c) The procedure described in paragraphs (a) and (b) of this section will not apply to a finding that a State or entity has been determined to be in violation of section 471(a)(18) which is based on a judicial decision.

4. Amend § 1355.40 by revising the second sentence in paragraph (a)(2) to read as follows:

§ 1355.40 Foster care and adoption data collection.

(a) *Scope of the data collection system.*

(1) * * *

(2) * * * This includes American Indian children covered under the assurances in section 422(b)(10) of the Act on the same basis as any other child. * * *

* * * * *

Appendix A to Part 1355—Foster Care Data Elements

5. Appendix A to part 1355 is amended as follows:

a. Amend Section I by revising data elements II.C.1. and heading of 2., IX.C.1., headings of 2. and 4., and IX.C.3.

b. Amend Section II by revising the first paragraph on ''Reporting population'' and the instruction paragraphs II.C. and IX.C., and

c. Remove paragraph IX.D. to read as follows:

Section I—Foster Care Data Elements

* * * * *

II. Child's Demographic Information

* * * * *

C. Race/Ethnicity
1. Race
a. American Indian or Alaska Native
b. Asian
c. Black or African American
d. Native Hawaiian or Other Pacific Islander
e. White
f. Unable to Determine
2. Hispanic or Latino Ethnicity_____

* * * * *

IX. Foster Family Home-Parent(s) Data (To be answered only if Section V., Part A. CURRENT PLACEMENT SETTING is 1, 2 or 3)

* * * * *

C. Race/Ethnicity
1. Race of 1st Foster Caretaker
a. American Indian or Alaska Native
b. Asian
c. Black or African American
d. Native Hawaiian or Other Pacific Islander
e. White
f. Unable to Determine
2. Hispanic or Latino Ethnicity of 1st Foster Caretaker_____

* * * * *

3. Race of 2nd Foster Caretaker (If Applicable)
a. American Indian or Alaska Native
b. Asian
c. Black or African American
d. Native Hawaiian or Other Pacific Islander
e. White
f. Unable to Determine
4. Hispanic or Latino Ethnicity of 2nd Foster Caretaker (If applicable)_____

* * * * *

Section II—Definitions of and Instructions for Foster Care Data Elements

Reporting population. The population to be included in this reporting system includes all children in foster care under the responsibility of the State agency administering or supervising the administration of the title IV-B Child and Family Services State plan and the title IV-E State plan; that is, all children who are required to be provided the assurances of section 422(b)(10) of the Social Security Act.

* * * * *

II. Child's Demographic Information

* * * * *

C. Race/Ethnicity**

1. Race—In general, a person's race is determined by how they define themselves or by how others define them. In the case of young children, parents determine the race of the child. Indicate all races (a through e) that apply with a ''1.'' For those that do not apply, indicate a ''0.'' Indicate ''f. Unable to Determine'' with a ''1'' if it applies and a ''0'' if it does not.

American Indian or Alaska Native—A person having origins in any of the original peoples of North or South America (including Central America), and who maintains tribal affiliation or community attachment.

Asian—A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.

Black or African American—A person having origins in any of the black racial groups of Africa.

Native Hawaiian or Other Pacific Islander—A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands.

White—A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.

Unable to Determine—The specific race category is ''unable to determine'' because the child is very young or is severely disabled and no person is available to identify the child's race. ''Unable to determine'' is also used if the parent, relative or guardian is unwilling to identify the child's race.

2. Hispanic or Latino Ethnicity—Answer ''yes'' if the child is of Mexican, Puerto Rican, Cuban, Central or South American origin, or a person of other Spanish cultural origin regardless of race. Whether or not a person is Hispanic or Latino is determined by how they define themselves or by how others define them. In the case of young children, parents determine the ethnicity of the child. ''Unable to Determine'' is used because the child is very young or is severely disabled and no person is available to determine whether or not the child is Hispanic or Latino. ''Unable to determine'' is also used if the parent, relative or guardian is unwilling to identify the child's ethnicity.

* * * * *

IX. Family Foster Home-Parent(s) Data

* * * * *

C. Race—Indicate the race for each of the foster parent(s). See instructions and definitions for the race categories under data element II.C.1. Use ''f. Unable to Determine'' only when a parent is unwilling to identify his or her race. Hispanic or Latino Ethnicity—Indicate the ethnicity for each of the foster parent(s). See instructions and definitions under data element II.C.2. Use ''f. Unable to Determine'' only when a parent is unwilling to identify his or her ethnicity.

* * * * *

Appendix B to Part 1355—Adoption Data Elements

6. Appendix B to part 1355 is amended as follows:

a. Amend Section I by revising data elements II.C.1., headings of 2. and 4., II.C.3., II.C. and VI.C. b. Amend Section II by revising the instruction paragraphs II.C. and VI.C. to read as follows:

Section I—Adoption Data Elements

* * * * *

II. Child's Demographic Information

* * * * *

C. Race/Ethnicity
1. Race
a. American Indian or Alaska Native
b. Asian
c. Black or African American
d. Native Hawaiian or Other Pacific Islander
e. White
f. Unable to Determine
2. Hispanic or Latino Ethnicity_____

* * * * *

VI. Adoptive Parents

* * * * *

C. Race/Ethnicity
1. Adoptive Mother's Race (If Applicable)
a. American Indian or Alaska Native
b. Asian
c. Black or African American
d. Native Hawaiian or Other Pacific Islander
e. White
f. Unable to Determine
2. Hispanic or Latino Ethnicity of Mother (If Applicable)_____

* * * * *

3. Adoptive Father's Race (If Applicable)
a. American Indian or Alaska Native
b. Asian
c. Black or African American
d. Native Hawaiian or Other Pacific Islander

e. White
f. Unable to Determine
4. Hispanic or Latino Ethnicity of Father (If Applicable)_____

* * * * *

Section II—Definitions of Instructions for Adoption Data Elements

* * * * *

II. Child's Demographic Information

* * * * *

C. Race/Ethnicity

1. Race—In general, a person's race is determined by how they define themselves or by how others define them. In the case of young children, parents determine the race of the child. Indicate all races (a–e) that apply with a ''1.'' For those that do not apply, indicate a ''0.'' Indicate ''f. Unable to Determine'' with a 1'' if it applies and a ''0'' if it does not.

American Indian or Alaska Native—A person having origins in any of the original peoples of North or South America (including Central America), and who maintains tribal affiliation or community attachment.

Asian—A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.

Black or African American—A person having origins in any of the black racial groups of Africa.

Native Hawaiian or Other Pacific Islander—A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands.

White—A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.

Unable to Determine—The specific race category is ''unable to determine'' because the child is very young or is severely disabled and no person is available to identify the child's race. ''Unable to determine'' is also used if the parent, relative or guardian is unwilling to identify the child's race.

2. Hispanic or Latino Ethnicity—Answer ''yes'' if the child is of Mexican, Puerto Rican, Cuban, Central or South American origin, or a person of other Spanish cultural origin regardless of race. Whether or not a person is Hispanic or Latino is determined by how they define themselves or by how others define them. In the case of young children, parents determine the ethnicity of the child. ''Unable to Determine'' is used because the child is very young or is severely disabled and no other person is available to determine whether or not the child is Hispanic or Latino. ''Unable to determine'' is also used if the parent, relative or guardian is unwilling to identify the child's ethnicity.

* * * * *

VI. Adoptive Parents

* * * * *

C. Race/Ethnicity—Indicate the race/ethnicity for each of the adoptive parent(s). See instructions and definitions for the race/ethnicity categories under data element II.C. Use ''f. Unable to Determine'' only when a parent is unwilling to identify his or her race or ethnicity.

* * * * *

Appendix D to Part 1355—Foster Care and Adoption Record Layouts

7. Appendix D to part 1355 is amended as follows:

a. Amend Section A by revising 1.b.(2) and (3), revising the Element No., Data element description, and No. of numeric characters columns of the table under c. for certain elements, and revising the number of ''Total characters'';

b. Amend Section A by revising 2.b.(3) and the table under c. including the No. of characters for Element No. 02 and the number for ''Record Length'';

c. Amend Section B by revising 1.b.(2) and (3), revising the Element No., Data element description, and No. of numeric characters columns of the table under c. for certain elements, and revising the number of ''Total characters''; and

d. Amend Section B by revising 2.b.(3) and the table under c. including the No. of characters for Element No. 02 and the number for ''Record Length'', to read as follows:

A. Foster Care

1. Foster Care Semi-Annual Detailed Data Elements Record

a. * * *

b. * * *

(2) Enter date values in year, month and day order (YYYYMMDD), *e.g.*, 19991030 for October 30, 1999, or year and month order (YYYYMM), *e.g.*, 199910 for October 1999. Leave the element value blank if dates are not applicable.

(3) For elements 8, 11–15, 26–40, 52, 54 and 59–65, which are ''select all that apply'' elements, enter a ''1'' for each element that applies, enter a zero for non-applicable elements.

* * * * *

c. foster care Semi-Annual Detailed Data elements Record layout follows:

Element No.	Appendix A data element	Data element description	No. of numeric characters
		* * * * * * *	
02	I.B.	Report period ending date	6
		* * * * * * *	
05	I.E.	Date of most recent periodic review	8
06	II.A.	Child's date of birth	8
		* * * * * * *	
08	II.C.1.	Race	
08a		American Indian or Alaska native	1
08b		Asian	1
08c		Black or African American	1
08d		Native Hawaiian or Other Pacific Islander	1
08e		White	1
08f		Unable to Determine	1
09	II.C.2.	Hispanic or Latino Ethnicity	1
		* * * * * * *	
18	III.A.1.	Date of first removal from home	8

Element No.	Appendix A data element	Data element description	No. of numeric characters
		* * * * * * *	
20	III.A.3.	Date child was discharged from last foster care episode	8
21	III.A.4.	Date of latest removal from home	8
22	III.A.5.	Removal transaction date	8
23	III.B.1.	Date of placement in current foster care setting	8
		* * * * * * *	
45	VII.B.1.	Year of birth (1st principal caretaker)	4
46	VII.B.2.	Year of birth (2nd principal caretaker)	4
47	VIII.A.	Date of mother's parental rights termination	8
48	VIII.B.	Date of legal or putative father's parental rights	8
		* * * * * * *	
50	IX.B.1.	Year of birth (1st foster caretaker)	4
51	IX.B.2.	Year of birth (2nd foster caretaker)	4
52	IX.C.1.	Race of 1st foster caretaker	
52a		American Indian or Alaska Native	1
52b		Asian	1
52c		Black or African American	1
52d		Native Hawaiian or Other Pacific Islander	1
52e		White	1
52f		Unable to Determine	1
53	IX.C.2.	Hispanic or Latino ethnicity of 1st foster caretaker	1
54	IX.C.3.	Race of 2nd foster caretaker	
54a		American Indian or Alaska Native	1
54b		Asian	1
54c		Black or African American	1
54d		Native Hawaiian or Other pacific Islander	1
54e		White	1
54f		Unable to Determine	1
55	IX.C.4.	Hispanic or Latino ethnicity of 2nd foster caretaker	1
56	X.A.1.	Date of discharge from foster care	8
57	X.A.2.	Foster care discharge transaction date	8
		* * * * * * *	
		Total Characters	197

2. Foster Care Semi-Annual Summary Data Elements Record

a. * * *

b. * * *

(3) Enter date values in year, month order (YYYYMM), *e.g.*,199912 for December 1999.

c. Foster Care Semi-Annual Summary Data Elements Record Layout follows:

Element No.	Summary data file	No. of characters
	* * * * *	
02	Report period ending date (YYYYMM).	6
	* * * * *	
	Record Length	174

B. Adoption

1. Adoption Semi-Annual Detailed Data Elements Record

a. * * *

b. * * *

(2) Enter date values in year, month and day order (YYYYMMDD), *e.g.*, 19991030 for October 30, 1999, or year and month order (YYYYMM), *e.g.*, 199910 for October 1999. Leave the element value blank if dates are not applicable.

(3) For elements 7, 11–15, 25, 27 and 29–32 which are ''select all that apply'' elements, enter a ''1'' for each element that applies; enter a zero for non-applicable elements.

c. Adoption Semi-Annual Detailed Data Elements Record Layout follows:

Element No.	Appendix B data element	Data element description	No. of numeric characters
		* * * * * * *	
02	I.B.	Report period ending date	6
		* * * * * * *	
05	II.A.	Date of birth	6
		* * * * * * *	
07	II.C.1	Race.	
07a		American Indian or Alaska Native	1
07b		Asian	1
07c		Black or African American	1
07d		Native Hawaiian or Other Pacific Islander	1

Element No.	Appendix B data element	Data element description	No. of numeric characters
07e		White	1
07f		Unable to Determine	1
08	II.C.2.	Hispanic or Latino ethnicity	1
*	*	* * * * * *	
16	IV.A.1	Mother's year of birth	4
17	IV.A.2.	Father's (Putative or legal) year of birth	4
*	*	* * * * * *	
19	V.A.1.	Date of mother's termination of parental rights	8
20	V.A.2.	Date of father's termination of parental rights	8
21	V.B.	Date adoption legalized	8
*	*	* * * * * *	
23	VI.B.1.	Mother's year of birth (if applicable)	4
24	VI.B.2.	Father's year of birth (if applicable)	4
25	VI.C.1.	Adoptive mother's race	
25a		American Indian or Alaska Native	1
25b		Asian	1
25c		Black or African American	1
25d		Native Hawaiian or Other Pacific Islander	1
25e		White	1
25f		Unable to Determine	1
26	VI.C.2.	Hispanic or Latino Ethnicity	1
27	VI.C.3.	Adoptive father's race	
27a		American Indian or Alaska Native	1
27b		Asian	1
27c		Black or African American	1
27d		Native Hawaiian or Other Pacific Islander	1
27e		White	1
27f		Unable to Determine	1
28	VI.C.4.	Hispanic or Latino Ethnicity	1
		Total Characters	111

2. Adoption Semi-Annual Summary Data Elements Record

a. * * *

b. * * *

(3) Enter data values in year, month order (YYYYMM), *e.g.,* 199912 for December 1999.

c. Adoption Semi-Annual Summary Data Element Record Layout follows:

Element No.	Summary data file	No. of characters
*	* * * * *	
02	Report period ending date (YYYYMM).	6
*	* * * * *	
	Record Length	174

Appendix E to Part 1355—Data Standards

8. Appendix E to part 1355 is amended as follows:

a. Amend Section A.2. by adding paragraph a.(18);

b. Revise Section A.3. paragraph a.(1), and the element description for Element No. 09, 53, and 55 of the chart under b.(2);

c. Amend Section B.2. by revising paragraph a.(8) and adding paragraph a.(9); and

d. In Section B.3. revise paragraph a.(1), the element description for Element No. 08, 26 and 28 of the chart under b.(2), to read as follows:

A. Foster Care

* * * * *

2. Detailed Data File Submission Standards

a. * * *

(18) In Elements 8, 52, and 54, race categories (''a'' through ''e'') and ''f. Unable to Determine'' cannot be coded ''0,'' for it does not apply. If any of the race categories apply and are coded as ''1'' then ''f. Unable to Determine'' cannot also apply.

* * * * *

3. Missing Data Standards

* * * * *

a. * * *

(1) Data elements whose values fail internal consistency validations as outlined in A.2.a.(1)–(18) above, and

* * * * *

Element No.	Element description
*	* * * *
09	Child's Hispanic or Latino Ethnicity
*	* * * *
53	Hispanic or Latino Ethnicity of 1st foster caretaker
*	* * * *
55	Hispanic or Latino Ethnicity of 2nd foster caretaker

* * * * *

B. Adoption

* * * * *

2. Detailed Data Elements File Submission Standards

a. * * *

(8) If the ''Family Structure'' (Element 22) is option 3, Single Female, then the Mother's Year of Birth (Element 23), the ''Adoptive Mother's Race'' (Element 25) and ''Hispanic or Latino Ethnicity'' (Element 26) must be completed. Similarly, if the ''Family Structure'' (Element 22) is option 4, Single Male, then the Father's Year of Birth (Element 24), the Adoptive Father's Race'' (Element 27) and ''Hispanic or Latino Ethnicity'' (Element 28) must be completed. If the ''Family Structure'' (Element 22) is option 1 or 2, then both Mother's and Father's ''Year of Birth,'' ''Race'' and ''Hispanic or Latino Ethnicity'' must be completed.

(9) In Elements 7, 25, and 27, race categories (''a'' through ''e'') and ''f. Unable to Determine'' cannot be coded ''0,'' for it does not apply. If any of the race categories apply and are coded as ''1'' then ''f. Unable to Determine'' cannot also apply.

* * * * *

3. Missing Data Standards

* * * * *

a. * * *

(1) Data elements whose values fail internal consistency validations as outlined in 2.a.(1)–(9) above, and

* * * * *

Element No.	Element description
*	* * * *
08	Is the child of Hispanic or Latino ethnicity?
*	* * * *
26	Hispanic or Latino ethnicity of mother
*	* * * *
28	Hispanic or Latino ethnicity of father

* * * * *

PART 1356—REQUIREMENTS APPLICABLE TO TITLE IV–E

9. The authority citation for Part 1356 continues to read as follows:

Authority: 42 U.S.C. 620 *et seq.*, 42 U.S.C. 670 *et seq.*, and 42 U.S.C. 1302.

10. Section 1356.20 is amended by revising the first two sentences of paragraph (e)(4) to read as follows:

§ 1356.20 State plan document and submission requirements.

* * * * *

(e) * * *

(4) *Action.* Each Regional Administrator, ACF, has the authority to approve State plans and amendments thereto which provide for the administration of foster care maintenance payments and adoption assistance programs under section 471 of the Act. The Commissioner, ACYF, retains the authority to determine that proposed plan material is not approvable, or that a previously approved plan no longer meets the requirements for approval. * * *

* * * * *

11. Section 1356.21 is revised to read as follows:

§ 1356.21 Foster care maintenance payments program implementation requirements.

(a) *Statutory and regulatory requirements of the Federal foster care program.* To implement the foster care maintenance payments program provisions of the title IV–E State plan and to be eligible to receive Federal financial participation (FFP) for foster care maintenance payments under this part, a State must meet the requirements of this section, 45 CFR 1356.22, 45 CFR 1356.30, and sections 472, 475(1), 475(4), 475(5) and 475(6) of the Act.

(b) *Reasonable efforts.* The State must make reasonable efforts to maintain the family unit and prevent the unnecessary removal of a child from his/her home, as long as the child's safety is assured; to effect the safe reunification of the child and family (if temporary out-of-home placement is necessary to ensure the immediate safety of the child); and to make and finalize alternate permanency plans in a timely manner when reunification is not appropriate or possible. In order to satisfy the ''reasonable efforts'' requirements of section 471(a)(15) (as implemented through section 472(a)(1) of the Act), the State must meet the requirements of paragraphs (b) and (d) of this section. In determining reasonable efforts to be made with respect to a child and in making such reasonable efforts, the child's health and safety must be the State's paramount concern.

(1) *Judicial determination of reasonable efforts to prevent a child's removal from the home.*

(i) When a child is removed from his/her home, the judicial determination as to whether reasonable efforts were made, or were not required to prevent the removal in accordance with paragraph (b)(3) of this section, must be made no later than 60 days from the date the child is removed from the home pursuant to paragraph (k) of this section.

(ii) If the determination concerning reasonable efforts to prevent the removal is not made as specified in paragraph (b)(1)(i) of this section, the child is not eligible under the title IV–E foster care maintenance payments program for the duration of that stay in foster care.

(2) *Judicial determination of reasonable efforts to finalize a permanency plan.*

(i) The State agency must obtain a judicial determination that it has made reasonable efforts to finalize the permanency plan that is in effect (whether the plan is reunification, adoption, legal guardianship, placement with a fit and willing relative, or placement in another planned permanent living arrangement) within twelve months of the date the child is considered to have entered foster care in accordance with the definition at § 1355.20 of this part, and at least once every twelve months thereafter while the child is in foster care.

(ii) If such a judicial determination regarding reasonable efforts to finalize a permanency plan is not made, the child becomes ineligible under title IV–E from the end of the twelfth month following the date the child is considered to have entered foster care in accordance with the definition at § 1355.20 of this part, or the end of the month in which the most recent judicial determination of reasonable efforts to finalize a permanency plan was made, and remains ineligible until such a judicial determination is made.

(3) *Circumstances in which reasonable efforts are not required to prevent a child's removal from home or to reunify the child and family.* Reasonable efforts to prevent a child's removal from home or to reunify the child and family are not required if the State agency obtains a judicial determination that such efforts are not required because:

(i) A court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);

(ii) A court of competent jurisdiction has determined that the parent has been convicted of:

(A) Murder (which would have been an offense under section 1111(a) of title 18, United States Code, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;

(B) Voluntary manslaughter (which would have been an offense under section 1112(a) of title 18, United States Code, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;

(C) Aiding or abetting, attempting, conspiring, or soliciting to commit such a murder or such a voluntary manslaughter; or

(D) A felony assault that results in serious bodily injury to the child or another child of the parent; or,

(iii) The parental rights of the parent with respect to a sibling have been terminated involuntarily.

(4) *Concurrent planning.* Reasonable efforts to finalize an alternate permanency plan may be made concurrently with reasonable efforts to reunify the child and family.

(5) *Use of the Federal Parent Locator Service.* The State agency may seek the services of the Federal Parent Locator Service to search for absent parents at any point in order to facilitate a permanency plan.

(c) *Contrary to the welfare determination.* Under section 472(a)(1) of the Act, a child's removal from the home must have been the result of a judicial determination (unless the child was removed pursuant to a voluntary placement agreement) to the effect that

continuation of residence in the home would be contrary to the welfare, or that placement would be in the best interest, of the child. The contrary to the welfare determination must be made in the first court ruling that sanctions (even temporarily) the removal of a child from home. If the determination regarding contrary to the welfare is not made in the first court ruling pertaining to removal from the home, the child is not eligible for title IV–E foster care maintenance payments for the duration of that stay in foster care.

(d) *Documentation of judicial determinations.* The judicial determinations regarding contrary to the welfare, reasonable efforts to prevent removal, and reasonable efforts to finalize the permanency plan in effect, including judicial determinations that reasonable efforts are not required, must be explicitly documented and must be made on a case-by-case basis and so stated in the court order.

(1) If the reasonable efforts and contrary to the welfare judicial determinations are not included as required in the court orders identified in paragraphs (b) and (c) of this section, a transcript of the court proceedings is the only other documentation that will be accepted to verify that these required determinations have been made.

(2) Neither affidavits nor nunc pro tunc orders will be accepted as verification documentation in support of reasonable efforts and contrary to the welfare judicial determinations.

(3) Court orders that reference State law to substantiate judicial determinations are not acceptable, even if State law provides that a removal must be based on a judicial determination that remaining in the home would be contrary to the child's welfare or that removal can only be ordered after reasonable efforts have been made.

(e) *Trial home visits.* A trial home visit may not exceed six months in duration, unless a court orders a longer trial home visit. If a trial home visit extends beyond six months and has not been authorized by the court, or exceeds the time period the court has deemed appropriate, and the child is subsequently returned to foster care, that placement must then be considered a new placement and title IV–E eligibility must be newly established. Under these circumstances the judicial determinations regarding contrary to the welfare and reasonable efforts to prevent removal are required.

(f) *Case review system.* In order to satisfy the provisions of section 471(a)(16) of the Act regarding a case review system, each State's case review system must meet the requirements of sections 475(5) and 475(6) of the Act.

(g) *Case plan requirements.* In order to satisfy the case plan requirements of sections 471(a)(16), 475(1) and 475(5)(A) and (D) of the Act, the State agency must promulgate policy materials and instructions for use by State and local staff to determine the appropriateness of and necessity for the foster care placement of the child. The case plan for each child must:

(1) Be a written document, which is a discrete part of the case record, in a format determined by the State, which is developed jointly with the parent(s) or guardian of the child in foster care; and

(2) Be developed within a reasonable period, to be established by the State, but in no event later than 60 days from the child's removal from the home pursuant to paragraph (k) of this section;

(3) Include a discussion of how the case plan is designed to achieve a safe placement for the child in the least restrictive (most family-like) setting available and in close proximity to the home of the parent(s) when the case plan goal is reunification and a discussion of how the placement is consistent with the best interests and special needs of the child. (FFP is not available when a court orders a placement with a specific foster care provider);

(4) Include a description of the services offered and provided to prevent removal of the child from the home and to reunify the family; and

(5) Document the steps to finalize a placement when the case plan goal is or becomes adoption or placement in another permanent home in accordance with sections 475(1)(E) and (5)(E) of the Act. When the case plan goal is adoption, at a minimum, such documentation shall include child-specific recruitment efforts such as the use of State, regional, and national adoption exchanges including electronic exchange systems.

(This requirement has been approved by the Office of Management and Budget (OMB) under OMB control number 0980–0140)

(h) *Application of the permanency hearing requirements.*

(1) To meet the requirements of the permanency hearing, the State must, among other requirements, comply with section 475(5)(C) of the Act.

(2) In accordance with paragraph (b)(3) of this section, when a court determines that reasonable efforts to return the child home are not required, a permanency hearing must be held within 30 days of that determination, unless the requirements of the permanency hearing are fulfilled at the hearing in which the court determines that reasonable efforts to reunify the child and family are not required.

(3) If the State concludes, after considering reunification, adoption, legal guardianship, or permanent placement with a fit and willing relative, that the most appropriate permanency plan for a child is placement in another planned permanent living arrangement, the State must document to the court the compelling reason for the alternate plan. Examples of a compelling reason for establishing such a permanency plan may include:

(i) The case of an older teen who specifically requests that emancipation be established as his/her permanency plan;

(ii) The case of a parent and child who have a significant bond but the parent is unable to care for the child because of an emotional or physical disability and the child's foster parents have committed to raising him/her to the age of majority and to facilitate visitation with the disabled parent; or,

(iii) the Tribe has identified another planned permanent living arrangement for the child.

(4) When an administrative body, appointed or approved by the court, conducts the permanency hearing, the procedural safeguards set forth in the definition of *permanency hearing* must be so extended by the administrative body.

(i) *Application of the requirements for filing a petition to terminate parental rights at section 475(5)(E) of the Social Security Act.* (1) Subject to the exceptions in paragraph (i)(2) of this section, the State must file a petition (or, if such a petition has been filed by another party, seek to be joined as a party to the petition) to terminate the parental rights of a parent(s):

(i) Whose child has been in foster care under the responsibility of the State for 15 of the most recent 22 months. The petition must be filed by the end of the child's fifteenth month in foster care. In calculating when to file a petition for termination of parental rights, the State:

(A) Must calculate the 15 out of the most recent 22 month period from the date the child entered foster care as defined at section 475(5)(F) of the Act;

(B) Must use a cumulative method of calculation when a child experiences multiple exits from and entries into foster care during the 22 month period;

(C) Must not include trial home visits or runaway episodes in calculating 15 months in foster care; and,

(D) Need only apply section 475(5)(E) of the Act to a child once if the State

does not file a petition because one of the exceptions at paragraph (i)(2) of this section applies;

(ii) Whose child has been determined by a court of competent jurisdiction to be an abandoned infant (as defined under State law). The petition to terminate parental rights must be filed within 60 days of the judicial determination that the child is an abandoned infant; or,

(iii) Who has been convicted of one of the felonies listed at paragraph (b)(3)(ii) of this section. Under such circumstances, the petition to terminate parental rights must be filed within 60 days of a judicial determination that reasonable efforts to reunify the child and parent are not required.

(2) The State may elect not to file or join a petition to terminate the parental rights of a parent per paragraph (i)(1) of this section if:

(i) At the option of the State, the child is being cared for by a relative;

(ii) The State agency has documented in the case plan (which must be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the individual child. Compelling reasons for not filing a petition to terminate parental rights include, but are not limited to:

(A) Adoption is not the appropriate permanency goal for the child; or,

(B) No grounds to file a petition to terminate parental rights exist; or,

(C) The child is an unaccompanied refugee minor as defined in 45 CFR 400.111; or

(D) There are international legal obligations or compelling foreign policy reasons that would preclude terminating parental rights; or

(iii) The State agency has not provided to the family, consistent with the time period in the case plan, services that the State deems necessary for the safe return of the child to the home, when reasonable efforts to reunify the family are required.

(3) When the State files or joins a petition to terminate parental rights in accordance with paragraph (i)(1) of this section, it must concurrently begin to identify, recruit, process, and approve a qualified adoptive family for the child.

(j) *Child of a minor parent in foster care.* Foster care maintenance payments made on behalf of a child placed in a foster family home or child care institution, who is the parent of a son or daughter in the same home or institution, must include amounts which are necessary to cover costs incurred on behalf of the child's son or daughter. Said costs must be limited to funds expended on those items described in the definition of *foster care maintenance payments.*

(k) *Removal from the home of a specified relative.*

(1) For the purposes of meeting the requirements of section 472(a)(1) of the Act, a removal from the home must occur pursuant to:

(i) A voluntary placement agreement entered into by a parent or relative which leads to a physical or constructive removal (i.e., a non-physical or paper removal of custody) of the child from the home; or

(ii) A judicial order for a physical or constructive removal of the child from a parent or specified relative.

(2) A removal has not occurred in situations where legal custody is removed from the parent or relative and the child remains with the same relative in that home under supervision by the State agency.

(3) A child is considered constructively removed on the date of the first judicial order removing custody, even temporarily, from the appropriate specified relative or the date that the voluntary placement agreement is signed by all relevant parties.

(l) *Living with a specified relative.*For purposes of meeting the requirements for living with a specified relative prior to removal from the home under section 472(a)(1) of the Act and all of the conditions under section 472(a)(4), one of the two following situations must apply:

(1) The child was living with the parent or specified relative, and was AFDC eligible in that home in the month of the voluntary placement agreement or initiation of court proceedings; or

(2) The child had been living with the parent or specified relative within six months of the month of the voluntary placement agreement or the initiation of court proceedings, and the child would have been AFDC eligible in that month if s/he had still been living in that home.

(m) *Review of payments and licensing standards.* In meeting the requirements of section 471(a)(11) of the Act, the State must review at reasonable, specific, time-limited periods to be established by the State:

(1) The amount of the payments made for foster care maintenance and adoption assistance to assure their continued appropriateness; and

(2) The licensing or approval standards for child care institutions and foster family homes.

(n) *Foster care goals.* The specific foster care goals required under section 471(a)(14) of the Act must be incorporated into State law by statute or administrative regulation with the force of law.

(o) *Notice and opportunity to be heard.* The State must provide the foster parent(s) of a child and any preadoptive parent or relative providing care for the child with timely notice of and an opportunity to be heard in permanency hearings and six-month periodic reviews held with respect to the child during the time the child is in the care of such foster parent, preadoptive parent, or relative caregiver. Notice of and an opportunity to be heard does not include the right to standing as a party to the case.

12. Section 1356.30 is redesignated as § 1356.22 and revised to read as follows:

§ 1356.22 Implementation requirements for children voluntarily placed in foster care.

(a) As a condition of receipt of Federal financial participation (FFP) in foster care maintenance payments for a dependent child removed from his home under a voluntary placement agreement, the State must meet the requirements of:

(1) Section 472 of the Act, as amended;

(2) Sections 422(b)(10) and 475(5) of the Act;

(3) 45 CFR 1356.21 (f), (g), (h), and (i); and

(4) The requirements of this section.

(b) Federal financial participation is available only for voluntary foster care maintenance expenditures made within the first 180 days of the child's placement in foster care unless there has been a judicial determination by a court of competent jurisdiction, within the first 180 days of such placement, to the effect that the continued voluntary placement is in the best interests of the child.

(c) The State agency must establish and maintain a uniform procedure or system, consistent with State law, for revocation by the parent(s) of a voluntary placement agreement and return of the child.

13. New § 1356.30 is added to read as follows:

§ 1356.30 Safety requirements for foster care and adoptive home providers.

(a) Unless an election provided for in paragraph (d) of this section is made, the State must provide documentation that criminal records checks have been conducted with respect to prospective foster and adoptive parents.

(b) The State may not approve or license any prospective foster or adoptive parent, nor may the State claim FFP for any foster care maintenance or adoption assistance payment made on behalf of a child placed in a foster home

operated under the auspices of a child placing agency or on behalf of a child placed in an adoptive home through a private adoption agency, if the State finds that, based on a criminal records check conducted in accordance with paragraph (a) of this section, a court of competent jurisdiction has determined that the prospective foster or adoptive parent has been convicted of a felony involving:

(1) Child abuse or neglect;

(2) Spousal abuse;

(3) A crime against a child or children (including child pornography); or,

(4) A crime involving violence, including rape, sexual assault, or homicide, but not including other physical assault or battery.

(c) The State may not approve or license any prospective foster or adoptive parent, nor may the State claim FFP for any foster care maintenance or adoption assistance payment made on behalf of a child placed in a foster home operated under the auspices of a child placing agency or on behalf of a child placed in an adoptive home through a private adoption agency, if the State finds, based on a criminal records check conducted in accordance with paragraph (a) of this section, that a court of competent jurisdiction has determined that the prospective foster or adoptive parent has, within the last five years, been convicted of a felony involving:

(1) Physical assault;

(2) Battery; or,

(3) A drug-related offense.

(d)(1) The State may elect not to conduct or require criminal records checks on prospective foster or adoptive parents by:

(i) Notifying the Secretary in a letter from the Governor; or

(ii) Enacting State legislation.

(2) Such an election also removes the State's obligation to comport with paragraphs (b) and (c) of this section.

(e) In all cases where the State opts out of the criminal records check requirement, the licensing file for that foster or adoptive family must contain documentation which verifies that safety considerations with respect to the caretaker(s) have been addressed.

(f) In order for a child care institution to be eligible for title IV–E funding, the licensing file for the institution must contain documentation which verifies that safety considerations with respect to the staff of the institution have been addressed.

14. Section 1356.50 is amended by revising paragraphs (a) and (b) to read as follows:

§ 1356.50 Withholding of funds for noncompliance with the approved title IV–E State plan.

(a) To be in compliance with the title IV–E State plan requirements, a State must meet the requirements of the Act and 45 CFR 1356.20, 1356.21, 1356.30, and 1356.40 of this part.

(b) To be in compliance with the title IV–E State plan requirements, a State that chooses to claim FFP for voluntary placements must meet the requirements of the Act, 45 CFR 1356.22 and paragraph (a) of this section; and

* * * * *

15. Section 1356.60 is amended by revising paragraph (b)(1) and removing paragraph (c)(4) to read as follows:

§ 1356.60 Fiscal requirements (title IV–E).

* * * * *

(b) *Federal matching funds for State and local training for foster care and adoption assistance under title IV–E.*

(1) Federal financial participation is available at the rate of seventy-five percent (75%) in the costs of:

(i) Training personnel employed or preparing for employment by the State or local agency administering the plan, and;

(ii) Providing short-term training (including travel and per diem expenses) to current or prospective foster or adoptive parents and the members of the state licensed or approved child care institutions providing care to foster and adopted children receiving title IV–E assistance.

* * * * *

§§ 1356.65 and 1356.70 [Removed]

16. Sections 1356.65 and 1356.70 are removed.

17. New § 1356.71 is added to read as follows:

§ 1356.71 Federal review of the eligibility of children in foster care and the eligibility of foster care providers in title IV–E programs.

(a) *Purpose, scope and overview of the process.*

(1) This section sets forth requirements governing Federal reviews of State compliance with the title IV–E eligibility provisions as they apply to children and foster care providers under paragraphs (a) and (b) of section 472 of the Act.

(2) The requirements of this section apply to State agencies that receive Federal payments for foster care under title IV–E of the Act.

(3) The review process begins with a primary review of foster care cases for the title IV–E eligibility requirements. States determined to be in substantial compliance based on the primary review will not be subject to another review for three years. States that are determined not to be in compliance will develop and implement a program improvement plan designed to correct the areas of non-compliance, and a secondary review will be conducted after completion of the program improvement plan.

(b) *Composition of review team and preliminary activities preceding an on-site review.*

(1) The review team must be composed of representatives of the State agency, and ACF's Regional and Central Offices.

(2) The State must provide ACF with the complete payment history for each of the sample and oversample cases prior to the on-site review.

(c) *Sampling guidance and conduct of review.*

(1) The list of sampling units in the target population (*i.e.*, the sampling frame) will be drawn by ACF statistical staff from the Adoption and Foster Care Analysis and Reporting System (AFCARS) data which are transmitted by the State agency to ACF. The sampling frame will consist of cases of children who were eligible for foster care maintenance payments during the reporting period reflected in a State's most recent AFCARS data submission. For the initial primary review, if these data are not available or are deficient, an alternative sampling frame, consistent with one AFCARS six-month reporting period, will be selected by ACF in conjunction with the State agency.

(2) A sample of 80 cases (plus a 10 percent oversample of eight cases) from the title IV–E foster care program will be selected for the primary review utilizing probability sampling methodologies. Usually, the chosen methodology will be simple random sampling, but other probability samples may be utilized, when necessary and appropriate.

(3) Cases from the oversample will be substituted and reviewed for each of the original sample of 80 cases which is found to be in error.

(4) At the completion of the primary review, the review team will determine the number of ineligible cases. When the total number of ineligible cases does not exceed eight, ACF can conclude with a probability of 88 percent that in a population of 1000 or more cases the population ineligibility case error rate is less than 15 percent and the State will be considered in substantial compliance. For primary reviews held subsequent to the initial primary reviews, the acceptable population ineligibility case error rate threshold will be reduced from less than 15 percent (eight or fewer ineligible cases)

to less than 10 percent (four or fewer ineligible cases)). A State agency which meets this standard is considered to be in ''substantial compliance'' (see paragraph (h) of this section). A disallowance will be assessed for the ineligible cases for the period of time the cases are ineligible.

(5) A State which has been determined to be in ''noncompliance'' (*i.e.*, not in substantial compliance) will be required to develop a program improvement plan according to the specifications discussed in paragraph (i) of this section, as well as undergo a secondary review. For the secondary review, a sample of 150 cases (plus a 10 percent oversample of 15 cases) will be drawn from the most recent AFCARS submission. Usually, the chosen methodology will be simple random sampling, but other probability samples may be utilized, when necessary and appropriate. Cases from the oversample will be substituted and reviewed for each of the original sample of 150 cases which is found to be in error.

(6) At the completion of the secondary review, the review team will calculate both the sample case ineligibility and dollar error rates for the cases determined ineligible during the review. An extrapolated disallowance equal to the lower limit of a 90 percent confidence interval for the population total dollars in error for the amount of time corresponding to the AFCARS reporting period will be assessed if both the child/provider (case) ineligibility and dollar error rates exceed 10 percent. If neither, or only one, of the error rates exceeds 10 percent, a disallowance will be assessed for the ineligible cases for the period of time the cases are ineligible.

(d) *Requirements subject to review.* States will be reviewed against the requirements of title IV–E of the Act regarding:

(1) The eligibility of the children on whose behalf the foster care maintenance payments are made (section 472(a)(1)–(4) of the Act) to include:

(i) Judicial determinations regarding ''reasonable efforts'' and ''contrary to the welfare'' in accordance with § 1356.21(b) and (c), respectively;

(ii) Voluntary placement agreements in accordance with § 1356.22;

(iii) Responsibility for placement and care vested with the State agency;

(iv) Placement in a licensed foster family home or child care institution; and,

(v) eligibility for AFDC under such State plan as it was in effect on July 16, 1996.

(2) Allowable payments made to foster care providers who comport with sections 471(a)(10), 471(a)(20), 472(b) and (c) of the Act and § 1356.30.

(e) *Review instrument.* A title IV–E foster care eligibility review checklist will be used when conducting the eligibility review.

(f) *Eligibility determination—child.* The case record of the child must contain sufficient documentation to verify a child's eligibility in accordance with paragraph (d)(1) of this section, in order to substantiate payments made on the child's behalf.

(g) *Eligibility determination—provider.*

(1) For each case being reviewed, the State agency must make available a licensing file which contains the licensing history, including a copy of the certificate of licensure/approval or letter of approval, for each of the providers in the following categories:

(i) Public child care institutions with 25 children or less in residence;

(ii) Private child care institutions;

(iii) Group homes; and

(iv) Foster family homes, including relative homes.

(2) The licensing file must contain documentation that the State has complied with the safety requirements for foster and adoptive placements in accordance with § 1356.30.

(3) If the licensing file does not contain sufficient information to support a child's placement in a licensed facility, the State agency may provide supplemental information from other sources (*e.g.*, a computerized database).

(h) *Standards of compliance.*

(1) Disallowances will be taken, and plans for program improvement required, based on the extent to which a State is not in substantial compliance with recipient or provider eligibility provisions of title IV–E, or applicable regulations in 45 CFR parts 1355 and 1356.

(2) Substantial compliance and noncompliance are defined as follows:

(i) *Substantial compliance*—For the primary review (of the sample of 80 cases), no more than eight of the title IV–E cases reviewed may be determined to be ineligible. (This critical number of allowable ''errors,'' *i.e.*, ineligible cases, is reduced to four errors or less in primary reviews held subsequent to the initial primary review). For the secondary review (if required), *substantial compliance* means either the case ineligibility or dollar error rate does not exceed 10 percent.

(ii) *Noncompliance*—means not in substantial compliance. For the primary review (of the sample of 80 cases), nine or more of the title IV–E cases reviewed must be determined to be ineligible. (This critical number of allowable ''errors,'' *i.e.*, ineligible cases, is reduced to five or more in primary reviews subsequent to the initial primary review). For the secondary review (if required), *noncompliance* means both the case ineligibility and dollar error rates exceed 10 percent.

(3) ACF will notify the State in writing within 30 calendar days after the completion of the review of whether the State is, or is not, operating in substantial compliance.

(4) States which are determined to be in substantial compliance must undergo a subsequent review after a minimum of three years.

(i) *Program improvement plans.*

(1) States which are determined to be in noncompliance with recipient or provider eligibility provisions of title IV–E, or applicable regulations in 45 CFR Parts 1355 and 1356, will develop a program improvement plan designed to correct the areas determined not to be in substantial compliance. The program improvement plan will:

(i) Be developed jointly by State and Federal staff;

(ii) Identify the areas in which the State's program is not in substantial compliance;

(iii) Not extend beyond one year. A State will have a maximum of one year in which to implement and complete the provisions of the program improvement plan unless State legislative action is required. In such instances, an extension may be granted with the State and ACF negotiating the terms and length of such extension that shall not exceed the last day of the first legislative session after the date of the program improvement plan; and

(iv) Include:

(A) Specific goals;

(B) The action steps required to correct each identified weakness or deficiency; and,

(C) a date by which each of the action steps is to be completed.

(2) States determined not to be in substantial compliance as a result of a primary review must submit the program improvement plan to ACF for approval within 90 calendar days from the date the State receives written notification that it is not in substantial compliance. This deadline may be extended an additional 30 calendar days when a State agency submits additional documentation to ACF in support of cases determined to be ineligible as a result of the on-site eligibility review.

(3) The ACF Regional Office will intermittently review, in conjunction with the State agency, the State's

progress in completing the prescribed action steps in the program improvement plan.

(4) If a State agency does not submit an approvable program improvement plan in accordance with the provisions of paragraphs (i)(1) and (2) of this section, ACF will move to a secondary review in accordance with paragraph (c) of this section.

(j) *Disallowance of funds.* The amount of funds to be disallowed will be determined by the extent to which a State is not in substantial compliance with recipient or provider eligibility provisions of title IV–E, or applicable regulations in 45 CFR parts 1355 and 1356.

(1) States which are in found to be in substantial compliance during the primary or secondary review will have disallowances (if any) determined on the basis of individual cases reviewed and found to be in error. The amount of disallowance will be computed on the basis of payments associated with ineligible cases for the entire period of time that each case has been ineligible.

(2) States which are found to be in noncompliance during the primary review will have disallowances determined on the basis of individual cases reviewed and found to be in error, and must implement a program improvement plan in accordance with the provisions contained within it. A secondary review will be conducted no later than during the AFCARS reporting period which immediately follows the program improvement plan completion date on a sample of 150 cases drawn from the State's most recent AFCARS data. If both the case ineligibility and dollar error rates exceed 10 percent the State is in noncompliance and an additional disallowance will be determined based on extrapolation from the sample to the universe of claims paid for the duration of the AFCARS reporting period (*i.e.,* all title IV-E funds expended for a case during the quarter(s) that case is ineligible). If either the case ineligibility or dollar rate does not exceed 10 percent, the amount of disallowance will be computed on the basis of payments associated with ineligible cases for the entire period of time the case has been determined to be ineligible.

(3) The State agency will be liable for interest on the amount of funds disallowed by the Department, in accordance with the provisions of 45 CFR 30.13.

(4) States may appeal any disallowance actions taken by ACF to the HHS Departmental Appeals Board in accordance with regulations at 45 CFR Part 16.

PART 1357—REQUIREMENTS APPLICABLE TO TITLE IV–B

18. The authority citation for part 1357 continues to read as follows:

Authority: 42 U.S.C. 620 *et seq.,* 42 U.S.C. 670 *et seq.*; 42 U.S.C. 1302.

19. Section 1357.40 is amended by revising paragraph (d)(6) to read as follows:

§ 1357.40 Direct payments to Indian Tribal Organizations (title IV–B, subpart 1, child welfare services).

* * * * *

(d)* * *

(6) In order to determine the amount of Federal funds available for a direct grant to an eligible ITO, the Department shall first divide the State's title IV–B allotment by the number of children in the State, then multiply the resulting amount by a multiplication factor determined by the Secretary, and then multiply that amount by the number of Indian children in the ITO population. The multiplication factor will be set at a level designed to achieve the purposes of the act and revised as appropriate.

[FR Doc.00–1122 Filed 1–24–00; 8:45 am]

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LIST OF PUBLIC LAWS

Note: The List of Public Laws for the first session of the 106th Congress has been completed and will resume when bills are enacted into law during the second session of the 106th Congress, which convenes on January 24, 2000.

A Cumulative List of Public Laws for the first session of the 106th Congress will be published in the **Federal Register** on December 30, 1999.

Last List December 21, 1999.